

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

VALERIE HARDY-MAHONEY, Regional  
Director of the Thirty-Second Region of the  
National Labor Relations Board, for and on  
behalf of the National Labor Relations Board  
  
Petitioner,  
  
v.  
  
EVERPORT TERMINAL SERVICES,  
INC., and INTERNATIONAL  
LONGSHORE AND WAREHOUSE  
UNION  
  
Respondents.

Case No. [17-cv-00804-RS](#)

**ORDER DENYING PETITION FOR  
TEMPORARY INJUNCTION UNDER  
SECTION 10(J) OF THE NATIONAL  
LABOR RELATIONS ACT**

I. INTRODUCTION

Section 10(j) of the National Labor Relations Act (29 U.S.C. Section 160(j)),  
authorizes the National Labor Relations Board (the “Board”) to petition a federal district court for  
interim injunctive relief pending the Board’s final resolution of an unfair labor practice charge.  
Petitioner Valerie Hardy-Mahoney, in her capacity as the Regional Director of the Thirty-Second  
Region of the Board, seeks such relief here against respondents Everport Terminal Services, Inc.,  
and the International Longshore and Warehouse Union, in connection with charges the Board is  
currently adjudicating regarding events that took place in 2015.

In light of the fact that the Board effectively requests an injunction returning circumstances  
to the status quo ante of well over a year ago, and given respondents’ showing that their defenses  
are, at a minimum, not frivolous, the Board had failed to show that an injunction under section

1 10(j) is warranted. The petition will therefore be denied.  
2

3 II. BACKGROUND

4 There is little dispute as to the central facts.

5 a. Historical context

6 Since a 1938 settlement of longstanding labor strife in the West Coast longshore industry,  
7 the International Longshore and Warehouse Union (“ILWU”) has been certified as the bargaining  
8 representative for a coast-wide bargaining unit covering all Pacific Coast ports. In most locations,  
9 this meant that the ILWU represented not only all longshore workers, but also employees engaged  
10 in so-called “maintenance and repair” work (“M&R”).

11 Employers typically belong to the Pacific Maritime Association (“PMA”) formed in 1949  
12 by the merger of two earlier multi-employer associations. The PMA exists primarily to negotiate  
13 and administer agreements between its members and the ILWU.

14 In the 1960s, the “container revolution” brought intermodal containers with standardized  
15 dimensions, complete with cranes to lift those containers on and off vessels, thereby changing the  
16 nature of longshore work. At least in part because of those changes, some conflict arose between  
17 the ILWU and another union, the International Association of Machinists (“IAM”). Employees  
18 represented by the IAM had historically performed M&R work for trucks, tractors, mobile cranes,  
19 and other mechanical equipment in and around the ports. For the next forty years the ILWU and  
20 IAM apparently jockeyed for position to determine which would represent various categories of  
21 workers, as the nature of the jobs changed.

22 By 2008, ILWU had come effectively to claim jurisdiction over “longshore M&R work.”  
23 Under a written agreement, however, some terminals were “red circled,” whereby certain  
24 grandfathered exceptions supplanted ILWU jurisdiction over M&R work. Those exceptions  
25 existed where non-ILWU mechanics historically had provided M&R labor and had separate  
26 bargaining history with the specific terminal operator. The Ben E. Nutter Terminal at the Port of  
27 Oakland, the subject of the present controversy, was designated as a “red circled” exception,  
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1 because its M&R employees had historically been represented by IAM.  
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3 *b. Everport’s acquisition of the Nutter Terminal operations*

4 Dating to approximately 1968, the Nutter Terminal had been operated by Marine  
5 Terminals Corporation and/or Miles Motors Transport System (collectively “MTC”). In 2002, the  
6 Port of Oakland assigned the right to operate the Nutter Terminal to Evergreen Marine  
7 Corporation (Taiwan), Ltd. (“EMC”). Between 2002 and 2015, however, EMC, and later its  
8 wholly-owned subsidiary Everport, effectively continued to operate the terminal in conjunction  
9 with MTC, through a joint enterprise they formed known as “STS.” The details of the transactions  
10 and the entities involved are not material, because it is not disputed that prior to December of  
11 2015, the Nutter Terminal workers were employees of MTC or STS, and were represented by  
12 either ILWU or IAM, as appropriate for their positions. The current dispute involves only what  
13 happened after December of 2015 to those MTC employees who had been represented by IAM—  
14 the so-called “MTC Mechanics.”

15 On July 30, 2015, Everport, which by then had been assigned EMC’s rights, gave notice it  
16 was terminating the relationship with MTC/STS as of December 5, 2015, and that it would  
17 thereafter operate the Nutter Terminal itself. Weeks earlier, Everport had applied, and been  
18 approved, for membership in the PMA. The ILWU took the position that the “red circle”  
19 exception to ILWU jurisdiction over M&R work at Nutter Terminal would not apply once  
20 Everport assumed direct operation at the facility. Everport argues, in effect, that it had no real  
21 choice but to accept it had an obligation to hire M&R workers through the “joint longshore  
22 dispatch” procedures applicable to employers in the PMA, and employees represented by the  
23 ILWU. Everport asserts that in October and November of 2015, its attorneys had “several  
24 discussions” with counsel for the IAM union in which it advised that (1) it was obligated to hire  
25 through the ILWU-PMA Joint Dispatch Hall, and (2) it would not discriminate against any  
26 employee or union, and would consider applications from any of the former MTC mechanics.  
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*c. Everport's hiring.*

Everport subsequently looked to the ILWU-PMA Joint Dispatch Hall to fill twenty-seven so-called "steady" mechanic positions. It hired thirteen or fourteen employees. Then, it considered the MTC Mechanics to fill the remaining approximately thirteen slots. Everport asserts it ultimately interviewed all eighteen MTC Mechanics, made offers to fifteen, and employed thirteen, deciding not to hire only three who had applied. Plaintiff, in response, states that "a number" of MTC Mechanics remain unemployed, and that even those who accepted jobs under ILWU representation may have been disadvantaged in various ways.

*d. The Board proceedings*

On March 21, 2016, IAM filed a charge with the Board against Everport, alleging violations of sections 8(a)(1), (2), (3), and (5) of the National Labor Relations Act ("NLRA"). IAM alleged Everport refused to negotiate as a successor to MTC, discriminated against IAM members, and unlawfully recognized the ILWU as the bargaining agent for Everport's M&R mechanics.

The next day, the Board advised Everport it had "identified this case as one in which injunctive relief pursuant to Section 10(j) of the act may be appropriate." The following month, April of 2016, the Board again corresponded with Everport, advising it of the charges and warning that the Board had "decided that injunctive relief may be appropriate under section 10(j)." Everport was asked to submit a response, which it did, setting out why it believed section 10(j) relief would not be warranted.

Nearly eight months later, in December of 2016, the Board issued its underlying complaint. Even then, the Board did not file this section 10(j) petition for another eight weeks, until approximately the time the administrative trial was to begin.

1 III. LEGAL STANDARD

2 Although some circuits evaluate section 10(j) petitions with greater deference to the Board  
3 than is accorded to ordinary private litigants seeking preliminary injunctive relief, the Ninth  
4 Circuit has made clear that a section 10(j) petition is subject to substantively the same analysis as  
5 other requests for interim injunctions:

6 Section 10(j) permits a district court to grant relief “it deems just  
7 and proper.” 29 U.S.C. § 160(j) . . . . Thus, when a Regional  
8 Director seeks §10(j) relief, he [or she] “must establish that he is  
9 likely to succeed on the merits, that he is likely to suffer irreparable  
10 harm in the absence of preliminary relief, that the balance of equities  
tips in his favor, and that an injunction is in the public interest.”  
Winter v. Nat. Res. Def. Council, 555 U.S. 7, 129 S.Ct. 365, 374,  
172 L.Ed.2d 249 (2008).

11 “[S]erious questions going to the merits’ and a balance of hardships  
12 that tips sharply towards the [Regional Director] can support  
issuance of a preliminary injunction, so long as the [Regional  
13 Director] also shows that there is a likelihood of irreparable harm  
and that the injunction is in the public interest.” Alliance for the  
14 Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). In all  
cases, however, the Regional Director “must establish that  
15 irreparable harm is likely, not just possible, in order to obtain a  
preliminary injunction.” Id. at 1131 (emphasis omitted)  
16 Frankl v. HTH Corp., 650 F.3d 1334, 1355 (9th Cir. 2011).

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18 IV. DISCUSSION

19 The Board insists that the liability of Everport and the ILWU is clear. It argues that under  
20 N.L.R.B. v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972) an employer succeeds to its  
21 predecessor’s collective bargaining obligations if a majority of its employees, consisting of a  
22 substantial and representative bargaining unit, are former employees of the predecessor and if  
23 there is substantial continuity between the two enterprises. Thus, the Board contends, Everport  
24 committed an unfair labor practice, in which ILWU participated, when it joined the PMA and  
25 thereby obligated itself to hiring through the ILWU, even before it had any employees.

26 In the Board’s view, this was part of a deliberate “scheme” to avoid the obligations  
27 Everport had under Burns to negotiate with the IAM, and not to discriminate against IAM-

1 represented employees when hiring its own workforce. The Board points to the fact that Everport  
2 initially filled M&R positions through listings posted exclusively at the ILWU-PMA Joint  
3 Dispatch Hall. The Board also relies on allegations of some former MTC Mechanics who contend  
4 they were told during their interviews that Everport needed to ensure former IAM-represented  
5 workers constituted less than 50 percent of the new workforce.

6 Defendants do not challenge the Board’s assertion that when a successor employer  
7 attempts to evade its Burns obligation to avoid negotiating with the prior union by discriminating  
8 against hiring a majority of employees represented by that union, it is appropriate to presume the  
9 employer otherwise would have hired those individuals. See, *Am. Press, Inc. v. N.L.R.B.*, 833 F.2d  
10 621, 625 (6th Cir. 1987) (“An employer may not defeat a finding of successorship through its own  
11 discrimination.”)

12 Nevertheless, it is far from clear that the Board has shown a likelihood of success on the  
13 merits. This certainly was not a circumstance where an employer was attempting to avoid having  
14 a unionized workforce, or any obligation to negotiate with unions.<sup>1</sup> While the Board’s  
15 characterization that Everport was engaged in a “scheme” to avoid obligations under Burns is  
16 somewhat persuasive, so is the alternative narrative offered by Everport that it was merely  
17 attempting to act consistently with other West Coast terminal operators in abiding by its  
18 obligations as a member of the PMA.

19 Apart from any showing on the potential merits, however, the Board simply has not  
20 demonstrated how at this juncture additional irreparable harm is likely to accrue absent a ruling in  
21 its favor on this petition. The events alleged to have been wrongful took place in 2015. The  
22 Board was on notice of those facts almost exactly one year ago, and advised Everport it thought  
23 section 10(j) relief would be warranted the very next day. The petition in this court was not filed  
24 for some eight weeks after the underlying administrative complaint was filed. While there is some  
25 evidence a handful of MTC Mechanics may remain unemployed, the Board has not made a

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27 <sup>1</sup> This is not to suggest that no unfair labor practice can ever exist where an employer favors one  
28 union over another.

1 compelling showing of irreparable harm.

2           The Board relies on *Frankl*, *supra*, 650 F.3d 1334, and similar cases to argue that Board  
3 investigations necessarily take time and that some courts have issued injunctions under section  
4 10(j) even where the Board had been aware of the allegations months before seeking relief under  
5 section 10(j). On the record here, however, petitioner has not shown that a mandatory injunction,  
6 requiring respondents to attempt to restore a status quo ante of 2015 is warranted, under any  
7 showing on the merits the Board arguably has made. The relief the Board seeks here is more  
8 appropriately granted—if at all—in the administrative proceedings, and not by a district court on  
9 an abbreviated record, especially where the irreparable harm, if any, has not been shown to be  
10 substantially increasing.

11           At the hearing, the parties suggested that the proceedings before the administrative law  
12 judge may be concluded in May of this year. Accordingly, there appears to be a reasonable  
13 chance a determination at the initial administrative level will issue within the next several months.  
14 Without prejudging the question of whether decision in the Board’s favor would sufficiently alter  
15 the balance of equities as to warrant section 10(j) relief at that juncture, this decision is without  
16 prejudice to any new application by the Board, should that come to pass.

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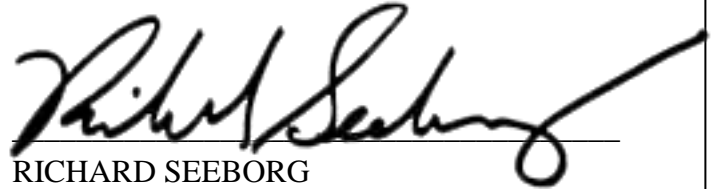
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V. CONCLUSION

The petition under Section 10(j) of the National Labor Relations Act is denied. The Clerk of the Court is directed to close the file. In the event the parties contend further proceedings are necessary, and/or that a separate judgment should be entered to permit appeal, they may so advise the Court in a joint filing, or in separate filings following meet and confer negotiations.

**IT IS SO ORDERED.**

Dated: March 23, 2017



RICHARD SEEBORG  
United States District Judge