

<p>In the Matter of a Controversy</p> <p>Between</p> <p>PACIFIC MARITIME ASSOCIATION</p> <p>AND</p> <p>INTERNATIONAL LONGSHORE AND WAREHOUSE UNION LOCAL 13</p> <p>RE: Pasha Superintendents Picket Line – Interim Opinion and Decision SCAA-014- 2017</p>	<p>SCAA-0001-2018</p> <p>Opinion and Decision</p> <p>Of</p> <p>Southern California Area Arbitration Panel</p> <p>Walter Daugherty, Chair Person Mark Mascola Ron Merial</p> <p>August 30, September 6 and 18, 2017</p> <p>Long Beach and San Pedro, California</p>
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The hearing was held on Wednesday, August 30, 2017, at the Pacific Maritime Association Office, 1 World Trade Center, Suite 1700, Long Beach, California, and on Wednesday, September 6 and Monday, September 18, 2017, at ILWU Local 13, 630 S. Centre Street, San Pedro, California. Each party was afforded full opportunity for examination and presentation of relevant arguments, documents, and testimonies of witnesses. A Certified Shorthand Reporter was in attendance and recorded a transcript of the hearing.

APPEARANCES:

FOR THE EMPLOYERS: Lee Swietlikowski, Pacific Maritime Association
Jeremy Bridges, Pacific Maritime Association

FOR THE UNION: Mike Dimon, ILWU Local 13
Luke Hollingsworth, ILWU Local 13

WITNESSES: Robert Abordo, ILWU Local 63 Superintendents' Unit
Joe Gasperov, ILWU Local 63
David VanWaardenburg, Pasha Stevedoring
Stephen Berry, Harbor Employers
Heather Stack, Pasha Stevedoring
Chad Lindsay, PMA
Clay O'Neal, PMA

ALSO PRESENT: Various Individuals at Various Hearing Days

ISSUE:

The parties stipulated that the issue was as follows: The dispute involves whether or not the picket lines established by the ILWU Local 63 vessel superintendent unit employees at Pasha Stevedoring and Terminals (PST) are legitimate and bona fide as defined in Section 11.51 of the Pacific Coast Longshore and Clerks Agreements.

BACKGROUND:

Following an election conducted under the National Labor Relations Board (NLRB or Board) Rules and Regulations, the Board's Regional Director on May 31, 2017 issued a Certification of Representative to ILWU Local 63 as the exclusive collective bargaining representative for the unit designated as "all full-time and part-time vessel superintendents employed by the Employer [Pasha Stevedoring & Terminals LP] at its facility in Wilmington, California" (Union Ex. 16). This Superintendents Unit consists of four employees found to be an appropriate unit in the Regional Director's written decision and direction of election issued on May 5, 2017 (Employer Ex. 2).

The Vessel Superintendents (Superintendents) are involved in the planning and ensuring the unloading of cargo from a vessel upon its arrival at the port facility. Although the NLRB concluded that the Superintendents were not supervisors within the meaning of the National Labor Relations Act and Robert Abordo testified that they do not supervise the foremen, David VanWaardenburg, Pasha's Vice President of Maritime Operations, testified that the Superintendents managed the labor force on the vessel, including the foremen.

Abordo testified further that he was the Chair of the Unit's bargaining team and that the team was assisted and advised by Joe Gasperov, ILWU Local 63's Vice President. Abordo acknowledged that neither he nor the other Superintendents had any prior bargaining experience. Both Abordo and Gasperov testified that the latter functioned as the chief spokesperson and was responsible for scheduling the bargaining sessions, presenting the contract proposals, and signing off on any tentative agreements at the direction of the bargaining team. VanWaardenburg stated that Gasperov was leading the negotiations for the Union as he was the person to whom he corresponded regarding bargaining and that bargaining sessions were scheduled directly with Gasperov.

Bargaining between the parties began in early June 2017, some 13 negotiation sessions were held prior to August 14, 2017, with tentative agreements reached on some 25 issues (Union Ex. 18). The parties remained deadlocked on the majority of the economic issues and a few non-economic issues remained outstanding.

VanWaardenburg testified that following a bargaining session on August 10, 2017, he met alone with Gasperov who said that if the Employer did not pull its appeal of the NLRB decision the Superintendents would picket. VanWaardenburg testified further that on August 11, 2017, Gasperov again asked if the Employer would drop the appeal, presented Union proposals on wages, hours, and working conditions, and asked if the Employer could immediately reach tentative agreement on these proposals. When told the Employer would not do so, Gasperov,

according to VanWaardenburg, said that negotiations were done and that no additional meetings would be set. Gasperov denied that he had told VanWaardenburg that a picket line would be established if the Employer did not drop the appeal.

By letter dated August 10, 2017, the Superintendents Unit notified ILWU Locals 13 and 63 of its intention to establish a picket line “in support of our demands for better wages, hours and working conditions” (Union Ex. 20). On Monday, August 14, 2017 at 1:00 p.m. the Superintendents established picket lines at the Employer’s facilities at Berth 176 Wilmington and Berth 206 Terminal Island. The picket lines were honored by ILWU Locals 13, 63, and 94 at both locations.

Pursuant to the relevant provisions of the Pacific Coast Longshore and Clerks Agreements (PCL&CA), a hearing was held at 4:30 p.m. on Monday, August 14, 2017 before Area Arbitrator Ron Merial regarding the contractual propriety of the picket lines. At the close of the hearing, the Area Arbitrator issued a verbal decision finding the picket lines not bona fide and legitimate. On August 16, 2017, Area Arbitrator Merial issued his Interim Opinion and Decision in SCAA-0014-2017 in which he confirmed his verbal decision that the picket lines established by the Superintendents Unit were “not bona fide and legitimate within the meaning of Section 11.51 of the Agreement” (Joint Ex. 1). The picket lines were removed on August 15, 2017, with the Superintendents returning to work at about 1:00 pm.

Following the issuance of the Area Arbitrator’s Interim Opinion and Decision, the Union requested that the matter be referred to the Area Arbitration Panel (Panel) under Section 17.63 for hearing and decision in accordance with Section 17.5 of the PCL&CA. Hearings were scheduled and conducted on August 30, and September 6 and 18, 2017.

RELEVANT CONTRACTUAL PROVISIONS

11.51 Refusal to cross a legitimate and bona fide picket line, as defined in this paragraph, shall not be deemed a violation of this Agreement. Such a picket line is one established and maintained by a union, acting independently of the ILWU longshore locals, about the premises of an employer with whom it is engaged in a bona fide dispute over wages, hours or working conditions of employees, a majority of whom it represents as the collective bargaining agency. Collusive picket lines, jurisdictional picket lines, hot cargo picket lines, secondary boycott picket lines and demonstration picket lines are not legitimate and bona fide picket lines within the meaning of this Agreement.

UNION POSITION:

Interim award SCAA-0014-2017 was wrongly decided as it ignored the relevant Coast Arbitrator awards that establish the criteria for a picket line to be legitimate under Section 11.51. In his January 10, 1966 award, Coast Arbitrator Sam Kagel first set forth these criteria as included in Section 11.51 and held that the Union had the burden to establish that a picket line meets these criteria (Union Ex. 1). Subsequent awards of the Coast Arbitrators are controlling regarding the dispute presented and cannot be ignored by the Panel as they comprise arbitral precedents within the meaning of Section 24.3. These awards supersede the 1947 award of then Chairman Arthur

C. Miller (Arthur C. Miller award) and the other awards issued before Section 11.51 was included in the PCL&CA. In his 1994 bench award, Arbitrator Sam Kagel acknowledged these older awards and implicitly rejected them (Union Ex 23).

The Superintendents in establishing their picket lines were acting independently within the meaning of Section 11.51 as decided by Coast Arbitrator Sam Kagel in C-16-80 (Union Ex. 2) and as stated in the letter issued by PMA President Edmund Flynn in July 1981 (Flynn Letter) (Union Ex. 5). For it is undisputed that the Superintendents Unit was not covered by any Coast Agreement. Further, the Employers have attempted to modify the language of Section 11.51 to conform to their position as argued here and were unable to secure these proposed modifications in bargaining.

When the picket lines were erected on August 14, 2017, a bona fide dispute existed over wages, hours, or working conditions as contemplated by Section 11.51, for the parties had exchanged numerous proposals on these matters and had not reached full agreement on the terms of a contract. In such regard, Section 11.51 does not require that the parties be at an impasse before a legitimate picket line may be established. Further, the determination whether the parties were bargaining in good faith is outside the jurisdiction of the Panel as decided by Arbitrator Pandora in SC-23-95 and SC-25-95 (Union Ex. 8 and Ex. 9), a conclusion not disturbed or modified by the Coast Arbitrator in C-02-96 (Union Ex. 7).

Regarding the dispute as to the collusion issue, the awards cited by the Employer issued before the inclusion of Section 11.51 in the PCL&CA are not controlling. The awards of the Coast Arbitrators and any relevant Area Arbitrator awards decided after this language was included comprise the precedential awards that are to be followed by the Panel.

In C-03-2012, Coast Arbitrator John Kagel held that the Employer has the burden of proving collusion and that the picket line at issue was not collusive on facts similar to this dispute (Union Ex. 13). Arbitrator Kagel acknowledged that the Area or Coast Arbitrators could not ignore prior precedential awards. These precedents supersede any contrary holdings in the Arthur C. Miller award or the other pre-1948 decisions and are to be applied by the Panel to this dispute. Their application establishes that the Superintendents Unit picket lines were not collusive.

Arbitrator Sam Kagel's decision in C-02-96 involved a parallel factual pattern concerning a picket line established by the Vessel Planners Unit (Union Ex. 7). There, the Coast Arbitrator found that the picket line at issue was not collusive, stating that "*There was nothing 'collusive' in the fact that the Planners were seeking a collective bargaining agreement with the Employers at the Yusen Terminal.*" This decision comprises further support for the conclusion that the Superintendents Unit picket lines were not collusive.

For the foregoing reasons, the Union has established that the relevant criteria to establish a legitimate and bona fide picket line were met and that the Employer failed to meet its requisite burden to prove the picket line was collusive. The Union requested that the Panel find the August 14, 2017 picket line to be legitimate and bona fide, that it overturn the Opinion and Decision issued in SCAA-014-2017, and that the Longshoremen and Marine Clerks who were working at the Pasha facilities on the first and second shifts on August 14, 2017 be made whole.

EMPLOYER POSITION:

Previous arbitration awards mandate that Section 11.51 picket line disputes be decided on a case-by-case basis. In such regard, Area Arbitrator Mercial in SCAA-14-2017 correctly found that the Superintendents Unit picket lines were not bona fide and legitimate pursuant to Section 11.51 and arbitration precedent. In such regard, the Union failed to prove that the Superintendents were acting independently and were engaged in a good faith dispute. Most importantly, the picket lines were collusive.

Review of the bargaining history, prior ILWU bargaining demands, and the credible testimony of the Employer witnesses show that the Superintendents' negotiations were planned and led by Local 63 Vice President Gasperov and that the ILWU Local Unions had a direct interest in their outcome. Further, the local and international officers are using their resources to aid the Superintendents Unit in obtaining a contract and their demands are based on the PCCCD.

Coast Arbitrator Sam Kagel's award in C-16-80 (Union Ex. 2) and the subsequently issued Flynn Letter (Union Ex. 5) cannot be read to establish the Superintendents Unit's independence under Section 11.51, for they apply only to parallel situations. Since the facts here do not parallel those in C-16-80, neither C-16-80 nor the Flynn Letter warrants the conclusion that in erecting their picket lines the Superintendents Unit was acting independently of the Longshore or Clerks Locals.

As to the required element that a bona fide dispute over wages, hours, or working conditions exist for the picket line to be legitimate and bona fide, the Union has failed to prove that the dispute between the Superintendents Unit and Pasha met this contractual requirement. The term "bona fide" means good faith; the evidence presented demonstrates that the Superintendents Unit had not been bargaining in good faith when it established its picket lines on August 14, 2017. For the Superintendents Unit had proposed a wage increase of some 300 percent (Employer Ex. 12), refused to hold meaningful discussions on significant bargaining issues, threatened to erect its picket lines unless the Employer withdrew its appeal of the NLRB unit determination decision and agreed to all its economic proposals, and had prematurely claimed an impasse and went on strike.

The Union has failed to meet its requisite burden that the Superintendents Union was independent of the Longshore or Clerks Locals and that it was engaged in a bona fide dispute over wages, hour, or terms and conditions of employment necessary to establish a legitimate and bona fide picket line under Section 11.51. Even if it is assumed that the Union had established these required elements, the Superintendents Unit picket lines were collusive.

In the prior awards in which collusion was an issue the Employers incorrectly argued their position, citing to the dictionary definition of this term and ignoring the pre-1948 awards. Often, collusion was a secondary aspect of the Employers' presentations and was not fully developed; nor was the concept of collusion fully discussed and analyzed in the decisions cited by the Union. In the awards issued before 1948, particularly the November 13, 2017 award of Chairman Arthur C. Miller (Employer Ex. 16), the definition and parameters of what comprises a

collusive picket line were established. These pre-1948 awards are essential to the proper understanding of the term “collusive” in Section 11.51 as they were known to the parties before this Section was negotiated into the PCL&CA and thus demonstrate the parties’ understanding of this contractual term. These awards also serve to undermine any precedential value of the “Vessel Planners” decision issued by Coast Arbitrator Sam Kagel (C-02-96) and the “OCU” decision issued by Coast Arbitrator John Kagel (C-03-2012) relied on by the Union. Further, a published address delivered at the 1973 National Academy of Arbitrators Annual Meeting, which discussed the pre-1948 awards, provides historical context for the inclusion of Section 11.51 in the labor agreement (Employer Ex. 13).

As to award C-02-96, the Vessel Planners perform a specialty job and have significantly less effect on operations than the Superintendents. Organizing the Superintendents with their supervisory functions and responsibilities is significantly more valuable and beneficial to the self-interests of the Longshore and Clerk Locals. The Employer has presented evidence that in violation of the PCL&CA the Union has colluded with the picketing Superintendents Unit to diminish the role of these frontline supervisors. This conclusion was substantiated by the statement attributed to ILWU International Vice President Ray Familathe regarding the “real issue at stake” in the Pasha negotiations as reported in the Journal of Commerce (Employer Ex. 32).

Based on the foregoing, the Superintendents Unit picket lines were not erected by a union acting independently within the meaning of Section 11.51 nor was there a bona fide dispute over wages, hour or working conditions as required by this Section. Moreover, the picket lines were collusive under Section 11.51. The Employer moved that the Panel find that the Union has failed to meet its burden to prove that the Superintendent Units picket lines were legitimate and bona fide in accordance with PCL&CA Section 11.51.

DISCUSSION:

The record in this proceeding is fairly voluminous, consisting of some 495 transcript pages spanning three days of hearing and more than 75 exhibits. All the testimonies, exhibits submitted, and arguments advanced by the parties were considered by the Panel. However, only that which ultimately contributed to the formulation of the decision will be addressed within the context of the discussion underlying the decision as rendered.

Section 11.51 sets forth the criteria by which a picket line is deemed legitimate and bona fide. In his January 10, 1966 award, Coast Arbitrator Kagel essentially restated the relevant contractual provisions in setting forth the elements of a legitimate and bona fide picket line (Union Ex. 1). This decision cannot be read as excising the language of Section 11.51 regarding collusive picket lines, for subsequently issued Coast Arbitrator decisions have addressed and decided the collusion issue when presented.

Attention first turns to the dispute whether the Superintendents Units in establishing and maintaining their August 14, 2017 picket lines were “acting independently” of the ILWU Locals as required by Section 11.51 for the picket lines to be legitimate and bona fide. The involvement and role of the Local 63 Vice President in the Superintendents Unit negotiations, as well as the

organizational relationship between the Superintendents Unit and the ILWU Locals, has been considered. However, the Panel is persuaded that the award of Coast Arbitrator Sam Kagel in C-16-80 (Union Ex. 2) and the subsequently issued Flynn letter (Union Ex. 5) are dispositive of this matter.

In C-16-80, Arbitrator Kagel in clear language held that the picketing Local 63 unit was a completely independent unit and *“has the same standing as being an independent Union for purposes of this case from that of the ILWU locals”* (Union Ex. 2, p. 3). Consistent with this language, the July 1, 1981 Flynn letter stated that *“if an ILWU longshore or clerks local bound by the ILWU-PMA Coast Agreement has a . . . unit which represents employees not covered by the Coast Agreement, picket lines established by that local in behalf of such employees are for purposes of Section 11.51 requirements the same as picket lines of any other non-ILWU unions.”* As to the Flynn letter, the Panel notes that in C-03-2012, Coast Arbitrator John Kagel opined that neither the Area Arbitrator nor the Coast Arbitrator could ignore this letter (Union Ex. 13, p. 10).

The Panel finds that the above-referenced Coast Arbitrator awards and the Flynn letter are applicable and controlling as to the dispute regarding the independence of the Superintendents Unit. In line with these precedents, it is concluded that the Superintendents Unit was acting independently of the ILWU Longshore and Clerk Locals when it erected their August 14, 2017 picket lines.

Regarding the question of whether the Superintendents Unit was engaged in a bona fide dispute over wages, hours or working conditions, the term “bona fide” means, among other things, good faith, real, or genuine. The Panel’s review of the relevant testimonies and documentary evidence shows that the parties were in negotiations on wages, hours and working conditions, had met some 13 times, had exchanged proposals, and were deadlocked on a number of issues. It thus appears that a real dispute existed as to wages, hours or working conditions prior to and during the picketing by the Superintendents Unit. As to the Employer’s contention that the Superintendents had not been bargaining in good faith, as noted above, “good faith” is only one of the definitions that may be applied to the contractual term “bona fide.” Moreover, resolution of the Employer’s position requires an inquiry and determination by the Panel whether the parties were engaged in good faith bargaining. This determination implicates the relevant federal labor statutes and case law and lies outside the jurisdiction and authority of the Panel as held by Area Arbitrator John Pandora in his September 13, 1995 Interim Ruling (Union Ex. 9), a conclusion that was not modified or set aside by Coast Arbitrator Sam Kagel in decision C-02-96 (Union Ex. 7). It is therefore concluded that the Superintendents Unit was engaged in a bona fide dispute with Pasha Stevedoring and Terminals over wages, hours and working conditions when it established the picket lines at issue.

In view of the foregoing and noting that it was undisputed that the picket lines were “about the premises” of the Employer and that a majority of the employees were represented by Local 63, the Union has met its burden to establish the requisite elements of a legitimate and bona fide picket line as set out in Section 11.51. Attention next turns to whether the picket lines were collusive picket lines and thus prohibited by Section 11.51.

It is first observed that the relevant arbitral precedents place the burden on the Employer in proving that a picket line was collusive under Section 11.51. The Employer argued that in prior cases involving disputes over alleged collusive picket lines it improperly presented its position and failed to submit the pre-1948 awards that inform the meaning and intent of this term. The Employer's argument, however, does not serve as the basis on which to ignore or reject the Coast Arbitrator awards issued subsequent to the inclusion of Section 11.51 in the PCL&CA, for these awards remain in effect pursuant to Section 24.3 of the PCL&CA. Further, it is speculative whether the Coast Arbitrators would have reached different decisions had the pre-1948 awards been submitted and considered in their respective decisions. The Panel emphasizes further that it cannot set aside an award of a Coast Arbitrator, for this authority is vested with the Coast Arbitrator should he be called upon to do so. The Panel will therefore follow and apply the prior Coast Arbitrator awards to the extent they are relevant to the factual record in this proceeding.

Although the parties are in dispute as to the weight, if any, that should be accorded the pre-1948 awards, the Panel believes these awards may be considered for whatever instructive value they may afford. In his November 13, 2017 award (Arthur C. Miller Award), described by the Employer as the seminal picket line case, then Impartial Chairman Arthur C. Miller wrote at length about picket lines, their collusive elements, and discussed and analyzed prior industry awards concerning picketing disputes (Employer Ex. 16). As to a collusive picket line, his most concise definition is found at page 21, wherein he wrote that a collusive picket line is one that has "*as one of its objects either securing of some specific gain or advantage to the longshoremen themselves, whether individually or collectively as a union organization, or the use of the economic force of the longshoremen as an aggressive weapon on behalf of some affiliated union or group*" (emphasis added). The use of the underscored "or" indicates that these definitional elements are to be applied in the disjunctive.

The Panel's review of Coast Arbitrator John Kagel's 2012 decision in C-03-2012 (Union Ex. 13) persuades that the first enumerated definition of a collusive picket line in the Arthur C. Miller award was implicitly rejected therein by Kagel. In his decision, Arbitrator Kagel considered the record showing that issues of interest to and impact on the Longshore Locals were discussed during negotiations with the OCU Local, the Union which had established the picket lines at issue, but found that this did not demonstrate a lack of independence nor was it collusive.

In a picketing dispute involving the Vessel Planners picket line, Coast Arbitrator Sam Kagel held in C-02-96 that the picket line was not collusive, stating, "*There was nothing 'collusive' in the fact that the Planners were seeking a collective bargaining agreement with the Employers at the Yusen Terminal*" (Union Ex. 7, p. 3). As the case here with the Superintendents, the Longshore and Clerk Locals had previously made bargaining demands on behalf of the Vessel Planners. It is acknowledged that the bargaining proposals made relevant to the Superintendents were broader and were made over a longer time span than those for the Vessel Planners and that the Superintendents have a greater effect on port operations than the Vessel Planners. Nevertheless, the Panel is not persuaded that on this evidence record this serves to make what was found non-collusive in the Vessel Planners case to be collusive here. Further, the statements attributed to ILWU Vice President Familathe in the Journal of Commerce article, even when considered in concert with the evidence of record in this case, do not support the conclusion that the Superintendents Unit picket lines were collusive.

This second touchstone as supplied in the Arthur C. Miller award was explicitly rejected by Coast Arbitrator John Kagel in his decision in C-03-2012, wherein he stated that the fact employees of the Office Clerical Unit (OCU), members of ILWU Local 63, “*can strike and picket its employers to extract economic gain, and that it leverages Longshore observation of its picket line to do so, does not show that there is a lack of independence within the meaning of Section 11.5 and the precedent arbitration decisions. Such picketing is not collusive in violation of that provision*” (Union Ex. 13, p. 10). He stated further that the Agreements allow for the observation of the picket lines with “*whatever consequences*” that may have for the involved parties, including the picketing employees, the Employers, the Union and the individual longshoremen and clerks who observe them (*Ibid.*).

The above referenced conclusions of the Coast Arbitrator in C-03-2012 are the most recent expressions at the Coast level regarding the elements of a collusive picket line as stated in the Arthur C. Miller award. They are to be followed and applied by this Panel to the record developed in the instant dispute. It is emphasized that this award was issued after Section 11.51 was incorporated in the PCL&CA and comprises the binding precedent contemplated by Section 24.3. Accordingly, that the Superintendents Unit may have leveraged longshore and clerks’ observation of their picket lines to extract economic gains does not establish that the Superintendents Unit picket lines of August 14, 2017 were collusive within the meaning of Section 11.51.

For the foregoing reasons, it is the finding and conclusion of the Panel that the Union has met its burden to establish that the Superintendents Unit picket lines were legitimate and bona fide in accordance with PCL&CA Section 11.51. The following decision is therefore issued.

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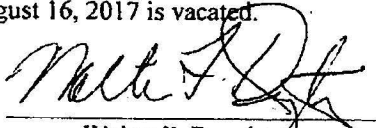
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DECISION:

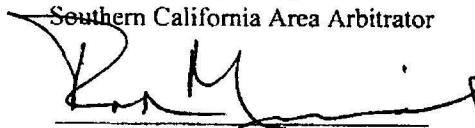
1. The picket lines established by the ILWU Local 63 vessel superintendent unit employees at Pasha Stevedoring and Terminals are legitimate and bona fide as defined in Section 11.51 of the Pacific Coast Longshore and Clerks Agreements.
2. SCAA-0014-2017, August 16, 2017 is vacated.



Walter F. Daugherty
Southern California Area Arbitrator



Mark Mascola
Southern California Area Arbitrator



Ron Merical
Southern California Area Arbitrator

Dated: January 5, 2018