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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRSTLINE TRANSPORTATION  
SECURITY, INC,

Employer

And

Case 17-RC-12354

INTERNATIONAL UNION, SECURITY,  
POLICE AND FIRE PROFESSIONALS  
OF AMERICA (SPFPA)

Petitioner

AMICUS BRIEF OF ILWU SUPPORTING BOARD JURISDICTION

INTRODUCTION

This Amicus brief is submitted on behalf of the International Longshore and Warehouse Union ("ILWU") in response to the Board's Notice And Invitation To File Briefs, dated July 7, 2005, in this matter. For the reasons set out below, the ILWU urges the Board to reject unequivocally the Employer's suggestion that the Board create an unprecedented "national security" exception to its jurisdiction and that, accordingly, the Board continue the long

1  
2 established jurisprudence and practice of asserting mandatory jurisdiction over privately  
3 employed airport security screeners at issue in this case.

4         The ILWU is a labor organization that represents, among others, longshore and port  
5 workers employed in United States ports on the West Coast. The ILWU serves as the exclusive  
6 bargaining representative of longshore and port workers employed by waterfront employers  
7 operating in all West Coast ports. See, Waterfront Employers Association, 7 NLRB 1081  
8 (1937). ILWU members include marine clerks who screen all incoming and outgoing containers,  
9 rail and yard planners who track the locations of cargo including hazardous cargo and crane  
10 operators who load containers from and to ships for transport. In short, ILWU members are the  
11 front line of security in West Coast marine terminal facilities. Accordingly, the ILWU has a  
12 direct stake in this proceeding and in all matters affecting the safety and security of our port and  
13 maritime facilities.  
14

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16         The ILWU has been actively involved in port security and, particularly involved in  
17 proceedings related to the creation of new regulations implementing post-September 11, 2001  
18 legislation regarding security measures, including, in particular, the Maritime Transportation  
19 Security Act of 2002 (MTSA), 46 U.S.C. section 70101, et seq. (Pub. L. 107 -- 297, Title I,  
20 November 25, 2002, 116 Stat 2073). Indeed, several MTSA provisions, including mandatory  
21 training and evacuation procedures for port workers as well as due process and appeal rights  
22 relating to employee background checks, come from specific ILWU proposals. ILWU  
23 representatives have, by invitation, testified before Congress on various occasions concerning  
24 national and port security matters, including at the House Committee on Transportation and  
25 Infrastructure, Coast Guard and Maritime Transportation Subcommittee Oversight Hearing on  
26 Port Security Regulations on June 9, 2004 and July 22, 2003.  
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2 **THE ROLE AND EXPERTISE OF THE BOARD ARE LIMITED TO ENFORCING THE**  
3 **CONGRESSIONAL POLICIES OF THE ACT, PROMOTING COLLECTIVE**  
4 **BARGAINING**

5 Under 29 USC sec. 151, Congress has determined that it is the policy of the nation to  
6 encourage collective bargaining:

7 It is hereby declared to be the policy of the United States to eliminate the causes of  
8 certain substantial obstructions to the free flow of commerce and to mitigate and  
9 eliminate these obstructions when they have occurred by encouraging the practice and  
10 procedure of collective bargaining and by protecting the exercise by workers of full  
11 freedom of association, self-organization, and designation of representatives of their own  
12 choosing, for the purpose of negotiating the terms and conditions of their employment or  
13 other mutual aid or protection.

14 The Board's role is to enforce the Act consistent with that policy, not other policies,  
15 particularly if another policy would discourage collective bargaining. The Board lacks any  
16 expertise to interpret and apply other statutes or congressional actions. As the Ninth Circuit has  
17 observed:

18 Just as federal courts are ill-equipped to displace the role of the NLRB, the NLRB is not-  
19 suited to balance the competing federal interests presented by these two statutes. To  
20 permit the NLRB to decide claims in which an employer's reasonable accommodation  
21 may violate the NLRA would leave the interpretation of the ADA to the NLRB. This  
22 judicial function certainly exceeds that agency's expertise and authority. Instead, the  
23 careful balancing of these two statutes should be left to the federal courts, who may  
24 properly consider the requirements imposed on a employer by the NLRA when  
25 determining whether the employer has provided a reasonable accommodation.

26 *Smith v. National Steel and shipbuilding Co.*, 125 F.3d 751, 757 (9th Cir. 1997)

27 Thus, it is clear that any careful balancing of the NLRA with "national security" interests  
28 embodied in federal anti-terrorism laws should be performed by the courts, not the Board.

29 **THERE IS NO LEGAL BASIS FOR THE CREATION OF A "NATIONAL**  
30 **SECURITY" EXCEPTION TO THE BOARD'S JURISDICTION; RATHER THE**  
31 **BOARD HAS HISTORICALLY PROMOTED COLLECTIVE BARGAINING RIGHTS**  
32 **IN TIMES OF NATIONAL CRISIS AND WORLD WAR**

33 There is absolutely no legal authority whatsoever for the dubious creation of a so- called  
34 "national security" exception to the Board's jurisdiction or to private sector employees' statutory

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2 entitlement to the protections of the Act. In fact, history shows that in times of national crisis  
3 and even world wars, continued enforcement of the Act and promotion of collective bargaining  
4 rights have vigorously continued unabated.

5  
6 For example, during this country's greatest military conflict in the Second World War, the  
7 Board exercised jurisdiction throughout all corners of private sector industries including defense  
8 industries. While Congress certainly passed various emergency and war-related legislation after  
9 the 1941 attack on Pearl Harbor, none, including the War Labor Disputes Act, was considered to  
10 conflict with or preclude collective bargaining rights under the Act. Indeed, the Board  
11 specifically held, "There is nothing in the War Labor Disputes Act to indicate that Congress  
12 intended that Act to encroach in any way upon the exclusive authority which the National Labor  
13 Relations Act grants the Board to investigate and determine in appropriate cases questions  
14 concerning the representation of employees." *Allis-Chalmers Mfg. Co.*, 52 NLRB 100, 102  
15 (1943).  
16

17 In fact, the Board specifically ruled that the exigencies of the Second World War required  
18 an expansion, not an erosion, of collective bargaining rights as the best means for achieving the  
19 harmonious purposes of the Act and the war-effort by stabilizing labor relations and promoting  
20 the free flow of commerce. In *International Harvester Company*, 55 NLRB 497 (1944), the  
21 Board specifically rejected the claim that war-related legislation somehow divested the Board of  
22 jurisdiction over disputes pending before the National War Labor Board and further observed  
23 that its wartime rulings provided incumbent bargaining representatives with extended  
24 "immunity" from challenges by rival unions in certain situations. The Board there explained:  
25

26 While it is true that in some cases we have declined to proceed to a determination  
27 of representatives in the presence of a dispute before the National War Labor Board, we  
28 did so, not on jurisdictional grounds, but because we were of the opinion that to order an  
election in those cases might unfairly deprive a recently certified or recognized

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2 representative of a reasonable opportunity to obtain the benefits of exclusive  
3 representation, inasmuch as its initial bargaining efforts, following recognition or  
4 certification, had proved fruitless primarily as a result of unavoidable delays consequent  
5 upon its voluntary resort to the proceedings of the National War Labor Board. It is clear  
6 that we are not here confronted with such a factual situation. For over 2 years, the N. M.  
7 U. has been the exclusive bargaining representative of the unlicensed personnel aboard  
8 the Company's two freighters. During that period, it has obtained, both through the  
9 collective bargaining process and through directives of the National War Labor Board,  
many substantial benefits for itself and its membership. All disputed matters before the  
National War Labor Board, except working rules, have been resolved. In these  
circumstances, we believe that the policies of the Act can best be effectuated by  
providing the employees herein with the opportunity to express their present  
representation desires in an election by secret ballot. [Footnotes omitted]

10 55 NLRB at 500-501.

11 Similarly in *Taylor Forge & Pipe Works*, 58 NLRB 1375 (1944), the Board justified its  
12 rule on extending the period for protecting incumbent bargaining representatives from rival  
13 unions specifically on "the exigencies of war-time labor relations." In this regard the Board  
14 explained:

15  
16 Although the result of these decisions is to extend the period during which an  
17 established statutory representative customarily enjoys immunity from a reinvestigation  
18 of its status as such, we are of the opinion that that result is justified and required by the  
19 exigencies of war-time labor relations. For the duration of the war, a majority of labor  
20 organizations have agreed not to exercise their right to strike, and the Federal  
21 Government has set up agencies to arbitrate differences between employers and  
22 employee representatives. In adhering to the no-strike pledge and taking advantage of the  
23 peaceful means of settlement provided by the Government, labor unions may be forced  
24 into inactivity during the sometimes slow processing of their disputes, while recently  
25 enrolled members lose patience and transfer allegiance to what seems at the time a more  
26 militant organization. In the interest of stable and orderly collective bargaining, we  
27 believe that a measure of protection should be afforded to newly recognized or newly  
28 certified unions which, without fault, are placed in that position. [Footnotes omitted].

58 NLRB at 1378-1379.

**SECTION 14(C)(1) OF THE ACT MANDATES THAT THE BOARD ASSUME  
JURISDICTION IN THIS AND SIMILAR CASES CONSISTENT WITH BOARD  
STANDARDS AS OF AUGUST 1, 1959.**

Section 14(c)(1) of the Act states in full:

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2 The Board, in its discretion, may, by rule of decision or by published rules  
3 adopted pursuant to the Administrative Procedure Act, decline to assert  
4 jurisdiction over any labor dispute involving any class or category of employers,  
5 where, in the opinion of the Board, the effect of such labor dispute on commerce  
6 is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided,  
7 That the Board shall not decline to assert jurisdiction over any labor dispute over  
8 which it would assert jurisdiction under the standards prevailing upon August 1,  
9 1959.

10 Here, there can be no serious claim that the private sector employer of airport security  
11 screeners does not sufficiently affect commerce to warrant discretionary withholding of the  
12 Board's jurisdiction. In fact, the Employer here appears to claim just the opposite -- that its role  
13 in promoting "national security" is so critical to the welfare and commerce of our airline  
14 transportation system as to warrant a special exemption from the Act.

15 Likewise, it is beyond dispute that as of August 1, 1959, the relevant time frame in  
16 section 14(c)(1), the Board had continuously not only asserted its jurisdiction but expanded  
17 collective bargaining rights not just in spite of, but specifically because of, war and "national  
18 security" emergencies. See the cases cited above. Accordingly, section 14(c)(1) of the Act  
19 specifically mandates that "the Board shall not decline to assert jurisdiction" in this or similar  
20 cases. See, *Harold P. Goodbody, et al. d/b/a Goodbody and Co*, 181 NLRB 81 (1970) (holding  
21 that section 14(c)(1) prohibits the Board from declining to assert jurisdiction over brokerage  
22 firms where jurisdiction would have been asserted under standards existing as of 1959).

23 **THE BOARD HAS REPEATEDLY REJECTED CLAIMS THAT OTHER  
24 FEDERAL LAWS SOMEHOW PRECLUDE ENFORCEMENT OF THE ACT.**

25 On many past occasions, "consistently the Board and the courts have affirmed the clear  
26 Congressional mandate that the Board's power in the administration of the Nation's labor policy,  
27 as reflected in the National Labor Relations Act, shall be exclusive, notwithstanding regulation  
28 or assertion of jurisdiction by other governmental agencies, or other means of adjustment or

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2 prevention of labor disputes affecting commerce." *Harold P. Goodbody, et al. d/b/a Goodbody*  
3 *and Co*, 181 NLRB 81 (1970) (rejecting claim that the Securities Exchange Act divests the  
4 Board of jurisdiction over banks and brokerage firms); and see cases cited therein. The Board  
5 has noted, "The legislative history of the NLRA also indicates that consideration was given to  
6 the effect of existing or future Federal and state regulations in the minimum wages and hours and  
7 other areas and, even though it was recognized that such types of regulations may ultimately  
8 affect the contents of any collective-bargaining agreements reached, such did not derogate from  
9 the provision for exclusive collective-bargaining representation, and the collective-bargaining  
10 process as a means of mitigating and eliminating obstructions to the free flow of commerce." *Id.*  
11 at 82.

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14 **NATIONAL SECURITY REGULATIONS SINCE SEPTEMBER 11**  
15 **SPECIFICALLY PROTECT AND ENCOURAGE COLLECTIVE BARGAINING**  
16 **RIGHTS IN PRIVATE SECTOR TRANSPORTATION INDUSTRIES**

17 Nothing in the Aviation and Transportation Security Act (ATSA) (49USC section 114)  
18 nor in the Maritime Transportation Security Act (MTSA) (46 U.S.C. section 70101, et seq.)  
19 suggests that Congress intended to deprive any private-sector employees, including the Airport's  
20 screeners at issue in this case, of collective bargaining rights under the Act. Indeed, various  
21 Federal regulations such as those implementing the MTSA clearly preserve and protect the rights  
22 of labor organizations to fully function as part of these new "national security" measures.

23 Beginning on July 1, 2003, the Department of Homeland Security (Coast Guard) issued  
24 comprehensive regulations for the security of Maritime transportation, including all US ports,  
25 against possible terrorism. (68 Fed Reg. 39240, et seq.). A cornerstone of the MTSA  
26 regulations is the establishment of Area Maritime Security (AMS) Committees, which have the  
27 legal responsibility of developing guidelines and administering the overall security of their  
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2 respective port areas. See, 33 CFR§103.300. Significantly the Department of Homeland  
3 Security has mandated that all AMS committees "will be composed of not less than seven  
4 members having an interest in the security of the area and who may be selected from... (5)  
5 Maritime industry, including labor." See, 33 CFR§103.305 (a) (5). In accordance with this  
6 regulation, it is a matter of public record that virtually all AMS Committees administering the  
7 national security regulations under the MTSA include representatives from organized labor as  
8 committee members. On the West Coast, ILWU's representatives serve on all AMS Committees  
9 in our West Coast ports.  
10

11           Moreover, while the MTSA regulations restrict public access to waterfront facilities and  
12 impose strict security clearance standards, significantly, the Department of Homeland Security  
13 has explicitly stated that the new regulations "encourage both the vessel and of the facility  
14 operators to coordinate shore leave for mariners, as well as procedures for access through the  
15 facility by visitors, including port chaplains and union representatives." (68 Fed Reg. at 39252).  
16 Accordingly, the MTSA regulations mandate that "the facility owner or operator must insure that  
17 an identification system is established for checking the identification of facility personnel or  
18 other persons seeking access to the facility that... (5) allows temporary or continuing access for  
19 facility personnel and visitors, including seafarers chaplains and union representatives, through  
20 the use of a badge or other system to verify their identity." See, 33 CFR§105.255 (c)(5).  
21  
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23           These Federal regulations refute any claim that "national security" concerns somehow  
24 conflict with union representation and collective-bargaining rights for employees in private  
25 sector transportation industries. To be sure, transportation workers are the eyes and ears of their  
26 industries. They are most familiar with the intricacies of company operations and, therefore,  
27 most aware of suspicious activities and insecure situations. The hands-on expertise of  
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2 transportation workers and their unions is an invaluable asset to any serious port security  
3 initiative. As recognized by the Department of Homeland Security, inclusion of Maritime unions  
4 on port AMS Committees and in developing port security assessments and plans best promotes  
5 the "national security" objectives of the MTSA and similar legislation adopted after the  
6 September 11 terrorist attacks on our country.  
7

8 Since the Department of Homeland Security has adopted regulations that recognize the  
9 continuing, legitimate role of organized labor in the administration of our nation's new security  
10 initiatives, manifestly, the Board should not and must not restrict under the guise of "national  
11 security" concerns the long-established collective bargaining rights guaranteed by the Act.  
12

### 13 CONCLUSION

14 For the above reasons, the Board should not countenance the employers self-serving and  
15 cynical use of "national security" issues to escape its long established legal obligations under the  
16 National Labor Relations Act. Accordingly, the Board should confirm its mandatory jurisdiction  
17 in this and similar cases involving private sector transportation industries and reject any so-called  
18 "national security" exception to the protections provided under the Act.  
19

20 Dated: August 3, 2005

21 Respectfully Submitted,

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