

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

**INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION LOCAL 23**

**and**

**Cases 19-CB-175084**

**JIM TESSIER, an Individual**

**and**

**19-CB-198689**

**KEITH LOWE, an Individual**

**GENERAL COUNSEL'S BRIEF TO THE  
ADMINISTRATIVE LAW JUDGE**

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## **I. INTRODUCTION**

This matter was heard before Administrative Law Judge Eleanor Laws in Seattle, Washington, on a Consolidated Complaint alleging that Respondent International Longshore and Warehouse Union Local 23 ("Respondent") violated § 8(b)(1)(A) of the National Labor Relations Act ("Act") by failing to provide, and once again delaying in providing, requested hiring hall documents to two users of Respondent's dispatch hall. Respondent has a history of failing to timely provide minutes from the Joint Port Labor Relations Committee ("JPLRC"), as evidenced by Informal Board Settlement agreements in 2005 and 2017, the latter of which was revoked due to Respondent's recidivism.

Given that the JPLRC is uniquely empowered to discuss and carry out discipline of the dispatch hall users, its minutes are the only means by which dispatch hall users can verify that the proper protocols were followed. Karey Martinez and Keith Lowe are two of Respondent's dispatch hall users who requested JPLRC minutes precisely for this reason after being suspended. Despite having a fixed procedure in place for dealing with these requests and with no legitimate business justification, Respondent deviated from its normal procedure and failed to provide Martinez with the May 2016 JPLRC minutes he requested and unreasonably delayed in providing both Martinez and Lowe with the other JPLRC minutes they requested. Accordingly, Respondent should be found in violation of § 8(b)(1)(A) of the Act.

## II. FACTS

### A. Respondent's Operations

Respondent, which is based in Fife, Washington, represents longshoremen and other cargo-handling employees employed at the Port of Tacoma (the "Port") by employer-members of the Pacific Maritime Association ("PMA"), an employer association composed of various employers in California, Oregon, and Washington operating as steamship companies, stevedore contractors, and mariner terminal operators. (GC Exhs 1(m),(o)).<sup>1</sup> Respondent and the PMA jointly operate the dispatch hall in Fife (the "dispatch hall") by which PMA employers exclusively obtain employees for the Port. (JX Exh 2). Respondent and the PMA are bound by the Pacific Coast Longshore Contract Document ("PCLCD"), effective from July 1, 2014, through July 1, 2019. (JX Exhs 1, 2).

Section 17.1 of the PCLCD establishes a Joint Port Labor Relations Committee ("JPLRC") for each port comprised of Local PMA representatives and local ILWU representatives. (JX Exh 2). It is the PCLCD that vests the JPLRCs with the authority to maintain and operate dispatch halls. (JX Exh 2).

As part of this authority, the JPLRC investigates and adjudicates complaints against any longshoremen. (JX Exh 2). Once the investigation is complete, the JPLRC determines whether to approve discipline recommended by Respondent's Executive Board at its monthly meetings. (JX Exh 2). Thus, Respondent controls employment opportunities for its dispatch hall users by exercising its authority to recommend

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<sup>1</sup> References to the transcript appear as (Tr :-). The first number refers to the pages; the second to the lines. References to General Counsel Exhibits appear as (GC Exh -). References to Respondent Exhibits appear as (R Exh -). References to Joint Exhibits appear as (JX Exh -).

discipline through its Executive Board and implementing the discipline through the JPLRC. (JX Exh 2).

**B. Respondent's JPLRC Minutes and Information Request Procedure**

The JPLRC at the Port has historically followed a practice whereby the PMA staff prepares draft meeting minutes after each JPLRC meeting and distributes them to Respondent's Labor Relations Committee ("LRC") a few days before the next monthly JPLRC meeting. (JX Exh 2). Respondent's LRC reviews the previous month's draft minutes so that the minutes can be approved at the upcoming monthly meeting of the JPLRC. (JX Exh 2). The minutes discuss the JPLRC's consideration and imposition of discipline on dispatch hall users. (GC Exh 6). Those affected often request the JPLRC minutes to ascertain the reason for the JPLRC's discipline recommendation. (Tr 35: 16-19).

Respondent's dispatch hall users request JPLRC minutes by going to the dispatch hall and filling out a Request for Information form. (R Exh 3; Tr 121: 21-25; Tr 122 1-10.) According to the language on the request form itself, a user of the dispatch hall will be provided the information he or she requests within 2 to 3 weeks. (R Exh 3). Respondent will also notify the dispatch hall user when the information is ready to be picked up at the dispatch hall. (R Exh 3; Tr 121: 21-25; Tr 122: 1-10).

**1. Respondent Has a History of Recidivism Dating Back to 2005 Settlement Regarding Not Providing JPLRC Minutes Timely**

Respondent has had difficulty in timely providing JPLRC minutes to its dispatch hall users dating back to 2005. On June 23, 2005, Respondent entered into a settlement in Case 19-CB-9269, to address this issue. In that settlement, it agreed to

timely provide users of its dispatch hall with access to and copies of the JPLRC minutes upon their request. (GC Exh 4).

With Respondent acknowledging its duty to provide requested JPLRC minutes, it had over a decade to determine for itself what the necessary procedures were for gathering and providing the information. (Tr 192: 20-25). Accordingly, Respondent's Executive Board developed a request form for dispatch hall users seeking such information in order to standardize the process and make sure that information was equally distributed to any dispatch user who requested it. (Tr 192: 19-25). Those procedures included having the requester fill out a form, file the form in Respondent's office, provide a copy for the requester's own minutes, and notify the requester when the information was ready to be picked up in 2 to 3 weeks. (Tr 121: 23-25; Tr 122: 1-10). This time line, created by Respondent, allows for Respondent to receive the JPLRC draft minutes from PMA, approve the minutes at the following Executive Board meeting, and make them available. (Tr 146: 3-17; Tr 193: 4-15).

## **2. The Regional Director Approved a Settlement in 2017 and Revoked It After Respondent Again Failed to Timely Provide Requested JPLRC Minutes**

Despite the 2005 settlement agreement and the form it instituted, Respondent thereafter failed to follow its own request for information procedure. On March 22, 2017, Respondent entered into a second settlement involving the failure to timely provide JPLRC minutes to dispatch hall user longshoreman Karey Martinez ("Martinez") in Case 19-CB-175084, one of the two cases involved in this matter. (GC Exh 1(m)).

Like the first settlement, Respondent again agreed to provide requesting users of its dispatch hall with access to and copies of JPLRC minutes as per their normal procedure. (GC Exh 1(m)). The Region ultimately revoked the 2017 settlement after

finding merit to a charge in Case 19-CB-198689 filed by longshoreman Keith Lowe, alleging that Respondent had again refused to provide JPLRC minutes to requesting dispatch hall users in a timely manner. (GC Exh 1(s)). That is the second case in this matter.

**C. Karey Martinez Followed Respondent's Procedures to Request April and May 2016 JPLRC Minutes**

Karey Martinez is a registered Class A longshoreman and member of ILWU Local 19 in Seattle, Washington.<sup>2</sup> (Tr 22: 1-25). He has been a longshoreman and ILWU member for 14 years. (Tr 22: 10-12). From time to time, Martinez, in search of additional pay and better job selection, travels to different ILWU locals to work as a voluntary traveler. (Tr 24: 3-5; Tr 23: 15-19). When Martinez travels, he primarily travels to Respondent's dispatch hall. (Tr 23: 9-19).

While working as a voluntary traveler being dispatched out of Respondent's dispatch hall in the past four years, two employer complaints were lodged against Martinez, each of which resulted in disciplinary action. Martinez' first discipline was issued in January 2013 and resulted in a \$50 dollar fine, with no other disciplinary action taken. (Tr 24: 11-25; Tr: 25 1-2; GC Exh 2). His second discipline was issued in April, 2016 for allegedly leaving a job site early. (Tr 24: 11-25; Tr 25: 1-2; GC Exh 2). Instead of levying a \$50 fine against Martinez, Respondent issued a much harsher punishment and suspended Martinez from its dispatch hall for 6 months. (GC Exhs 2, 3; Tr 34: 18-20; 36: 6-25). Rather than being told of his suspension by Respondent, Martinez learned of his suspension from a fellow Local 19 member. (Tr 36: 6-25).

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<sup>2</sup> Martinez was forthright at the hearing about being in a state of grief due to the proximate death of his father, which caused some difficulty in remembering exact details at times. (Tr 88: 5-9).



Curious to know the reason behind this unexpectedly severe punishment, and wanting to verify that he had in fact been suspended from the dispatch hall, Martinez went to Respondent's dispatch hall on June 15, 2016, to request his JPLRC minutes for April and May. (Tr 35: 6-19). He requested the two months because, at the time of his request, Martinez was unaware of which monthly JPLRC meeting his discipline was discussed. (Tr 35: 9-19).

When Martinez arrived at the dispatch hall on June 15, he spoke to Respondent's secretary, Tawni Bailey. Bailey gave Martinez the request for information form created in direct response to the Informal Board Settlement in 2005 so he could request his JPLRC minutes. (GC Exh 3; Tr. 37: 7-15). After Martinez filled the form out as instructed and gave it back, Bailey told him that someone would be in contact with him to pick up his requested minutes. (Tr 37: 7-15). The form clearly states in bold, capital letters, that the information will be provided in 2 to 3 weeks from the request date. (GC Exh 3). Bailey never mentioned during this interaction that there could be a delay or problem with Martinez' request. (Tr 37: 7-15).

**1. Martinez Made Several Attempts to Follow Up on His JPLRC Minute Request**

At the time Martinez made his initial information request on June 15, 2016, he was unaware of the 2005 settlement. He learned of it afterward when speaking with labor relations consultant, Jim Tessier ("Tessier"); Tessier told Martinez about the settlement and that the Respondent had previously used a kiosk to provide dispatch hall users with requested information. (Tr 62: 23-25; 63: 1-2; 193: 8-12). Having never known about or seen the kiosk previously, or been aware of the 2005 settlement, Martinez believed he had good reason to follow up on his request with this new

information and bring the prior settlement to Respondent's office staff's attention. (Tr 62: 2-18, 23-25; 63: 1-4; 66: 13-16). Due to his new information from Tessier, Martinez believed it was possible that the information might be available sooner than anticipated. (Tr 84: 1-4).

On June 20, 2016, Martinez returned to the Respondent's offices and again spoke to Bailey. The purpose of this visit was to bring attention to the 2005 settlement agreement. (Tr 37: 21-22). Martinez told Ms. Bailey that he had a copy of a NLRB Notice from the 2005 settlement agreement stating that the Respondent would provide users of its hiring hall with timely access to or copies of JPLRC minutes. (GC Exh 4; Tr 37: 14-21; 40: 7-21). He showed both Bailey and Sarah Faker, another financial secretary, the Notice and explained to them what he understood the agreement to mean. (Tr 38: 19-25; Tr 39: 11-20).

Faker told Martinez that he would need to speak to the President, Dean McGrath ("McGrath"), or a business agent regarding the settlement agreement. (Tr 40: 22-25; Tr 41: 3-25). Martinez asked Faker where he could find McGrath or a business agent and Faker pointed Martinez to their offices. (Tr 41: 3-9). Martinez first walked to McGrath's office and knocked on the door. (Tr 41: 16-19). Seeing that the lights were off, Martinez proceeded to the business agent's door. (Tr 41: 22-25). Finding no one inside that office either, Martinez walked over to a dispatcher to ask for McGrath's phone number, which he received. (Tr 42: 2-7).

Martinez then returned to the secretaries' office and asked if they could have McGrath call him after McGrath had a chance to review the 2005 settlement agreement. (Tr 42: 17-19). Martinez left the settlement agreement with the secretaries and thanked

them for their time. (Tr 42: 17-25). The entire interaction between Martinez and the secretaries lasted about five to ten minutes from the time he first approached them until he thanked them and left. (Tr 42: 23-25; 43: 1-3; 135: 11-13).

At no point in time during his interaction was Martinez told he could never return to the dispatch hall. (Tr 43: 7-9). Bailey never told Martinez the process for granting an information request, or that the information was in the process of being cleared by Respondent's president, and neither Faker nor Bailey told Martinez his minutes would be delayed beyond two to three weeks. (Tr 135: 14-18; Tr 136: 6-16). Similarly, neither secretary told Martinez that his minutes would be available at a different location other than the dispatch hall. (Tr 136: 14-20).

After Martinez left, the two secretaries wrote statements regarding their interactions with him and assert that he wanted the information at that time. (Tr 152: 16-17). Both statements corroborate Martinez' version of events that when he arrived he showed them the 2005 settlement, explained that he understood it to mean the information should be provided to him, and that he left the settlement with them after unsuccessfully attempting to speak with McGrath and a business agent.<sup>3</sup> (R Exh 6, 7).

Respondent's President McGrath testified that Longshoremen have a reputation for being a little "mouthy" at times and can be "rougher than most" and prone to profanity. (Tr 197: 23-25; Tr 210: 18-24; Tr 211: 2). Both Faker and Bailey have years of experience with Respondent and are required to interact with dozens of longshoremen on a daily basis as a regular part of their job duties. (Tr 210: 18-24). When Bailey wrote her statement, she did not intend to prevent Martinez from returning

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<sup>3</sup> However, as will be discussed later, Bailey and Faker added self-serving details to their testimonial accounts of Martinez' conduct that do not appear in their written statements which they prepared shortly after their interaction with Martinez. (Tr 38: 8-25; R Exh 6; Tr 156: 7-8; Tr 169: 17-22; R Exh.7).

to the hall. (Tr 138: 8-10). In fact, neither of the women's statements indicate that Martinez had threatened them, used profanity, or behaved violently; neither statement made any reference to either woman feeling threatened by Martinez. (R Exh 6; R Exh 7; Tr: 11-18).

Rather than provide the requested records to Martinez, as promised and per usual practice, Respondent faxed draft minutes of the April 2016 JPLRC meeting to Local 19 on June 21, the day following Martinez' visit to the dispatch hall. (GC Exh.6). Martinez had no idea they were waiting for him at Local 19. (Tr 53: 12-25). McGrath testified that Respondent never even considered sending Martinez the requested information by certified mail, despite admitting that it can be done in certain circumstances. (Tr. 213: 1-3).

## **2. Martinez Followed Up His Information Request With Phone Calls to Respondent**

Martinez, still wanting to make sure Respondent was aware of the 2005 settlement, proceeded to call night business agent Dave Basher ("Basher") after leaving the secretaries' office. (Tr 43: 10-12; Tr 43: 16-20). Basher informed Martinez that he could come down to the hall to speak to him, but, ultimately, the men did not speak in person. (Tr 71: 4-13).

Later that same day and shortly after Martinez spoke with Basher, Martinez received a phone call from business agent Ryan Whitman ("Whitman"). (Tr 71: 17-25; Tr 72: 1-3). Martinez received the call from Whitman on his personal cell phone while in his car speaking on speaker phone with labor relations consultant Tessier on a second phone he uses for business. (Tr 73: 7-16). Whitman confirmed that Respondent was preparing the minutes for Martinez. (Tr 185: 2-3). Whitman did not tell Martinez the

minutes would be faxed to his home local or that the minutes could be delayed. (Tr 184: 22-24).

After Martinez had obtained President McGrath's phone number on June 20, he had left a voicemail for McGrath, which McGrath returned later that same day. (Tr 76: 2-3). Martinez told McGrath about the 2005 settlement agreement and communicated to him that Respondent had violated the settlement agreement as Martinez understood it. (Tr 198: 23-25). McGrath admitted that during the call Martinez did not argue but, instead, simply tried to get his point across regarding his honest belief of what the settlement meant. (Tr 204: 17-19).

During this phone call, McGrath told Martinez the minutes would be available within 2 to 3 weeks, but he did not tell Martinez that Respondent would depart from its normal procedures in timely providing the requested JPLRC minutes for any reason, including due to Martinez' behavior earlier that day. (Tr 46: 1-20; Tr 76: 18-20). According to Martinez, he was also never told by McGrath or Whitman that his minutes had been or would be faxed to Local 19. (Tr 51: 18-25).

McGrath never followed up with Local 19 to see if they had provided Martinez his minutes. (Tr 199: 1-25). Additionally, McGrath never contacted Martinez to see if he had received the minutes faxed to Local 19. (Tr 198: 7-13; Tr 216: 6-19).

Three weeks after his initial request Martinez still had neither received his minutes nor heard from Respondent when he could expect them. (Tr 47: 11-15). As such, Martinez followed up with night business agent Basher on July 8, 2016, by text message to ask whether his minutes were available. (GC Exh 5). Hearing no response from Basher, Martinez called the secretaries' office later that same day to ask whether

his minutes were ready. (Tr 47: 21-25). Either Ms. Bailey or Ms. Faker told Martinez to call a business agent or president McGrath. (Tr 49: 2-8). Again, no one for Respondent never told Martinez that his minutes had been faxed to Local 19 weeks earlier, despite the two secretaries and McGrath all possessing this information. (Tr 49: 2-8; Tr 155 9-10).

Martinez sent Basher a second text message on July 10, 2016. The text message outlined Martinez' conversation with Respondent's secretaries about his JPLRC minutes request and that he had not been told whether the minutes were ready. (GC Exh 5; Tr 51: 1-12). Martinez told Basher he intended to go forward with his NLRB charge the following week, but that Basher could still respond to him before that time. Instead of informing Martinez of the status of his minutes, or telling Martinez his minutes had been faxed to his home local, Basher sent Martinez a text back stating he had no comment and that supplying the minutes was not his job. (GC Exh 5; Tr 51: 1-12).

Martinez finally received his April 2016 JPLRC minutes on August 29, 2016, a full ten weeks after he first requested them, due in part to his pursuing an unfair labor practice charge against Respondent. (TR 52: 4-5). Respondent never notified him they were ready; nor did Local 19. (TR 52 1-12). Instead, Martinez first learned that the minutes were potentially available at Local 19 from a Board agent during an unfair labor practice investigation. (Tr 53: 12-19).

By Respondent faxing the draft minutes to Local 19 instead of making the final minutes available for pick-up at their office, Respondent knowingly acted against its normal policy. (Tr 172: 6-12). Martinez has never received the May 2016 JPLRC

minutes he requested; nor has he received any explanation as to why the May minutes would not be made available. (Tr 56: 12-18).

**D. Respondent Delayed in Providing Keith Lowe With His Requested April 2017 JPLRC Minutes**

Keith Lowe (“Lowe”) is a registered Class A longshoreman and member of the ILWU Local 19 located in Seattle, Washington. (Tr 93: 17-21; 94: 7-13). Over the past 3 years, Lowe has traveled outside of Local 19 to work at Respondent’s dispatch hall in Fife, Washington, as a voluntary traveler for both convenience and lack of work; he also receives additional pay as a voluntary traveler. (Tr 24: 3-5; 95: 7-24).

On March 23, 2017, while working out of Respondent’s dispatch hall as a voluntary traveler, Lowe received a dispatch to Washington United Terminals (“WUT”) as a skilled holdman. (GC Exh 8). He accepted the job but, due to an attendance issue described as a failure to show for the job, Lowe received an employer complaint from WUT. (GC Exh 8). Even though Respondent suspended Lowe from the dispatch hall for 6 months as a result of this employer complaint, Lowe did not learn of his suspension for several weeks after Respondent made its decision. (Tr 96: 7-13; Tr 98: 15-21).

Lowe believed that the 6 month suspension was not a justified response to his conduct. (Tr 101: 23-25; Tr 102: 1; Tr 115: 20-24). Based on this belief, Lowe went to Respondent’s dispatch hall on April 19, 2017, to ask for the JPLRC minutes for the month of April 2017.<sup>4</sup> (GC Ex 7; Tr 115 20-24). Knowing this, and wanting to ensure that he was being treated fairly by Respondent in its decision to limit his work

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<sup>4</sup> As noted earlier, the JPLRC minutes are the only means available to longshoremen to determine if Respondent in fact discussed their discipline and properly applied the Pacific Coast Labor Contract Document. (JT Exh 2).

opportunities, Lowe followed Respondent's information request procedures as stated. (Tr 101: 17-25; Tr 115 20-24).

When Lowe arrived at Respondent's hall, he signed in with Respondent's financial secretary Sarah Faker, wrote down his registration number on the sign in sheet, and asked for the JPLRC meeting minutes for the month of April. (GC Exh 7; Tr 121: 3-12). He did this in writing on the form provided by Respondent. Faker stamped Lowe's request as "Received April 19, 2017 ILWU Local #23" and she made him a copy of the request. (GC Exh 7; Tr 121: 3-12).

According to Faker, she informed Lowe that he would receive his minutes in about a month. (Tr 157: 19-25; Tr 158: 1-6). Lowe does not have a clear recollection of what Ms. Faker specifically stated, but allowed for the possibility that she indicated it would take "about a month." (Tr 105: 11-12). As stated earlier, the request form indicates that the information requested will be available within 2 to 3 weeks and that the requester will be notified when the information is ready to be picked up. The form does not indicate that it is the responsibility of the longshoreman who requested the information to follow up on the request. (Tr 115-116: 25-2; GC Exh 7).

In the meantime, Lowe discussed his information request with Martinez, his fellow longshoreman and Local 19 member. (R Exh 1). Martinez, like Lowe, had previously requested JPLRC minutes from Respondent in response to discipline he had received as a voluntary traveler, but had not received the minutes until after filing an unfair labor practice charge. (GC Exh 6). Martinez advised Lowe that if he did not receive the information within the 2 to 3 week period he could file a charge with the National Labor Relations Board. (R Exh 1). After three weeks passed and no one from



Respondent had been in contact with Lowe, Lowe filed an NLRB charge on May 11, 2017. (GC Exh 1(k)).

Respondent notified Lowe his minutes were ready to be picked up on May 24, 2017, five weeks after his initial April 19, 2017, request. (GC Exh 7; Tr 102: 19-24). Lowe traveled to the Local 23 offices on May 31, 2017, after receiving the May 24 voicemail from Faker. When Lowe arrived at the office, he was given the April JPLRC minutes he had requested. (Tr 102: 19-22).

### **III. ARGUMENT**

Respondent, like all unions, owes a duty of fair representation to every employee that it represents. 29 U.S.C. § 158(b)(1)(A). It is a basic pillar of labor law that when a union acts arbitrarily, discriminatorily, or in bad faith, it violates the duty of fair representation. *Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991). A union's duty of fair representation obligates it to provide employees with requested information that pertains to matters affecting their employment. *Letter Carriers Branch 529 (Postal Service)*, 319 NLRB 879, 881 (1995); *Carpenters Local 35 (Construction Employers Ass'n of CA)*, 317 NLRB 18 (1995).

The duty of fair representation includes providing employees who use a dispatch hall with requested documents relating to the operation of that hall. *Teamster Local 519 (Rust Engineering Co.)*, 276 NLRB 898 (1985). When a union fails to provide requested, relevant hiring hall information, the burden is on the union to demonstrate a legitimate interest in refusing to provide the documents. See, *Boilermakers Local 197*, 318 NLRB at 205 (citing *Carpenters Local 608*, 249 NLRB 747, 755–57 (1986), *enfd*, 811 F.2d 149 (2d Cir. 1987)). A union seeking not to produce requested information

must provide the information if it fails to raise a countervailing interest as to its refusal. *United States Postal Service*, 365 NLRB No. 103 (May 29, 2015).

Moreover, when operating a dispatch hall that provides exclusive employment dispatches, a union owes a *heightened* duty of fair representation to all dispatch hall users. *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989). This is because a union in such a situation, “wield[s] additional power ... by assuming the employer's role,” [and] “its responsibility to exercise that power fairly increases rather than decreases.” *Id.* at 89.

As to information requests going to a hall user's belief that he/she is being treated unfairly, the Board has looked at varying degrees to the reasonableness of the employee's belief in determining whether requested documents must be provided. On occasion, the Board has held hiring hall users are entitled to requested documents without laying any foundation as to whether the requester had a reasonable belief they were being discriminated against. See, e.g., *Bartenders' and Beverage Dispensers' Union, Local 165*, 261 NLRB 420, 423 (1982); *Operating Engineers Local 513 (Various Employers)*, 308 NLRB 1300, 1303 (1992). Most recently, however, the Board has held that a union violates § 8(b)(1)(A) of the Act when it arbitrarily denies a request for hiring hall documents, “if the request is reasonably directed toward ascertaining whether the user has been treated fairly.” *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, Local 720, AFL-CIO, (Tropicana Las Vegas, Inc.)*, 363 NLRB No. 148, slip op. at 2 (March 30, 2016). This is true even in circumstances where the Board has applied a more stringent standard of whether or not the requester has a reasonable

belief that they were being treated unfairly. *Id.*, citing *Boilermakers Local 197 (Northeastern State Boilermaker Employers)*, 318 NLRB 205, 205 (1995) (requesting employee “reasonably believed there had been a violation of the hiring hall’s referral procedure” and thus was entitled to requested records”); *Operating Engineers Local 12 (Nevada Contractors Assn.)*, 344 NLRB 1066, 1066 n.1 (2005).

**A. Respondent Owes a Duty of Fair Representation to Dispatch Hall Users to Timely Provide Requested JPLRC Minutes**

Here, Respondent operates a dispatch hall from which employers at the Port of Tacoma exclusively obtain their employees. In light of the well-established Board law set forth above, there is no doubt that Respondent must provide requested records regarding operation of the dispatch hall to Martinez and Lowe as members of the hall, as well as records going to their perceived discrimination against them by Respondent.

**B. Respondent Violated § 8(b)(1)(A) by Failing to Timely Provide, Without a Valid Justification, Martinez’ Requested April 2016 JPLRC Minutes**

Martinez had heard only from a fellow ILWU Local 19 member that Respondent had voted to suspend him from the dispatch hall. As such, on June 15, 2016, he requested the minutes from the JPLRC meetings in which it was possible his discipline was determined. Given that Respondent had not notified Martinez in writing of its ultimate decision to suspend him, he had no means of being certain of which month the JPLRC actually decided to suspend him from the dispatch hall. Therefore, he requested the minutes from both the April and May, 2016, JPLRC meetings.

The April and May 2016 JPLRC minutes that he requested were the only means accessible to Martinez to ascertain and verify if Respondent had, in fact, discussed his discipline and decided to suspend him for six months from the dispatch hall and the

reasons therefore. Thus, there can be no doubt that these records directly relate to Martinez' employment and are relevant hiring hall documents. *Letter Carriers Branch 529*, supra, 319 NLRB 879 (1995).

Martinez' request for the JPLRC minutes was also his only means of ascertaining whether or not Respondent had treated him in a fair and equitable manner by suspending him from the dispatch hall for a six month period, if the suspension were true. Martinez held a reasonable belief that he might not have received fair discipline by being suspended from the dispatch hall for six months. This belief was based on his having previously been the recipient of an employer complaint several years earlier, and only fined \$50; thus, he was unaware of any reason that he should receive such a harsh penalty for a similar infraction three years later. He was entitled to ascertain this to determine whether Respondent was properly carrying out its duties as his statutory collective-bargaining representative. *Letter Carriers Branch 47 (Postal Service)*, 330 NLRB 667, 667 n.1, 668 (2000); *Law Enforcement and Security Officers Local 40B (South Jersey Detective Agency)*, 260 NLRB 419, 420 (1982).

Since the JPLRC minutes directly affect Martinez' employment, can be used to determine whether Respondent was upholding its statutory duty in representing him, and ascertain the validity of Martinez' belief he was treated unfairly, Respondent was obligated to provide the requested April JPLRC minutes. Despite this obligation, Respondent caused a two month delay in Martinez, until June 15, 2016, in providing the April 2016 JPLRC minutes. It did so without any proper justification, as is required by Board law.

First, Respondent never gave Martinez an explanation as to why it refused to follow its own procedure in making the requested information available at its own offices within 2 to 3 weeks from the requesting date. According to Respondent's own information request form that Martinez filled out and submitted to Respondent on June 15, 2016, the information was to be made available to him in 2 to 3 weeks from the date of the request. As the record makes clear, this form was created in direct response to an informal Board settlement in Case 19-CB-9269, approved in June 2005, based on Respondent's prior conduct in failing and refusing to meet its duty of fair representation and provide precisely such information to its dispatch hall users.

Despite the prior undertaking to address its unlawful conduct, Respondent chose to stray from its own remedial procedure in this matter without any legitimate business justification for doing so. As such, instead of making the documents available at its office for pick up by the requestor, as it always does, and did even in this matter with Lowe, Respondent faxed its April 2016 JPLRC minutes to Martinez' home local, ILWU Local 19, in Seattle. Local 19 had not requested the minutes; Martinez had.

Martinez never received notification from either Respondent or ILWU Local 19 that the requested April 2016 JPLRC minutes had been faxed to Local 19 for him to pick up. And, even if this were acceptable and Martinez had been notified, the April 2016 minutes Respondent faxed were draft minutes and not even the official record minutes of the April 2016 JPLRC meeting. Respondent's own witnesses admitted that faxing the minutes to Local 19 and providing draft minutes both constituted deviations from Respondent's normal policy.

Second, although Respondent argued at hearing that it was compelled to abandon its normal procedures for providing information because of Martinez' behavior in the secretaries' office on June 20, 2016, there is nothing to support such a claim. As Respondent's own witness testified, longshoremen can be mouthy and rougher than most. Martinez was neither on that day; thus, not even approximating the usual brusqueness the women were used to on a daily basis.

Martinez returned to Respondent's office and spoke with secretaries Faker and Bailey on June 20, 2016, in order to ascertain the availability of his minutes and let them know about the prior settlement agreement, of which he had just become aware and had no indication the secretaries were aware. While he was insistent, no one testified he yelled, cursed, or behaved abusively.

After showing a copy of the 2005 settlement to Faker and Bailey, Martinez was directed to speak with Respondent's President Dean McGrath. Martinez then went to McGrath's office, found McGrath was not there, and proceeded to knock on the door to the Business Agent's office, which was also unoccupied. Faker and Bailey witnessed Martinez leave their desk area and approach McGrath's office. Despite their claims of feeling uncomfortable with Martinez' behavior, neither secretary made any attempt to stop Martinez or notify anyone that he was walking through the hall unsupervised and looking for both the President and Business Agent. Based on Martinez' consistent version of events, along with his calm and forthright demeanor at hearing, as well as the secretaries' corroboration of facts in their contemporaneous written statements, his testimony should be credited.<sup>5</sup>

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<sup>5</sup> Martinez' entire course of testimony about his attempts to request the JPLRC minutes was fairly detailed, forthright, calm, even, and consistent despite being in an admitted fresh state of grief.

Despite their written corroboration of Martinez' account, at hearing, however, Faker and Bailey provided well-rehearsed narrative testimony largely free of foundational detail in response to leading questions. Their vague answers, lacking foundation, were in response to leading questions which cuts against their credibility. *Precision Plating*, 243 NLRB 230 (1979), *enfd.* 648 F.2d 1076 (6th Cir. 1981); *Weather Tec Corporation*, 238 NLRB 1535 (1978), *enfd.* 626 F.2d 868 (9th Cir. 1980). In addition, Bailey and Faker added self-serving details to their accounts of Martinez' conduct that do not appear in their written statements which they prepared shortly after their interaction with Martinez.

Despite the benign accounts of Martinez' conduct at the time, according to McGrath, Respondent wanted to prevent Martinez from returning to the secretaries' office purely because of his behavior which, again, included asking for JPLRC minutes, showing the settlement to Faker and Bailey, and knocking on office doors. McGrath, Faker, and Bailey all agreed Martinez did not use profanity, threaten violence, become physical with anyone, or otherwise behave in a threatening manner. This explanation falls far short of credulity and certainly does not amount to a legitimate business justification for the two month delay in Respondent providing Martinez with his April JPLRC minutes.

Third, Respondent could have met its obligation to provide the April JPLRC minutes to Martinez by simply mailing them to his home address. McGrath testified that Respondent is cautious of documents getting lost in the mail and therefore generally avoids mailing requested documents to employees. The use of certified mail or any process with a tracking system (e.g., FedEx, UPS, USPS Priority Mail, USPS Express

Mail, DHL, etc.) would alleviate this concern. While this is not the normal procedure Respondent follows, McGrath admitted it can be done in certain circumstances but was never even considered vis-a-vis Martinez.

Finally, McGrath admitted Respondent never even followed up with Local 19 or Martinez to ensure that he had received the requested documents which had been faxed. Obviously, concern about meeting its obligations under Board law or the prior settlement was not at the forefront.

**C. Respondent Violated § 8(b)(1)(A) by Failing to Provide Martinez with the Requested May 2017 JPLRC Minutes**

Not only did Respondent cause an unnecessary delay of two months in providing Martinez with the April 2016 minutes, but Respondent also completely failed to provide him with the May 2016 minutes he requested. Martinez' June 15 request plainly states he was also requesting May 2016 JPLRC minutes. These minutes were equally as important to Martinez' ability to determine if his suspension from the dispatch hall was carried out in accordance with Respondent's rules, as he was unaware of exactly which JPLRC meeting, or meetings, determined his discipline and what may have been discussed regarding that decision. He therefore had reason to request both April and May, 2016, JPLRC minutes to verify he had all of the necessary information in determining if he was treated fairly by Respondent.

Given that the May minutes were relevant hiring hall documents that Martinez was entitled to, they should have been provided to Martinez in accordance with Respondent's regular procedures. Yet this never occurred. As of the date of the hearing, over a year later, Martinez still has not received his requested May minutes.



Respondent did not and has not articulated a reason for its refusal to provide Martinez with his requested May JPLRC minutes. Rather, it appeared to argue at hearing that Martinez' discipline was discussed and decided during the April meeting, and the May meeting minutes were therefore not relevant. However, Respondent did not provide this explanation to Martinez in the intervening year and a half from the date he made the request. In fact, but for the hearing, he still would not have been told that.

Regardless, such an explanation would not necessarily excuse Respondent from its legal obligation to provide the May minutes in the first place. As the entire purpose of reviewing the minutes was for Martinez to be able to ascertain whether his discipline was decided and carried out properly, he is entitled to review the May minutes as well as the April. Respondent utterly failed to meet its duty of fair representation to Martinez by not providing the May minutes and not offering a justification for its failure to do so.

**D. Respondent Violated § 8(b)(1)(A) by Failing to Timely Provide Lowe with Requested April 2017 JPLRC Minutes**

Nearly one year after Martinez requested JPLRC minutes from Respondent, longshoreman Lowe made a similar request for JPLRC minutes. Like Martinez, Lowe had been suspended for six months from Respondent's dispatch hall after receiving a complaint from an employer. Lowe followed Respondent's procedures exactly as directed and filled out the proper information request form to obtain the JPLRC minutes in which his discipline was discussed.

Lowe was understandably upset at having lost a major source of employment by being suspended from Respondent's dispatch hall for six months. He regularly chose to work out of Respondent's dispatch hall because it was more convenient, offered more work opportunities, and higher pay, than his home local of ILWU Local 19 in Seattle.

Only a matter of days passed between Lowe finding out that Respondent had suspended him from the dispatch hall and the time he requested the relevant JPLRC minutes by filling out Respondent's information request form. Lowe wanted to ensure that Respondent was within its rights to suspend him from the dispatch hall for six months based on a single employer complaint. Thus, his requested JPLRC minutes were not only relevant in that they constitute hiring hall documents, but the request was of greater importance as it was made to ascertain whether Respondent had treated him fairly.

Lowe made his information request on April 19, 2017. The form provided by Respondent states in bold, capitals letters that the information will be available "within 2-3 weeks of request being submitted." Respondent then delayed its own process and notified Lowe 5 weeks later, on May 24 2017, that the minutes were ready to be picked up at Respondent's hall. This delay occurred despite the fact that the form Lowe used, and the timeline it promised, were created by Respondent in direct response to an NLRB settlement designed to remedy Respondent's refusal and delay in providing JPLRC minutes. As discussed above, the JPLRC minutes constitute relevant hiring hall documents which Respondent had a duty to timely provide to Lowe. See *Letter Carriers Branch 529*, 319 NLRB 879 (1995); *Teamster Local 519*, 276 NLRB 898 (1985).

Respondent appeared to argue at hearing that it notified Lowe at the time he made his request that it would take a month to provide the information. Respondent did not make any notations on the request form that any conversation took place despite several notations on both Lowe's request form and Martinez' request form indicating conversations about something with someone had taken place. In fact, the record is

devoid of evidence that the actual process for preparing the documents and the reason they might be delayed was explained to Lowe.

Rather, the only thing introduced was a timeline of events, ostensibly in an effort to show a business justification for the five week delay. However, the timeline simply states that Respondent received the JPLRC minutes on May 19, 2017, and then notified Lowe on May 24, 2017, by leaving a voice mail for him. What this timeline fails to account for is that for the past 13 years, since the 2005 settlement, Respondent's process has been to make JPLRC minutes available within three weeks on the outside, not five, of the request. The burden is on Respondent to both notify dispatch hall users of any change to their requesting procedure and to adequately explain to this tribunal why a delay was undertaken but not communicated. Respondent failed to meet this burden and its delay therefore violates its duty of fair representation.

#### **IV. CONCLUSION**

Based on the foregoing argument, as well as the record as a whole, General Counsel respectfully requests that the Judge find that Respondent violated § 8(b)(1)(A) as alleged in the Consolidated Complaint. A proposed Order and Notice are appended hereto.

Dated at Seattle, Washington this 25<sup>th</sup> day of January, 2018.

Respectfully submitted,

/s/ Sarah McBride

/s/ Sarah Burke

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Sarah McBride  
Sarah Burke  
Counsel for the General Counsel  
National Labor Relations Board, Region 19  
915 Second Avenue, Room 2948  
Seattle, Washington 98174

## PROPOSED ORDER

Respondent, ILWU Local 23, its officers, agents, successors, and/or assigns, shall

1. Cease and desist from:
  - (a) Failing and refusing to provide Respondent's dispatch hall users with relevant requested hiring hall minutes, including JPLRC minutes, in a timely manner.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
  - (a) Upon request, provide users of Respondent's dispatch hall with access to and copies of JPLRC minutes.
  - (b) Post at its Union hall located in Fife, Washington, and in all locations where employee notices are customarily posted, copies of the attached notice marked "Appendix." Copies of the notices, on forms provided by the Regional Director for Region 19, after being signed by the authorized representative of Respondent, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
  - (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

## PROPOSED NOTICE TO EMPLOYEES AND MEMBERS

### FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising the above rights.

**WE WILL NOT** fail or refuse to promptly provide users of our dispatch hall with access to and copies of requested JPLRC minutes as per our normal procedure.

**WE WILL** upon request, promptly provide users of our dispatch hall with access to and copies of the JPLRC minutes as per our normal procedure.

**ILWU Local 23**  
(Labor Organization)

**Dated:** \_\_\_\_\_

**By:** \_\_\_\_\_

(Representative)

(Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov) and the toll-free number (866) 667-NLRB (6572).

### **THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER,

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the General Counsel's Brief to the Administrative Law Judge was served on the 25<sup>th</sup> day of January, 2018, on the following parties:

### **E-File:**

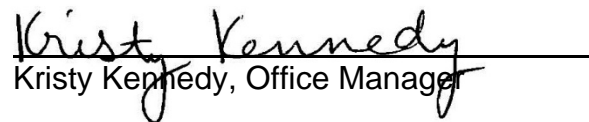
The Honorable Eleanor Laws  
Administrative Law Judge  
National Labor Relations Board  
Division of Judges  
901 Market St., Ste. 300  
San Francisco, CA 94103

### **E-Mail:**

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