Pacific Maritime Association *and* Long Beach Container Terminal LLC *and* ILWU, Warehouse, Processing and Distribution Workers' Union, Local 26. Cases 21–CA–197882 and 21–CA–198530

May 2, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On July 9, 2018, Administrative Law Judge Andrew S. Gollin issued the attached decision. Respondents Pacific Maritime Association (PMA) and Long Beach Container Terminal LLC (LBCT) each filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and Respondents PMA and LBCT each filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, to amend the remedy,[3] and to adopt the judge's recommended Order as modified and set forth in full below.[4]

This case presents the question of whether the Respondents could lawfully apply an anti-discrimination policy and attendant procedures contained in their contract with one union to resolve alleged misconduct by an employee represented by a different union, under a different contract for a different bargaining unit with a different anti-discrimination policy, procedures, and penalties. We agree with the judge that they could not. For the reasons stated by the judge and discussed further below, we affirm his findings that the Respondents violated Section 8(a)(5) and (1) of the Act, under either of the General Counsel's alternative theories, when they applied section 13.2 of the Pacific Coast Longshore and Clerks' Agreement (PCL&CA) to watchman Demetrius Pleas, an employee in the watchmen's unit represented by the Charging Party Union (Local 26) and covered by that unit's Watchmen's Agreement, and when they subsequently disciplined him pursuant to the 13.2 process.

I.

Respondent Long Beach Container Terminal (LBCT) employs marine clerks in a Pacific coastwide, multiport bargaining unit covered by the PCL&CA, a multiemployer collective-bargaining agreement with the International Longshore and Warehouse Union (Longshoremen ILWU). LBCT also employs watchmen in a different bargaining unit covered by a different multiemployer agreement with Local 26 covering the Los Angeles / Long Beach area, the Watchmen's Agreement. Respondent Pacific Maritime Association (PMA) is a multiemployer bargaining representative for LBCT for both units and contracts.

Under section 13.2 of the PCL&CA, clerks' complaints of prohibited discrimination or harassment—including, as relevant here, racial name-calling—in the workplace can be referred through PMA to an arbitrator for expedited investigation and resolution. Details of the 13.2 policy and procedures, including specific examples of prohibited conduct, are set forth in several letters of understanding between ILWU and PMA supplementing the PCL&CA (LOUs A, B, and C).[5] By its terms, LOU A broadly

[1] International Longshore and Warehouse Union (Longshoremen ILWU) filed an amicus curiae brief, to which the General Counsel and the Charging Party filed responses.

[2] Chairman Ring is recused and took no part in the consideration of this case.

[3] We amend the judge's remedy to provide that backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), rather than with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The *F. W. Woolworth* formula applies where there has been a cessation of employment, including as here, a suspension exceeding a few days. See, e.g., *Postal Service*, 355 NLRB 368, 368 (2010) (7-day suspension). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondents to compensate Demetrius Pleas for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Additionally, having found that Respondent PMA unlawfully disciplined watchman Demetrius Pleas by means of notification letters sent to all of PMA's employer members covered by the Pacific Coast Longshore and Clerks Agreement (PCL&CA) and to the third party contractor who administers the dispatch of watchmen represented by ILWU Local 26, we shall order Respondent PMA to notify its employer members and the third-party contractor that any previous instructions, requests, or appeals that Respondent PMA may have made that they implement the sec. 13.2 area arbitrator's award against Demetrius Pleas are withdrawn and have no force or effect. See *Longshoremen ILWU (California Cartage)*, 278 NLRB 220, 226 (1986), enf. denied on other grounds, 822 F.2d 1203 (D.C. Cir. 1987).

[4] We shall modify the judge's recommended Order and substitute new notices to conform to the violations found, the amended remedy, and the Board's standard remedial language.

[5] LOU A lists examples of prohibited conduct including: physical harassment, such as unwelcome touching or grabbing or sexual assault, blocking someone's movement, or standing unnecessarily close; verbal harassment such as racial or sexual jokes, name-calling, using slurs, derogatory terms, belittling remarks, or abusive language related to a person's gender, race, or other defining characteristics; and visual harassment, such as displaying objects, messages, pictures, pornography, graffiti, or drawings of a sexual or racial nature, engaging in offensive and unwelcome personal conduct such as offensive gestures, staring

mandates adherence to the PCL&CA's anti-discrimination policy by—in addition to unit employees and supervisory personnel—all "outside truck drivers, vendors, contractors and others." A later LOU, entered into on July 1, 2014, states, inter alia, that 13.2 complaints "can be brought against . . . other employees of PMA member companies (such as ILWU-represented guards)," but that "other employees of PMA member companies (such as ILWU-represented guards) . . . do not have standing to file a complaint" under section 13.2. Procedurally, LOUs A and B provide that a clerk or longshore worker who becomes aware of prohibited conduct must first report it to his or her local union and the employer involved. Then a 13.2 complaint may be submitted to an arbitrator, care of the local PMA office, either directly by the grieving employee—as happened in this case—or by the grievant's union, PMA, or a member employer. The arbitrator schedules a hearing and provides notice to the parties permitted or required to attend the hearing, including PMA and the involved employer. Within 14 days after the close of the hearing, the arbitrator issues a written binding decision, including a remedy consistent with guidance set forth in LOU C.[6]

The Watchmen's Agreement covering LBCT's watchmen contains a much less detailed anti-discrimination provision (article 16)[7] and no mechanism similar to section 13.2 for direct arbitration of employees' complaints about other employees' harassment or discrimination. Instead, article 18 of the Watchmen's Agreement provides that a Labor Relations Committee (LRC) comprised of representatives of Local 26 and of PMA employer members "shall establish rules and regulations governing the conduct of watchmen as well as penalties for the breach of these rules and regulations."[8] An employer with a complaint about a watchman's conduct must first attempt to resolve the matter informally through discussion with the individuals involved and a Local 26 representative. Failing such informal resolution, either the employer or the Union may elevate the matter to consideration by the LRC, followed, if necessary, by referral for decision by a watchmen arbitrator and appeal to a coast arbitrator. Any remedial suspension short of termination applies only to the terminal where the complaint arose. By its terms, article 18's contractual grievance machinery is "the exclusive remedy with respect to any dispute arising under the [contract]."

LBCT, PMA, and Local 26 have previously utilized the Watchmen's Agreement article 18 procedures—both formal and informal—to resolve complaints of employee-on-employee harassment by watchmen in violation of article 16. Thus, in 2014, Local 26 filed a grievance with the article 18 LRC alleging harassment by a watchman in violation of article 16. The LRC conducted an investigation and disciplined the offending individual. And, in 2016, LBCT filed an employer complaint with the LRC about a watchman's conduct alleged to violate article 16. After an investigation that included interviewing the involved employees and listening to an audio recording of the incident, the LRC concluded that both of the individuals involved had violated article 16 and required both to attend an unpaid diversity training class. In addition, Bill Carson, LBCT's general manager with responsibility for security guard operations including Local 26 watchmen, testified that he had informally resolved at least two dozen similar instances by issuing nondisciplinary warning letters to the watchmen involved without invoking the Watchmen's Agreement's formal article 18 LRC process.

During the last two rounds of contract negotiations for the Watchmen's Agreements effective 2008–2014 and 2014–2019, PMA and its employer-members, including LBCT, proposed amending the Watchmen's Agreement to incorporate procedures similar to the PCL&CA's section 13.2. Local 26 consistently rejected such proposals because, in Local 26's view, such procedures made it too easy for management or employees with ulterior motives to target other unit members for discipline. On each occasion, PMA eventually withdrew the proposal before the parties reached a final agreement.

It is also undisputed that section 13.2 of the PCL&CA had never been applied to a Local 26 watchman prior to this case. Indeed, in February 2017, when a watchman attempted to invoke the PCL&CA's 13.2 procedure to address allegations against another watchman, PMA did not process the 13.2 grievance, but instead requested an article 18 LRC meeting.

(especially at particular body parts), mooning, leering, or showing a lack of respect for privacy in toilet facilities and locker rooms, as well as unwelcome romantic or sexual attention.

[6] LOU C provides, inter alia, that anyone, including "outside truck drivers, vendors, contractors, or others" who violates sec. 13.2 will be subject to minimum penalties of 7 days off work, unpaid diversity training, and a requirement to sign a statement agreeing to abide by the sec. 13.2 policy in the future.

[7] Art. 16 provides, in its entirety:

> There shall be no discrimination in connection with any action subject to the terms of this Agreement either in favor of or against any person because of membership or nonmembership in the Union, activity for or against the Union or absence thereof, race, color, national origin, religious or political beliefs, sex, age, Veteran's status, or disability.

[8] Art. 18 reserves "the Employer's existing right to discipline or discharge men" for five specific types of infractions not relevant here.

II.

On March 28, 2017, a Local 26 watchman covered by the Watchmen's Agreement, Demetrius Pleas, and a marine clerk covered by the PCL&CA—both employed by LBCT at its terminal—got into an argument over whether a particular task came within the work jurisdiction of the watchmen or the clerks. During the course of their argument, both men allegedly cursed and engaged in racial name-calling.[9] Later the same day, the men temporarily resolved the dispute informally in a meeting with LBCT General Manager Carson, a watchman sergeant, and a representative from the clerk's union. On March 31, 2017, however, Carson notified Local 26 that LBCT was investigating the March 28 incident. Carson stated that he intended "if necessary" to pursue discipline under article 18 of the Watchmen's Agreement.[10]

In addition, on March 30, 2017, the marine clerk filed a 13.2 grievance under the PCL&CA against Pleas. The arbitrator designated under section 13.2 notified the parties (including Pleas, as the accused) as required by section 13.2, and scheduled a hearing. Several weeks later, PMA informed Local 26 that a 13.2 grievance had been filed against Pleas, and that a hearing had been scheduled. Local 26 replied that Pleas was not subject to the PCL&CA or section 13.2, and that neither it nor Pleas would participate in any proceedings conducted under section 13.2. PMA Senior Counsel Todd Amidon replied that the arbitration would proceed with or without Local 26 and Pleas' participation, and LBCT and all other employer-members of PMA would be required to implement, and would implement, the arbitrator's order.

The arbitration was held as scheduled on May 3, 2017. Prior to the hearing, LBCT privately told PMA that LBCT did not want to become involved in the dispute—which it characterized as being between the two unions—and asked that PMA maintain LBCT's status as a nonparty, including by objecting to any attempt to bring LBCT into the dispute. However, both LBCT and PMA were represented and participated at the hearing. PMA's representative stated on the record, in the presence of LBCT's representatives: (1) that he was there on behalf of LBCT; (2) that Pleas worked directly for LBCT and was "subject to complaints under section 13.2 of the PCL&CA as outlined in the [July 1,] 2014 LOU . . . under the category of 'other employees of PMA member companies (such as ILWU-represented guards);'" and (3) that LBCT was prepared to implement any decision made by the arbitrator. Neither Local 26 nor Pleas attended the hearing.

The arbitrator issued his award on June 5, 2017. The arbitral award states that the hearing was held under the authority of section 13.2 of the PCL&CA and the July 1, 2014 LOU, and that "[c]onsidering the [jurisdictional] objections raised by the ILWU Local 26 . . . would . . . be outside the Arbitrator's purview," because Pleas was an ILWU-represented guard, and the 2014 LOU clearly and unambiguously states that a marine clerk can bring a 13.2 complaint against an ILWU-represented guard. The arbitrator found Pleas guilty of harassment based on race or color, in violation of section 13.2, and ordered that "Pleas shall serve 28 days off of all work," attend unpaid diversity training, and sign a statement agreeing to abide by the 13.2 policy in the future.[11] The Respondents implemented the arbitrator's award by notification to all PMA employer-members and the third-party contractor who administers the dispatch of watchmen.[12]

III.

At the outset, we emphasize that the issue in this case is not the right of a complaining employee to seek protection from unlawful harassment. There is no question that a clerk in the PCL&CA bargaining unit, or an employer on his behalf, could pursue a harassment complaint, either under the PCL&CA's section 13.2 or under the Watchmen's Agreement's article 18, depending on the circumstances.[13] The issue here is an accused employee's right to protection under the contractual grievance procedure covering his own bargaining unit. This is not affected by

[9] The marine clerk allegedly called Mr. Pleas "boy," a racial slur in context, and threatened to have Pleas fired, while Pleas allegedly called the marine clerk a "white, Trump-loving motherfucker" and threatened physical violence. Both men denied having made any racially charged statements during the altercation.

[10] Carson later provided Local 26 with a nondisciplinary warning letter addressed to Pleas, dated April 27, 2017, similar to past informal resolutions of issues of watchman conduct by LBCT. The record does not establish whether Pleas ever received or signed the warning letter. Carson testified that he chose not to elevate the March 28 incident to a formal art. 18 LRC complaint under the Watchmen's Agreement because, unlike the 2016 incident discussed above—where LBCT "had documented facts"—the March 28 incident "was a he said/she said."

[11] While sec. 13.2 also prohibits harassment based on political beliefs, the arbitrator concluded that "simply making a crude accusation that someone is a supporter of a particular political candidate does not rise to the level of a 13.2 violation."

[12] After an initial notification letter sent in July 2017, PMA sent an additional notification in mid-August 2017, informing employers, inter alia, that Pleas remained ineligible to return to work because he had not completed the training requirement. The record does not establish whether Pleas had regained work eligibility as of the date of the Board hearing.

[13] For this reason, the Respondents' assertion that they were required to take their actions by Title VII has no basis. Title VII does not require employers to resolve discrimination complaints through any particular procedure. We also reject our dissenting colleague's implicit suggestion that an employer subject to a collectively-bargained grievance procedure has no authority to pursue an employee's harassment complaint *unless* it has also negotiated a disciplinary procedure similar to the PCL&CA's sec. 13.2.

the fact that Local 26 is an affiliate of the ILWU International, or that PMA and LBCT are common employers in both the PCL&CA unit and the watchmen's unit. As the judge emphasized, one union represents the PCL&CA unit and the other represents the watchmen's unit; and the Respondents negotiated two separate contracts, including disciplinary and grievance procedures, for those units.

The General Counsel alleges that LBCT and PMA each violated Section 8(a)(5) and (1) of the Act by applying section 13.2 of the PCL&CA to Pleas and by subsequently implementing the arbitrator's disciplinary order, because this conduct modified the disciplinary procedures and penalties set forth in article 18 of the Watchmen's Agreement without Local 26's consent, and because this conduct unilaterally changed watchmen's terms and conditions of employment by imposing a new formal investigative and disciplinary process with new standards and penalties, without giving Local 26 prior notice and an opportunity to bargain over the change. We affirm the judge's findings of these violations under both theories. Cf., e.g., *Bath Iron Works Corp.*, 345 NLRB 499, 501–502 (2005) (distinguishing between midterm contract modification and unilateral change theories of 8(a)(5) and (1) violations), affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007); *Comau, Inc.*, 364 NLRB No. 48, slip op. at 4–6 (2016) (finding respondent's conduct violated Sec. 8(a)(5) and (1) on both midterm contract modification and unilateral change theories); *Naperville Jeep/Dodge*, 357 NLRB 2252, 2271–2272 (2012) (same), enfd. 796 F.3d 31 (D.C. Cir. 2015), cert. denied 136 S.Ct. 1457 (2016).[14]

The midterm contract modification

Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer from modifying terms and conditions of employment established by a collective-bargaining agreement during the agreement's term without the union's consent. See, e.g., *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 2 (2017); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1063–1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975). When an employer defends against a midterm contract modification allegation by arguing that the contract did not prohibit the challenged action, the Board will not ordinarily find a violation if the employer's contractual interpretation has a "sound arguable basis." *Bath Iron Works Corp.*, 345 NLRB 499, 501–502 (2005), enfd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).[15] It is well settled Board law that "[i]n interpreting a collective bargaining agreement to evaluate the basis of an employer's contractual defense, the Board gives controlling weight to the parties' actual intent underlying the contractual language in question" and "examines 'both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself.'" *Knollwood Country Club*, above, slip op. at 3 (quoting *Mining Specialists, Inc.*, 314 NLRB 268, 268–269 (1994)).[16]

[14] As a preliminary matter, we reject our dissenting colleague's claim that the General Counsel failed to establish that the Respondents applied sec. 13.2 to Pleas. Respondent PMA admits in its answer to the General Counsel's complaint that it processed the marine clerk's 13.2 complaint against Pleas, and it has never contended otherwise. Although LBCT denies responsibility, it also does not dispute that sec. 13.2 was applied to Pleas. And contrary to the dissent, PMA's previous decision not to process an employee complaint under sec. 13.2 (discussed above) shows that its role in applying that section is more than merely ministerial. While Respondent LBCT has consistently denied processing the complaint or participating in the arbitration, both PMA and LBCT principals *did* attend and participate as parties in the arbitration. Moreover, even if PMA's status as LBCT's bargaining representative were not itself sufficient to attribute PMA's conduct to LBCT, LBCT principals were present and did not object when PMA's representative stated on the record that he was at the arbitration "on behalf of LBCT," that sec. 13.2 applied to Pleas as LBCT's employee, and that LBCT was prepared to abide by the arbitrator's decision. We agree with the judge that LBCT's tacit assent to PMA's application of sec. 13.2 to Pleas on LBCT's behalf constitutes a manifestation sufficient to attribute to PMA at least apparent authority to act for LBCT, contrary to any previous private attempt to limit that authority. See, e.g., *Cablevision Industries*, 283 NLRB 22, 29 (1987) (quoting *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 756 (9th Cir. 1969)) ("Apparent authority results when the principal does something or permits the agent to do something which reasonably leads another to believe that the agent had the authority he purported to have."). And, of course, the sole legal basis for any authority exercised by the *arbitrator* in this case is—as the arbitrator's award explicitly recognizes—the consent of the parties to the PCL&CA, including LBCT as Pleas' employer. See, e.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989)) ("'[a]rbitration . . . is a matter of consent, not coercion.'"). Finally, the fact that the Respondents contracted with the Longshoremen ILWU at least by 2014 to apply sec. 13.2 to employees outside the PCL&CA bargaining unit does not make Local 26's charge untimely under Sec. 10(b) of the Act. Cf. *Leach Corp.*, 312 NLRB 990, 991 (1993) (internal quotation omitted) ("The running of the [6-month Sec. 10(b)] limitations period can begin only when the unfair labor practice occurs."), enfd. 54 F.3d 802 (D.C. Cir. 1995). In reaching this conclusion, we find it unnecessary to rely on the judge's characterization of the Respondents' participation in the arbitrator's bench decision to issue an interim remedial order prior to issuing his final award.

[15] Member McFerran finds it unnecessary to address the issue of whether *Bath Iron Works* was correctly decided in light of finding that the Respondents' conduct violated the Act for the reasons discussed below.

[16] Accord: *Electrical Workers Local 1395 v. NLRB*, 797 F.2d 1027, 1036 & fn. 9 (D.C. Cir. 1986) (quoting *C&C Plywood*, 385 U.S. 421, 430 (1967)) ("The intent of the parties to collective bargaining agreements is not to be discerned by reference to 'abstract definitions

It is also an elementary principle of law that only the parties to a contract can be bound by it. *EEOC v. Wafflehouse*, 534 U.S. at 294 ("It goes without saying that a contract cannot bind a nonparty."). That is, neither Local 26 nor its members in the watchmen's unit were bound by the PCL&CA disciplinary procedures negotiated by the Respondents and Longshore ILWU for the longshore unit; and the Respondents could not extend those procedures to an outside bargaining unit represented by a union that was not a party to the PCL&CA.

Here, we agree with the judge that article 18 of the Watchmen's Agreement, by its clear language, prohibited the Respondents from applying the policies and procedures set forth in section 13.2 of the clerks' agreement to watchmen represented by Local 26. Article 18 sets forth specific procedures governing employer complaints about watchmen's conduct, and states that its grievance procedure is the exclusive remedy with respect to any dispute arising under the contract.[17] Thus article 18's plain language establishes that the parties intended to prohibit all other mechanisms—including, a fortiori, one set forth in a different contract covering a different bargaining unit—for addressing alleged watchman misconduct.[18] But even if this were not so, the parties' past practice and bargaining history preclude any plausible claim that the parties *actually intended* the Watchmen's Agreement to encompass a 13.2 process for watchmen accused of harassment. Thus, as discussed in detail above, prior to this case the parties regularly processed complaints of article 16 harassment under article 18, including by addressing them informally. They undisputedly had never previously processed such a complaint under section 13.2. Even in this case, LBCT initially pursued the complaint against Pleas under article 18. Moreover, and critically, Local 26 consistently resisted PMA's proposals to incorporate procedures similar to section 13.2 during the last two rounds of bargaining for the Watchmen's Agreement.[19] Our dissenting colleague's attempt to characterize the evidence as showing "no consistent practice" accordingly fails.

Because the Respondents could not have mistaken or misunderstood Local 26's intent that no such procedure be applicable to watchmen, they had no sound arguable basis for interpreting the Watchmen's Agreement to permit their conduct. Cf. *Electrical Workers Local 1395*, above, at 1036 (citing Restatement (Second) of Contracts §§ 20, 201 (1979)) ("absent mutual consent on the issue, there could be no binding contractual commitment").[20] The Respondents' agreement with Longshore ILWU on a disciplinary procedure for discrimination and harassment complaints in the PCL&CA bargaining unit did not authorize the Respondents to ignore the disciplinary procedure they had separately negotiated with Local 26 for the watchmen's unit, or to insert the PCL&CA procedure into the Watchmen's Agreement. We accordingly affirm the judge's finding that the Respondents unlawfully modified article 18 of the Watchmen's Agreement without Local 26's consent by replacing its procedures and remedies with those contained in section 13.2 of the PCL&CA.

The unilateral change

It is well established that Section 8(a)(5) and (1) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before making material, substantial and significant changes to terms of employment that are mandatory subjects of bargaining, such as the employer's disciplinary system. *NLRB v. Katz*, 369 U.S. 736 (1962); *Toledo Blade Co.*, 343 NLRB 385, 387 (2004). Here, it is uncontested that the Respondents did not give Local 26 notice and an opportunity to bargain before they applied section 13.2 to Pleas.[21] It is also undisputed that section 13.2 had never

unrelated to the context in which the parties bargained,' . . . especially where the bargaining history is crucial to an understanding of that intent.").

[17] Significantly, by contrast, although PCL&CA sec. 13.2 purports to cover employees outside the PCL&CA bargaining unit who are accused of harassment, it specifically precludes outside employees from filing their own complaints.

[18] In our dissenting colleague's view, the Pleas disciplinary incident is not "necessarily a dispute under the [Watchmen's] Agreement," and can therefore be subject to the PCL&CA's 13.2 procedures. If the language in art. 18 does not bring disputes over discipline under the Watchmen's Agreement, it is difficult to conceive what language would. Nor do we agree that an issue of discipline could not become a "dispute within the meaning of" the contract "until after the Respondents implement the discipline."

[19] Tellingly, the July 2014 LOU to the PCL&CA, upon which the Respondents and the arbitrator relied in applying sec. 13.2 to Pleas, was executed *after* Local 26 had rejected the Respondents' overtures during negotiations for the 2008-2014 Watchmen's Agreement.

[20] We specifically reject as without basis Respondent PMA's argument that art. 16's prohibition of discrimination or harassment implies that employers can investigate and correct alleged violations utilizing 13.2 procedures. Art. 18 sets forth the exclusive agreed-upon procedures for resolving art. 16 complaints. We also reject our dissenting colleague's theory, not advanced by the parties, that art. 18 does not prohibit the application of sec. 13.2 to watchmen because the record does not include further rules or regulations governing watchmen's conduct beyond the Watchmen's Agreement itself, or because the parties have not always resolved complaints against watchmen by utilizing art. 18's formal procedures. As discussed above, the record clearly establishes that the parties did not intend for art. 18 to permit the application of sec. 13.2 to watchmen, and there is no sound basis for interpreting the Watchmen's Agreement otherwise.

[21] No party has argued to the Board that Local 26 waived its statutory right to bargain over the Respondents' disciplinary system under the Board's controlling "clear and unmistakable waiver" standard. See generally *Provena St. Joseph Medical Center*, 350 NLRB 808, 812–815 (2007) (describing standard). In any case, the parties' contract terms, past practice, and bargaining history, as discussed above, preclude any

previously been applied to a watchman. And, the application of section 13.2 to a watchman materially, substantially, and significantly changed existing terms and conditions of employment, because: (1) sec13.2's detailed rules of conduct are substantially and materially different from the general proscriptions set forth in article 16 of the Watchmen's Agreement; (2) mandatory investigation by a neutral arbitrator and adjudication on the record of a formal arbitral hearing is substantially different from the parties' previous informal investigations and resolutions of disputes under the Watchmen's Agreement; and (3) the arbitrator's disciplinary order that Pleas be barred from dispatch to *all* PMA-member employers and required to sign a pledge to abide by the 13.2 policy in the future is substantially different from any previous watchman discipline authorized by article 18 or established on this record.[22] We accordingly affirm the judge's finding that the Respondents unlawfully materially changed terms and conditions of employment for Local 26 watchmen without providing Local 26 with prior notice and an opportunity to bargain when they processed the marine clerk's complaint and disciplined Pleas in accordance with section 13.2 of the PCL&CA.

ORDER

The National Labor Relations Board orders that the Respondents, Pacific Maritime Association (PMA) and Long Beach Container Terminal LLC (LBCT), Long Beach, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Modifying the disciplinary procedures and penalties set forth in their collective-bargaining agreement (the Watchmen's Agreement) with ILWU, Warehouse, Processing and Distribution Workers' Union, Local 26 (ILWU Local 26) during the agreement's term without Local 26's consent.

(b) Unilaterally changing the terms and conditions of employment of their unit employees represented by Local 26 by imposing a new formal investigative and disciplinary process with new standards and penalties, without giving Local 26 prior notice and an opportunity to bargain over the change.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the unlawful suspension of Demetrius Pleas and restore him to the dispatch list, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Demetrius Pleas whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Demetrius Pleas for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 21,

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conclusion that the Watchmen's Agreement clearly and unmistakably waived Local 26's statutory right to bargain over unilateral changes to watchmen's discipline. Further, we reject Respondent PMA's suggestion that the "contract coverage" standard applied by some United States courts of appeals would require a different result. See, e.g., *NLRB v. U.S. Postal Service*, 8 F.3d 832, 836–837 (D.C. Cir. 1993) (where an employer acts "pursuant to a claim of right under the parties' agreement," the resolution of the charge requires interpreting the contract to determine whether it "covers" the employer's conduct, i.e., whether the parties have "negotiat[ed] contract terms that make it unnecessary to bargain over subsequent changes in terms or conditions of employment."); *Chicago Tribune Co. v. NLRB,* 974 F.2d 933 (7th Cir. 1992) (same). While art. 18 allows significant discretion for the informal resolution of art. 16 allegations, the scope of that discretion clearly does not encompass or "cover" the Respondents' conduct in applying sec. 13.2 to Pleas.

Member Emanuel would consider, in a future appropriate case, whether the Board should adopt the "contract coverage" standard, but he agrees that it would not require a different result here.

[22] As noted above, the Watchmen's Agreement limits dispatch restrictions to the terminal where the complaint arose. We reject our dissenting colleague's suggestion that the record establishes a past practice of PMA employers unilaterally disciplining Local 26 watchmen for art. 16 harassment that is not significantly different from their unilateral application of sec. 13.2 here. In this regard, PMA's senior counsel Amidon testified that neither he nor PMA would normally be involved in any employer investigation of a watchman's conduct that was not elevated to a formal complaint before an art. 18 LRC. He also testified that he himself did not participate in art. 18 LRC meetings and that he had no personal knowledge of what occurred there. Thus, while Amidon testified that he *believed* the Watchmen's Agreement would not prevent an employer from unilaterally disciplining a watchman for harassment, this testimony, in context, falls far short of establishing a past practice of unilateral discipline. Nor do we find that Local 26 President Luisa Gratz's testimony establishes any such practice; rather, Gratz's testimony about past practice of informal resolutions of alleged watchman misconduct is consistent with art. 18. We also reject amicus Longshoremen ILWU's argument that the Respondents could, consistent with their obligations under the Watchmen's Agreement, apply sec. 13.2 to watchmen solely as a substitute for their own internal means for determining whether discipline against a watchman should be "initiated" under the Watchmen's Agreement, because the record does not establish any history of PMA employers unilaterally disciplining Local 26 watchmen, and because the record shows that the arbitration proceeding culminating with Pleas' suspension did more than merely "initiate" discipline. Finally, we also reject amicus Longshoremen ILWU's argument—endorsed by our dissenting colleague—that a different result is required because the judge's decision improperly elevates the terms of the Watchmen's Agreement over those of the PCL&CA. Insofar as each contract purports to establish the terms and conditions of employment of represented watchmen employees whose representative is not party to the PCL&CA, the two contracts do not stand on the same ground. Cf. *EEOC v. Wafflehouse*, supra, 534 U.S. at 294 ("It goes without saying that a contract cannot bind a nonparty.").

within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(d) Within 14 days from the date of this Order, remove from their files any reference to Demetrius Pleas' unlawful suspension, and within 3 days thereafter, notify Pleas in writing that this has been done and that the suspension will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Abide by the terms of the Watchmen's Agreement by applying the disciplinary procedures and penalties set forth in that agreement as the exclusive means of addressing employer complaints about unit employees' misconduct.

(g) Before implementing any changes to unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with ILWU Local 26 as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> Security employees in the Los Angeles/Long Beach harbor area, including on-dock and near-dock rail, container yards, extensions of existing and future yards, and Container Freight Station (CFS) work established after July 1, 1999, who are classified as sergeant, gatemen, dockmen and cargo watchmen, clockmen, traffic watchmen, gangway watchmen, detainee watchmen and/or cabin watchmen.

(h) Respondent PMA shall notify all of its employer members covered by the PCL&CA and the third-party contractor who administers the dispatch of watchmen represented by ILWU Local 26 that any previous instructions, requests, or appeals that Respondent PMA may have made that they implement the 13.2 area arbitrator's award against Demetrius Pleas are withdrawn and have no force or effect.

(i) Within 14 days after service by the Region, Respondent PMA shall post at its facilities copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by PMA's authorized representative, shall be posted by PMA and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and employer members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if PMA customarily communicates with its employees and employer members by such means. Reasonable steps shall be taken by PMA to ensure that the notices are not altered, defaced, or covered by any other material. If PMA has gone out of business or closed the facilities involved in these proceedings, PMA shall duplicate and mail, at its own expense, a copy of the notice to all current employees and employer members and former employees and employer members employed by or member of PMA at any time since April 19, 2017.

(j) Within 14 days after service by the Region, Respondent LBCT shall post at its facilities copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by LBCT's authorized representative, shall be posted by LBCT and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if LBCT customarily communicates with its employees by such means. Reasonable steps shall be taken by LBCT to ensure that the notices are not altered, defaced, or covered by any other material. If LBCT has gone out of business or closed the facilities involved in these proceedings, LBCT shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by LBCT at any time since April 19, 2017.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. May 2, 2019

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

In this case, an employee believed that he had been the victim of racial harassment. The multiemployer collective-bargaining agreement pertaining to the alleged victim's collective-bargaining unit provided that alleged victims of racial harassment could file a complaint and have their claim considered under an expedited grievance-arbitration procedure. Further, the express terms of the applicable collective-bargaining agreement empowered the alleged victim to pursue complaints against employees outside of his own bargaining unit. His alleged harasser, in fact, was not a member of the alleged victim's bargaining unit; he worked for employers that were also signatories to that agreement, but the alleged harasser was covered by a different multiemployer collective-bargaining agreement. Beholden to both agreements, the alleged harasser's employers implemented the suspension ultimately ordered by the arbitrator, as the alleged victim's agreement required. No provision of the alleged harasser's agreement prohibited the employers from implementing the discipline unilaterally without resort to the grievance-arbitration procedure set forth there, and it did not contravene any established past practice to act unilaterally.

Missing some of the considerable nuance presented by the facts of this case and conflating two legal doctrines, the judge concluded that the Respondents violated Section 8(a)(5) and (1)—by both modifying, without consent, their collective-bargaining agreement with the Charging Party Union and unilaterally changing a past practice without affording the Charging Party Union notice and an opportunity to bargain—when they, in the judge's words, "appl[ied]" and "adopt[ed]" the grievance-arbitration procedure in the alleged victim's agreement against the alleged harasser and "implement[ed] . . . the mandatory discipline." My colleagues affirm the judge's conclusions, generally with the same rationale. For the reasons explained more thoroughly below, I disagree with my colleagues and the judge, and I would dismiss the complaint.

Facts

I. BACKGROUND

In the West Coast port industry, there is a coast-wide bargaining unit of approximately 25,000 longshore workers and marine clerks. Respondent Pacific Maritime Association (PMA) is a multiemployer association, representing about 50 terminal operators (including Respondent Long Beach Container Terminal, LLC (LBCT)), that bargains and administers, for this unit, the Pacific Coast Longshore & Clerks' Agreement (PCL&CA) with the International Longshore and Warehouse Union (ILWU International). Watchmen employed at these terminals have bargaining units that are separate from the PCL&CA unit, and, unlike the PCL&CA unit, the watchmen units are not coast-wide. Charging Party ILWU, Warehouse Processing and Distribution Workers' Union, Local 26 (ILWU Local 26) represents a unit of 400 watchmen who are employed at the Ports of Los Angeles and Long Beach. PMA, representing the four terminal operators at these ports (including LBCT), bargains and administers, for this unit, the Watchmen's Agreement with ILWU Local 26. PMA and the four terminal operators at Los Angeles and Long Beach (including LBCT) thus operate under both the PCL&CA, for the longshore workers and marine clerks unit, and the Watchmen's Agreement, for the watchmen unit.

II. THE GRIEVANCE-ARBITRATION PROCEDURES UNDER THE TWO AGREEMENTS

Since 2001, the PCL&CA has contained section 13.2, which sets forth a special expedited grievance-arbitration procedure for claims of harassment or discrimination. Under this procedure, any longshore worker or marine clerk can file a complaint against not just other PCL&CA unit employees, but also employees outside the unit, such as "outside truck drivers, vendors, contractors, [and] *other employees of PMA member companies*." (Emphasis added.) ILWU Local 26 watchmen are among employees who fall within this last category. Although complaints can be filed against them, outsiders to the PCL&CA, such as ILWU Local 26 watchmen, cannot file complaints under section 13.2.

Under the terms of the PCL&CA collective-bargaining agreement, a unit employee's 13.2 complaint is to be filed directly with a designated arbitrator, without any prior step. A complaint filed by an employee against another employee is arbitrated as an employee versus employee matter with the complainant's union representative prosecuting the claim. Neither PMA nor any member employer plays more than administrative role in the complaint process, and none necessarily take any active role in the arbitration, although they are required to implement the corrective action ordered by the arbitrator, if not disturbed on appeal. Under section 13.2, PMA and any involved member employer are considered "parties" that may attend the arbitration hearing, which is closed to nonparties "to protect the privacy rights of those involved." Being a party within the meaning of the 13.2 procedure, however, does not mean that PMA or a member employer will advocate for any particular result; rather it is consistent with the employers' responsibility to implement any arbitration award and their ability to provide pertinent information when requested.

The Watchmen's Agreement does not contain section 13.2 or any similar procedure allowing employees to

assert harassment allegations. ILWU Local 26, during bargaining for the two most recent agreements, refused PMA's proposals to include one. Article 16 of the Watchmen's Agreement prohibits discrimination "in connection with any action subject to the terms of this Agreement," but there is no procedure for employees to bring complaints. Further, the Watchmen's Agreement is silent about how discipline must be handled and does not contain common language about management-rights or just cause. Article 18, "Labor Relations Committees and Grievance Machinery" is the only provision of the Watchmen's Agreement that mentions discipline. Article 18 establishes the Labor Relations Committee (LRC), a committee given the authority to "resolve grievances, secure conformance to the terms of the Agreement, maintain current employee registration rosters, maintain dispatch procedures, and generally administer the Agreement." Regarding watchmen conduct, article 18 provides:

> The Labor Relations Committee shall establish rules and regulations governing the conduct of watchmen as well as penalties for the breach of these rules and regulations. However, nothing herein shall restrict the Employer's existing right to discipline or discharge men for intoxication, pilferage, assault, incompetency, or failure to perform work as directed, but any man who considers that he has been improperly disciplined or discharged may appeal to the Labor Relations Committee.

There is no evidence, however, that the LRC established any rules or regulations governing watchmen conduct on the jobsite.[1]

Article 18's grievance machinery can be used to address watchmen conduct and discipline (among other issues), but the agreement does not clearly provide it is the only avenue to discipline employees. Only the parties to the Watchmen's Agreement (i.e., the PMA *employers* or ILWU Local 26) can file grievances. Watchmen cannot file any complaint nor can PCL&CA longshore workers or marine clerks. Any employer or union complaint must first be addressed in informal discussions among any individuals involved, the employer, and the union; then the complaint must be brought before the LRC before escalating to arbitration, if LRC discussions fail. Article 18 states that its "grievance machinery shall be the exclusive remedy with respect to any dispute arising under the Collective-Bargaining Agreement and no other remedies shall be used by the Union, the Employer, or any covered employee until the grievance procedures have been exhausted." There is no language that clearly establishes that discipline is necessarily a "dispute arising under the Collective-Bargaining Agreement."[2]

Looking beyond the language of the Watchmen's Agreement, there is scant evidence in the record establishing how prior instances of harassment or other discipline have been handled by the Watchmen's Agreement employers or ILWU Local 26, and no consistent practice emerges from what little evidence is available. Victor Gasset, who has held several positions in ILWU Local 26, and ILWU Local 26 President Luisa Gratz both testified that allegations of harassment among watchmen are typically and best resolved unilaterally by ILWU Local 26 through internal processes rather than through the Article 18 process. The record also contains uncontroverted testimony by PMA's senior counsel, Todd Amidon, that when a Watchmen's Agreement employer becomes aware of harassment, the employer can discipline the offending watchman unilaterally without filing a complaint under Article 18. Indeed, ILWU Local 26 President Gratz admitted that employers sometimes deal with complaints unilaterally without informing the ILWU Local 26. ILWU Local 26 even once filed a grievance against an employer for *not* taking unilateral action against a harasser. In fact, there is only one instance in the record where an employer filed an article 18 employer complaint to address harassment through the grievance procedure.

III. THE INSTANT DISPUTE

On March 28, 2017, ILWU Local 26 Watchman Demetrius Pleas, who received his assignments through the PMA/ILWU Local 26 dispatch hall, allegedly called a PCL&CA marine clerk a "white Trump loving motherfucker" while both were working for LBCT that day. The marine clerk filed a PCL&CA 13.2 harassment complaint against Pleas, and the arbitration went forward as provided for in section 13.2. ILWU Local 26 objected to the 13.2 arbitration, asserting that the PCL&CA does not apply to its unit, and both ILWU Local 26 and Pleas chose not to attend the arbitration. PMA and LBCT attended the arbitration, but they did not prosecute the claim or otherwise seek a certain result.[3]

The arbitrator, in his final order, found Pleas guilty of racial harassment, ordered that Pleas be suspended from working for any PCL&CA employer for 28 days, that he

[1] The LRC did establish dispatch rules and procedures, but they are not relevant to employee conduct during work.

[2] Nor is there language suggesting that allegations of harassment brought by a non-unit employee are covered by the agreement. Non-unit employees cannot invoke the art. 18 grievance machinery.

[3] The judge incorrectly stated that PMA/LBCT representative Phillip Tabyanan joined in a motion for the arbitrator to issue an interim order separating Pleas and the marine clerk. The arbitrator issued the order sua sponte, and Tabyanan never expressed any support for the order. He only engaged in discussion about how the separation order would be implemented.

be barred from any PCL&CA premises during his suspension, and that he complete unpaid EEO training. ILWU Local 26 appealed the order under the 13.2 procedure, asserting that its watchmen are not subject to section 13.2. The appeals officer rejected the appeal, finding that section 13.2 expressly applies, by its terms, to nonbargaining unit employees. The Respondents thereafter implemented the arbitrator's mandated discipline. ILWU Local 26 never filed a grievance under article 18 of the Watchmen's Agreement contesting the discipline the Respondents imposed on Pleas.

Discussion

The judge's decision, affirmed by my colleagues, found that the Respondents violated Section 8(a)(5) and (1) when they "appl[ied]" and "adopt[ed]" the PCL&CA 13.2 procedures to discipline Pleas and "implement[ed] . . . the mandatory discipline" against him. The judge relied on two separate legal theories to find the same violations. He found that the Respondents both modified, without consent, the Watchmen's Agreement and unilaterally changed, without providing ILWU Local 26 notice and an opportunity to bargain, their "formal investigative and disciplinary process."

In *Bath Iron Works* 345 NLRB 499 (2005),[4] the Board explained the clear differences between these two legal theories:

> The "unilateral change" case and the "contract modification" case are fundamentally different in terms of principle, possible defenses, and remedy. In terms of principle, the "unilateral change" case does not require the General Counsel to show the existence of a contract provision; he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining.* The allegation is a *failure to bargain.* In the "contract modification" case, the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract. In terms of defenses, a defense to a unilateral change can be that the union has waived its right to bargain. A defense to the contract modification can be that the union has consented to the change. In terms of remedy, a remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract.

Id. at 501 (emphasis in original). In the contract-modification cases, "the issue . . . is whether the contract *forbade* the conduct. In the unilateral change cases, the issue is whether the contract *privileges* the conduct." Id. at 502 (emphasis in original). To defend against a contract-modification allegation, an employer need only have "a sound arguable basis for its interpretation" of the contract. Id. at 502 (internal quotation marks omitted).

I. THE RESPONDENTS DID NOT APPLY OR ADOPT SECTION 13.2 OF THE PCL&CA AGAINST PLEAS

Analysis under either legal theory is unnecessary to reject the judge's largely unexplained findings that the Respondents *applied* or *adopted* the PCL&CA 13.2 procedure against Pleas. It was the marine clerk, allegedly harassed by Pleas, who invoked the 13.2 procedure by filing the 13.2 complaint directly with the arbitrator, as his collective-bargaining agreement allowed him to do. Further, the marine clerk's agreement expressly gave him the right to file that complaint against "other employees of PMA member companies." The arbitrator independently heard the complaint as an employee versus employee matter where the marine clerk's union representative prosecuted the complaint before the arbitrator. The Respondents, though present at the arbitration, had no role in the marine clerk's filing the complaint and did not seek any particular result.[5] Nor did they have any power to stop the 13.2 arbitration.[6] The General Counsel simply failed to prove his allegations that *the Respondents* applied or adopted the PCL&CA procedure against Pleas, and the judge erred in finding merit in those allegations.[7]

II. IMPLEMENTING THE DISCIPLINE AGAINST PLEAS DID NOT MODIFY THE WATCHMEN'S AGREEMENT

The Respondents implemented the discipline against Pleas that the 13.2 arbitrator ordered, as it was required to do under the PCL&CA. The Respondents'

[4] Affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

[5] PMA admitted in its answer that it "processed the Section 13.2 complaint" against Pleas, but "processed" appears to only mean that PMA performed the administrative role it was required to perform under the PCL&CA, such as in forwarding copies of the complaint and in providing a venue for the arbitration. Serving the requisite administrative function is not the same as "applying" or "adopting" sec. 13.2 against Pleas.

[6] Once, where the grievant was an ILWU Local 26 watchman filing a complaint against another ILWU Local 26 watchman, PMA did not forward a 13.2 complaint on to an arbitrator and flagged the issue to the involved parties. However, there is no question that an employee not covered by the PCL&CA, such as an ILWU Local 26 watchman, may not file a 13.2 complaint. Therefore, in so acting, PMA undertook the ministerial act of not processing a facially invalid complaint. By contrast, PMA had no right on the facts of this case to stop a facially *valid* complaint filed by a PCL&CA marine clerk against an ILWU Local 26 watchman.

[7] To the extent that the Respondents could be said to have "applied" sec. 13.2 to the ILWU Local 26 unit by agreeing, years ago, to a provision broad enough to include them within its scope (without consulting ILWU Local 26), that argument was never raised by the General Counsel.

implementation only modified the Watchmen's Agreement if the agreement forbade the Respondents from implementing the arbitrator's order. In my view, the Respondents at least had a sound arguable basis for their interpretation that the Watchmen's Agreement contained no such prohibition. Specifically, the Respondents were reasonable in their view that the Watchmen's Agreement *did not provide* that pursuing an employer complaint under the article 18 grievance-arbitration procedure is the exclusive way Pleas could face discipline for racial harassment.

The judge primarily concluded the Respondents modified the Watchmen's Agreement because article 18 provides that the "grievance machinery shall be the exclusive remedy with respect to any dispute arising under the Collective-Bargaining Agreement." This language does not mean, as the judge assumed, that discipline for Pleas' alleged harassment must result from the Watchmen's Agreement article 18 grievance-arbitration procedure. First, there is no language that clearly establishes that discipline is necessarily a "dispute arising under" the agreement, until perhaps after the Respondents implement the discipline. Second, even if the judge's interpretation were correct, Pleas' discipline that the Respondents implemented here arose from the PCL&CA, *not the Watchmen's Agreement*.

The only provision of the Watchmen's Agreement directly addressing discipline provides, as set forth in full above, "The Labor Relations Committee shall establish rules and regulations governing the conduct of watchmen as well as penalties for the breach of these rules and regulations. However, nothing herein shall restrict the Employer's existing right to discipline or discharge men for intoxication, pilferage, assault, incompetency, or failure to perform work as directed." This passage from article 18 may be ambiguous, but a reasonable interpretation is that it is limited to granting the LRC the power to make disciplinary rules, so long as those rules do not restrict the employers' right to discipline for the five enumerated offenses, but does not limit the Employer's ability to discipline employees in the absence of any controlling LRC rule.

The absence of any evidence that the LRC established rules or regulations governing watchmen's conduct (outside of dispatch rules), combined with the parties' inconsistent history on discipline, confirms that this interpretation has a sound arguable basis. "[T]he Board gives controlling weight to the parties' actual intent underlying the contractual language in question. . . . To determine the parties' intent, the Board examines . . . relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question." *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 3 (2017) (internal quotation marks omitted). If article 18 were the only procedure through which the Respondents may implement discipline, one would expect the record to contain more than a single example of discipline for any reason, harassment or otherwise, resulting from an article 18 employer complaint. Instead, there is uncontroverted evidence that sometimes ILWU Local 26 unilaterally resolved harassment complaints and other times Watchmen's Agreement employers unilaterally implemented discipline for harassment—and, in fact, ILWU Local 26 once complained when an employer had not. There is no basis to conclude that the parties intended article 18 to be the only way the Respondents could implement discipline for harassment.[8]

Because the Watchmen's Agreement did not prohibit the Respondents from unilaterally implementing discipline against Pleas for racial harassment, the Respondents did not modify the agreement and thus did not violate Section 8(a)(5) and (1).[9] Although ILWU Local 26 was clear in bargaining for the Watchmen's Agreement that it

[8] My colleagues assert that the parties had a consistent practice of addressing harassment complaints under art. 18's formal or informal procedures. They discount the evidence of ILWU Local 26 or the Respondents unilaterally resolving harassment complaints as examples of art. 18's informal procedures. Art. 18, however, only contemplates informal discussions that include the individuals involved, the employer, *and* ILWU Local 26. Therefore, resolutions reached by ILWU Local 26 without involving the employer or resolutions reached by the employer without involving ILWU Local 26 do not fall within the parameters of art. 18.

[9] In point of fact, the judge's decision does not make sense unless sec. 13.2 of the PCL&CA is modified. That provision expressly gives unit employees the right to file complaints of harassment against non-unit employees, including "other employees of PMA member companies," and mandates that signatory employers implement any discipline ordered by an arbitrator pursuant to such a complaint. Accordingly, to find that the Respondents violated the Act by implementing the arbitrator's order pursuant to the victim's complaint, one would have to ignore the text of the PCL&CA.

My colleagues misrepresent that their decision will not preclude victims covered by the PCL&CA, like the marine clerk here, from seeking protection from harassment by ILWU Local 26 watchman. They aver that a clerk or an employer on his behalf can pursue a complaint under either sec. 13.2 of the PCL&CA or art. 18 of the Watchmen's Agreement. But a PCL&CA clerk *cannot* file a complaint under art. 18. Although a Watchmen's Agreement employer could file an art. 18 complaint on the clerk's behalf, it is under no obligation to do so. In fact, in the instant case, LBCT considered pursuing discipline on behalf of the clerk, but chose not to wade into the "he said/he said" conflict—potentially leaving the victim without recourse. Furthermore, the clerk here *did* file a 13.2 complaint found meritorious by the arbitrator, but my colleagues find that the Respondents' action in complying with their PCL&CA obligations to implement the discipline ordered by the arbitrator is unlawful. It is difficult to see how my colleagues' position would not negatively affect a harassed employee's rights. In fact, my colleagues appear to be focused solely on the rights of accused harassers with no regard for the victims' rights.

opposed adding the procedure set forth in Section 13.2 of the PCL&CA into its agreement, the Respondents' unilateral implementation of discipline that was ordered by the PCL&CA 13.2 arbitrator does not mean that the 13.2 procedure was forced upon ILWU Local 26. How the Respondents arrived at the unilateral discipline—via internal investigation, extra-unit PCL&CA 13.2 arbitration, or even a coin flip—is immaterial. Just because the Respondents implemented discipline that originated from the PCL&CA 13.2 procedure does not mean that ILWU Local 26 is bound to the terms of PCL&CA section 13.2, such as the finality of the arbitrator's decision. Under article 18 of the Watchmen's Agreement, ILWU Local 26 could have filed a grievance, after implementation, challenging Pleas' discipline, but it did not.[10] ILWU Local 26 was the only party here that shied away from the agreement it made.

III. IMPLEMENTING THE DISCIPLINE AGAINST PLEAS WAS NOT A UNILATERAL CHANGE

Indispensable to finding that an employer has committed an unlawful unilateral change is that the employer has *changed an established practice*. See, e.g., *Richmond Times-Dispatch*, 346 NLRB 74, 74 fn. 2 (2005).[11] As explained above, the record does not establish that harassment discipline (or any other discipline) was treated in any consistent way. Sometimes ILWU Local 26 addressed harassment on its own and sometimes employers addressed harassment on their own (and ILWU Local 26 even once filed a grievance when an employer had not). Only once did an employer file an article 18 complaint. Therefore, the judge did not rely on any practice apart from, implicitly, the Respondents' alleged departure from article 18 of the Watchmen's Agreement. As set forth in the preceding section, the Respondents did not contravene article 18, but, in any event, failing to adhere to article 18 would only be a contract-modification violation.[12] The General Counsel failed to prove an established practice from which the Respondents departed in implementing Pleas' discipline and thus there is no basis for the judge's finding.

Conclusion

For the reasons set forth above, I respectfully dissent.

Dated, Washington, D.C. May 2, 2019

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES AND EMPLOYER MEMBERS OF THE PACIFIC MARITIME ASSOCIATION
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives 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 modify the disciplinary procedures and penalties set forth in our collective-bargaining agreement (the Watchmen's Agreement) with the ILWU, Warehouse Processing and Distribution Workers' Union, Local 26 (ILWU Local 26) during the agreements term without Local 26's consent.

WE WILL NOT unilaterally change terms and conditions of employment of unit employees represented by Local 26 by imposing a new formal investigative and disciplinary process with new standards and penalties, without giving Local 26 prior notice and an opportunity to bargain over the change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful suspension of Demetrius Pleas and restore him to the dispatch list, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Demetrius Pleas whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension, less any net interim earnings, plus

[10] The Watchmen's Agreement states that "[a]ny man who considers that he has been improperly disciplined or discharged may appeal to the Labor Relations Committee."

[11] Enfd. sub nom. *Media General Operations, Inc. v. NLRB*, 225 Fed. Appx. 144 (4th Cir. 2007).

[12] It would not be lawful for the Respondents to fail to adhere to the contract, without ILWU Local 26's consent, even if they, in the safe harbor of a unilateral-change allegation, provided prior notice and an opportunity to bargain.

interest, and WE WILL make Pleas whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Demetrius Pleas for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s) for Demetrius Pleas.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Demetrius Pleas' unlawful suspension, and WE WILL, within 3 days thereafter, notify Pleas in writing that this has been done and that the suspension will not be used against him in any way.

WE WILL abide by the terms of the Watchmen's Agreement by applying the disciplinary procedures and penalties set forth in that agreement as the exclusive means of addressing employer complaints about unit employees' misconduct.

WE WILL, before implementing any changes to unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with ILWU Local 26 as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> Security employees in the Los Angeles/Long Beach harbor area, including on-dock and near-dock rail, container yards, extensions of existing and future yards, and Container Freight Station (CFS) work established after July 1, 1999, who are classified as sergeant, gatemen, dockmen and cargo watchmen, clockmen, traffic watchmen, gangway watchmen, detainee watchmen and/or cabin watchmen.

PACIFIC MARITIME ASSOCIATION

The Board's decision can be found at www.nlrb.gov/case/21-CA-197882 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives 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 modify the disciplinary procedures and penalties set forth in our collective-bargaining agreement (the Watchmen's Agreement) with the ILWU, Warehouse Processing and Distribution Workers' Union, Local 26 (ILWU Local 26) during the agreement's term without Local 26's consent.

WE WILL NOT unilaterally change terms and conditions of employment of unit employees represented by Local 26 by imposing a new formal investigative and disciplinary process with new standards and penalties, without giving Local 26 prior notice and an opportunity to bargain over the change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful suspension of Demetrius Pleas and restore him to the dispatch list, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Demetrius Pleas whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension, less any net interim earnings, plus interest, and WE WILL make Pleas whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Demetrius Pleas for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s) for Demetrius Pleas.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Demetrius

Pleas' unlawful suspension, and WE WILL, within 3 days thereafter, notify Pleas in writing that this has been done and that the suspension will not be used against him in any way.

WE WILL abide by the terms of the Watchmen's Agreement by applying the disciplinary procedures and penalties set forth in that agreement as the exclusive means of addressing employer complaints about unit employees' misconduct.

WE WILL, before implementing any changes to unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with ILWU Local 26 as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> Security employees in the Los Angeles/Long Beach harbor area, including on-dock and near-dock rail, container yards, extensions of existing and future yards, and Container Freight Station (CFS) work established after July 1, 1999, who are classified as sergeant, gatemen, dockmen and cargo watchmen, clockmen, traffic watchmen, gangway watchmen, detainee watchmen and/or cabin watchmen.

LONG BEACH CONTAINER TERMINAL LLC

The Board's decision can be found at www.nlrb.gov/case/21-CA-197882 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Alice J. Garfield, Esq., for the General Counsel.
Nicole A. Buffalano, Esq., for Pacific Maritime Association.
Brigham M. Cheney and Michael Berry, Esqs., for Long Beach Container Terminal LLC.
Alejandro Delgado, Esq., for the Charging Party.

DECISION

I. INTRODUCTION[1]

ANDREW S. GOLLIN, Administrative Law Judge. These cases were tried on April 16–17, 2018, in Los Angeles, California. The issue is whether a multiemployer bargaining association and an employer-member violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the Act) when they disciplined a watchman pursuant to a grievance/arbitration procedure contained in a different union's collective-bargaining agreement. Pacific Maritime Association (PMA) is the multiemployer bargaining representative of four marine terminal companies, including Long Beach Container Terminal LLC (LBCT), which are subject to a collective-bargaining agreement with the ILWU, Warehouse, Processing and Distribution Workers Union, Local 26 (Local 26) covering about 400 watchmen at the Ports of Los Angeles and Long Beach in California. This agreement is referred to as the Watchmen's Agreement. PMA also is the multiemployer bargaining representative of approximately 50 companies, including LBCT, who are subject to a separate, coast-wide collective-bargaining agreement with the International Longshore and Warehouse Union (the International) covering about 25,000 longshore workers and marine clerks at ports along the Pacific Coast, including at the Ports of Los Angeles and Long Beach. This agreement is referred to as the Pacific Coast Longshore & Clerks' Agreement (the PCL&CA).

Both the Watchmen's Agreement and the PCL&CA prohibit unlawful discrimination and harassment, but section 13.2 of the PCL&CA sets out a separate, expedited grievance/arbitration procedure for longshore workers and marine clerks who believe they have been subjected to unlawful harassment or discrimination to individually file a complaint that is referred directly to a special arbitrator who has the authority to review, hear, and decide the grievance and, if warranted, issue a remedial order against the perpetrator(s). There is not an equivalent procedure in the Watchmen's Agreement. During the last two contract negotiations, PMA proposed adding language from section 13.2 to the Watchmen's Agreement. Local 26 rejected those proposals, believing the process would only make it easier for an employer to get rid of a watchman, and PMA withdrew the proposals prior to reaching overall agreements.

On March 28, 2017, Demetrius Pleas, a Local 26 watchman subject to the Watchman's Agreement and another employee, a marine clerk subject to the PCL&CA, got into a dispute about work jurisdiction while they were both working for LBCT at the Port of Long Beach. During the course of their argument, both men allegedly cursed and engaged in racial name-calling. The marine clerk later filed a Section 13.2 grievance against Pleas alleging prohibited discrimination and harassment under the PCL&CA. PMA and LBCT informed Local 26 that the marine clerk's grievance would be processed in accordance with the Section 13.2 procedure and PMA would enforce any Section 13.2 arbitration order that issued. Local 26 objected and maintained that the PCL&CA did not apply to Pleas or any other employees covered under the Watchmen's Agreement. PMA and LBCT allowed the marine clerk's grievance to be heard and decided by the Section 13.2 arbitrator. That arbitrator found Pleas engaged in prohibited conduct under the PCL&CA and suspended him from working for all PMA employer-members for 28 days. Local 26 appealed the decision, challenging, among others, that the arbitrator lacked jurisdiction to hear and decide

[1] Abbreviations in the decision are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibit; "GC Exh." for General Counsel's Exhibit; "PMA Exh." for PMA's Exhibit; and "LBCT Exh." for LBCT's Exhibits.

the matter. On appeal, the decision was sustained and Local 26's jurisdictional argument was rejected. Thereafter, on July 12, 2017, PMA informed all of its employer-members of the order suspending Pleas from working at any terminal covered by the PCL&CA.

The consolidated complaint alleges PMA and LBCT (collectively "Respondents") violated Sections 8(a)(5) and (1) of the Act by applying Section 13.2 to the watchmen unit and by implementing, inter alia, the arbitrator's disciplinary/remedial order, thereby changing the disciplinary procedures and penalties of the Watchmen's Agreement, and by failing to continue in effect all the terms and conditions of that Agreement, without the consent of Local 26; and, in the alternative, Respondents violated Sections 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment applicable to the watchmen represented by Local 26 by adopting a formal investigative and disciplinary process, which included new standards and penalties, and by disciplining a member of the watchmen unit pursuant to that new process, without providing Local 26 with notice and an opportunity to bargain over the change. For the reasons stated below, I find that the Respondents committed the violations as alleged.

I. STATEMENT OF THE CASE

On May 1, 2017, Local 26 filed an unfair labor practice charge against PMA in Case 21–CA–197882, and later amended that charge on September 28 and again on November 21, 2017. On May 9, 2017, Local 26 filed an unfair labor practice charge against LBCT in Case 21–CA–198530, and later amended the charge on May 22 and again on November 21, 2017. On January 17, 2018, the Regional Director for Region 21 of the National Labor Relations Board (Board), on behalf of the General Counsel, issued an order consolidating cases, consolidated complaint, and notice of hearing alleging that Respondents violated Sections 8(a)(5) and (1) of the Act as stated. On January 31, 2018, Respondents each filed an answer denying the alleged violations and raising various affirmative defenses.[2]

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. PMA, LBCT, Local 26, and the General Counsel filed posthearing briefs, which I have carefully considered.[3] Accordingly, based upon the entire record, including the posthearing briefs and my observations of the credibility of the witnesses, I make the following findings of fact, conclusions of law, and recommendations:

II. FINDINGS OF FACT[4]

A. Jurisdiction and Labor Organization Status

PMA is a California nonprofit mutual benefit corporation composed of approximately 50 for-profit stevedore companies, marine terminal operators, and cargo-handling equipment maintenance and repair contractors at dock facilities that employ longshore workers, marine clerks, watchmen, and other dockworkers at ports in California, Oregon, and Washington, including at the Ports of Los Angeles and Long Beach.[5] PMA is a multiemployer collective-bargaining agent with the primary purpose of negotiating, entering into, and administering on behalf of its members, collective-bargaining agreements with various labor organizations, including Local 26. At all material times, LBCT has been an employer-member of PMA, and has authorized PMA to represent it in negotiating and administering collective-bargaining agreements with various labor organizations, including Local 26. During the 12-month period ending December 31, 2017, a representative period, PMA's employer-members who participate in association bargaining through PMA, including LBCT, derived gross revenues in excess of $50,000 from the transportation of passengers, freight, or both from the State of

[2] The Respondents each raised numerous affirmative defenses in their answers. I will treat only those defenses that were both raised and argued in brief, and I will consider the other affirmative defenses to the extent they do not overlap with those asserted in brief as having been abandoned.

[3] On June 4, 2018—the date that posthearing briefs were due—the International, through its attorney Robert Remar, filed a motion to submit an amicus brief. The International contends it has a direct interest in the outcome of these cases because the decision may affect the extent that longshore workers and marine clerks may utilize Section 13.2 policies and procedures under the PCL&CA in response to alleged discrimination, harassment and/or retaliation by other persons at the port terminals, including Local 26 watchmen. The International asserts that its interests are separate and distinct from those of PMA and LBCT because the International is responsible for protecting and promoting the rights of its unit members, which, at times, may be at odds with the interests of PMA and LBCT. The International cites to *24 Hour Fitness USA, Inc.,* 363 NLRB No. 84, slip. 6 fn. 1 (2015) for support. *24 Hour Fitness* involved an employee's challenge to the arbitration provisions in an employee handbook. More than a month before the start of the hearing in that case, the SEIU International filed a motion to intervene. The motion was denied, but the judge allowed the SEIU to file an amicus brief. More than a month after the record closed, the Chamber of Commerce moved to submit an amicus brief, which the judge granted.

On June 7, 2018, I issued an Order to Show Cause giving the parties until July 5, 2018 to submit their positions, if any, on the propriety of granting the International's motion. After considering the parties' submissions, I grant the International's motion to submit an amicus brief (which was attached to its motion). However, to the extent that the International's motion could be interpreted as a motion to intervene as a party, that motion is denied. Section 102.29 of the Board's Rules and Regulations addresses motions to intervene prior to or during the hearing. The International's motion was almost two months after the record closed. There is no issue that the International had notice of the complaint and hearing, as evidenced by Mr. Remar's appearance at the hearing as one of PMA's witnesses. The International has not provided any explanation for the timing of its motion. Under these circumstances, I conclude any motion by the International to intervene is denied as untimely and without good cause.

[4] Although I have included record citations to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as having been in conflict with credited testimony or other evidence, or because it was in and of itself incredible and unworthy of belief.

[5] These Ports consist of two adjoining ports that coordinate activities and operate as one port complex.

California directly to points outside the State of California. At all material times, PMA admits, and I find, that it and its employer-members have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

LBCT operates marine container terminals with an office and place of business located in Long Beach, California. During the 12-month period ending December 31, 2017, a representative period, LBCT derived gross revenues in excess $50,000 from the transfer of cargo containers between international ocean-going vessels and overland modes of cargo transportation (including, e.g., truck and rail), from the State of California directly to points outside the State of California. At all times, LBCT admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, Local 26 has been a labor organization within the meaning of Section 2(5) of the Act.

B. Collective-Bargaining Relationships and Dispatch

The International is the collective-bargaining representative of the longshore workers and marine clerks at the Ports of Los Angeles and Long Beach as part of a broader multiemployer bargaining unit.[6] PMA, on behalf of its employer-members, including LBCT, has been party with the International to the PCL&CA. The PCL&CA is made up of two documents: the Pacific Coast Longshore Contract Document ("PCLCD"), which covers longshore workers, and the Pacific Coast Clerks' Contract Document ("PCCCD"), which covers marine clerks. The most recent PCL&CA is dated July 1, 2014 to June 30, 2019.[7]

Local 26 is the collective-bargaining representative of a unit of watchmen described in Article 1(A) of the Watchmen's Agreement who are employed by PMA employer-members at the Ports of Los Angeles and Long Beach. The four employer-members are: SSA (formerly Stevedoring Services of America), APMT (formerly A.P. Moller Terminals), LBCT, and TTI (formerly Total Terminals, International, and also formerly referred to as Hanjin Terminal). (Tr. 226–227.) PMA and its four employer-members have recognized Local 26 as the exclusive representative of the watchmen unit, and that recognition has been embodied in successive collective-bargaining agreements between PMA, on behalf of its four employer-members, and Local 26. The most recent Agreement is dated July 1, 2014 to July 1, 2019. (Jt. Exh. 1 and 2.)[8]

Local 26 and PMA jointly operate a dispatch hall that is administered by a third-party contractor, which refers out watchmen to work for the four employer-members. (Tr. 63:19–25; 64; 100.) Watchmen are classified as either "steady" or "hall." A "steady" watchman is guaranteed 5 days of work a week at a specific terminal and does not have to go through the dispatch hall to obtain work. (Tr. 59:16–20; 65:9–12.) A "hall" watchman receives daily assignments through a telephonic dispatch system and may work at different terminals on different days. (Tr. 64:22–65: 109:9–12.) The "hall" watchmen are either "registered" or "casual (or emergency)." Watchmen start out as "casual (or emergency)" and remain in that status until promoted to "registered" status. "Registered" watchmen receive higher contractual pay and benefits, training, and are given preference over casuals in dispatch assignments. (Tr. 217–218.) The Watchmen's Agreement contains rules and regulations for watchmen seeking and accepting work through dispatch.

C. Grievance Procedures and Claims of Discrimination or Harassment

1. PCL&CA Grievance Procedure

As stated, the PCL&CA applies to the longshore workers and marine clerks working for PMA employer-members along the Pacific Coast, including at the Ports of Los Angeles and Long Beach. Section 17 of the PCL&CA contains a traditional grievance/arbitration procedure for disputes arising on the job. Under this procedure, the parties first meet to informally discuss and, if possible, resolve the grievance. If unresolved, the grievance is referred to the Joint Port Labor Relations Committee ("JPLRC"), and then, if necessary, to the Joint Area Labor Relations Committee ("JALRC"). If the grievance remains unresolved, it may be submitted to the Area Arbitrator for hearing and decision. The Area Arbitrator's decision is final and binding unless appealed to the Joint Coast Labor Relations Committee ("JCLRC"). Certain matters may be submitted to the Coast Arbitrator. Section 17 sets forth the procedural requirements and timeframes for these steps.

2. PCL&CA Special Grievance Procedure for Claims of Harassment or Discrimination

1. Section 13 of the PCL&CA refers to a special grievance/arbitration procedure for complaints alleging unlawful harassment or discrimination. The International and PMA negotiated this procedure in 2001 in response to litigation and settlements of complaints of discrimination and harassment, primarily on the basis of race or sex. (Tr. 219–320.) The parties designed Section 13 to provide a more direct, efficient, and confidential process for reporting, adjudicating, and remedying complaints alleging prohibited conduct than if the complaints were handled under the Section 17 grievance/arbitration procedure.

Section 13.1 provides, in pertinent part, that:

> There shall be no discrimination . . . because of membership or non-membership in the Union, activity for or against the Union or absence thereof, race, creed, color, sex (including gender, pregnancy, sexual orientation), age (forty or over), national origin, religious or political beliefs, disability, protected family care or medical leave status, veteran status, political affiliation

[6] The Board certified the International as the representative of this coast-wide, multiemployer unit in *Shipowners' Assn. of the Pac. Coast*, 7 NLRB 1002 (1938), review dismissed sub. nom. *Am. Fed'n of Labor v. NLRB*, 103 F.2d 933 (D.C. Cir. 1939), aff'd, 308 U.S. 401 (1940).

[7] The International is the certified bargaining representative and negotiates the PCL&CA, but ILWU Local 13 handles the day-to-day representation of the longshoremen, and ILWU Local 63 handles the day-to-day representation of the marine clerks, at the Ports of Los Angeles and Long Beach.

[8] There is not yet a booklet version of the 2014–2019 Watchmen's Agreement. Joint Exhibit 1 is the 2008–2014 Agreement. Joint Exhibit 2 is the Memorandum of Understanding reflecting the agreed upon revisions to the Agreement following the 2014 negotiations between Local 26, PMA, and the four employer-members. These combined documents constitute the applicable 2014–2019 Agreement.

> or marital status. Also prohibited by this policy is retaliation of any kind for filing or supporting a complaint of discrimination or harassment. . . .

Section 13.2 provides, in pertinent part, that:

> All grievances and complaints alleging incidents of discrimination or harassment (including hostile work environment) . . . based on race, creed, color, sex (including gender, pregnancy, sexual orientation), age (forty or over), disability, national origin, or religious or political beliefs, or alleging retaliation of any kind for filing or supporting a complaint of such discrimination or harassment, shall be processed solely under the [Special Section 13.2 Grievance/Arbitration Procedures for the Resolution of Complaints of Discrimination and Harassment Under the PCL&CA] with the exception of those types of grievances and complaints described in Section 13.3.

Section 13.3 provides, in pertinent part, that:

> Grievances and complaints alleging . . . discrimination . . . based on protected family care or medical leave status, veteran status, political affiliation, marital status, membership or nonmembership in the Union, or activity for or against the Union or absence thereof, are . . . to be filed and processed with the [JPLRC] under the grievance procedures in Section 17.4 of the [PCL&CA] . . .

The International and PMA negotiated three Letters of Understanding ("A", "B", and "C") setting forth the procedures and remedies for complaints under section 13. Those Letters of Understanding and other related documents are contained in the Special Section 13.2 Grievance Handbook. (Jt. Exhs. 7 and 8.) The 13.2 procedure is limited to complaints by bargaining unit longshore workers and marine clerks, PMA member companies, PMA, or longshore and marine clerk ILWU locals alleging discrimination in relation to PCL&CA covered employment by individuals on the basis of one or more of the protected categories specifically listed in section 13.2. Those who have standing can individually file a 13.2 complaint concerning incidents of discrimination or harassment (including hostile work environment) in connection with any action subject to the terms of the PCL&CA (including at work sites, joint dispatch halls, training sites, and other locations, when reasonably related to employment covered by the PCL&CA), or alleging retaliation of any kind for filing or supporting a complaint of such discrimination or harassment. The complaint must be written on a 13.2 grievance form and submitted within 15 days of the alleging prohibited conduct. The Section 13.2 grievance does not go through the labor-management committees. Instead, it is referred directly to a designated Section 13.2 arbitrator, who will review to determine if the grievance was properly filed. If so, the arbitrator will schedule a hearing and notify the parties, the grievant, and the accused.[9] The grievant and any longshore worker or marine clerk accused of discrimination or harassment are each permitted to have a registered worker assist and represent them, or they may request their ILWU local appoint a union representative to assist them. If the grievant and accused are represented by the same ILWU local, the local will assign separate representatives. (Jt. Exh. 8.)

The 13.2 arbitrator is generally required to hold the hearing within 14 days of receipt of the grievance, and then must issue a decision within 14 days after the close of the hearing. The Arbitrator's decision is final and binding unless a party appeals it to the Coast Appeals Officer within 15 days of the mailing of the decision. The parties have 10 days from receipt of the appeal to file a response or opposition. The Coast Appeals Officer has the authority to affirm, vacate, or modify the section 13.2 arbitrator's decision, but must do so within 14 days of receipt of the appeal. The JPLRC is required to promptly implement the remedies provided in the final decision. No other appeals or proceedings, including appeals to the JCLRC or the Coast Arbitrator, are allowed in 13.2 cases. (Jt. Exh. 8.)

Anyone found to have violated section 13.2 is subject to discipline or penalties. The minimum discipline for an employee found guilty of engaging in prohibited conduct is 7 days off work and unpaid attendance at diversity training. The minimum discipline for an employee found guilty of retaliating against someone for complaining of prohibited conduct or retaliating against someone for assisting another who complained, or for quid pro quo harassment or for physical harassment, shall be 1 month off work and unpaid attendance at diversity training. Remedies may also include: reassignment from a location where the victim works, time off without pay for longer periods, ineligibility for supervisory and/or dispatcher positions, loss of steady positions, or other remedies as deemed appropriate. Anyone found guilty is required, prior to returning to work, to review an approved training video without pay and sign a statement agreeing to abide by the EEO policy and not to engage in prohibited conduct in the future. (Jt. Exh. 8.)

On July 1, 2014, the International and PMA entered into a Letter of Understanding to clarify that section 13.2 and section 13.3 of the PCL&CA contain two distinct procedures for handling complaints filed pursuant to section 13.1. (Jt. Exh. 9.)[10] It states that section 13.2 is limited to complaints alleging discrimination in relation to PCL&CA covered employment by individuals on the basis of one or more of the protected categories specifically listed in section 13.2, and that "[c]omplaints filed pursuant to the Section 13.2 procedure can be brought against longshore workers, marine clerks, casual workers, walking bosses/foremen, superintendents, managers, outside truck drivers, vendors, contractors, other employees of PMA member companies (such as ILWU-represented guards), etc., but such complaints can only be brought by longshore workers, marine clerks, casual workers, PMA, the longshore and marine clerk ILWU locals, and employers covered by the PCL&CA." (Jt. Exh. 8, pp. 2–3.)[11]

[9] The JPLRC or the Arbitrator may issue interim relief pending the outcome of the proceeding, including temporary job re-assignment, transfer, or separation of the accused from the grievant. (Jt. Exh. 8.)

[10] Jt. Exh. 9 originally was incomplete and has since been replaced with a complete version.

[11] The Letter of Understanding also clarified that intra-union factional quarrels over intra-union political disputes and union business unrelated to PCL&CA covered employment are not covered by Section 13.1 and are not subject to resolution under either Section 13.2 or Section 13.3. Additionally, it clarified that nothing in Section 13.1 permits a complaint

Local 26 had no involvement in the negotiation of the PCL&CA or the Letters of Understanding relating to the 13 grievance/arbitration procedure.

3. Watchmen's Agreement's grievance procedure

As stated, the Watchmen's Agreement applies to the watchmen working for PMA employer-members at the Ports of Los Angeles and Long Beach.[12] Article 18 of the Watchmen's Agreement is entitled "Labor Relations Committees and Grievance Machinery." Article 18 states, in pertinent part, the following:

> A. The parties shall establish a local Labor Relations Committee [hereinafter referred to as the "Joint Port Watchmen Labor Relations Committee" or "JPWLRC"].[13] The Committee shall meet to resolve grievances, secure conformance to the terms of the Agreement, maintain current employee registration rosters, maintain dispatch procedures, and generally administer the Agreement.
>
> B. The [JPWLRC] shall be composed of one or more persons representing the employee and designated by [Local 26] and one or more persons representing the Employers and designated by PMA. Each side shall give written notice to the other of their designated [JPWLRC] representatives and each side shall have one vote . . .
>
> C. The [JPWLRC] shall establish rules and regulations governing the conduct of watchmen as well as penalties for the breach of these rules and regulations. However, nothing herein shall restrict the Employer's existing right to discipline or discharge men for intoxication, pilferage, assault, incompetency, or failure to perform work as directed, but any man who considers that he has been improperly disciplined or discharged may appeal to the [JPWLRC]. Employers agree to a 24- month statute of limitations for all employer complaints as outlined in Meeting No. 15–99. The progressive penalty also applies to employer complaints.[14]
>
> D. Prior to a complaint being filed by the Employer or the Union, the following procedures shall apply:
>
> (1)(A.) The Employer shall notify and discuss the alleged incident with the individuals involved and president and/or a steward of [Local 26] and attempt to resolve the matter. Whatever evidence the parties have or have relied upon relating to the discharge and/or grievance shall be provided to [Local 26] at the time of request. Any evidence submitted in an arbitration hearing must first be discussed at the [JPWLRC] level. If such new evidence has not been discussed at the time of the arbitration hearing, it will be referred back to the [JPWLRC] for discussion. Following a good faith discussion with [Local 26], or inability to contact the designated [Local 26] representative within a reasonable time period, the Employers may implement the established procedures as outlined in Articles 18 and 19 of the Agreement.
>
> (B.) The Union shall notify and discuss the alleged incident with management and attempt to resolve the matter. Whatever evidence the parties have or have relied upon relating to the grievance shall be provided to the Employer at the time of request. Any evidence submitted in an arbitration hearing must first be discussed at the [JPWLRC] level. If such new evidence has not been discussed at the time of the arbitration hearing, it will be referred back to the [JPWLRC] for discussion. Following a good faith discussion with the Employer, or inability to contact the designated management representative within a reasonable time period, the Union may implement the established procedures as outlined in Articles 18 and 19 of the Agreement.
>
> (2.) In cases of discipline and/or discharge, the Employer shall identify, specifically, and describe in detail the violation committed by the watchman. The Employer shall specify the company procedure and/or [c]ontract provision violated.
>
> E. The [JPWLRC] shall schedule a meeting at the request of either party to hear any grievance arising under the Agreement. If a satisfactory settlement cannot be reached by the JPWLRC, either party may refer the matter for decision to the Watchmen's Area Arbitrator.[15] The Watchmen Area Arbitrator['s] decision shall be provided to each party in writing and considered final and binding, unless an appeal is made within seven (7) working days to the ILWU/PMA Local 26 Appeals Arbitrator as provided in (f) below.
>
> F. Any decision of the Watchmen Arbitrator claimed by either party to conflict with the Agreement may be referred at the request of such party to the ILWU/PMA Local 26 Appeals Arbitrator. The ILWU/PMA Local 26 Appeals Arbitrator's decision shall be final and binding.
>
> G. Arbitrator's decisions must be based upon the showing of facts and their application under the specific provisions of the Agreement as written. If an Arbitrator holds that a particular dispute does not arise under the Agreement, then such dispute shall be subject to arbitration only by mutual consent. The cost of arbitration proceedings shall be borne equally by the parties.

challenging the sections of the PCL&CA with which an individual has a general disagreement. (Jt. Exh. 9.)

[12] PMA has employer-members who employ watchmen in northern California at the Ports of Oakland and San Francisco, and those watchmen are represented by ILWU Local 75. Like Local 26, Local 75 negotiates its own collective-bargaining agreement with PMA and its employer-members covering just the watchmen at the Ports of Oakland and San Francisco. (Jt. Exhs. 3–4.)

[13] In the record, the terms "local Labor Relations Committee," "Watchmen's Labor Relations Committee," and "Joint Port Watchmen Labor Relations Committee" are all used to refer to this Committee.

[14] The minutes from Meeting No. 15-99 are attached to the Watchmen's Agreement. They establish the following disciplinary guidelines for violations of the Dispatch Rules and Procedures: First Offense—Warning/Reprimand; Second Offense—30-day Suspension; Third Offense—Six Months Suspension; Fourth Offense—Deregistration. (Jt. Exh. 1, pg. 107.)

[15] In April 2009, the PMA and Local 26 entered into Letter of Understanding #18, requiring that the parties "jointly select and appoint an Area Arbitrator who shall serve at our discretion for all arbitrations in accordance with the [Watchmen's Agreement]." During the 2014 negotiations, the Employers submitted 3 names for consideration. (Jt. Exh. 1, pg. 34; Jt. Exh. 2, pg. 10.)

> H. This grievance machinery shall be the exclusive remedy with respect to any dispute arising under the Collective-Bargaining Agreement and no other remedies shall be used by [Local 26], the Employer, or any covered employee until the grievance procedures have been exhausted.
>
> i. An Employer Complaint (EC) is only applicable to the terminal where the complaint arose, for dispatch purposes only.[16]
>
> . . . .

(Jt. Exh. 1, pg. 33–36) (Jt. Exh. 2; 8–10.)

4. Watchmen's Agreement Discrimination Provision and Efforts to Adopt or Apply Section 13.2

Like the PCL&CA, the Watchmen's Agreement prohibits certain forms of discrimination. Specifically, article 16 prohibits "discrimination . . . either in favor of or against any person because of membership or nonmembership in the Union, activity for or against the Union or absence thereof, race, color, national origin, religious or political beliefs, sex, age, Veteran's status, or disability." (Jt. Exh. 1, p. 32.) The parties apply Article 16 to also prohibit harassment. (PMA Exhs. 10, 11, and 12.) Unlike the PCL&CA, the Watchmen's Agreement does not have a special grievance/arbitration procedure allowing an employee to individually file a grievance alleging discrimination or harassment that is referred directly to an arbitrator for review, hearing, and decision.[17]

PMA proposed adding language from section 13.2 to the Watchmen's Agreement during the last two contract negotiations. Local 26 rejected those proposals. During the negotiations over the 2008–2014 Agreement, PMA and its member-employers (including LBCT) provided Local 26 with a packet of documents, including the Letters of Understanding between the International and PMA addressing the grievance/arbitration procedures and remedies. (GC Exh. 2.) Local 26 President Luisa Gratz and Local 26 Trustee Victor Gasset were both members of Local 26's bargaining committee during these negotiations. Both testified that PMA wanted to include these same grievance/arbitration procedures in the Watchmen's Agreement, Local 26 rejected that proposal, and PMA eventually dropped the proposal prior to the parties reaching an overall agreement. (Tr. 72–75; Tr.125) (GC Exhs. 3 and 4.)

During the negotiations over the 2014–2019 Watchmen's Agreement, PMA and its employer-members (including LBCT) proposed revising Article 16 to add special procedures similar to those in the Letters of Understanding between the International and PMA concerning how claims under section 13.2 of the PCL&CA are processed. Specifically, on October 9, 2014, PMA proposed changing Article 16 to allow any employee to file "special" grievances alleging violation of Article 16 with the Area Arbitrator, and that Arbitrator would then hold a hearing within 14 days of the grievance on the merits and issue a decision within 14 days of the hearing. (GC Exh. 5.) Gasset, Gratz, and Local 26 steward Mark Reyes were on Local 26's bargaining committee during these negotiations. They each testified that Local 26 rejected the proposal, and PMA eventually withdrew it prior to the parties reaching their current agreement. (Tr. 105–106; 129–130; and 303–304) (GC Exhs. 5–7.) Gasset testified Local 26 did not want the proposed language added to Article 16 because "it's a way for the union and PMA to wash their hands of a situation and to pit member against member . . . instead of resolving it amicably. It's a way for them to just say, hey, you guys handle it. Easy way to get somebody fired." (Tr. 95; GC Exhs. 3–7.)

The Watchmen's Agreement does not have a management rights' provision, and Article 21 of the Agreement states that no provisions or term of the Agreement may be amended, modified, changed, altered, or waived, except by written agreement executed by the parties. (Jt. Exh. 1, p. 45.)

In February 2017, a female Local 26 watchman attempted to file a 13.2 grievance against a male Local 26 watchman, alleging race and sex harassment and discrimination. On February 24, PMA Labor Relations Representative Eric Naefke emailed Local 26 President Gratz to inform her about the grievance and to request a labor relations committee meeting with the grievant and the accused to discuss the matter. (Tr. 140–141; GC Exh. 8.) That same day, Gratz responded with a handwritten fax, stating:

> As you know, in our CBA, Local 26 does <u>not</u> participate in the 13.2 process which <u>is</u> provided for in the [PCL&CA]. PMA proposed Local 26 participation during the past two contract negotiations whereby your proposal was rejected. PMA can <u>not</u> lawfully require Local 26 or our members to appear [and/or] participate in your unilateral imposition of another local's contract process. This violates the Local 26 CBA. Local 26 demands that you respect our CBA [and] cease [and] desist any such unilateral action including any retaliation to Local 26 [and] our members.

(GC Exh. 8.)

On February 28, Naefke responded to Gratz, stating the reason for the meeting was not to conduct a Section 13.2 hearing, but to address the concerns of Local 26 watchmen who feel like they are being harassed on the job. (PMA Exh. 3).[18]

D. Unfair Labor Practices

On March 28, 2017,[19] Demetrius Pleas, a watchman represented by Local 26 and subject to the Watchman's Agreement and a marine clerk represented by ILWU Local 63 and subject to the PCL&CA got into a dispute about work jurisdiction while

[16] There are rules attached to the Agreement. Rule 5 of the "Registered Watchmen's Rules" states "registered watchmen who have open [e]mployer complaints and/or disciplinary grievances filed against them will not be dispatched to that particular terminal until the case is resolved." (Jt. Exh. 1, pg. 97.)

[17] ILWU Local 75 which represents the watchmen at the Ports of Oakland and San Francisco, and the unions representing the foremen/walking bosses working for PMA employer-members at the ports in California, Oregon, and Washington, each have agreed during their contractual negotiations with PMA to include a special grievance/arbitration procedure similar to Section 13.2 into their individual collective-bargaining agreements. Local 26 is the only union representing dockworkers working for PMA employer-members who has not agreed to include such a procedure in its agreement. (Tr. 245–246.)

[18] The 13.2 grievance was never processed. This female watchman later attempted to pursue a grievance under sec. 16 of the Watchmen's Agreement, but was unsuccessful. Thereafter, she filed a civil suit against PMA and the employer-member, alleging discrimination and harassment. (PMA Exh. 7.)

[19] All dates hereinafter refer to 2017, unless otherwise stated.

they were both working for LBCT at the Port of Long Beach. During the course of their argument, both men allegedly cursed and engaged in racial name-calling. The marine clerk alleged that Pleas used a politically descriptive term in trading insults with him and made a threat of violence. Pleas alleged that the marine clerk threatened that he could have Pleas fired. Later that day, the men resolved the dispute informally in a meeting with LBCT's general manager, a sergeant, and an ILWU Local 63 representative. On March 30, the marine clerk filed a Section 13.2 grievance against Pleas under the PCL&CA. (Jt. Exhs. 12(a) and 16.)[20] The 13.2 grievance was assigned to Arbitrator Mark Mascola for hearing. There is no dispute that this was the first time that a Section 13.2 grievance was successfully filed against a Local 26 watchman. (Tr. 152.)

On March 31, Arbitrator Mascola scheduled a hearing for May 3, and he notified Pleas and ordered him to appear. (Jt. Exh. 12(b).)[21] On around April 19, PMA Labor Relations Representative Eric Naefke informed Local 26 President Gratz that a 13.2 grievance had been filed against Pleas, and that a hearing was scheduled for May 3. Naefke and Gratz had a telephone conversation and Gratz informed Naefke that Section 13.2 is not contained in the Watchmen's Agreement and it could not be applied to discipline Pleas. In their conversation, Gratz told Naefke that neither she nor Pleas would attend the 13.2 hearing. Gratz told Naefke that in her view "any asshole on the waterfront could provoke any one of Local 26's members into an argument and then subject them to this kangaroo court." (Tr. 153.) Naefke told Gratz that she and Pleas should be at the hearing, and that she should "tell it to the arbitrator." Gratz told him that they would not be there.[22] (Tr. 153–154.)

On April 27, Local 26's attorney sent a letter to PMA, stating that Local 26 was not a party to the PCL&CA and section 13.2 does not apply to Local 26 or its members. Local 26, therefore, requested that PMA cease and desist from imposing any requirement on a Local 26 member to participate in any proceeding that Local 26 is not a party to, and PMA should not take any adverse action against Local 26 members based on those proceedings. Local 26 also advised PMA that because Local 26 is not bound by the provisions of Section 13.2 of the PCL&CA, Local 26 and its members would not participate in or appear at any proceedings conducted under that section. (Jt. Exh. 10.)

On May 2, PMA responded in a letter, stating that while Local 26 is not a party to the PCL&CA, the 13.2 grievance procedure has been a component of the watchmen's terms and conditions of employment since 2001, and that it is the established way for investigating and remedying allegations that watchmen have engaged in section 13.2 prohibited conduct against longshore workers and marine clerks, and Local 26 has never negotiated any changes to those procedures. PMA added that if the accused (Pleas) does not appear, he will not be able to defend himself; and if Local 26 does not appear, the accused will not have an advocate. PMA concluded by stating that LBCT, as well as all other employers covered under the Watchman's Agreement, are required to implement, and will implement, whatever final order the arbitrator issues. (Jt. Exh. 11.)

That same day LBCT's Manager of Labor Relations John Beghin called PMA representative Philip Tabyanan to state that LBCT had no interest in being dragged into a dispute between the two ILWU locals and asked that PMA maintain LBCT's status as a non-party to the proceedings. Beghin asked PMA to object to any attempt to bring LBCT into the dispute. (Tr. 420–421)

The Section 13.2 arbitration hearing occurred on May 3. Eric Naefke and Phillip Tabyanan, from PMA, and John Beghin and Steven Ybarra, from LBCT, attended the hearing, along with representatives from ILWU Local 63 and witnesses to the alleged altercation between Pleas and the marine clerk. Neither Pleas nor a representative from Local 26 attended. At the start of the hearing, Tabyanan informed Arbitrator Mascola that he was there on behalf of LBCT. (Jt. Exh. 12(c), p. 12.) During the hearing, Arbitrator Mascola had an exchange with Tabyanan about whether a Local 26 watchman was subject to Section 13.2, and Tabyanan stated the July 1, 2014 Letter of Understanding between PMA and the International "speaks to" that matter. (Jt. Exh. 12(c), p. 50.) At the conclusion of the hearing, Tabyanan joined in a motion for Arbitrator Mascola to issue an interim order prohibiting Pleas from being dispatched to LBCT until the formal decision on the grievance issued. (Jt. Exh. 11, pp. 53–58.) Arbitrator Mascola issued the requested interim remedial order. (Jt. Exh.12(d).)

On June 5, Arbitrator Mascola issued his formal decision. He found Pleas guilty of violating section 13.2 and suspended him from working for all PMA employer-members for 28 days. The order barred Pleas from being on the premises, including parking lots, of any terminal under the PCL&CA. He also was ordered, prior to returning to work, to watch an approved EEO training video, without pay, and sign a statement agreeing to abide by the EEO policy and not to engage in prohibited conduct in the future. (Jt. Exh. 12(e).)

On June 19, Local 26 appealed the arbitration decision and order to the Coast Appeals Officer, primarily challenging the

[20] This was not the first time that Pleas was alleged to have engaged in harassing conduct. In March 2016, Pleas had a verbal altercation with another Local 26 watchman while working at LBCT's facility. (PMA Exhs. 11 and 12.) Pleas allegedly made statements of a discriminatory or harassing nature. LBCT conducted an investigation and filed an employer complaint against Pleas. (PMA Exh. 11.) In accordance with the Watchmen's Agreement, the complaint was referred to the JPWLRC, which issued a letter placing Pleas on nondispatch to LBCT until the JPWLRC could meet to further address the allegations against him. (LBCT Exh. 1.) The JPWLRC eventually met and determined that both individuals had violated art. 16 of the Watchmen's Agreement, and the JPWLRC required both to attend an unpaid diversity training class. (PMA Exh. 12; GC Exhs. 9 and 10.)

[21] On March 31, LBCT Manager Bill Carson sent Local 26 President Gratz a letter informing her that LBCT would be conducting an investigation into the alleged altercation between Pleas and the marine clerk. (GC Exh. 9.) Carson informed Gratz that LBCT would finalize its investigation shortly and, if necessary, pursue art. 18 discipline, including discharge, of Pleas. (GC Exh. 9.) LBCT eventually issued Pleas a warning that "[a]ny future occurrences of this nature will be dealt with through the JLRC process which could include firing and a complaint filed." (GC Exh. 10.) It is unclear whether this reference to the JLRC meant the JPWLRC or one of the joint committees described in the PCL&CA.

[22] Gratz had a conversation with Pleas, and she recommended that he not request dispatch to LBCT out of concern that he would be targeted. Pleas followed her recommendation. (Tr. 151–152.)

arbitrator's jurisdiction to hear and decide the matter since Local 26 was not a party to the PCL&CA and not subject to the section 13.2 procedures. In its appeal, Local 26 argued that the remedial order violated the terms of the Watchmen's Agreement. (Jt. Exh. 12(f)(ii).) On July 6, the Coast Appeals Officer (Larry Schwerin) upheld Arbitrator Mascola's decision and order, finding the conclusion that Pleas was subject to section 13.2 was "supported by the contract and the letter of understanding that submits some non-bargaining unit employees to sanctions for violations of section 13.2."

PMA informed all its employer-members of the 13.2 proceedings and the arbitration order. PMA also notified the third-party contractor who administers the dispatch of watchmen. (Jt. Exhs. 13 and 14.)

On around July 19, Pleas was dispatched to work for Hanjin, an employer-member under the Watchmen's Agreement. Upon arriving at the facility, Pleas was ordered to leave. Pleas contacted Gasset what had occurred. Gasset contacted Hanjin, who confirmed that PMA had informed Hanjin that Pleas was barred from assignment to that facility. (Tr. 83–84.)

I. DISCUSSION AND ANALYSIS

A. Overview

Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. Section 8(d) defines this duty to bargain as requiring the employer to meet at reasonable times, to confer in good faith over wages, hours, and other terms or conditions of employment, and to put into writing any agreement reached if so requested. Once an agreement is reached, the employer is prohibited from modifying the terms and conditions of employment contained therein without the union's consent. See *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984). Whether or not there is an agreement, an employer also is prohibited from changing unit employees' wages, hours, or other conditions of employment without first notifying and bargaining with the union. Id.

The General Counsel alleges Respondents violated Section 8(a)(5) and (1) of the Act by processing the marine clerk's complaint and disciplining Pleas in accordance with section 13.2 of the PCL&CA.[23] The General Counsel first asserts, under a "contract modification" theory, that by applying section 13.2 to Pleas and by implementing, inter alia, the arbitrator's disciplinary/remedial order, Respondents changed the disciplinary procedures and penalties contained in the Watchmen's Agreement, and failed to continue in effect all the terms and conditions of that Agreement, without the consent of Local 26. In the alternative, the General Counsel asserts, under "unilateral change" theory, that Respondents altered the terms and conditions of employment applicable to the Local 26 watchmen by adopting a formal investigative and disciplinary process, which included new standards and penalties, and disciplined a Local 26 watchman pursuant to that new process, without providing Local 26 with notice and an opportunity to bargain over the change.

The Board has held that "contract modification" cases and "unilateral change" cases are different in terms of principle, possible defenses, and remedy. *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), enfd. 475 F.3d 14 (1st Cir. 2007). Specifically, the Board explained:

> In terms of principle, the "unilateral change" case does not require the General Counsel to show the existence of a contract provision; [the General Counsel] need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*. The allegation is a failure to

[23] LBCT contends it was an "innocent bystander" and should not be held liable. Specifically, LBCT contends it played no role in the marine clerk's filing of the 13.2 grievance against Pleas and/or the subsequent arbitration of that grievance, other than as an observer during the hearing. It also argues that it had no involvement in the enforcement of the Section 13.2 arbitration order suspending Pleas from being dispatched. LBCT further asserts that it never authorized PMA to act as its agent in the processing of the marine clerk's grievance or the enforcement of the arbitration order. I reject these arguments. LBCT is a party to the Watchmen's Agreement and bound by its terms. It had the same statutory obligation to adhere to and not modify that Agreement as PMA, and it had the same statutory obligation not to make unilateral changes to the applicable disciplinary procedures and penalties contained in the Watchmen's Agreement governing the alleged conduct at issue. Furthermore, even if LBCT did not actively participate in the processing of the grievance or the enforcement of the order, or actively restrict dispatch of Pleas, an employer cannot be absolved of liability if it knowingly allows its agent to violate the Act, even if the employer itself does not actively participate in the violation. Under the common law principles of agency, actual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent. Under this concept, the principal will be held responsible for actions of its agent when it knows or "should know" that its conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for it. RESTATEMENT 2D AGENCY § 27. As with actual authority, apparent authority can be created either expressly or by implication. See *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988) (citing Restatement 2d Agency, §27 comment a.). See also *Communication Workers Local 9431 (Pacific Bell),* 304 NLRB 446, 446 fn. 4 (1991). A principal is responsible for an agent's actions even if it did not authorize the particular act under scrutiny, so long as the act was within the agent's general scope of authority. See *Electrical Workers Local 3 IBEW*, 312 NLRB 487, 490–491 (1993). And, as for apparent authority, an employer is responsible for the acts of an agent if it has placed the agent in a position where it could reasonably be believed the agent spoke on the employer's behalf. See *Dentech Corp.*, 294 NLRB 924 (1989), and *Allegany Aggregates, Inc.*, 311 NLRB 1165 (1993). PMA is LBCT's authorized agent for the purposes of administering the PCL&CA and the Watchmen's Agreement, and LBCT, therefore, is liable for PMA's conduct while acting in that capacity.

Furthermore, I find LBCT was actively involved. It initially handled the marine clerk's grievance in accordance with article 18 of the Watchmen's Agreement, but later abandoned those procedures in favor of the 13.2 process. LBCT Manager Carson informed Local 26 that the grievance would be processed in accordance with sec. 13.2. When Local 26 President Gratz objected, Carson told her she should appear at the arbitration hearing and "tell it to the arbitrator." At the hearing, Tabyanan acted as LBCT's representative. He informed Arbitrator Mascola that the July 1, 2014 Letter of Understanding "spoke to" whether Section 13.2 applied to Local 26 watchmen, and he joined in the motion for an interim order barring Pleas from dispatch to LBCT until a final decision issued.

> bargain. In the "contract modification" case, the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract. In terms of defenses, a defense to a unilateral change can be that the union has waived its right to bargain. A defense to the contract modification can be that the union has consented to the change. In terms of remedy, a remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract.

Id. (emphasis in original).

B. Contract Modification

As stated, to prove a violation under the "contract modification" theory, the General Counsel must establish that the employer modified a contractual provision. *Bath Iron Works Corp*., 345 NLRB at 502. The employer may defend by proving it had a "sound arguable basis" for its belief that the contract authorized its unilateral action. Id. See also *American Electric Power*, 362 NLRB 803, 803, 805 (2015) (sound arguable basis found when employer's interpretation is supported by past practice). Where the dispute is solely one of contract interpretation and there is no evidence of animus, bad faith, or intent to undermine the union, the Board does not seek to determine which of two *equally plausible* contract interpretations is correct. See *Phelps Dodge Magnet Wire Corp*., 346 NLRB 949, 951 (2006) (citing *Atwood & Morrill Co*., 289 NLRB 794, 795 (1988)).

The Board assesses whether a party's contract interpretation has a "sound arguable basis" by applying traditional principles of contract interpretation. The parties' actual intent underlying the contractual language in question is always paramount, and is given controlling weight. To determine the parties' intent, the Board begins with the contract language itself, and then at any relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself. *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 3 (2017); *Mining Specialists, Inc.*, 314 NLRB 268, 268–269 (1994).

The General Counsel alleges Respondents made an unlawful mid-term contract modification when they processed the complaint and disciplined Pleas in accordance with section 13.2 of the PCL&CA rather than article 18 of the Watchmen's Agreement. The General Counsel cites to the plain language of article 18 and argues that its procedures and penalties apply when an employer files a complaint against, disciplines, or discharges a Local 26 watchman for misconduct.[24] Article 18(D) requires that the employer notify and discuss the alleged incident with the individuals involved and with Local 26 to attempt to resolve the matter. Any complaint or grievance filed is referred to the JPWLRC for its review. If there is no resolution before the JPWLRC, Article 18(E) provides that either party may submit the matter to the Watchmen Arbitrator for hearing and decision. PMA and Local 26 agreed that they are to "jointly select and appoint" the arbitrator that is to handle all arbitrations under the Watchmen's Agreement. The Watchmen arbitrator's decision is final and binding unless appealed to the ILWU/PMA Local 26 Appeals Arbitrator, whose decision is then final and binding. Article 18 clearly states it is "the exclusive remedy with respect to any dispute arising under [the Watchmen's Agreement] and no other remedies shall be used by the Union, the Employer, or any covered employee until the grievance procedures have been exhausted." As for penalties, article 18(I) requires that, for dispatch purposes, a complaint against a Local 26 watchman is only applicable to the terminal where the complaint arose.

Initially, LBCT handled the marine clerk's complaint against Pleas in accordance with article 18. (GC Exh. 9.) But rather than exhaust article 18 as required—including submitting the dispute to the JPWLRC and then, if necessary, the mutually-appointed Watchmen Arbitrator—Respondents allowed the complaint to proceed through the 13.2 process, including having the 13.2 arbitrator review and hear the dispute.[25] At the hearing, LBCT and PMA representatives attended and participated, including responding to the Arbitrator's inquiries about the applicability of section 13.2 to Local 26 watchmen. PMA and LBCT also requested that the 13.2 Arbitrator issue an interim order barring Pleas from dispatch to LBCT until a final decision issued. Thereafter, when the section 13.2 Arbitrator issued his final decision suspending Pleas from working *for all PMA employer-members* for 28 days, PMA enforced that order even though it exceeded the remedy permitted under Article 18(I) which limits dispatch restrictions to just the terminal where the complaint arose (LBCT).[26]

[24] There is no accusation that Pleas engaged in any of the safe harbor offenses described in Article 18(C) (i.e., intoxication, pilferage, assault, incompetency, or failure to perform work as directed) for which LBCT would have had the unrestricted right to discipline and/or discharge him.

[25] Respondents presented evidence and arguments regarding the history and intent of the 13.2 grievance/arbitration procedure, and why it is preferable to the traditional grievance/arbitration procedures the Watchmen's Agreement and the PCL&CA. However, the issue is not which procedure is preferable; the issues are which procedure was agreed to by the parties during the negotiations over the Watchmen's Agreement, and did Respondents unilaterally modify that procedure during the events at issue.

[26] In its posthearing brief, Counsel for General Counsel asserts for the first time that Respondents also unlawfully modified Article 14 of the Watchmen's Agreement. Article 14 states the JPWLRC shall maintain a registration roster of watchmen for dispatch, and the roster "shall be kept current and employees shall be removed from the roster because of death, retirement, lack of availability, and disciplinary action, or for any just cause as determined by the [JPWLRC]." (Jt. Exh. 1, pp. 29–30.) The General Counsel argues this provision grants the JPWLRC—not PMA or individual employers—the authority to deregister a watchman for discipline or some other just cause, and that the PMA, on its own, and as LBCT's agent, usurped the JPWLRC's contractual authority to remove employees from the register roster. I reject this argument on both procedural and substantive grounds. Procedurally, I find the complaint allegations do not encompass this alleged modification, and there was no motion to amend the complaint. I, therefore, find the matter was not fully litigated. Substantively, I do not find this argument to be supported or persuasive. Counsel for General Counsel has cited to no evidence regarding art. 14, its bargaining history, or how it has been applied. The plain language of art. 14 allows the JPWLRC to remove a watchman from the roster for just cause. But the language does not state the JPWLRC also must determine whether there was just cause for the disciplinary action prior to removing the watchman from the register. When interpreting a contract, each item in a string of terms, separated by the disjunctive "or," is given independent meaning. See 11 *Williston on*

PMA defends by arguing there has been no contract modification because nothing in the Watchmen's Agreement indicates any particular method for how claims of discrimination or harassment are to be reported, investigated, or adjudicated, and Article 18 does not prohibit the use of the 13.2 process to investigate and adjudicate claims of harassment by marine clerks against watchmen. This is simply wrong. Article 18 explicitly and unambiguously states it is the exclusive remedy with respect to any dispute arising under [the Watchmen's Agreement] "and no other remedies shall be used … until the grievance procedures have been exhausted." The Article 18 procedures were not exhausted in this case—the dispute was not submitted to the JPWLRC, not referred to the Watchmen Arbitrator, and not appealed to the ILWU/PMA Local 26 Appeals Arbitrator. Therefore, under the clear and unambiguous language of Article 18, Respondents *were* prohibited from processing the marine clerk's complaint and disciplining Pleas in accordance Section 13.2 of the PCL&CA.

Respondents next argue they had a sound arguable basis under Article 16 of the Watchmen's Agreement for applying section 13.2 to investigate and adjudicate the complaint against Pleas. As stated, Article 16 prohibits "discrimination . . . because of membership or nonmembership in the Union, activity for or against the Union or absence thereof, race, color, national origin, religious or political beliefs, sex, age, Veteran's status, or disability." Respondents argue Article 16's prohibition necessarily implies that the employers, and PMA as their collective-bargaining representative, have the right to police and enforce Article 16's mandate by investigating and correcting potential violations, and the marine clerk's harassment allegation against Pleas fell within the anti-discrimination language of article 16.

Article 16 prohibits discrimination, and it has been applied to also prohibit harassment. PMA and its employer-members may investigate and discipline a Local 26 watchman for prohibited harassment or discrimination, but in doing so they must comply with Article 18. Nothing in the language of article 16, or how it has been applied, or any other language in the Watchmen's Agreement, affords PMA or its employer-members the discretion to disregard or bypass article 18 in favor of provisions contained in section 13.2 of the PCL&CA. Again, article 18 clearly states it is the "exclusive remedy" with respect to *any dispute* arising under the Watchmen's Agreement and "no other remedies shall be used . . . until the grievance procedures have been exhausted."[27] Additionally, the bargaining history does not support Respondents' arguments. As previously discussed, during the 2014 negotiations, PMA and its employer-members proposed adding language to Article 16 to allow employees who believed that they had been harassed or discriminated against to file a "special" grievance with the Area Arbitrator, and the Area Arbitrator would hold a hearing within 14 days and then issue a decision 14 days after the hearing. Local 26 rejected that proposal, and PMA and its employer-members eventually withdrew it prior to the parties reaching an overall agreement. Respondents, therefore, failed to prove the contract provided a sound arguable basis for processing the clerk's complaint and disciplining Pleas in accordance with section 13.2 of the PCL&CA. See *Hospital San Carlos Borromeo*, 355 NLRB 153 (2010).

Respondents also contend their conduct was an effort to comply with their obligations under Federal civil rights legislation and to further public policy against unlawful discrimination and harassment.[28] In *Bridgestone/Firestone, Inc.*, 337 NLRB 133, 134 (2001), the Board found an employer violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented a new antiharassment policy. The employer argued it was attempting to further the public policy against harassment on the basis of race, color, national origin, religion, age, or disability. The Board rejected that argument and held it would not be an affront to that public policy interest to require the employer to provide the union with notice and an opportunity to bargain if it wished to pursue promulgating a policy against these forms of harassment by implementing a new work rule prohibiting them.

Article 18 requires the parties exhaust the procedures and

Contracts § 30:12 (4th ed.) (citing *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Group Limited Partnership, LLLP*, 454 Md. 475, 164 A.3d 978 (2017).

The General Counsel further argues that when Respondents processed the clerk's complaint and disciplined Pleas in accordance Section 13.2 of the PCL&CA, rather than Article 18 of the Watchmen's Agreement, they also failed to adhere to Article 21 of the Agreement, which prohibits changes without the parties' written agreement. A finding of such a violation would be cumulative, and not change the remedy. I, therefore, conclude it is not essential to decide whether this was also an unlawful modification.

[27] Respondents contend the past practice has not always been to apply art. 18 procedures to all disputes over alleged harassment or discrimination. Respondents cite to the limited testimony from Local 26 President Gratz who discussed situations in which Local 26 watchmen have reported to *Local 26* about harassment or discrimination, and that her practice in those instances has been to meet with the individuals involved and attempt to resolve the matter informally. (Tr. 142–144.) Local 26's practice is consistent with Article 18, because Article 18 encourages informal discussion and resolution. But where the employer files a complaint against, disciplines, or discharges a Local 26 watchman for prohibited discrimination or harassment, the employer must comply with Article 18. Respondents presented no evidence or examples of any other situations in which this procedure was not followed where PMA or the employer-member sought to take adverse action against a watchman for prohibited conduct.

[28] Respondents contend they are required to comply with Sec. 13.2 otherwise they would be in violation of the PCL&CA. To be sure, Respondents have obligations under the PCL&CA. But those obligations do not trump or negate Respondent's statutory and contractual obligations to Local 26. The analogous scenario is to situations where there are changes to the law affecting employees' wages, hours, and other terms and conditions of employment. The Board has held that when an employer has discretion over how to implement certain changes in employee wages, hours, or other terms and conditions of employment mandated or imposed on it by statute or regulation, it has a duty to notify and bargain with the employees' representatives over how such changes should be implemented before making any such changes. See *Hospital San Cristobal*, 358 NLRB 547, 551 (2012); *Long Island Day Care Services*, 303 NLRB 112 (1991), *Sheltering Pines Convalescent Hospital*, 255 NLRB 1195 (1981); *United Parcel Service*, 336 NLRB 1134, 1135 (2001); and *Armour & Co*., 280 NLRB 824, 827 (1986). Respondents did not exhaust the Article 18 procedures and remedies, and they never sought to bargain with Local 26 before processing the grievance and disciplining Pleas in accordance with sec. 13.2.

remedies contained therein, and Respondents failed to do so. Instead, they replaced those contractual procedures and remedies with those contained in sction 13.2 of the PCL&CA, without Local 26's consent. As a result, I find Respondents made an unlawful mid-term contract modification within the meaning of Section 8(d), in violation of Section 8(a)(5) and (1) of the Act.

C. Unilateral Change

Absent impasse or waiver, an employer violates Section 8(a)(5) and (1) if it unilaterally changes the wages, hours or terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). In order to prove a violation, the General Counsel must establish: (1) the employer made a material change to the employees' terms and conditions of employment; (2) the changes involved mandatory subjects of bargaining; (3) the employer failed to provide the union with prior notice of the change; and (4) the union did not have an opportunity to bargain with respect to the change. *San Juan Teachers Assn*., 355 NLRB 172, 175 (2010); *Flambeau Airmold Corp*., 334 NLRB 165, 171 (2001).

The material changes at issue are the adoption of the formal investigative and disciplinary procedures and penalties contained in section 13.2 of the PCL&CA to process the marine clerk's complaint and then discipline Pleas. It is well established that disciplinary policies and procedures are among the terms and conditions of employment that constitute mandatory subjects of bargaining. See *Toledo Blade Company, Inc.*, 343 NLRB 385, 385 (2004); *Migali Industries*, 285 NLRB 820, 821 (1987); and *Electri-Flex Co.*, 228 NLRB 847 (1977), enfd. as modified 570 F.2d 1327 (7th Cir. 1978), cert. denied 439 U.S. 911 (1978). The same is true regarding grievance/arbitration procedures. *Bethlehem Steel Co*., 136 NLRB 1500 (1962), enfd. in relevant part 320 F.2d 615 (3d Cir. 1963).

Respondents, however, argue there has been no material change. They contend that since section 13.2 was adopted in 2001, the status quo has been that all 13.2 complaints filed by longshore workers and marine clerks against any individual, irrespective of the identity or union membership of the accused, are to be processed in accordance with the 13.2 procedures. Respondents rely upon the Letters of Understanding negotiated by the International and PMA regarding section 13.2. Specifically, Letter of Understanding "A" states that "All longshore workers, clerks, walking bosses/foreman, superintendents or managers, outside truck drivers, vendors, contractors *and others* are required to follow [section 13.2]." (Jt. Exh. 7, pg. 1) (emphasis added). It also states that if these same individuals violate section 13.2 of the [PCL&CA] . . . [they] will be subject to discipline or penalties . . ." (Jt. Exh. 7, p. 5). On July 1, 2014, the International and PMA entered into another Letter of Understanding to clarify the two distinct procedures for handling complaints section 13.2 versus section 13.3 This Letter of Understanding states that "Complaints filed pursuant to the 13.2 procedure can be brought against longshore workers, marine clerks, casual workers, walking bosses/foremen, superintendents, managers, outside truck drivers, vendors, contractors, other employees of PMA member companies *(such as ILWU–represented guards)*, etc." (Jt. Exh. 9, p. 1) (emphasis added). Respondents rely on these documents to argue the status quo has been that section 13.2 applies to all port workers, including Local 26-represented watchmen, and there was no change when they processed the marine clerk's complaint and disciplined Pleas in accordance with section 13.2.

Respondents gloss over a critical fact: the watchmen at issue are represented by Local 26, not the International. Respondents presented no evidence (i.e., certifications, constitutions, bylaws, etc.) that the International has any authority to negotiate or enter into any agreement establishing or changing the watchmen's terms and conditions of employment. See generally, *Pacific Northwest Regional Council of Carpenters (Brand Energy Services, LLC)*, 355 NLRB 274, 278 (2010); *Iron Workers (Walker Construction Co.),* 285 NLRB 770 (1987). Moreover, Local 26 is not a party to or bound by the PCL&CA, or any of the Letters of Understanding relating to section 13.2. These documents, therefore, cannot establish the status quo applicable to Local 26 watchmen.

Respondents also argue the established practice has been to apply section 13.2 to other represented employees accused of engaging in prohibited harassment or discrimination. Specifically, Respondents cite to an example in which a truck driver or mechanic represented by the International Association of Machinists was accused by a longshore worker or marine clerk of prohibited conduct. The grievance that was filed was processed in accordance with section 13.2 of the PCL&CA, even though the IAM is not party to the PCL&CA and it was unclear whether the IAM had a section 13.2, or its equivalent, in its collective-bargaining agreement. Respondents, however, cited no authority for how an employer's conduct toward an employee in one bargaining unit establishes the status quo for employees in a separate, unrelated bargaining unit, and I am aware of none. There is no dispute that this is the first time that section 13.2 has ever been applied to a Local 26 watchman. As such, I conclude there is no past practice to support Respondents' claims that the status quo has been to apply section 13.2 to Local 26 watchmen accused of discrimination or harassment.

The General Counsel further contends Respondents failed to provide Local 26 with notice and an opportunity to bargain over these changes at issue because they presented them as a fait accompli. When an employer presents the bargaining representative with a fait accompli, however, the Board will not find a waiver. *Harley-Davidson Motor Company,* 366 NLRB No. 121, slip op. at 3 (2018); *Comau, Inc.*, 364 NLRB No. 48, slip op. at 3 (2016); *Tesoro Refining & Marketing Co.*, 360 NLRB 293, 295 fn. 10 (2014). The Board considers objective evidence regarding the presentation of the proposed change and the employer's decision-making process to determine if it was presented as a fait accompli. *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004) (employer presented fait accompli by telling union that layoff was a ""done deal"); *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023–1024 (notice stating that changes "will be implemented" and other "unequivocal language" evidence of fait accompli). The Board also evaluates the timing of the employer's statements vis-a-vis the actual implementation of the change, the manner in which the change is presented, and other evidence pertinent to the existence of a "fixed

intent" to make the change at issue which obviates the possibility of meaningful bargaining. *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). In this case, on around April 19, PMA informed Local 26 that a 13.2 grievance had been filed against Pleas, and that the hearing before the 13.2 area arbitrator was scheduled for May 3. Local 26 immediately objected, stating it was not a party to the PCL&CA, and section 13.2 does not apply to its members. On April 27, Local 26's counsel sent PMA a letter reiterating this and requesting that PMA cease and desist from imposing any requirement on any Local 26 member to participate in any 13.2 proceeding. PMA responded to Local 26's letter, stating that LBCT, as well as all other employers covered under the Watchman's Agreement, are required to implement, and will implement, whatever final order the 13.2 arbitrator issues. I conclude this letter demonstrates a fixed intent and announced to Local 26 that it was processing the grievance against Pleas through the 13.2 procedure.

Overall, I find that by processing the marine clerk's complaint and disciplining Pleas in accordance with section 13.2 of the PCL&CA, Respondents materially changed the terms and conditions of employment for Local 26 watchmen without providing Local 26 with notice and an opportunity to bargain, in violation of Section 8(a)(5) and (1) of the Act.

D. Affirmative Defenses

1. Waiver and contract coverage

Respondents argue that Local 26 waived its right to bargain over the changes at issue. Specifically, they argue that by agreeing to Article 16 of the Watchmen's Agreement Local 26 *implicitly* waived its right to bargain over whether discipline may be imposed on watchmen for engaging in prohibited discrimination or harassment. The Board applies the "clear and unmistakable waiver" standard in determining whether an employer has the right to make unilateral changes in unit employees' terms and conditions of employment during the life of the collective-bargaining agreement. *Provena St. Joseph Medical Center*, 350 NLRB 808, 810 (2007). In a unilateral change case, a collectively-bargained provision may be deemed to constitute a waiver by the union of the employer's duty to bargain over the conduct, but only if the contract's text, or the parties' practices and bargaining history "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." Id. at 811. The party claiming waiver has the burden of proof. *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed.Appx. 65 (D.C. Cir. 2004). Establishing waiver is a heavy burden, not to be lightly inferred. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). See also *Georgia Power Co*., 325 NLRB 420, 420–421 (1998). Waiver can occur in three ways: by express provision in an agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two. *American Diamond Tool*, 306 NLRB 570, 570 (1992). The Board has held the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter. *Allison Corp*., 330 NLRB 1363, 1365 (2000).

Some courts have rejected the Board's use of a "clear and unmistakable waiver" analysis in favor of a "contract coverage" analysis. See, e.g., *Bath Marine Draftmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007); *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936–937 (7th Cir. 1992). The D.C. Circuit of Appeals explained the "contract coverage" analysis as follows:

> [T]he duty to bargain under the NLRA does not prevent parties from negotiating contract terms that make it unnecessary to bargain over subsequent changes in terms or conditions of employment. The union may exercise its right to bargain about a particular subject by negotiating for a provision in a collective bargaining contract that fixes the parties' rights and forecloses further mandatory bargaining as to that subject. To the extent that a bargain resolves any issue, it removes that issue *pro tanto* from the range of bargaining. This court has referred to this inquiry as an analysis of whether an issue is covered by a collective bargaining agreement.

NLRB v. Postal Service, 8 F.3d at 836 (internal quotations and citations omitted).

In *Provena*, the Board rejected the "contract coverage" analysis and reaffirmed its adherence to the "clear and unmistakable waiver" standard. 350 NLRB at 810. I am required to follow Board precedent where neither the Board, nor the Supreme Court has reversed. *Pathmark Stores, Inc*., 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984). But, as discussed below, the result would be the same regardless of the test applied.

Respondents contend Article 16 of the Watchmen's Agreement *implicitly* gives PMA and its employer-members the clear and unmistakable authority to enforce the prohibition against discrimination and harassment, because without the right to correct conduct that violates article 16, the provision would have no purpose. Respondents further argue that because article 16 covers workplace discrimination and harassment, and article 18 provides the Local 26 and the worker with resolution through a grievance-arbitration process in the event that such discipline is "improper," there is no continuing duty to bargain over this subject.

Article 16 is silent as to how allegations of prohibited harassment or discrimination are to be adjudicated or remedied. Contractual silence will not be inferred to constitute a clear and unmistakable waiver of a union's statutory right to bargain. See *Bierl Supply Company*, 179 NLRB 741 (1969); *J. H. Bonck Company, Inc.*, 170 NLRB 1471, 1479 (1968). Particularly when Local 26 rejected PMA's October 8, 2014 proposal during the 2014 negotiations to modify article 16 to add procedures similar to those in section 13.2 of the PCL&CA, which resulted in PMA withdrawing the proposal prior to the parties reaching the

current overall agreement.[29] The combination of contractual silence and this bargaining history undermines Respondents' arguments that article 16 implicitly affords PMA and its employer-members the discretion to determine how alleged violations of article 16 are to be adjudicated and remedied.

In contrast, article 18 clearly sets forth the applicable procedure when an employer files a complaint against, disciplines, or discharges a Local 26 watchman. Article 18 is the exclusive remedy with respect to *any dispute* arising under the Watchmen's Agreement and no other remedies may be used until the grievance procedures contained therein have been exhausted. And while there was a dispute over whether Pleas engaged in prohibited conduct, Respondents did not exhaust Article 18 before processing the marine clerk's grievance and disciplining Pleas in accordance with section 13.2 of the PCL&CA. Respondents presented no contractual language, bargaining history, or past practice that establishes PMA or its employer-members had the discretion to disregard or bypass these procedures.[30] See *Georgia Power Co*., 325 NLRB 420, 420–421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999).

As a result, Respondents have failed to establish waiver under either the "clear and unmistakable" standard or the "contract coverage" standard.

2. Untimely under Section 10(b)

Respondents also contend the allegations are time barred under Section 10(b) of the Act. Section 10(b) provides that "no complaint shall be based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The Board has held that only the actual occurrence of an unfair labor practice starts the running of the 6-month statute of limitations; statements of intent or threat to commit unfair labor practices do not. *Leach Corp*., 312 NLRB 990, 991 (1993). Further, the limitations period begins to run only when a party has clear and unequivocal notice, either actual or constructive, of the violation. *Art's Way Vessels, Inc*., 355 NLRB 1142, 1147 (2010). The burden of showing such notice is on the party raising the 10(b) defense. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004).

Respondents contend Local 26 has been aware since at least 2008 of the 13.2 process and procedure, and that it would apply in the event that a longshore worker or marine clerk filed a complaint against a Local 26 watchman. PMA cites for support that Gratz and Gasset, Local 26 representatives involved in the 2008 negotiations, testified that they were generally familiar with the 13.2 process. Gratz testified that she had "read" section 13.2 and knew what it says, and Gasset testified that "[Local 26 knows] what 13.2 is and [doesn't] want it." PMA argues the fact that Local 26 rejected PMA's proposals during the 2008 negotiations to add a 13.2 process to the Watchmen's Agreement further confirms its understanding and knowledge of section 13.2's salient features.

The fact that Local 26 was aware of the 13.2 process, and that Respondents proposed adding it to the Watchmen's Agreement during the 2008 negotiations, is not actual or constructive notice that 13.2's procedures and penalties would be applied if a longshore worker or marine clerk ever accused a Local 26 watchman of harassment or discrimination. Regardless, even if PMA or the employer-members had communicated intent or plan to apply section 13.2 if a Local 26 watchman was accused of prohibited harassment or discrimination, such statements of intent or plan are insufficient to trigger the 10(b) period, because, as stated, it is the actual occurrence—not the statement of intent or plan—that starts the clock. Based on the record, the first notice Local 26 received was when PMA and LBCT notified Local 26 that it was going to process the marine clerk's grievance against Pleas under that provision of the PCL&CA, which was in early April 2017. Local 26 filed the instant charges within 6 months of that notice. I, therefore, reject that the allegations are untimely.

3. Failed to join indispensable party

Respondents contend the complaint should be dismissed because the General Counsel failed to join the International and the other employers subject to both the Watchmen's Agreement and the PCL&CA as necessary and indispensable parties under Rule 19 of the Federal Rules of Civil Procedure (FRCP).[31] The Board's Rules and Regulations do not require application of the FRCP to Board proceedings. The Supreme Court has stated that

[29] Respondents argue this 2014 contract proposal to modify art. 16 does not undermine their waiver argument because the proposal was to provide Local 26 watchmen with a procedure if they are the alleged victims of prohibited harassment or discrimination. Respondents argue it did not alter the existing status quo when Local 26 watchmen are accused by longshore workers or marine clerks of engaging in prohibited harassment or discrimination. This contention is belied by the plain language of PMA's October 8, 2014 proposal, which states "The grievance machinery of the ILWU Local 26 Watchmen's Agreement is available to *any employee* who claims that the foregoing policies and guidelines have been violated." (GC Exh. 5, p. 9) (emphasis added). Compare this to the Letters of Understanding related to sec. 13.2, which specifically state that special grievance/arbitration procedure is available to ILWU longshore workers and marine clerks only. The October 8, 2014 proposal allows "any employee" to file a complaint, and Gassat testified that Local 26 rejected the proposal because it did not want its members subjected to this sort of special grievance/arbitration procedure.

[30] If anything, Articles 18(A) and (C) grant the JPWLRC, not PMA or the employers, with the responsibility to "generally administer the Agreement" and to establish "rules and regulations governing the conduct of watchmen, as well as the penalties for the breach of these rules and regulations."

[31] Under FRCP Rule 19(a), a person is required to be joined if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. Under Rule 19(b), if the person cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or be dismissed. The factors considered include: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed.

in Board unfair labor practice proceedings, which are "narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *National Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940). See also *Expert Electric, Inc*., 347 NLRB 18, 19 (2006) (holding that even if FRCP 19 applied individual members of a multiemployer association were not necessary and indispensable parties to the 8(a)(5) refusal-to-bargain case against the association because the Board could accord full relief to the parties without the joinder of individual members).

Furthermore, even if FRCP Rule 19 applied to unfair labor practice proceedings, it would not support dismissal here. Respondents contend that under Rule 19(a)(2)(i) the International has a legally protected interest in the 13.2 process and its absence has impeded and impaired its ability to protect that interest, but they failed to provide any specifics to explain or support this contention. Moreover, if the International believed it had a legally protected interest that would be impeded or impaired by not being a party, it could have filed a motion to intervene under Section 102.29 of the Board's Rules and Regulations. As stated, the International had notice of the complaint and the hearing because its legal counsel testified as one of PMA's witnesses. As for the other employers, PMA is their authorized agent and representative for the purposes of negotiating and administering the two agreements. Respondents failed to articulate a basis for how the absence of these other employers impeded or impaired their ability to protect any interest at issue here. And, similar to *Expert Electric*, there is no contention as to how the Board would not be able to accord full relief without their joinder.

4. Dismissal for failure to exhaust

Finally, LBCT argues the complaint should be "dismissed on the grounds of deferral." In its posthearing brief, LBCT identifies reasons and cites authority for deferral, but argues the complaint should be dismissed because Local 26 ignored *its* contractual obligations to exhaust the procedures and remedies contained in article 18 before filing the charges at issue. LBCT cites no authority to support this dismissal argument.[32]

Under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies*, 268 NLRB 557, 558 (1984), deferral of an unfair labor practice charge to the parties' grievance/arbitration procedure is appropriate when: (1) the dispute arose within the confines of a long and productive collective-bargaining relationship; (2) there is no claim of employer animosity to the employees' exercise of protected rights; (3) the parties' contract provided for arbitration of a very broad range of disputes; (4) the arbitration clause clearly encompassed the dispute at issue; (5) the employer had asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute was eminently well suited to such resolution by arbitration. See *United Technologies*, supra at 558. The moving party has the burden of proving deferral is appropriate. *Rickel Home Centers*, 262 NLRB 731, 731 (1982).

Assuming *arguendo* the evidence is sufficient to meet the first four factors, LBCT contends the complaint should be dismissed, not deferred, because even though deferral was appropriate, Local 26 failed to exhaust article 18 before filing the instant charges. I find LBCT's urging for dismissal cannot reasonably be viewed as a willingness to utilize arbitration to resolve the dispute. *United Technologies Corp*., 268 NLRB at 560 fn. 22.

Even if LBCT had asserted a willingness to arbitrate the dispute, I do not find the dispute is eminently well suited for resolution by arbitration because, as stated, I find the contractual language to be clear and unambiguous regarding the appropriate procedure and penalties to be applied in this case. Therefore, the special expertise of an arbitrator is unnecessary to interpret the contract. See *Doctors' Hospital of Michigan*, 362 NLRB No. 149, slip op. at 1 (2015) (deferral to arbitration was inappropriate because the relevant provision of the collective-bargaining agreement was unambiguous) (cases cited therein); See also *New Mexico Symphony Orchestra*, 335 NLRB 896, 897 (2001). I, therefore, decline to dismiss the complaint.

On these findings of fact, and on the entire record, I issue the following recommended[33]

CONCLUSIONS OF LAW

1. Pacific Maritime Association ("PMA") and Long Beach Container Terminal ("LBCT") are each an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. ILWU, Warehouse Processing and Distribution Workers' Union, Local 26 (Local 26) is a labor organization within the meaning of Section 2(5) of the Act.

3. PMA and LBCT are signatory to a collective-bargaining agreement with Local 26, known as the Watchmen's Agreement, which by its terms is effective from 2014 through 2019.

4. Local 26 has been the designated exclusive collective-bargaining representative of a unit of watchmen described in Article 1(A) of the Watchmen's Agreement and has been recognized as such by PMA and LBCT.

5. By applying section 13.2 of the Pacific Coast Longshore and Clerks Agreement (PCL&CA) to the bargaining unit represented by Local 26, and by implementing, inter alia, the mandatory discipline of the watchman as ordered by the 13.2 area arbitrator, PMA and LBCT have changed both the disciplinary procedures and the penalties of the Watchmen's Agreement and have failed to continue in effect all the terms and conditions of that Agreement.

6. PMA and LBCT also unilaterally changed the terms and conditions of employment of the bargaining unit represented by Local 26 by adopting a formal investigative and disciplinary process, which included new standards and penalties and by disciplining a member of the bargaining unit pursuant to that new process.

7. The terms and conditions described above in paragraphs 5 and 6 are mandatory subjects for the purpose of collective-bargaining.

8. PMA and LBCT engaged in the conduct described above

[32] PMA took no position regarding deferral in its answer or posthearing brief.

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

in paragraphs 5 and 6 without the consent of Local 26 and without providing it with notice and an opportunity to bargain.

9. As a result of the conduct described above, since about August 19, 2017, PMA on behalf of its employer-members, including Long Beach Container Terminal, processed the grievance in accordance with Section 13.2 of the PCL&CA and suspended watchman Demetrius Pleas as result of the arbitration order.

10. By the conduct described above, PMA and LBCT have failed and refused to bargain collectively and in good faith with Local 26 within the meaning of Section 8(d), in violation of Section 8(a)(1) and (5) of the Act.

11. By the conduct described above, PMA and LBCT have failed and refused to bargain collectively and in good faith with Local 26 in violation of Section 8(a)(1) and (5) of the Act.

12. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that PMA and LBCT have engaged in certain unfair labor practices, I shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having unlawfully processed the marine clerk's grievance against Demetrius Pleas in accordance with section 13.2 of the PCL&CA on around April 19, 2017, and, thereafter, enforcing the 13.2 arbitration order suspending him, PMA and LBCT are jointly and severally responsible for making Pleas whole for any loss of earnings and other benefits suffered as a result of their unlawful conduct.[34] The make whole remedy shall be computed in accordance with *Ogle Protection Service, Inc.*,183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance *with Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), PMA and LBCT shall compensate Pleas for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). PMA and LBCT shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 21 a report allocating backpay to the appropriate calendar year for Pleas. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. PMA and LBCT shall also be required to remove from its files any references to the unlawful suspension of Pleas and to notify him in writing that this has been done and that the discipline will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[35]

ORDER

Respondents PMA and LBCT, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Modifying the disciplinary procedures contained in the existing collective-bargaining agreement (Watchmen's Agreement) with the ILWU, Warehouse Processing and Distribution Workers' Union, Local 26 (Local 26) without its written consent.

(b) Implementing or applying section 13.2 of the Pacific Coast Longshore and Clerks Agreement ("PCL&CA") to watchmen working at the Ports of Los Angeles and Long Beach, who are covered by the Watchmen's Agreement.

(c) Disciplining watchmen represented by Local 26 under section 13.2 of the PCL&CA or any unilaterally adopted or enforced investigative and disciplinary process.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind any modifications made to the Watchmen's Agreement based on section 13.2 of the PCL&CA, specifically those modifications affecting disciplinary procedures pertaining to alleged discrimination; and bargain with Local 26 before implementing any changes in its disciplinary process.

(b) Immediately reinstate Demetrius Pleas by rescinding his suspension and any other penalties or requirements resulting from implementation of the award based on section 13.2 of the PCL&CA, without prejudice to his seniority or any other rights he previously enjoyed, and take no action that interferes with his regular dispatch or employment.

(c) Make Demetrius Pleas whole for any wages, seniority rights, or other benefits he lost for the period he was suspended from employment, plus expenses and interest.

(d) Remove from its files all references to Demetrius Pleas' discipline, which resulted from its enforcement of section 13.2 of the PCL&CA, notify him and Local 26, in writing, that this has been done, and that such discipline shall not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, PMA will post at its facilities copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the PMA's

[34] The consolidated complaint sought consequential damages as part of the remedial order, but the General Counsel has not addressed that special remedy in its posthearing brief. I cannot order consequential damages. As the Board has recognized, it would require a change in Board law for me to award consequential damages. See, e.g., *Guy Brewer 43 Inc*., 363 NLRB No. 173, slip op. at 2 fn. 2 (2016). Since I must follow existing Board law, and current law does not authorize me to award consequential damages, the General Counsel must direct its request to the Board.

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

authorized representative, shall be posted by the PMA and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the PMA customarily communicates with its employees by such means. Reasonable steps shall be taken by PMA to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, PMA has gone out of business or closed the facility involved in these proceedings, PMA shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language, to all current employees and former employees employed by PMA at any time since April 19, 2017.

(g) Within 14 days after service by the Region, LBCT will post at its facilities copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the LBCT's authorized representative, shall be posted by the LBCT and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the LBCT customarily communicates with its employees by such means. Reasonable steps shall be taken by LBCT to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, LBCT has gone out of business or closed the facility involved in these proceedings, LBCT shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language, to all current employees and former employees employed by LBCT at any time since April 19, 2017.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that PMA has taken to comply.

Dated, Washington, D.C., July 9, 2018.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives 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 modify the disciplinary procedures contained in our existing collective-bargaining agreement (Watchmen's Agreement) with the ILWU, Local 26 without its written consent.

WE WILL NOT implement or apply section 13.2 of the Pacific Coast Longshore and Clerks Agreement ("PCL&CA") to watchmen working at the Ports of Los Angeles and Long Beach, who are covered by the Watchmen's Agreement.

WE WILL NOT enforce discipline on watchmen represented by ILWU, Local 26 under section 13.2 of the PCL&CA or any unilaterally adopted or enforced investigative and disciplinary process.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

WE WILL rescind any modifications made to the Watchmen's Agreement based on section 13.2 of the PCL&CA, specifically those modifications affecting disciplinary procedures pertaining to alleged discrimination; and WE WILL bargain with ILWU, Local 26 before implementing any changes in our disciplinary process.

WE WILL, upon rescission of Demetrius Pleas' suspension, and dispatch from the watchmen's hiring hall, and referral to us, immediately reinstate Demetrius Pleas without prejudice to his seniority or any other rights he previously enjoyed and take no action inconsistent therewith.

WE WILL make Demetrius Pleas whole for any wages, seniority rights or other benefits he lost for the period he was suspended unlawfully, plus expenses and interest.

WE WILL remove from our files all references to Demetrius Pleas' discipline, which resulted from our enforcement of section 13.2 of the PCL&CA, notify him and ILWU, Local 26, in writing, that this has been done, and that such discipline shall not be used against him in any way.

PACIFIC MARITIME ASSOCIATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-197882 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives 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 modify the disciplinary procedures contained in our existing collective-bargaining agreement (Watchmen's Agreement) with the ILWU, Local 26 without its written consent.

WE WILL NOT implement or apply Section 13.2 of the Pacific Coast Longshore and Clerks Agreement ("PCL&CA") to watchmen working at the Ports of Los Angeles and Long Beach, who are covered by the Watchmen's Agreement.

WE WILL NOT enforce discipline on watchmen represented by ILWU, Local 26 under section 13.2 of the PCL&CA or any unilaterally adopted or enforced investigative and disciplinary process.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

WE WILL rescind any modifications made to the Watchmen's Agreement based on section 13.2 of the PCL&CA, specifically those modifications affecting disciplinary procedures pertaining to alleged discrimination; and WE WILL bargain with ILWU, Local 26 before implementing any changes in our disciplinary process.

WE WILL, upon rescission of Demetrius Pleas' suspension, and dispatch from the watchmen's hiring hall, and referral to us, immediately reinstate Demetrius Pleas without prejudice to his seniority or any other rights he previously enjoyed, and take no action inconsistent therewith.

WE WILL make Demetrius Pleas whole for any wages, seniority rights or other benefits he lost for the period he was suspended unlawfully, plus expenses and interest.

WE WILL remove from our files all references to Demetrius Pleas' discipline, which resulted from our enforcement of section 13.2 of the PCL&CA, notify him and ILWU, Local 26, in writing, that this has been done, and that such discipline shall not be used against him in any way.

LONG BEACH CONTAINER TERMINAL

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-197882 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.