STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCALS 18, 34, & 91, Charging Parties, v. PORT OF WEST SACRAMENTO, Respondent.	Case No. SA-CE-853-M PERB Decision No. 2577-M July 11, 2018

Appearances: Leonard Carder, by Philip C. Monrad and Amy Endo, Attorneys, for International Longshore & Warehouse Union, Locals 18, 34, & 91; Kronick, Moskovitz, Tiedemann & Girard, by Kristianne T. Seargeant and Errol C. Dauis, Attorneys, for Port of West Sacramento.

Before Banks, Winslow, and Shiners, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by International Longshore & Warehouse Union (ILWU), Locals 18, 34, and 91 (collectively, the Locals) to an administrative law judge's (ALJ) proposed decision. The complaint alleged that the Port of West Sacramento (Port) violated the Meyers-Milias-Brown Act (MMBA)[1] by failing or refusing to meet and confer in good faith with the Locals over a work preservation agreement. The ALJ dismissed the complaint for lack of jurisdiction, after finding that the Port was not the employer of any ILWU-represented employees. Based on our review of the proposed decision and the entire record in light of the

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

parties' submissions, we affirm the dismissal of the complaint and underlying unfair practice charge.

FINDINGS OF FACT

Background

The Port is formally known as the Sacramento-Yolo Port District, and is governed by the Sacramento-Yolo Port Commission. Since 2006, the Port has been a "component unit" of the City of West Sacramento (City), but it remains a separate legal entity for accounting purposes.

The Locals represent longshoremen (Local 18), marine clerks (Local 34), and foremen (Local 91). The Locals are among several ILWU locals covered by contracts with the Pacific Maritime Association (PMA), a multi-employer association of shipping and stevedoring companies organized to negotiate and administer collective bargaining agreements with ILWU in California, Oregon, and Washington. The ILWU-PMA contracts are referred to as the "Coast Contracts."

Before 2006, the Port operated and directed its onsite maritime facilities. The Port, and private stevedoring companies on its property, requested dispatch of workers from the Locals' hiring halls. Although the Port is not a PMA member, the Port and the Locals entered into "Port supplement agreements" generally incorporating the terms of the Coast Contracts. One of these agreements, with Local 18, expired on June 30, 2008. Another, with Local 18 and Local 34, expired on July 1, 2008. The record includes only one agreement between the Port and Local 91, which expired in the late 1980's.

Port-SSA Agreement

In September 2006, following a deterioration in its financial performance, the Port entered into a 10-year agreement with SSA Pacific (SSA). The agreement described SSA as an independent contractor and designated it as the sole marine terminal operator, responsible for current and prospective management and operating services at the Port's maritime facilities, including the stevedoring and servicing of vessels landing at the Port, and the handling, storage and transportation of cargo in connection with vessels at the facility. The Port remained responsible for some business development activities. Regarding the Port's supplement agreements with the Locals, the SSA agreement stated:

> Port Local ILWU Local 18, 34 and 91 Labor Contracts — While still in effect, [SSA] shall maximize the use of labor specified under these existing Port labor contracts for their stevedoring, clerking and other non-warehouse maritime functions.

SSA was a PMA member and a signatory to the Coast Contracts. As a result, the Locals supported the Port's selection of SSA to operate the Port.

After it assumed responsibility for operations at the Port, SSA was, with minor exceptions, solely responsible for scheduling, payroll, and supervision of employees represented by the Locals. The Port laid off nearly all ILWU-represented employees, except for a steady gearman represented by Local 18 and two clerks represented by Local 34. Those three employees were laid off in April 2007 for lack of work.[2]

Local 18 challenged the layoff of the steady gearman by filing a grievance under the Port supplement agreements. The Port denied the grievance and requested to arbitrate the dispute. An arbitration hearing was scheduled regarding the grievance, but the hearing was

[2] The Port also employed warehouse workers, who were laid off around the end of 2007. Those employees were represented by ILWU Local 17, which is not a party to this case.

stayed while the Port and the Locals discussed proposals for a work preservation agreement. They reached a final agreement, effective from July 1, 2008 through July 1, 2013, which stated in its entirety:

> The Sacramento-Yolo Port District ("Port") and ILWU Locals 18, 34 and 91 ("Union") hereby enter into this Agreement ("Agreement") by which the Port agrees that it will abide by the work-preservation provisions set out in Section 1 of each of the [Coast Contracts]. This Agreement to abide by the work-preservation terms shall apply to work within the perimeter of the turning basin as identified on Port Map attached as Exhibit A. This Agreement shall be effective from July 1, 2008 until July 1, 2013.
>
> When the Port allows third parties such as subcontractors, operators, tenants or successors to employ workers to perform work within the scope of the work-preservation provisions hereby agreed to, these provisions operate as a subcontractor and/or a successor clause, requiring the subcontractor, operator, tenant or successor to be a member in good standing of the Pacific Maritime Association (PMA), and/or a signatory to either the Coast Contracts or an independent agreement which incorporates by reference the area standards set forth in the Coast Contracts. This Agreement does not apply to any third parties, such as subcontractors, operators, tenants, sub-tenants, assignee [sic] or successors, who, prior to the ratification of this Agreement, entered into land lease agreements with the Port. This exception to the scope of work preservation agreement does not include the Port Operator, SSA Marine, who is party to labor agreements with Locals 18, 34 and 91.
>
> The parties agree to arbitrate any dispute that arises out of the terms of this agreement.
>
> The Union's consideration for this Agreement is to protect and preserve for Union members all work which is described in the afore-mentioned work preservation provisions in order to protect for ILWU members all work within the scope of the work-preservation provisions occurring within the identified geographical boundary. The Union agrees to waive and release the Port and its officers, representatives, agents and/or employees from any claims, unfair labor practice charges, complaints, liabilities, demands, causes of action, grievances, and other obligations, arising in law or equity up to the date of execution of

> this Agreement, whether they be known and [*sic*] unknown, disclosed and [*sic*] undisclosed, arising out of or in any way related to the labor agreement between the Port and Locals 18, 34 and 91 set to expire on June 30, 2008.
>
> The Port's consideration for this Agreement is to protect its proprietary interest in ensuring the safe, efficient and uninterrupted operation of the Port, and to maximize revenue from Port operations, both of which interests require reliable availability of an experienced, trained workforce capable of safely and efficiently operating expensive, delicate and dangerous machinery.
>
> The following undersigned representatives agree that this document represents a complete agreement between the parties and any modification must be made in writing and agreed to by all parties to this agreement.

Leal Sundet, an ILWU official, became involved in the negotiations over this agreement after the Locals asked for assistance. He testified that the agreement was a successor to the Port supplement agreements, which were about to expire.

Philip Wright (Wright), the City's director of human resources and labor relations, participated in the negotiations on behalf of the Port. He testified that the agreement was only intended to resolve the Local 18 steady gearman grievance. He denied that the parties' discussions had been meet and confer sessions, or that they had any connection to the expiring Port supplement agreements. Wright acknowledged, however, that the work preservation agreement did not specifically state that it was a grievance settlement, that the waiver language was not added until the Port's second counterproposal, and that he did not remember why Locals 34 and 91 were included.

The work preservation agreement was submitted to the Port Commission for approval, along with a Port staff report stating that the Port's collective bargaining agreements with the

Locals expired on June 30, 2008, and would not be renewed as the Port was no longer an employer. The Port Commission approved the agreement.

Continuing Port Involvement in Operations

The Locals introduced evidence of two instances in which the Port continued to be involved in maritime operations, which they contend prove that the Port continued to be the employer of ILWU-represented employees. The first was a "PORT OF WEST SACRAMENTO RAIL SAFETY PLAN," signed by the Port, SSA, and Local 18 on January 27, 2012. The agreement specifies the steps to be taken by SSA, Local 18, and Sierra Northern Railway, another Port contractor, when the latter conducts rail operations on the Port's premises. Among other things, the plan requires SSA to hire a Local 18-represented rail point guard, for which the Port pays indirectly (SSA bills Sierra Northern Railway, which deducts the amount from its lease payments to the Port).

The second instance was a February 2, 2012 letter of understanding signed by the Port Manager, regarding the maintenance and repair of a sophisticated harbor crane purchased by the Port with a federal grant. The letter states that Local 18-represented millwrights will perform preventive maintenance and minor repairs on the crane not covered by the manufacturer's warranty; the Port's maintenance superintendent and electricians will provide assistance to the millwrights; and the Port may hire an outside vendor to perform major repairs. The Port and the millwrights are to mutually determine whether a repair qualifies as major or minor, with disputes resolved under the terms of the Coast Contract. The letter requires SSA to "order all manning for" the millwrights to perform maintenance and repairs on the crane.

New SSA Agreement

In 2012, the Port began developing a new business plan for Port operations. In late January 2013, the Port issued a request for statements of interest from cargo facility users, maritime terminal operators, and real estate developers to lease, purchase, operate, and/or develop all or part of the Port's facilities and property. The request stated that any new management agreement or lease would be subject to the Coast Contracts.

On March 13, 2013, the Port Commission adopted its new business plan, which specified two goals: (1) solidify the Port's role as a vital goods movement asset; and (2) reduce costs and increase productivity of Port real estate. The plan acknowledged that although the Port had originally sought to become only a landlord with respect to its facilities, its current agreement with SSA was not a true lease; rather, the Port and SSA were "joint venture partners." The new plan therefore aimed to achieve the Port's original goal of becoming only a landlord by getting out of the maritime operations completely.

In April 2013, the Port and the Locals corresponded regarding negotiations over a successor to the work preservation agreement, which would expire on July 1, 2013. The Port confirmed that it intended to honor its meet-and-confer obligations.

On May 15, 2013, the Port Commission authorized the Port's chief executive officer to execute a five-year lease agreement with SSA for the Port's maritime facilities starting July 1, 2013, consistent with the new business plan for the Port to become a landlord only.

In early June 2013, the Locals requested to meet with the Port to discuss renewal of the work preservation agreement. The Port refused to extend the agreement, explaining that it had "recently changed its operating model to a landlord-tenant model," and therefore did "not have any employees involved with the operations of the Port."

On June 14, 2013, the Port entered into a new agreement with SSA, effective July 1. Through the new agreement, the Port and SSA terminated their 2006 agreement, and the Port leased its premises to SSA, which was responsible for managing onsite terminal operations. As relevant to the present case, the new agreement contemplated other companies providing stevedoring services at the Port, without requiring those companies to be signatories to, or otherwise bound by the terms of, the Coast Contracts.

On June 28, 2013, the Port and the Locals met to discuss the soon-to-expire work preservation agreement and the Port's new lease with SSA. After the meeting, the Locals' counsel e-mailed the Port's counsel, stating the Locals' position that the Port had violated the existing work preservation agreement, and had violated its duty to meet and confer by refusing to bargain over an extension of the work preservation agreement.

On July 1, 2013, the Port responded that the work preservation agreement would not survive its expiration that day, because it was "not a memorandum of understanding under the MMBA or the [National Labor Relations Act]." The Port maintained that SSA "is and has been the employer of record" while the work preservation agreement was in effect.

PROPOSED DECISION

Before the formal hearing, the ALJ granted the Port's motion to bifurcate the proceedings to first resolve the Port's claims that it was not the employer of the employees represented by the Locals, and that the charge was untimely.[3]

Regarding the Port's argument that it was not the employer, the proposed decision identified two issues to resolve: (1) whether the Port employed the employees represented by the Locals; and (2) whether the 2008-2013 work preservation agreement was a memorandum

[3] The proposed decision rejected the Port's statute of limitations defense, and the Port has not excepted to that conclusion. We therefore discuss that issue no further.

of understanding (MOU), or as the Port contended, merely a settlement of Local 18's steady gearman grievance. The ALJ answered both questions in the negative.

Addressing the first issue, the ALJ noted that "since 2006, SSA has determined daily scheduling, number of employees needed to perform job duties, pay and benefits, work hours, and operational policies consistent with the [PMA-ILWU contracts]." The ALJ also noted that the Port laid off its last few remaining ILWU-represented employees in 2008. As a result, the ALJ concluded that SSA, not the Port, was the employer.

Turning to the work preservation agreement, the ALJ concluded that while it was not merely a settlement of Local 18's steady gearman grievance, it was not a comprehensive MOU like the previous port supplement agreements, as it "addressed only a limited number of issues."

The ALJ then considered whether the Port was a "subcontractor of ILWU-represented employees . . . for purposes of this 2013 charge and complaint." Because the Port had already subcontracted the majority of ILWU work to SSA in 2006, and then laid off its remaining ILWU workforce in 2008, the ALJ rejected the Locals' argument that the Port was a subcontractor in 2013.

Finally, although this issue was addressed only by the Port and not the Locals, the ALJ considered whether the Port was a joint employer along with SSA. She concluded that it was not, for largely the same reasons the Port was not the employer of the employees represented by the Locals.

DISCUSSION

The issue before us is whether the Locals were "recognized employee organization[s]" to whom the Port owed a duty to meet and confer. (MMBA, § 3505.) A "[r]ecognized

employee organization" is "an employee organization which has been formally acknowledged by the public agency as an employee organization that represents *employees of the public agency*." (§ 3501, subd. (b), emphasis added.) Thus, the critical issue in this case is whether the employees represented by the Locals were employed by the Port.[4]

The MMBA offers only a circular definition of "public employee": "any person employed by any public agency." (§ 3501, subd. (d).) When called upon to decide whether individuals are employees of a public agency subject to the MMBA or of another entity, the courts have addressed this problem by adapting the common law test for distinguishing an employee from an independent contractor. (*Service Employees Internat. Union v. Super. Ct.* (1982) 137 Cal.App.3d 320, 325-326.) The factors considered under this test include: "(1) the right to control the duties of employees; (2) the power to discharge employees; (3) payment of salary; (4) the nature of the services; and (5) the parties' belief as to the employment relationship." (*Sacramento County Employees Organization v. County of Sacramento* (1988) 201 Cal.App.3d 845, 850.) Under this test, the right to control the purported employee's duties is the most important factor: "'The essential characteristic of [an] employment relationship is the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed.'" (*Service Employees Internat. Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761, 769, superseded by statute on other grounds as stated in *Guerrero v. Super. Ct.* (2013) 213 Cal.App.4th 912, 951.)[5]

[4] In ordering a bifurcated hearing, the ALJ ruled that this was a jurisdictional defense to the complaint, on which the Port bore the burdens of "proof and persuasion." Neither party has excepted to this conclusion, so we assume, without deciding, that this was the correct allocation of the burden of persuasion.

[5] We follow applicable judicial precedent when, as here, we interpret the MMBA. (§§ 3509, subd. (b), 3510, subd. (a).) However, we note that PERB has similarly focused on

The Locals' primary argument is that the Port, although no longer the direct employer of the ILWU-represented workforce, remains a "subcontracting employer" of the relevant employees. For this argument, the Locals rely foremost on *Oakland Unified School District* (2005) PERB Decision No. 1770 (*Oakland*), in which the Board held that "the decision to subcontract bargaining unit work is negotiable when it results in an outside entity performing the duties of bargaining unit employees in a similar manner under similar circumstances." (*Id.*, adopting proposed decision at p. 25.) Because the Port was undisputedly the employer before it subcontracted with SSA in 2006, the Locals argue, the Port continued to owe a duty to bargain thereafter.

Initially, this argument appears to be irreconcilable with the test for an employment relationship, because a public agency would remain an employer regardless of whether it retains "the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed." (*Service Employees Internat. Union v. County of Los Angeles*, *supra*, 225 Cal.App.3d 761, 769.) The Locals have presented no authority, nor have we found any, in which an employer that subcontracted bargaining unit work without retaining control over how the subcontractor's employees performed the work nonetheless continued to be the employer of the subcontractor's employees.

In addition, *Oakland*, *supra*, PERB Decision No. 1770, cannot bear the weight of this argument. In *Oakland*, the school district unilaterally contracted with the city police department to take over policing duties previously performed by district employees. All of those district employees were laid off. The Board concluded that the school district was

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the right to control, relying on National Labor Relations Board (NLRB) precedent interpreting the common law test for distinguishing employees from independent contractors. (*Ventura County Community College District* (2003) PERB Decision No. 1547, pp. 21-22.)

required to negotiate over the decision to contract out the work of its police force, rejecting the district's argument that the decision represented a new direction within its entrepreneurial control and therefore had no duty to bargain. Thus, *Oakland* stands for the well-settled rule that an employer must bargain over the decision to contract out bargaining unit work, provided the contracting decision does not fall within the managerial prerogative of the employer. It does not imply or suggest that after *lawfully* subcontracting bargaining unit work (as the Locals admit the Port did here), a public agency remains the employer of those performing the relevant work.[6]

Nor does this argument find any support in the other subcontracting cases cited by the Locals, which follow the same basic fact pattern as *Oakland, supra,* PERB Decision No. 1770. (See *Fibreboard Paper Products Corp. v. NLRB* (1964) 379 U.S. 203; *Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295; *Lucia Mar Unified School District* (2001) PERB Decision No. 1440; *Redwoods Community College District* (1997) PERB Decision No. 1242; *Oakland Unified School District* (1983) PERB Decision No. 367.) In none of these cases was it found that the employer who subcontracted the work remained the employer of the subcontractor's employees.

The Locals' argument is also contrary to the legal distinction between contracting out and transferring bargaining unit work. Contracting out is generally defined as "a transfer of unit work to those *not in the employ* of the employer in question." (*Whisman Elementary School District* (1991) PERB Decision No. 868, p. 12, emphasis added.) A transfer of work, on the other hand, "involves a transfer of unit work to nonunit employees *of the same*

[6] After the school district contracted with the city to provide police services, those services were provided by city employees and the Oakland Police Department controlled the hiring, firing, assignments, pay and benefits. (*Oakland, supra*, PERB Decision No. 1770, p. 6.)

employer." (*Ibid.*, emphasis added.) The Board has diligently policed the line between contracting out and transferring work, because a different test applies to each type of case. (*Ventura*, *supra*, PERB Decision No. 1547, pp. 16-17.) That line would be blurred if we were to conclude that an employer remains an employer even after lawfully contracting out bargaining unit work.

The Locals also advance a policy rationale for finding that an entity remains an employer in these circumstances. Citing the MMBA's purpose, "to promote full communication between public employers and their employees" (§ 3500, subd. (a)), the Locals ask:

> [W]hat is the point of requiring a public agency to negotiate with the Union over a decision to subcontract bargaining unit work if, the minute the public agency executes the subcontracting agreement, all obligations to comply with the MMBA are extinguished and the agency is free to unilaterally eliminate the very terms of the subcontract which the Union relied on in assenting to the subcontracting agreement?

Certainly, we must interpret the MMBA in accordance with its fundamental purposes. (*County of San Bernardino* (2018) PERB Decision No. 2556-M, p. 17.) But the MMBA's purpose supplies no more guidance on this question than does the rest of the statute. Relying on the purpose of promoting full communication "between public employers and *their employees*" (§ 3500, subd. (a), emphasis added) to determine who *is* an employee merely begs the question. (See *Service Employees Internat. Union v. County of Los Angeles*, *supra*, 225 Cal.App.3d 761, 770 ["Regardless of the purpose of the MMBA . . . the statute does not apply where there is no employment relationship"].)

Moreover, there are at least two answers to the Locals' question. First, subcontracting decisions are negotiable—when they are negotiable[7]—because "'union concessions may substantially mitigate the concerns underlying the employer's decision, thereby convincing the employer to rescind its decision.'" (*Ventura*, *supra*, PERB Decision No. 1547, p. 19.) Although a union might decide not to offer concessions, or an employer might find any concessions inadequate, this does not mean the duty to bargain perpetually remains after the employer subcontracts. Second, even if a union acquiesces to subcontracting, it may be able to obtain a contractual commitment that materially benefits the employees, as the Locals did here through the 2008 work preservation agreement. There is no apparent reason such a commitment would not be judicially or arbitrally enforceable, even if there is no remaining duty to bargain.

Therefore, we reject the Locals' argument that the Port necessarily remained the employer of the Locals' members after it contracted out to SSA the work performed by the ILWU-represented workforce.

This brings us to the Locals' second argument: that the Port maintained sufficient control over the terms and conditions of employment for the ILWU-represented workforce to be considered their employer.

The Locals do not dispute the ALJ's general finding that, with the exception of the employees laid off in 2007, "since 2006, SSA has determined daily scheduling, number of employees needed to perform job duties, pay and benefits, work hours, and operational policies consistent with the [PMA-ILWU contracts]." However, the Locals argue that the ALJ ignored the Port's continued involvement in Port operations through the work preservation agreement

[7] "Contracting out decisions based on a change in the nature and direction of a significant facet of business are not negotiable." (*Arcata Elementary School District* (1996) PERB Decision No. 1163, p. 7.)

entered into in 2008, and the rail safety plan and letter of understanding regarding crane repairs promulgated in 2012.

These three actions are not sufficient to make the Port the employer of the ILWU-represented workforce. With respect to the 2008 work preservation agreement, the Locals argue that the agreement "incorporates by reference the terms and conditions of employment set forth in the truly comprehensive Coast Contracts." This is not an accurate and fair reading of that agreement. The work preservation agreement required the Port to abide by the work preservation provisions of the Coast Contracts (as opposed to all the terms and conditions of the Coast Contracts), and to ensure that any entity with which the Port contracted would either be a party to the Coast Contracts or to a supplemental agreement incorporating the Coast Contracts' terms. Because the Port by this time was not a direct employer, the Port's subcontractors, not the Port itself, were responsible for complying with the Coast Contracts. Thus, any control by the Port over terms and conditions of employment was negligible. More importantly, the work preservation agreement gave the Port no right to control or direct the activities of the ILWU-represented employees.[8] Thus, the 2008 work preservation agreement is more accurately characterized as a promise by the Port to require its subcontractors to be members of the PMA or to otherwise comply with the Coast Contracts.

As for the rail safety plan, this document mandated certain steps to be taken by SSA and Sierra Northern Railway. While one of those steps was for SSA to hire, indirectly at the Port's expense, a Local 18-represented employee, the plan neither dictated how that employee performed his or her job duties, nor gave the Port the right to do so.

[8] The Locals also argue that if the Port was not the employer, it "would have had no authority—much less an obligation—to ensure that the stevedoring work by SSA was performed by ILWU workers." This argument simply assumes the conclusion that because the Port entered into the work preservation agreement, it was the employer.

So, too, with the letter of understanding regarding crane repairs. This document designated which crane repairs would be performed by Local 18-represented millwrights employed by SSA, with the support of City of West Sacramento employees. It did not, however, give the Port the right to control the manner in which the millwrights performed that work.

We note that, although the ALJ considered and rejected the possibility that the Port and SSA were joint employers, the Locals have not excepted to that conclusion. Accordingly, the joint employer issue is not before us. (PERB Reg. 32300, subd. (c).)[9] This leaves the Locals to argue that the Port was the sole employer. That proposition is untenable in light of the undisputed control SSA exercised over terms and conditions of employment, and over the work performed.

In sum, the evidence establishes that the Port did not maintain enough control over ILWU-represented employees to be considered their employer. The Port therefore had no duty to bargain with the Locals in 2013.

Because this conclusion is dispositive, we need not resolve the Locals' exceptions concerning whether the 2008 work preservation agreement was an MOU.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-853-M are hereby DISMISSED.

Members Banks and Shiners joined in this Decision.

[9] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.