UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

and **Case 19–CB–169296**

PACIFIC MARITIME ASSOCIATION

and

EDMUND OBERTI, an Individual

Ann Marie Skov, Esq., for the General Counsel.

Rob Remar, Esq. (Law Office of Rob Remar)
for the Respondent.

Richard F. Liebman, Esq. (Barran Liebman LLP)
and *Todd Amidon, Esq.(Pacific Maritime Association)*
for the Intervenor.[1]

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. The core issue in this case is whether the International Longshore and Warehouse Union (Respondent or ILWU) breached its duty of fair representation toward Edmund Oberti (Oberti) in October 2015, by declining to reconsider its position in a 2012 decision by a grievance-arbitration panel that terminated Oberti's registration and privileges in a dispatch hall. Subsumed within that issue are two additional issues that must first be addressed in order to decide the core issue: first, whether Section 10(b) of the Act precludes this complaint against Respondent; and if not, whether Respondent, in its role as a member of the grievance-arbitration panel, owes a duty of fair representation toward Oberti in these particular circumstances—and the nature of such duty.

I. Procedural Background

Based on an initial charge on February 5, 2016, and an amended charged on March 24, 2016, filed by Oberti, the Regional Director for Region 19 of the Board issued a complaint on

[1] Both Mr. Liebman and Mr. Amidon appeared for the Intervenor (PMA) at trial, but only Mr. Liebman appears on brief.

August 25, 2016, alleging that Respondent had violated Section 8(b)(1)(A) of the Act in October 2015 by refusing to re-consider its 2012 decision, as part of a grievance-arbitration panel, to re-instate Oberti to the dispatch hall. It also alleges that Respondent violated Sec. 8(b)(1)(A) by failing to respond, until May 20, 2016, to a written request sent by Oberti's attorney on December 8, 2015, requesting that Respondent re-consider its position to reinstate Oberti. Respondent filed a timely answer denying the substantive allegations and raising affirmative defenses, including the defense that the conduct alleged in the complaint was time-barred by Section 10(b) of the Act. Thereafter, on November 14, 2016, I granted a motion by the employer, Pacific Maritime Association (PMA or Intervenor) to intervene in this case, since its interests might be affected by the outcome. I presided over this trial in Seattle, Washington, from November 29 through December 1, 2016.

II. Jurisdiction and Labor Organization Status

Based on a joint stipulation by the parties,[2] I find that the employer-intervenor, PMA, is a California non-profit mutual benefit corporation headquartered in San Francisco and with branch offices in West Coast cities, including Seattle. Its members include for-profit stevedore companies, marine terminal operators, and maintenance contractors that employ longshoremen and other categories of dockworkers at ports in California, Oregon, and Washington. It is a multiemployer collective-bargaining agent whose primary purpose is to negotiate, enter into, and administer on behalf of its members collective-bargaining agreements with Respondent and certain of its affiliated local unions, including ILWU Local 19 in the Port of Seattle. Annually, from January 1, 2010, to the present, some of the employer-members of PMA have derived gross revenues in excess of $50,000 for furnishing or functioning as essential links in the transportation of passengers, freight, or both from Washington to other States or foreign countries. Accordingly, I find that at all material times, PMA and its employer-members have been employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. Facts

A. Background

At the outset, I note that, as Counsel for the General Counsel (CGC) admits in her brief, most of the facts in this case are not in dispute. Respondent ILWU and PMA have had a long-standing collective-bargaining relationship covering the constituent employer members of PMA and longshore workers employed by them in ports throughout the west coast of the United States.[3] This relationship is governed by the Pacific Coast Longshore Contract Document

[2] Joint Exhibit 6. Hereinafter, General Counsel's exhibits will be referred to as "GC Exh.," followed by the corresponding number of the exhibit; Respondent exhibits will be referred to as "R. Exh.;" Intervenor exhibits will be "I Exh.;" and joint exhibits as "Jt. Exh." Transcript citations will appear as "Tr.," followed by the page number(s).

[3] The collective-bargaining relationship between the ILWU, its affiliate local unions, PMA, its constituent employer members and their predecessors date back to the 1930's. Indeed, many of the contractual structures still in place today are based on a decision by the Longshoremen's Board set up during the FDR administration to resolve

(PCLCD or Coast Agreement), a collective-bargaining agreement that has been in effect for sequential and discrete time periods for many years. The Coast Agreement in place during most of the events at issue herein was in effect by its terms from July 1, 2008, to July 1, 2014 (GC Exh. 2). One of the distinct features of the collective-bargaining relationship between PMA and the ILWU, in an arrangement that dates back to the 1930s, is that the process of hiring and dispatching individuals for employment in the longshore industry is jointly administered by the PMA and ILWU-affiliated local unions from joint "dispatch halls."[4] Pursuant to Section 17 of the Coast Agreement, dispatch halls in each port are thus jointly controlled and operated by local PMA employers and the local union affiliate(s) of the ILWU for that port, acting through the Joint Port Labor Relations Committee (JPLRC or Port Committee), which administers the lists of registered longshoremen, and handles any grievances filed by the workers, employers, or the local union(s).[5] Under the Coast Agreement, the Port Committees report to and are under the ultimate control of the Joint Coast Labor Relations Committee (JCLRC or Coast Committee), which is based in San Francisco and functions as an appellate body to review grievances and other disputes that are unresolved by the Port Committees or appeals from decisions by the Area Arbitrator.[6] As with the Port Committee(s), the Coast Committee is comprised of equal number of members of the ILWU and PMA, with each side getting 3 votes regardless of the amount of individuals actually named to that Committee.

Uncontroverted testimony by members of both the labor side as well as the management side of the Coast Committee, as well as the terms of the Coast Agreement, establishes that the Coast Committee functions as an appellate body when determining the outcome of appeals of disputes coming from either the Port Committee(s) or the Area Arbitrator. As an appellate body, it does not receive testimony from witnesses, but rather relies on a written record submitted to it from the lower panel or arbitrator. Its decisions are final, unless there is a tie vote and one side (or both) opts to submit the dispute to the Coast Arbitrator for resolution. Even if there is a tie vote, however, many such disputes are not submitted to the Coast Arbitrator, because either side may believe the facts to be weak, and may therefore be hesitant to create a poor precedent that might contradict the letter or spirit of the Coast Agreement. Significantly, witnesses for both the labor side as well as the management side testified that their loyalty as Coast Committee members was not towards their respective sides, but rather towards preserving or protecting the "sanctity" or "integrity" of the Coast Agreement.[7] Accordingly, members of the Committee or

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longstanding—and sometimes violent—disputes in that industry at the time. A copy of the Longshoremen's Board decision was introduced as R. Exh. 4. See, also, *Shipowners' Associaion of the Pacific Coast*, 7 NLRB 1002 (1938).

[4] This arrangement thus differs from that of typical "hiring halls," such as those operating in the construction industry, which are solely controlled by the union.

[5] The Port Committee for each port is composed of equal number of members from each side, the local union affiliates of the ILWU and the employer members of PMA.

[6] A chart introduced into evidence as R. Exh. 1 shows the different paths a dispute can follow to reach the Coast Committee (JCLRC), or ultimately the Coast Arbitrator. Some disputes are appealed directly from the Port Committee to the Coast Committee, while others first go to the Area Arbitrator before they can be appealed to the Coast Committee. For example, issues related to health and safety, work stoppage(s), discipline, and dispatch hall and hours disputes go from the Port Committee to the Area Arbitrator before they are appealed to the Coast Committee. Disputes related to registration (in dispatch halls), as occurred in the present case, as well as those related to the ADA, USSERA, and Section 17.4 discrimination issues, proceed directly from the Port Committee to the Coast Committee for resolution.

[7] This is based on the testimony of Leal Sundet, an ILWU member of the Coast Committee from 2006 to 2015, and the testimony of Rich Marzano, a PMA member of the Coast Committee from 2006(or 2007) to 2015. (Tr. 291;

panel would often vote against the interests of the "side" that had appointed them in order to preserve and protect the letter and spirit of the Coast Agreement. Uncontroverted testimony also established that the Coast Committee typically receives and handles approximately 500 disputes per year.

It is also uncontroverted that there are three (3) types of workers that are registered to be dispatched from the dispatch halls in each port, pursuant to the terms of the Coast Agreement: Class "A" registrants (also called A members or A men); Class "B" registrants (B members); and identified casuals (also called casuals or ID casuals).[8] There is a distinct "pecking order" for dispatching: Class A members have top priority, followed by Class B members, followed by identified casuals.[9]

The rules and procedures regarding registration at the dispatch halls, as well as the requirements needed for initial inclusion or advancement within the registry, are controlled and determined by the Coast Committee pursuant to the Coast Contract. Because of the potentially dangerous nature of the work in the longshore industry, where serious injury and even fatal accidents are a reality, the industry has a zero tolerance policy with regard to drug and alcohol abuse. Accordingly, drug and alcohol tests are routinely administered to all who are dispatched from the halls, at different times and different occasions as needed. The Coast Committee determines when testing is done and what procedures are used in these tests. One of the occasions when such testing is routinely employed is when new registrants are to be added or advanced into the Class A or B lists. In 2010, the Coast Committee agreed to add 45 new registrants to the Class B list in the port of Seattle, Washington. The dispatch hall in that port is jointly controlled and administered by PMA and the local union affiliate of Respondent, ILWU Local 19 (Local 19), and the Coast Committed delegated the task of notifying the eligible candidates to the Port Committee composed of PMA and Local 19 members. On July 29, 2010, the Port Committee by letter notified the registered casuals with the most hours worked, in accordance to the dispatch hall rules, that such registry was opening, and that those who applied had to submit to a drug test on August 7, 2010.[10] The controversy in this case stems from the events that followed, as described below.

B. The Relevant Facts in the Present Case

Oberti, an individual and Charging Party in this case, had worked as an identified casual longshoreman in the port of Seattle since 2006, and had earlier worked as an unidentified casual from 2004 to 2006. He received the July 29, 2010 letter from the Port Committee advising him of the availability of limited Class B registration for which he was eligible, and of the requirement that he submit for a physical examination and drug/alcohol screening test on

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399). I found both Sundet and Marzano to be credible witnesses, whose testimony was unhesitant and clear—and uncontroverted, as indicated above.

[8] When needed, dispatch halls also dispatch "unidentified" casuals, although that appears to have occurred very seldom in the past few years.

[9] In addition to having priority for dispatching purposes, Class A members have full health, welfare and pension benefits, as do Class B members to a lesser degree; casuals have no such benefits. Needless to say, because of the perks of having Class A or B status, achieving such status is a much sought-after goal in the longshore industry.

[10] A list of eligible identified casual individuals eligible for the Class B registration was also posted at the dispatch hall. (Tr. 348)

August 7, 2010.[11] Approximately 44 other "ID casual" longshoremen, in addition to Oberti, were sent the letter inviting them to apply for the Class B openings, and advising them of the required physical and drug/alcohol screening test.

The contractor chosen by the Port Committee to perform the physical examination and drug/alcohol screening test was U.S. Health Works Medical Clinic (USHW) in Seattle. Unlike drug/alcohol screenings done in the past, Local 19 and PMA representatives jointly decided that the August 7, 2010 testing would be an "observed" screening, in which the individual being tested would be required to produce a urine sample while under the direct observation of a clinician. According to the testimony of Sandra Starkey, whose job at the time was to represent PMA in matters pertaining to dispatch hall registration and drug/alcohol screenings, rumors were circulating at the time that some individuals might be planning to cheat on the upcoming drug/alcohol test, and Local 19 officials had informed her that there was actually some betting going on as to who was going to be successful in doing so.[12] Starkey also testified that PMA received multiple anonymous phone calls at the time from persons who wanted to know the specifics of the testing. In these circumstances, the Port Committee was concerned about the possibility of cheating and decided to follow "observed urination" protocols for the August 7 testing.[13]

On August 7, Oberti reported to the USHW clinic for the physical examination and drug/alcohol screening test shortly after 11 a.m., as scheduled. After checking in, Oberti was led to an examination room by Trevor Brandt, a lab technician employed by USHW, who informed Oberti that he was going to observe him urinate. The essential facts of what followed next are not in dispute, as described below:[14]

1. Oberti, under close-up observation by Brandt, could not produce a urine sample in sufficient quantity despite multiple attempts that lasted the remainder of the day, until about 5:30 p.m. when the clinic closed;[15]
2. After a couple of failed attempts by Oberti to produce a urine sample under close observation, PMA and Local 19 representatives agreed with USHW's

[11] The drug/alcohol testing requirement for Class B registration is mandated by Supplement 1A of the Coast Contract (R. Exh. 5, which also directs that those who fail to satisfactorily pass the test be denied Class B registration and be terminated from the industry (Tr. 280; 378)

[12] The testimony of Starkey was not only uncontroverted, but straightforward and rich in details. Accordingly, I credit her testimony.

[13] All dates hereinafter shall be in 2010, unless otherwise indicated.

[14] All parties, in the post-trial briefs, discuss and accentuate additional facts in evidence that at best are tangential to the core issue in this case, and thus non-essential to its resolution. I will discuss these additional facts only to the extent they provide some context for the facts that I believe are essential, as discussed below.

[15] According to Oberti's testimony-which was not refuted—after he failed to urinate a couple of times under Brandt's observation, Brandt left the examination room to speak with the Clinic Manager, Ms. Shibata, at which time Oberti was able to urinate. When Brandt returned to the examination room and Oberti produced the urine sample, Brandt informed him that such sample had to be rejected, because it had not been produced under observation. On another attempt, while having a bowel movement, Oberti produced a few drops of urine under the observation of Brandt, but such sample was deemed to be insufficient for testing purposes.

recommendation to implement the "shy bladder protocol" in an attempt to induce urination;[16]

3. Under the "shy bladder" protocol, Oberti drank a large amount of water over the next few hours;
4. Despite having consumed a large amount of water under the "shy bladder" protocol, Oberti was unable to produce an acceptable urine sample by the end of the day, as described above;
5. At the end of the day, after consulting with PMA and Local 19 representatives, USHW sent Oberti home after he was unable to provide a urine sample under observation;
6. USHW informed PMA and Local 19 that under "shy bladder" protocol criteria, Oberti's inability to produce a urine sample was deemed a "refusal" to comply with the testing;
7. On August 11, the Port Committee decided that Oberti and two other individuals had failed their required drug and alcohol screening test and would be permanently removed from the dispatch list, effectively removing them from the industry;[17]
8. On August 16, Starkey, on behalf of the Port Committee, notified Oberti by letter that because of his failure to comply with the requirements of the drug and alcohol screening test, was permanently removed from the dispatch list and the industry.

Prior to the events described on the last 2 enumerated items above, on August 9, Oberti had a consultation with a physician, Dr. Reese, to whom Oberti related what had occurred on August 7 regarding his inability to urinate under observation.[18] Dr. Reese gave Oberti a hand-written note stating "To whom it may concern: Mr. Edmund Oberti had some transient urinary problems. He should be allowed to take his urinary toxicology screen." (G.C. Exh. 4). He gave Oberti a prescription for Busperine, a medication to relieve anxiety, with instructions to take it before any follow-up (urine) test. (GC Exh. 5). Oberti testified that he personally delivered a copy of the note and the prescription to PMA and the (Local 19) dispatch hall on the same day.

On August 18, after Oberti had received the August 16 letter from the Port Committee notifying him of his removal from the dispatch list, he obtained another letter from Dr. Reese, this time typewritten on Dr. Reese's clinic stationary. The letter stated "To whom it may concern: Mr. Edmund Oberti …was seen in this clinic on 8/9/10 for urinary hesitancy due to

[16] "Shy bladder" protocols are determined by Department of Transportation (DOT) guidelines adopted by USHW and employed in this test. These guidelines are in evidence as part of GC Exh. 12, which is the referral of Oberti's grievance to the Coast Committee, as will be discussed below.

[17] This decision was again noted on the minutes of the Port Committee's meeting dated August 18 (Jt. Exh. 2, p. 2)

[18] Oberti testified that his mother recommended that he see Dr. Reese, who is her physician, and who had never apparently seen or treated Oberti before. On the evening of August 7, prior to his meeting with Dr. Reese, Oberti consulted by phone with Dr. Reese's nurse, who advised him successfully on how to induce urination that evening. Oberti admitted that Dr. Reese had simply relied on what he had told him about the events of August 7 to make a diagnosis, rather than performing any kind of medical tests or analyses. (Tr. 232–233). Oberti also admitted that this "shy bladder" condition had never occurred to him previously, or since. (Tr. 236)

anxiety. He was given a prescription for anxiety for his next drug testing appointment," and was signed by Dr. Reese. (GC Exh. 7). Oberti testified he gave this letter to Local 19 shortly thereafter. On August 22, Oberti wrote a letter to the Port Committee, informing them he was grieving his removal from the dispatch list and providing his explanation of the events of August 7, including the cause of his inability to urinate, as diagnosed by Dr. Reese. (GC Exh. 9).[19] Additional letters by Oberti, Dr. Reese and others followed that were forwarded to Local 19, and were made part of the record of the grievance before the Port Committee, and eventually the Coast Committee, as discussed below.[20]

Representatives for Local 19 advocated for Oberti in the grievance before the Port Committee, taking the position that in light of his "medical condition," namely "shy bladder," he should be allowed another opportunity to take the drug/alcohol screening test. PMA opposed giving Oberti another chance, contending that the proper protocols had been followed during the August 7 test, and that he had failed to comply with the test in accordance to those protocols. The grievance could not be resolved at the Port Committee level, with the parties apparently deadlocked, and thus the grievance was referred to the Coast Committee on September 23. (GC Exh. 12).

The grievance lingered at the Coast Committee until February 12, 2012.[21] On that date, the Coast Committee unanimously decided, in agreement with the position originally taken by PMA, that the USHW clinic had followed the proper protocol, and that Oberti had failed to complete the drug/alcohol screening test in accordance to such protocol. Such failure was properly deemed a refusal, the Coast Committee concluded, denying Oberti's grievance in a final ruling (GC Exh. 13). According to the testimony of Leal Sundet, one of the ILWU members of the Coast Committee who took part in the decision, the committee believed, based on the circumstances, that Oberti may have been trying to cheat or circumvent the requirements of the test. They found Dr. Reese's conclusions, based solely on what Oberti had told him, without any testing or other examinations, to be suspect, not entitled to much weight. According to Sundet, the committee concluded that the USHW clinic had followed the correct protocols. The committee thus agreed with USHW, which it viewed as the expert in these matters, that Oberti had failed the test. Rich Marzano, a PMA member of the Coast Committee who participated in

[19] In the letter Oberti states that he has always "happily" submitted to drug tests in the past and "successfully passed" those tests. This, however, is not completely accurate. Oberti admitted that he failed a drug test in 2007, testing positive for marijuana, and was suspended and placed on probation by the dispatch hall for 30 days until he was able to pass successive random drug tests. (Tr. 152–153; 187)

[20] These included a letter by Dr. Reese dated August 24, in which he states, for the first time, that Oberti had suffered an "acute anxiety attack" on August 7 (GC Exh. 10), and a letter by Oberti to the Port Committee dated September 7 (GC Exh. 11). Letters were also sent by DADS, a community organization that Oberti participated in, as well as a letter from his pastor. These letters formed part of the record presented to the Coast Committee (GC Exh. 12)

[21] There were various reasons for the delay, partly having to do with the large volume of cases handled by the Coast Committee, and partly because there were several discussions about finding a way to resolve the dispute to everyone's satisfaction (Tr. 402; GC Exh. 19). This resulted in the matter being tabled or held in abeyance several times. One of the proposed solutions was giving Oberti a new "swab" test, which involved taking a swab of saliva from inside the cheek, a testing method which would obviously avoid the "shy bladder" problem, since no urination was involved. This testing methodology was adopted and implemented by the Coast Committee later in 2012, *after* its decision regarding Oberti, but had been under consideration for a while. The parties, however, could not come to an agreement to resolve the dispute in such manner, and thus made a final ruling on February 12, 2012.

the February 2012 decision to deny Oberti's grievance, corroborated Sundet's testimony. The committee viewed the medical documentation that had been submitted by Oberti, which was the opinion of a general practitioner that was based on what Oberti had told him, which was not given much weight. Instead, the committee gave controlling weight to the opinion of the USHW clinic (lab), and found that the proper protocol was followed and that Oberti had failed the test in accordance to such protocol. Indeed, Marzano testified, the clinic had taken every reasonable step to accommodate Oberti and had gone beyond the required "shy bladder" protocol. Marzano also testified that decisions by the Coast Committee are final, and that although one side or the other can request re-consideration of a ruling in the future, the other side is under no obligation to agree—and that absent such agreement, the matter remains closed. Typically, the only reason for such re-consideration would be if new evidence or information has surfaced that was not available at the time of the original ruling. As stated earlier, I found Sundet and Marzano to be straightforward and credible witnesses, and thus credit their testimony.

About a year and a half later, on August 1, 2013, Oberti filed a lawsuit against PMA and Local 19 in Washington state court alleging, inter alia, discrimination based on his "disability" for his removal from the dispatch hall list, pursuant to the events described above (GC Exh. 14).[22] The case was removed to federal district court, and on February 19, 2014, Oberti voluntarily moved to dismiss all claims against Local 19. Thereafter, PMA filed a motion for summary judgment, and on March 25, 2015, the court issued an order granting in part and denying in part PMA's motion (GC Exh. 16).[23] Consequently, the matter was set for trial on the one cause of action (alleged discrimination based on disability) not dismissed by the court.

On September 24, 2015, PMA, facing an imminent jury trial, proffered Oberti a settlement offer (I Exh. 2). This settlement offer contained three (3) distinct settlement scenarios or offers, each containing different potential levels of (front or back pay) payments depending on whether the ILWU—whose agreement as an integral part of the Coast Committee was necessary—would agree to reinstate Oberti's privileges in the dispatch hall. Settlement Offer (or option) "A," which involved the least amount of money, would come into play if the ILWU accepted the offer to place Oberti on the "Class B" dispatch hall list, the list Oberti had applied for in 2010, contingent upon his passing a drug/alcohol screening test not involving observed urination. Settlement Offer "B," which involved a higher payment figure to Oberti, would come into play if the ILWU instead accepted Oberti back on the less senior "ID Casual list," the list Oberti was in when the events in 2010 took place. Settlement Offer "C," the last one, would come into play if the ILWU did not accept PMA's offer to reinstate Oberti to the dispatch hall list by October 31, 2015. This offer made it clear that it was **in lieu** of reinstatement to the list altogether. The settlement proposal also made it clear that in offering this settlement, PMA was not admitting any wrongdoing or liability for the events that resulted in Oberti's removal from the dispatch hall list.[24]

[22] Notably, Oberti never named or added Respondent ILWU as a defendant in the action.

[23] Oberti had claimed 6 distinct causes of action in his suit, and the court granted PMA's motion for summary judgment on 5 of those claims. The court denied the motion for summary judgment on Oberti's claim of discrimination based on his "disability" as defined by Washington state law. As more thoroughly discussed below, the court found that PMA, as to that claim, had not met the significantly high burden required for dismissal.

[24] The full language of PMA's settlement offer is part of the record as I Exh. 2 (PMA NLRB 721), with the payment amounts redacted because of their confidential nature.

On October 6, 2015, Oberti (through his attorney of record) accepted PMA's settlement offer, as outlined above. Accordingly, on October 7, 2015, PMA's Senior Coast Director for Contract Administration and Arbitration, William Bartelson, contacted ILWU's in-house counsel, Kirsten Donovan, by phone, and conveyed the terms of PMA's settlement offer that had been accepted by Oberti. The settlement terms, in writing, were forwarded to Donovan by Bartelson via email the following day, October 8, 2015 (Jt. Exh. 3). Bartelson had replaced Marzano as a PMA member of the Coast Committee in October 2015, when the latter's term expired. He phoned the ILWU's new members of the Coast Committee, Frank Ponce de Leon and Cameron Williams (who had replaced Sundet, whose Coast Committee term also expired in October 2015) and explained PMA's settlement agreement with Oberti, including the 3 options discussed above. Additional discussions were held, by phone, between Bartelson, PMA counsel Kathy O'Sullivan, and ILWU counsel Donovan, during which the ILWU inquired if any new factual or medical information had come to light since the Coast Committee's decision in 2012. Bartelson and O'Sullivan informed Donovan that no new factual or medical information regarding Oberti had been provided or revealed.

Williams testified that he and Ponce de Leon, in their role as Coast Committee members, reviewed all the documents related to the 2012 Coast Committee decision, including the medical information contained in the record as part of Oberti's grievance. After discussing the matter with the ILWU's other Coast Committee members—ILWU's president and vice president—, they decided, in view of the lack of any new facts which would warrant re-consideration of the 2012 Coast Committee decision, to decline PMA's invitation to change or overturn that decision.[25] Accordingly, on October 19, 2015, Respondent ILWU, in a phone conversation between Donovan and O'Sullivan, informed PMA that it was declining to overturn the February 2012 ruling by the Coast Committee (Jt. Exh. 6). This message was confirmed in emails exchanged by O'Sullivan and Donovan the following day, October 20, 2015 (Jt. Exh. 4). PMA thereafter notified Oberti's attorney of the decision by the ILWU members of the Coast Committee declining to overturn the 2012 decision, therefore triggering "Settlement Option C," which involved a higher payment to Oberti but no re-instatement to the dispatch hall list.

A few days earlier, on October 15, 2015, the federal court had issued an order dismissing Oberti's lawsuit, in light of the settlement agreement he had entered into with PMA (I Exh. 3, PMA NLRB 690). In the ensuing months, there were numerous communications between PMA and Oberti's attorney, in an attempt to finalize the terms of the settlement agreement and the payment to Oberti pursuant to the terms of that agreement.[26] Thereafter, PMA sent the settlement payment check(s) to Oberti and his attorney, which were cashed.[27]

[25] I credit Williamson's testimony, which was uncontroverted, was straight-forward and appeared completely candid.

[26] This was established by the uncontroverted testimony of O'Sullivan, whose testimony I credit, and by documents that are part of a federal court motion made by PMA to enforce its settlement agreement with Oberti.

[27] As mentioned above, on November 22, 2016, shortly before the trial in this matter started, PMA filed a motion in federal court to enforce it settlement agreement with Oberti (I Exh. 3). In its filing, PMA argues that by filing his Board charge(s), and the ensuing complaint by the General Counsel, Oberti was trying to make an end run around the terms settlement agreement, inasmuch he was seeking an order reinstating him to the dispatch hall list—a remedy PMA argues Oberti waived as part of its settlement. On January 27, 2017, the court issued an order concluding that PMA fulfilled its part of the bargain under the terms of the settlement agreement, and was no longer obligated to support Oberti's reinstatement—and precluding Oberti from seeking a Board remedy against PMA. The court did not preclude Oberti from pursuing such remedy against other parties, so long as the resulting remedies

Finally, on December 8, 2015, Oberti's attorney sent ILWU President Robert McEllrath (a member of the Coast Committee) a letter requesting Respondent to reconsider its decision not to reinstate Oberti (to the dispatch hall) (GC Exh. 18). On May 20, 2016, Respondent, through its attorney, responded by letter to Oberti's attorney, setting forth Respondent's position as to why its members of the Coast Committee had not agreed to revisit the Coast Committee's 2012 ruling.

IV. Discussion and Analysis

As briefly outlined in the opening paragraph of this decision, the core issue in this case is whether Respondent (ILWU) breached its duty of fair representation toward Oberti by declining to reconsider, in October 2015, its position as part of a grievance panel in a 2012 decision sustaining the termination of Oberti's registration and privileges in a dispatch hall. Before addressing that issue, however, I must first address whether Section 10(b) of the Act precludes the finding of a violation in October 2015, years after the initial theoretical violation occurred. If such alleged 2015 violation is not precluded, I must then decide whether Respondent, in its role as a member of an arbitration panel making a final decision in a grievance, owed a duty of fair representation toward Oberti—and the nature of such duty. I will address these issues in that order, below:

A. The Application of Section 10(b)

At the outset, leaving aside the 10(b) issue for the moment, I must point out that the underpinnings of the General Counsel's theory of a 2015 violation necessitate a finding that Respondent's initial conduct in 2012 was unlawful under the Act, even if that was never charged. In its role as part of the Coast Committee, an arbitration panel, Respondent did not do anything different in 2015 than it did in 2012, and its members in the 2015 panel relied on the same record and essential facts, which had not changed.[28] I simply cannot conceive of a theory under which Respondent's conduct was lawful in 2012 but unlawful in 2015. Accordingly, in discussing the applicability of Section 10(b), we must start with the presumption that Respondent's 2012 conduct was unlawful, and though no charge was filed within 6 months of such violation, something occurred in 2015 that revived or refreshed the earlier violation—thus providing Oberti the opportunity to take the proverbial "second bite" at the apple, even if Oberti chose not to take a first bite in 2012.[29]

The General Counsel argues that Sec. 10(b) is not applicable in this instance, because in 2015, Respondent failed to take the requested action—reconsidering the 2012 decision—for arbitrary, discriminatory, and/or capricious reasons. This argument misses the entire point,

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do not implicate a breach of the settlement agreement. I admitted the court order into the record as I Exh. 4 in a post hearing order dated February 8, 2017.

[28] While the General Counsel does not directly concede this, it is apparent from the nature of its arguments on brief, where it rails at the basic unfairness and impropriety of the Coast Committee's 2012 decision, that this presumption lies at the core of its argument. The General Counsel nevertheless insinuates that the facts had changed in 2015, an assertion I disagree with. Even if there was a change, such change was inconsequential as discussed below.

[29] Oberti did file charges against Local 19 in 2011, which were later withdrawn, apparently at the urging of the Region. (R. Exhs. 2; 3; Tr. 223–224)

however, as well as the *raison d' etre* behind Sec 10(b). Simply put, Respondent (as part of the Coast Committee) arguably failed to take the same requested action in 2012—reinstating Oberti to the dispatch hall—for the same arbitrary, discriminatory, and/or capricious reasons. Asking the Coast Committee (or a component thereof), in 2015, to *reconsider* its final 2012 decision should not serve as a resuscitation tool for a cause of action that expired 6 months after the final 2012 decision was made, a decision that Oberti was duly notified of at the time.[30]

I find this situation to be analogous to that of an employee who is unlawfully discharged by an employer for engaging in union or protected activity, but the employee does not file charges within the 10(b) period. A couple of years later, the employee requests *re-instatement*, which the employer denies. A Board charge is filed, alleging that the employer has refused reinstatement for unlawful reasons, that is, the employee's protected activity at the time of the discharge. In these circumstances the Board and the courts have consistently found that Sec. 10(b) (and other similar statutes of limitation) bars prosecution of the charge. *William B. Patton Towing Co.*, 180 NLRB 64, 67–68 (1969); *NLRB v. Auto Warehouses, Inc.*, 571 F.2d 860, 865 (5th Cir. 1978) ("Independent violations of continuing obligations do not exist where the illegality of the conduct charged cannot be established without assessing events outside the 10(b) period"); *NLRB v. McCready & Sons, Inc.*, 482 F.2d 872, 875 (6th Cir. 1973); See, also, *Intl Ass'n of Machinists v. NLRB (Bryan Manufacturing)*, 362 U.S. 411, 416 (1960); *United Airlines v. Evans*, 431 U.S. 553, 558 (1977) ("A contrary view would substitute a [renewed] claim... for almost every [past] claim which is barred by limitations")

While it is true that in this case it was not Oberti, but rather PMA, who requested a reconsideration of the 2012 decision by the Coast Committee, I find this to be a difference without a distinction for purposes of the applicability of Sec. 10(b). In that regard I note that PMA did so *at the behest* of Oberti, pursuant to the terms of the settlement agreement it reached with him. It is notable that during the hearing, as well as in its post-hearing brief, PMA took the position that it did **not** make such request because it believed the 2012 decision was wrong or unlawful, or because new facts had been discovered or the circumstances had changed, but because it had agreed to do so to settle a lawsuit.[31] Moreover, contrary to the General Counsel's

[30] The General Counsel cites scant authority to support its position that Sec. 10(b) is inapplicable. For example, it cites dicta from an administrative law judge's underlying decision in *Stage Employees IATSE Local 720 (AVW Studio Visual)*, 332 NLRB 1 (2000) where the judge addressed certain 10(b) issues. The Board—which reversed the judge on the merits of the 8(b)(1)(1)(A) and (2) violation he found—did not address the judge's findings that Sec. 10(b) was inapplicable because, apparently, no exceptions were taken to such findings. Thus, the judge's findings in that regard have no precedential value. See. e.g., *Operating Engineers Local 39 (Mark Hopkins Intercontinental Hotel)*, 357 NLRB 1683 fn. 1 (2011). Additionally, it should be noted that while the 9th Circuit disagreed with the Board on the merits of the substantive allegations in *AVW Studio Visual* and remanded the case, see 333 F.3d 927 (9th Cir. 2003), it did not comment on the 10(b) issue, since the Board had not ruled on such issue. Moreover, the facts underlying the administrative law judge's reasoning are different than in the present case. In that case, the judge opined that a March 1995 letter to the union from the doctor for the charging party, who had been expulsed from a union hiring hall in May 1994, created the "appearance of new circumstances" from which the new May 1995 charge (alleging unlawful hiring hall discrimination), could draw vitality. No such new "vitality" exists here, as the opinion of Oberti's doctor was duly considered by the Coast Committee *before* it made its final 2012 decision. In any event, in the Board in *AVW Studio* rejected the notion that the doctor's letter triggered an obligation on the union's part to look further into the member's termination from the hiring hall.

[31] Indeed, PMA admitted no wrongdoing or liability for the 2012 Coast Committee decision, and argued that it settled Oberti's lawsuit because it made a business decision to save money on litigation costs and the possibility of

argument that the district court's refusal to grant PMA's motion to dismiss Oberti's lawsuit meant that the Coast Committee had *arguably* acted unlawfully in 2012 and that therefore "new circumstances" existed warranting re-consideration of that decision, I find that no such inference of unlawfulness can be inferred from the court's ruling. In that regard I note that under Fed. R. Civ. P 56(a), the moving party in a motion to dismiss must meet a very high burden in showing that there is no genuine dispute as to any material fact and that it is therefore entitled to a judgment as a mater a law. Thus, the court must examine the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Revees v. Sanderson Plumbing Products*, *Inc.,* 530 U.S. 133, 150–151 (2000). The court noted that PMA had not met this high burden, since there were issues of fact in dispute which should ultimately be resolved by a jury (GC Exh. 16).[32] Thus, the General Counsel's insinuation that the court's ruling meant that the Coast Committee had somehow acted unlawfully in 2012 by discriminating against Oberti because of a "medical condition" alleged to be a "disability," is both factually and legally erroneous. No such inference can reasonably be drawn from the court's ruling, and therefore no "new circumstances" can be deemed to have existed in order to breathe "new life" into a defunct 2012 cause of action. Simply put, as Respondent correctly argues, PMA was only trying to save money by settling the lawsuit, and Respondent's refusal to oblige PMA's request to re-open a final 2012 decision by the Coast Committee does not create a new, or refreshed, cause of action for Oberti. To rule otherwise, as suggested by the Supreme Court in *United Airlines v. Evans*, supra, would mean that Respondent (or PMA) would forever be vulnerable under the proverbial "Sword of Damocles" for past rulings of the Coast Committee revived by future requests for re-consideration. Simply put, Oberti should have filed a charge within 6 months of the February 2012 Coast Committee decision finalizing his termination from the dispatch hall.

Accordingly, I conclude that Sec. 10(b) bars the allegations of the complaint, which I dismiss in its entirety on this basis alone. In order to avoid an unnecessary remand should the Board disagree with my conclusions with regard to Sec. 10(b), however, I will proceed to discuss the merit of the substantive allegations.

B. Does Respondent, in its Role as a Member of the Coast Committee Panel, Owe a Duty of Fair Representation Toward Oberti?

This case presents a unique set of facts and circumstances, and perhaps a novel issue for the Board. First, it needs noting that this case does not involve a typical "hiring hall," solely and unilaterally operated and controlled by a local union, which hires workers on behalf of employers to whom it refers. Rather, this case involves a **dispatch** hall that is jointly controlled and operated by a local affiliate of Respondent (in this case Local 19) **and** the employer, PMA, pursuant to the terms of the Coast Agreement. Second, and more importantly, the charge and the allegations in this case are not against Local 19, one of the 2 components operating the dispatch hall, but rather against ILWU, which is not directly involved in the control or operation of the dispatch hall. Moreover, the allegations of the complaint pertain to actions by ILWU in its role

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an adverse ruling. PMA further argued that no new facts or evidence existed in 2015 to warrant re-consideration of the 2012 decision, an argument that dovetails with Respondent's defense.

[32] In so ruling, the court noted that although it had doubts about the credibility of Oberti's assertion of facts, it was up to a jury whether to ultimately decide whether he was credible.

as part (or half) of a grievance-arbitration panel established by the Coast Agreement to resolve and rule upon grievances appealed from below by the parties or individuals. Thus, this case does not involve allegations of arbitrary or capricious conduct by a union in failing to properly represent worker for whom it was prosecuting a grievance, which was Local 19 responsibility in this instance; nor does it involve conduct by a union with regard to the actual operation of the dispatch hall, which again falls under Local 19's jurisdiction, in conjunction with PMA. Rather, the complaint alleges conduct by Respondent ILWU in its role as part of a grievance-arbitration panel that makes (or can make) final and binding determinations as to the merit of grievances appealed to that body. In my view, this raises an issue as to whether Respondent, in its capacity as part of a grievance-arbitration panel, owes the same "duty of fair representation" that a union prosecuting a grievance or operating a hiring hall owes to individuals in those instances.

I believe this is an issue of the first impression under the Act, for the parties have not cited, nor have I found, any Board cases directly on point. There are, however, court cases brought under Section 301 of the Labor Management Relations Act (LMRA) that provide guidance. In *Early v. Eastern Transfer*, 699 F.2d 552, 559–560,112 LRRM 3381, 3387 (1st Cir. 1983), cert. denied 464 U.S. 824 (1983), the First Circuit, citing the Supreme Court and other circuits, strongly suggests that union-side members of grievance-arbitration panels that are deemed under the collective-bargaining agreement to be a substitute and not a precursor to arbitration, do not owe a duty of fair representation, at least not in the traditional sense of such term. The court thus states:

> The Earlys and amicus analogize the union officials on the committee to union business agents deciding whether to send a grievance to arbitration. They do not say the union representatives must deadlock in every instance, any more than a business agent must send a meritless case to arbitration. See *Vaca*, 386 U.S. at 191. But they seem to argue that the union's duty of fair representation requires its representatives on the joint committee to resolve all doubts in favor of the grievant and arbitration. But see *Teamsters Local Union No. 30 v. Helms Express, Inc.*, 591 F.2d 211 (3d Cir.) (union members of joint committee owe grievant no duty of fair representation), cert. denied, 444 U.S. 837, 100 S.Ct. 74, 62 L.Ed.2d 48 (1979); Larry v. *Penn Truck Aids, Inc.*, 94 F.R.D. 708 (E.D. Pa. 1982) (same).
>
> Appellants' approach would alter the character of the joint committee from that contemplated in the collective bargaining agreement. The committee would become largely an alternative mechanism for deciding whether to bring a grievance to arbitration. Yet under the collective bargaining agreement, which is the controlling document, a joint committee decision is to be "final and binding." Absent a genuine deadlock, we believe the parties intended the committee to be a substitute for, and not simply a precursor of, arbitration. The Supreme Court has consistently treated the decisions of joint committees and of arbitrators identically. See, e.g., *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 918 (1963). Without any indication from either the Supreme Court or the collective bargaining

> agreement that a joint committee is to be perceived differently from an arbitrator, we cannot impose a duty of partiality on the members of such an adjudicatory body. Members of a joint committee, like arbitrators, must decide each case honestly and conscientiously on its merits. *See Chicago Cartage Co. v. Teamsters*, 659 F.2d 825 (7th Cir. 1981). On the record before us, we cannot say that the union representatives' vote against the Earlys raises a triable issue as to some breach of the duty of fair representation.

The issues and arguments raised by the court in *Early* are similar and thus applicable in the present case. The Coast Committee, in these circumstances, was clearly a substitute for arbitration, and not a precursor or step along the way. The provisions of the Coast Agreement make it clear that decisions of the Coast Committee, absent an even split among the two sides, are final and conclusive. It thus stands to reason that in its role as a panelist in the Coast Committee, as the court in *Early* indicates, Respondent's duty toward Oberti was to decide the matter "honestly and conscientiously on its merits," as an arbitrator would, and nothing more. Indeed, as credibly testified to by Sundet and Marzano (the union-side and employer-side members of the Coast Committee), their ultimate duty was toward preserving the sanctity or integrity of the Coast Agreement, rather than partiality toward their own side. If, as suggested by the above-cited cases under the LMRA, such is the standard by which to measure Respondent's duty in this case, did Respondent violate such standard?

I would answer such question in the negative. In the circumstances of this case, given the record as it existed at the time the Coast Committee made its decision in 2012—as well as in 2015, because the record had **not** changed—I cannot say that the Coast Committee generally, or Respondent's panelists in that committee specifically, acted in a manner that was not honest or conscientious. They reviewed the record evidence before them, including the findings of the USHW clinic as well as the opinion of Oberti's doctor, and came to a unanimous conclusion. Moreover, if as suggested by the cases cited above, the decisions of grievance-arbitration panels should be treated as those of arbitrators, perhaps an even higher bar needs to be met in order to find that Respondent violated the Act: whether its actions or conduct were *repugnant* to the Act, borrowing from the arbitration deferral doctrine under *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).[33] In any event, it would appear that in these circumstances, Respondent may not owe Oberti the traditional "duty of fair representation" that it would under other circumstances. In view of the lack of direct Board authority on this issue, however, I defer to the Board on this matter.

Accordingly, I will proceed to discuss whether Respondent violated its duty of fair representation toward Oberti, assuming such duty exists in these circumstances.

[33] I note that under the *Spielberg* doctrine, the Board has declined to defer to decisions of bipartite grievance-arbitration panels when there has been evidence of bias, hostility or lack of impartiality by all or some members of the panel. See, *Roadway Express, Inc.*, 145 NLRB 513, 515 (1963); *Mason & Dixon Lines*, *Inc.,* 237 NLRB 6 (1978). In the present case, however, there is no evidence of such, even if there were some good-faith doubts about the credibility of Oberti, as discussed below.

C. Did Respondent Violate its Duty of Fair Representation Toward Oberti?

The complaint alleges that Respondent violated Sec. 8(b)(1)(A) of the Act by declining (without an explanation) PMA's October 2015 request to re-instate Oberti to the dispatch list, and by refusing, from December 8 2015, to May 20, 2016, to respond to Oberti's written request to re-consider its denial of his reinstatement. I will address each of those allegations below.

First, with regard to the allegation that Respondent refused PMA's request to reinstate Oberti, it should be noted that the allegation's phrasing inaccurately pleads, or overly simplifies, what truly occurred. What Respondent did, in its role as a component of the Coast Committee, an arbitration panel, was to decline a request by PMA to reopen and reverse the panel's final 2012 decision terminating Oberti's dispatch hall privileges. As discussed earlier, PMA did so pursuant to the terms of the settlement agreement with Oberti, a settlement for an underlying lawsuit that Respondent was not part of—and that had little to do with the merits or the correctness of the Coast Committee's 2012 decision. For the reasons explained below, I conclude that Respondent did not violate its duty of fair representation toward Oberti, and thus did not violate the Act.

In its seminal decision in *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court defined the nature of a union's duty of fair representation, stating that a union violates such duty when it acts in a manner that is "arbitrary, discriminatory, or in bad faith." Id. at 207. In the ensuing years, the Board and the courts engaged in much "hairsplitting" in an attempt to define the precise boundaries of such terms, with the Board and the courts not always agreeing. In *Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991), the Supreme Court again stepped in, offering a more concrete definition and explanation of the nature of a union's duty. The Court thus stated that ". . . a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's action, the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational." Id. at 67 [internal citations omitted].

Accordingly, it is through the prism of the Court's ruling in *O'Neill* that we must ultimately analyze a union's actions to determine whether it has violated its duty of fair representation. This is true whether the union's actions occurred in the context of representing an employee in a grievance proceeding, in contract negotiations, or in the operation of a hiring hall. In the context of the operation of a "hiring hall," the Board has recently re-affirmed this principle in *IATSE Local 838 (Freeman Decorating Company)*, 364 NLRB No. 81, slip op. at 4 (2016).[34] It is true that in this context, the Board has modified the burdens of proof, so that a union must overcome certain presumptions if its refusal to refer an individual from the hiring hall is not due to certain limited reasons. Thus, the Board has ruled that if the union's interference with a referent's employment status is not due to the failure to pay dues, initiation fees, or other fees uniformly required, a rebuttable presumption arises that such interference is intended to encourage union membership in violation of Sec. 8(b)(1)(a) of the Act. *Operating*

[34] The Board had earlier applied the *O'Neill* analysis with regard to hiring halls in *IATSE Local (AVW Audio Visual)*, 332 NLRB 1, 2 (2000). Although the 9th Circuit refused to enforce this decision in *Lucas v. NLRB*, 333 F.3d 927 (9th Cir. 2003), finding that unions in hiring hall context owed a "heightened duty" standard, the Board has not adopted such standard. See, e.g., *IBEW Local 48 (Oregon-Columbia Chapter of NECA)*, 342 NLRB 101, 101–108 (2004); *Teamsters Local 631 (Vosburg Equipment, Inc.)*, 340 NLRB 881, fn. 4 (2003). I am bound to follow Board precedent, not that of a circuit court that disagrees.

Engineers Local 18 (Ohio Contractors Assn.), 204 NLRB 681 (1973), enf. denied on other grounds 555 F.2d 552 (6th Cir. 1977). This presumption may be rebutted by showing that the union's actions did not violate its duty of fair representation—such as by operating the hall based on purely subjective or discriminatory or arbitrary criteria, for example—and that its actions were necessary for the effective performance of its representational function. *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688, 691(1999). The reasons proffered by the union in support of the rebuttal, however, must nonetheless be accepted unless they are "so far outside 'the wide range of reasonableness' as to be irrational," as established by *O'Neill.*

In the present case, it is not disputed that the reason why Oberti was terminated from the dispatch hall had nothing to do with his failure to pay dues (pursuant to a valid union security clause), or initiation fees or other fees uniformly required. Rather, he was terminated as the result of what transpired during his alcohol and drug screening test, as described in the facts section. I must therefore apply the two-pronged test described above, as seen through the prism of the *O'Neill* criteria, to determine if Respondent rebutted the presumption that Oberti's termination from the hall violated the Act. I conclude that facts show that Respondent did not operate the dispatch hall is a discriminatory or arbitrary fashion, and that its actions were necessary for the effective performance of its representational function.

With regard to the requirement that it not operate the hall in an arbitrary, discriminatory or subjective fashion, there is no evidence that Respondent did so. Indeed, Respondent does not "operate" the hall at all, since the hall is jointly run and administered by Local 19 (a separate legal entity from Respondent) and PMA, the employer, pursuant to the terms of the Coast Agreement. Nonetheless, even assuming that somehow Respondent bears some direct or even indirect responsibility for the operation of the hall, there is no evidence of arbitrary or discriminatory conduct in the operation of the hall. In the present case, there is no contention, let alone any evidence, that the requirement that candidates for promotion to the "B List" take a drug/alcohol screening test is unreasonable, let alone discriminatory or unlawful.[35] Nor is there any evidence that the test was administered in a disparate manner, since all 45 candidates had to take the same test under observation, nor evidence that any other individual who may have failed the test in the same manner as Oberti was treated differently. There is likewise no basis to believe that the decision by the USHW clinic to apply the "shy bladder" protocol to Oberti, agreed upon jointly by the members of the Port Committee—PMA and Local 19—was unreasonable, much less arbitrary or discriminatory. Indeed, the evidence suggests, as Oberti admitted, that the clinic went above and beyond the requirements of the shy bladder protocol, and gave him additional time to complete the test. Finally, there is simply no evidence of discriminatory intent by the members of the Coast Committee, including Respondent, in its decision to accept the clinical judgment of the USHW, as the administrator of the screening test, that Oberti had failed to comply with the test, pursuant to the protocols established by the Port Committee. In short, the record is devoid of any persuasive evidence that the dispatch hall rules were applied in an arbitrary or discriminatory fashion toward Oberti, or that Respondent acted in any such manner toward Oberti in its decision to sustain his termination—both in 2012 and in

[35] Indeed, the Board long-ago approved requirements jointly agreed upon by the parties in this industry for the qualification and selection of individuals to be referred out of the dispatch halls. See *Pacific Maritime Association (Johnson Lee)*, 155 NLRB 1231 (1965).

2015—based on the record before the Coast Committee. This conclusion is particularly true when analyzed through the criteria as set forth by *O'Neill*.[36]

The same is true with regard to the second prong established by the Board in the context of hiring hall cases—that Respondent's actions were necessary for the effective performance of its representational function. As the Board clearly sets forth in *IATSE Local 838*, supra, slip op. at 3, unions must be accorded deference when determining what conduct is reasonable to ensure the effective performance of its representative function. As the Board stated, "Once a valid objective is shown, the Board will not substitute its judgment for the union's in determining what response is reasonable." Id. There can be no doubt that the parties to the Coast Agreement, PMA, Respondent, and its affiliated local unions (including Local 19), had a perfectly valid and lawful objective to maintain a strict alcohol and drug free work environment, an environment that admittedly was a potentially dangerous one. There can also be little doubt that the means chosen by the parties to reach this valid objective, a strict alcohol and drug screening test, was a reasonable vehicle to achieve this goal. Finally, I conclude that there can again be little doubt that the parties' approach to administering this test, as applied to Oberti, was a reasonable means of ensuring the integrity of the contractual referral system. Likewise, I conclude that Respondent's members of the Coast Committee, in the case of Oberti, reasonably made an objective and evidence-based decision to sustain Oberti's termination from the dispatch hall, and that such result was reasonably necessary for the preservation of the integrity of the contractual referral system In that regard, it is reasonable to envision a scenario where, if the parties started making exceptions or creating special procedures for individuals like Oberti, the whole system might start unraveling, as more and more individuals started demanding similar accommodations. Once again, I find that these conclusions are inevitable when seen through the prism of the criteria established by the Court in *O'Neill*. None of the actions taken by Respondent, in its role as a member of the Coast Committee panel in 2012 and again in 2015, can be deemed to have been "irrational" by any stretch of the imagination, given the evidentiary record before such panel(s).

In so concluding, I specifically reject CGC's arguments suggesting, for example, that Respondent's actions were unlawful because it had "no particular reason" to deny the 2015 request to reconsider the Coast Committee's 2012 decision. In so arguing, the General Counsel apparently misstates—and reverses-- the burden of proof required in these cases. It is not sufficient to show that Respondent had "no particular reason" to act the way it did. Rather, it is the General Counsel's burden to show that Respondent acted for unlawful, arbitrary reasons. Moreover, as discussed above, Respondent has showed that it had valid reasons for its actions. Likewise, the General Counsel argues without merit that it was "unlawful" for the Coast Committee in 2012 to reject—or give little weight to—the opinion of Oberti's physician that Oberti had a "medical condition" (or as the General Counsel suggests, a "disability" under the

[36] It is true, as admitted by Coast Committee panelist Sundet, that the members of the Committee viewed Oberti's conduct with some degree of suspicion, and believed that Oberti may have been trying to cheat on the test. Such suspicion, however, was not unreasonable, let alone "irrational," in light of Oberti's history of failing a previous test, as well as the information (received by the Port Committee, which opted for the strict testing protocols) that some individuals were planning—even placing bets—on cheating on the test.

Americans with Disabilities Act) that justified new testing;[37] or that the Port Committee was not obligated to adopt the "shy bladder" protocol, or that the testing clinic misinterpreted its application; or that the federal district court's declining to grant PMA's motion to dismiss Oberti's lawsuit meant that the Coast Committee's 2012 was likely unlawful, as was Respondent's panelists' decision not to re-open such decision in 2015. The General Counsel flails at the wind, attempting to substitute *its* judgment for that of Respondent in this matter, something the Board has specifically ruled it cannot do. Reasonable persons may differ on what the *best* course of action may have been in these circumstances, but such is not the test to determine if Respondent violated the Act in this instance. The test is as described in *O'Neill*, and the high bar set in that test has not come close to being reached. Boiling down General Counsel's arguments to their essence, the General Counsel appears offended by the harshness or arguable unfairness of Oberti's fate. Even assuming that the result was unfair, however, it is well established that an unfair result does not necessarily result in an unfair labor practice.[38]

In light of the above, I conclude that Respondent met its burden in rebutting the presumption that its interference with Oberti's dispatch hall privileges was intended to encourage union membership in violation of Sec. 8(b)(1)(a) of the Act. I accordingly conclude that Respondent, by its actions in 2012 and in 2015 did not violate its duty of fair representation toward Oberti, and did not violate Sec. 8(b)(1)(A) of the Act.

Finally, as described above, the complaint also alleges that Respondent violated Section 8(b)(1)(A) by failing to respond, until May 20, 2016, to a written request sent by Oberti's attorney on December 8, 2015, requesting that Respondent re-consider its position to reinstate Oberti.

I note that the General Counsel proffered no arguments or any authority in its brief supporting this allegation. At the time of Oberti's letter in December 2015, there were still ongoing talks between PMA and Oberti about finalizing their settlement, and indeed PMA later saw a need to file a motion with the court seeking a ruling that the settlement was a fait accompli. In February, Oberti filed the unfair labor practice charge with the Board in this case, and in response to these events, Respondent finally sent a letter to Oberti in May 2016, explaining in detail its position in this matter. While Respondent's letter was arguably slow in coming, I see nothing intrinsically unlawful about such late response, and can find no support for the proposition that such conduct, in these circumstances, was unlawful. Accordingly, I conclude that this allegation has no merit.

[37] As stated by the Board in *PCC Structural, Inc.*, 330 NLRB 868, fn. 4 (2000), it is not its function to determine if an arguably disabled person had a viable claim under the ADA—or for that matter, I would add, under any other statute.

[38] I am not without empathy for Mr. Oberti, in light of the events described above. Without a doubt, he lost much, since longshoremen jobs are highly coveted because of their good pay and benefits. It is not my role in this case, however, to determine whether he was credible in his claims, or whether he was trying to cheat on the drug screening test (as PMA and Respondent suggest), or whether he truly had a medical condition which prevented him from completing a screening test that he would have otherwise passed. Nor is it my role to determine if what occurred to him was unfair, nor whether he should have been allowed another opportunity using another method of testing. My role is simply to determine whether Respondent in this instance violated its duty of fair representation, and to that end I must apply the law as the Board and the Supreme Court have established.

In view of the above, I conclude that Respondent has not violated the Act as alleged and that the compliant should be dismissed in its entirety.

V. Conclusions of Law

1. PMA and its constituent members are employers engaged in commerce within the meaning of Section 2(2), (6), and 7 of the Act.

2. Respondent International Longshore and Warehouse Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Section 10(b) of the Act precludes the issuance of a complaint in this matter.

4. In the alternative, the Respondent did not violate the Act in any manner alleged in the compliant.

On these findings of fact and conclusions of law and based on the entire record in this case, I issue the following recommended[39]

ORDER

The complaint is dismissed in its entirety.

Dated: Washington, D.C. May 25, 2017

Ariel L. Sotolongo
Administrative Law Judge

[39] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.