

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31**

**MARINE EXCHANGE OF LOS ANGELES –<sup>1/</sup>  
LONG BEACH HARBOR, INC.**

**Employer**

**and**

**Case 31-RC-8213<sup>2/</sup>**

**INTERNATIONAL LONGSHORE AND WAREHOUSE  
UNION, LOCAL 63, MARINE CLERKS ASSOCIATION,  
OFFICE CLERICAL UNIT**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

The Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, as amended, seeking to represent a unit of all full-time and regular part-

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<sup>1/</sup> The name of the Employer appears as corrected at the hearing.

<sup>2/</sup> In March 2000, a hearing involving the same parties was held before a hearing officer at Region 31 in Case 31-RC-7851 regarding the same issue raised in the present case – is the Employer an “employer” under Section 2(2) of the Act and thus subject to the Board’s statutory jurisdiction.

On April 24, 2000, the Regional Director of Region 31 issued a Decision and Direction of Election finding that the Employer was an “employer” under Section 2(2) of the Act and subject to the Board’s statutory jurisdiction.

The Employer subsequently filed a Request for Review with the Board in Washington, DC, but withdrew it before it was decided by the Board.

In the present case, the parties have stipulated that the entire record in Case 31-RC-7851, including the transcript and exhibits, are incorporated into, and made a part of, the record in this hearing.

With few exceptions, which are noted in the following decision, the information supplied in the March 2000 hearing in Case 31-RC-7851 continues to be accurate today. Thus this Decision and Direction of Election includes the earlier factual discussion for Case 31-RC-7851, supplemented by the information provided in the hearing in the present case. The analysis and conclusion section integrates information from both cases into the discussion.

time answering service operators<sup>3/</sup> employed at the Employer's facility in San Pedro, California. A hearing was held before a hearing officer of the National Labor Relations Board.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Upon the entire record in this proceeding, I find:

**I. HEARING OFFICER RULINGS:** The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

**II. JURISDICTION:** The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.

The Employer, which contends that it does not meet the definition of "employer" under Section 2(2) of the Act, and thus should not be subject to the Board's statutory jurisdiction, has stipulated that it meets the Board's discretionary monetary jurisdictional standards. Thus, Marine Exchange of Los Angeles - Long Beach Harbor, Inc., hereafter Marine Exchange or the Employer, is a California non-profit, mutual benefit corporation, with an office and place of business located in San Pedro, California, where it is engaged in the business of providing maritime, vessel, and vessel traffic information at the Employer's 3601 So. Gaffey Street, San Pedro, California facility. During the past 12 months, a representative period, the Employer derived gross revenues in excess of \$500,000, and provided services valued in excess of \$50,000 to entities which in turn meet the Board's direct inflow or outflow jurisdictional standards. Thus, the Employer satisfies the Board's discretionary standard for asserting jurisdiction over non-retail enterprises. *Siemons Mailing Service*, 122 NLRB 81 (1959).

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<sup>3/</sup> The unit description appears as amended at the hearing.

### **A. PARTIES GENERAL CONTENTIONS**

As noted, the Employer disputes that it is an “employer” as defined in Section 2(2) of the Act. The Employer asserts that jurisdiction should not be asserted over Marine Exchange because, among other things, it is a “unique entity.” According to the Employer, Marine Exchange provides its vessel traffic services on behalf of the State of California, the Ports of Los Angeles and Long Beach, and the United States Coast Guard pursuant to a “unique partnership” and that everywhere else in the United States where vessel traffic service is provided, it is provided by Federal employees. The Employer contends that Marine Exchange acts as an agent on behalf of the State of California and the Ports of Los Angeles and Long Beach to collect tariffs and that Marine Exchange’s services are an essential government function “intimately connected” to maintaining the safety of the harbor.

The Employer further contends that Marine Exchange is a “political subdivision” of the State of California and the Ports of Los Angeles and Long Beach as that term has been described in *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 91 S. Ct. 1746 (1971), and that it is thus not subject to the Board’s statutory jurisdiction.

The Employer asserts that by virtue of their fundamental involvement in the re-invention of Marine Exchange through the introduction of the Vessel Traffic Information Service, hereafter VTIS,<sup>4/</sup> the State of California and the Ports of Los Angeles and Long Beach essentially created Marine Exchange as it exists today. Additionally, the Employer contends that Marine Exchange should be considered a political subdivision because its Board of Directors includes three individuals employed

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<sup>4/</sup> According to the testimony of the Employer’s Deputy Executive Director, VTIS has been renamed Vessel Traffic Service or VTS, but for purposes of this decision it will be referred to as VTIS.

by entities that are directly responsible to the public. According to the Employer, the three individuals have the power to vote, and hold key positions of authority with respect to the Board of Directors and Marine Exchange.

Furthermore, the Employer asserts that strong doctrinal and policy considerations demand reconsideration of the rule announced by the Board in *Management Training Corp.*, 317 NLRB 1355 (1995), that “jurisdiction should no longer be determined on the basis of whether the employer or the Government controls most of the employees’ terms and conditions of employment.” According to the Employer, Marine Exchange’s ties with the Coast Guard, the State of California and the Ports of Los Angeles and Long Beach preclude it from bargaining over essential economic and non-economic terms and conditions of employment. Accordingly, the Employer argues that asserting jurisdiction over the Employer in this case will not best effectuate the policies of the Act.

According to the Petitioner, the Employer is not “a political subdivision” as that term is defined in *Hawkins*, supra, as it is not a wholly owned government corporation nor was it “created directly by the state, so as to constitute a department or administrative arm of the government” nor is it “administered by individuals who are responsible to public officials or to the general electorate.” Thus, the Petitioner contends jurisdiction should be asserted over the Employer.

I have considered the evidence and arguments presented by the parties. As discussed below, I have concluded that the Employer is not a “political subdivision” as that term is defined in the *Hawkins* case. I further conclude that the Employer’s “intimate connection” argument is irrelevant under existing case law. As a result, I conclude that under the *Management Training Corp.* case the Employer is an “employer” under Section 2(2) of the Act and thus subject to the Board’s statutory jurisdiction.

## **B. BACKGROUND FACTS FROM THE HEARING IN CASE 31-RC-7851**

The history of Marine Exchange dates back to the early 1920's. Back then, ship owners and their agents would send "runners" out to points along the coast to watch for their ships to come in. Upon spotting their vessels, the runners would report back to their offices and make arrangements to handle the ship when it docked by alerting, among others, pilots, tug boat operators, customs agents and port authorities.

By around 1920 (when the Port of Los Angeles and Long Beach were established) it was realized that the services provided by the runners could be offered by a staff of full-time professional "lookouts" capable of identifying and communicating with arriving ships, and then "passing the word" along to the proper persons, agencies or authorities in connection with the vessels.

In July 1920 a local steamship agent/customhouse broker formed "The Maritime Exchange and Shipping Club of the Port of Los Angeles." He hired professional lookouts (many of them retired Quartermasters and Signalmen from the United States Navy and United States Coast Guard) and offered the new lookout and reporting service to the maritime industry and waterfront community for a fee.

The service was popular but not profitable. By 1923 The Maritime Exchange and Shipping Club of the Port of Los Angeles was declared insolvent. As a result, the Los Angeles Area Chamber of Commerce, hereafter the LAACC, took over the lookout operation and adopted the name Marine Exchange of Los Angeles. The LAACC is a private, nonprofit organization composed of business leaders from the Los Angeles area. Marine Exchange's relationship with the LAACC, as a non-profit affiliate, lasted for over 72 years.

### **C. CORPORATE STRUCTURE OF MARINE EXCHANGE**

In 1946, Marine Exchange was formally incorporated as a non-profit trade organization with the State of California, and the name Marine Exchange of Los Angeles - Long Beach Harbor, Inc. was adopted. Its stated purpose, among other things, was to maintain lookout stations for Los Angeles and Long Beach harbors, gather information pertinent to ship arrivals and departures, weather, and other marine intelligence, and disseminate that information for a fee to government and private subscribers. Pursuant to Marine Exchange's original Articles of Incorporation, upon dissolution, Marine Exchange's assets were to be distributed to the LAACC.

In the summer of 1995, the Board of Directors declared Marine Exchange to be an independent, self-supporting, non-profit organization, and asked to be released from its affiliate status with the LAACC. The LAACC complied, and complete separation of the two organizations was accomplished in early 1996.

In 1996, amended Articles of Incorporation were recorded and filed with the State of California. The amended Articles provide that Marine Exchange's authorized purposes are:

- (Two) a. To maintain an official Lookout Station, or Stations, for the Harbors of Los Angeles and of Long Beach, or either of them; to obtain and issue information, upon a fee basis or otherwise, for, and to, government and private subscribers pertinent to ship arrivals and departures, and other marine movements, weather conditions, casualties, and other marine intelligence; to compile and disseminate statistical data, upon a fee basis or otherwise, with respect to foreign commerce passing through Los Angeles Harbor and Long Beach Harbor, or either of them, with respect to the foregoing and domestic movement of specific commercial commodities;

- b. To provide reports and services regarding ship movements and activities for the Ports of San Diego and Hueneme, upon a fee basis or otherwise, to government and private subscribers, in the same manner and scope as outlined in Article Two(a);
- c. To provide 24-hour Vessel Traffic Information Service (VTIS) in accordance with State and Federal laws, and in partnership with the United States Coast Guard (USCG), the California Office Oil Spill Prevention and Response (OSPR), the Ports of Los Angeles and Long Beach, and other entities, upon a fee basis, to all arriving 'Covered Vessels';
- d. To purchase, lease and/or otherwise acquire; to hold, own, and/or enjoy; and to sell, lease, mortgage and/or otherwise encumber and dispose of, any and all kinds of real personal property, to carry on any and all operations necessary or convenient in connection with the activities of this corporation;
- e. To borrow money, either with or without security, and to give such promissory notes, mortgages, and/or other instruments of hypothecation as may be deemed necessary or advisable by the Board of Directors;
- f. To carry into effect any one or more of the objectives and purposes hereinabove set forth; and, to that end, to do any one of more of the acts and things aforesaid; and likewise any and all acts or things necessary to incidental thereto; and, in conducting or carrying on its activities (and for the purpose of promoting or furthering anyone or more of its said objectives or purposes) to exercise any or all of the powers herein set forth in this and any other article, or additional power now or hereafter authorized by law, either alone or in conjunction with others, as Principal, Agent, or otherwise.

The restated Articles of Incorporation also provide that upon dissolution, the assets of Marine Exchange are to be distributed to the Ports of Los Angeles and Long Beach.

In 1997, Marine Exchange's bylaws were also revised. The Board of Directors is the governing body of Marine Exchange. The Board of Directors is to consist of 15 regular voting directors from the following suggested categories of the

maritime industry: admiralty law, agents (ship/cargo), break/bulk operators, container operators, international finance, Long Beach pilots, Los Angeles pilots, marine insurance, The Port of Long Beach, The Port of Los Angeles, reefer operators, Steamship Association of Southern California, tanker operators, terminal operators, tug/barge operators, and “at large.” The Executive Director of Marine Exchange is a non-voting ex-officio director. There are also four non-voting advisors and liaisons.

The Board of Directors appoints a committee to select qualified candidates for election to the Board at least 60 days before the date of any election of directors. The nominating committee includes the current chairman and four regular directors. Regular directors are elected from nominees at the annual Board of Directors meeting. The regular directors serve a 3-year term. Vacancies on the Board of Directors are filled by the vote of a majority of the Board of Directors.

Officers of the Corporation, which include the Chairman, President, Vice President, Secretary and Treasurer, are chosen by the Board of Directors and serve at the pleasure of the Board of Directors and can be removed with or without cause.

The Executive Director of Marine Exchange reports directly to the President regarding Marine Exchange’s day-to-day operations, activities and decisions.

As per the bylaws, there are representatives of the Port of Los Angeles and Long Beach on the present Board of Directors. There are presently two representatives from the Port of Los Angeles and one from the Port of Long Beach. Representing the Port of Los Angeles are the Pilot Services Manager for the Port of Los Angeles (a civil service position) and the Director of Administration for the Port of Los Angeles. There is also a representative of the Port of Long Beach. These three, plus the Captain of the Port, who is also the Coast Guard Commanding Officer (a non-voting member of the Board), constitute the public officials on Marine Exchange’s Board of Directors. Testimony from

Marine Exchange's Deputy Executive Director indicates that in the years he has been with Marine Exchange, there has never been a time when representatives of the Port of Los Angeles or Long Beach, or any other government entity, have ever constituted a majority of the Board of Directors. Rather, industry representatives from the various suggested categories in the bylaws have always composed a majority of the Board.

#### **D. MARINE EXCHANGE OPERATIONS**

According to its Deputy Executive Director, Marine Exchange was established in 1923 to "facilitate commerce and the betterment of commerce, in the ports of Los Angeles and Long Beach harbors." Throughout the period of its existence, Marine Exchange has been engaged in the business of collecting information related to ship arrivals and departures and then "disseminat[ing] that information for the benefit of the merchants of the ports."

Since its inception, Marine Exchange has been in the business of publishing and selling various shipping reports and surveys, and providing maritime industry research and various other information related services, to customers (also referred to as "subscribers") in the Ports of Los Angeles and Long Beach. These customers include shipping agents, harbor pilots, tugboat operators, terminal operators, various kinds of shipping companies, newspapers, lawyers and the ports themselves.

As it has also done since its inception, Marine Exchange continues to operate as a maritime information service. It collects information on when ships arrive, depart, how long they will be staying, where they are berthed at, etc. To gather its information, Marine Exchange employees call the various vessel agents. The agents provide schedules on a daily basis. There is a constant updating of schedules. Marine Exchange solicits the information from the agents, collates it, puts it into various reports,

subscribers then subscribe to Marine Exchange's reporting services, and pay for the reports.

Marine Exchange also gathers information on 24 advance notification of foreign ships for the benefit of the Coast Guard, which information goes into Marine Exchange's regular reports, and satisfies Coast Guard requirements.

Marine Exchange has 250 or so subscribers to its services. Marine Exchange sells its reports to private subscribers and government entities such as the Navy, Customs, and the Department of Agriculture. In addition, various state agencies also buy Marine Exchange's information.

Marine Exchange also provides a telephone answering service to about 36 different customers. In addition, Marine Exchange acts as dispatcher for 8 terminals, for security guards for ILWU Local 26. Marine Exchange connects the Union with the various facilities that need personnel. Marine Exchange also rents cell phones for arriving ships, provides local messenger delivery services, and provides billing services to the Steamship Association of Southern California, a private business organization.

Marine Exchange has also contracted with the State of California to provide its Executive Director as secretariat for the Harbor Safety Committee. The Harbor Safety Committee is a formalized committee established by the Keene- Lempert-Seastrand Act of 1990. Keene-Lempert-Seastrand mandated that all ports in California must have a Harbor Safety Committee. This requirement came about as a result of the Exxon-Valdez incident, after which the State decided to take a stronger stance about environmental protection and Keene- Lempert-Seastrand Act grew out of that concern. Keene-Lempert-Seastrand also required that there be a vessel traffic service in each port.

### **E. VESSEL TRAFFIC INFORMATION SERVICE (VTIS)**

The VTIS is another component of Marine Exchange's business. Marine Exchange's Deputy Executive Director testified that:

The vessel traffic service, in essence, assimilates ships into the system as they approach... the ports of Los Angeles and Long Beach. The VTIS takes ships in an orderly fashion... identifies who... the ships are, and what their destinations are. We notify the appropriate entities in the port. We apprise the incoming ships of any unique characteristics that may be going on in the port, such as fog that they may encounter along the way, or dredging that they can anticipate. We apprise them of rules that are in effect... We in general, make sure that the ship is properly informed, and that people who are expecting him, are equally properly informed as to his status and where he is going.

Marine Exchange operates VTIS in conjunction with the U.S. Coast Guard, the State of California Office of Oil Spill Prevention and Response, hereafter OSPR, and the Ports of Los Angeles and Long Beach. VTIS monitors, and in some cases regulates, ship traffic in the Los Angeles-Long Beach harbor area and adjacent waters within a 25-mile radius. VTIS commenced operations on or about March 1, 1994.

Prior to 1994, going back to approximately 1981, Marine Exchange had established a vessel traffic advisory service, hereafter VTAS. This was a limited operation conducted with the "blessing" of the Coast Guard through the use of radar equipment and radio broadcasts detailing ship movements in the harbor area. As a provider of VTAS information, Marine Exchange had no regulatory authority, was not integrated into the Coast Guard information technology network, and had much less technological sophistication.

As noted, in response to the Exxon-Valdez oil spill in Alaska, the State of California took a stronger stance with respect to environmental protection. One of the

outgrowths of this concern with environmental issues was the passage of the Keene-Lempert- Seastrand Act. Keene-Lempert-Seastrand mandated that OSPR, work in conjunction with the Coast Guard to establish VTIS operations in the State's ports.

At the time, the Coast Guard did not have the requisite manpower or funds to unilaterally establish a VTIS in the Ports of Los Angeles and Long Beach. Instead, Marine Exchange and the Coast Guard formed a partnership to jointly provide VTIS for the Ports of Los Angeles and Long Beach.

Marine Exchange participates in the VTIS operation pursuant to statutory authority granted by California Government Code, Section 8670.21(f) and the California Harbors and Navigation Code, Sections 445, et seq.

Marine Exchange received various grants and loans from the State of California and the Ports of Los Angeles and Long Beach to help establish VTIS. In order to help establish VTIS, OSPR extended a million dollar line of credit to Marine Exchange through the Beverly Bill, Senate Bill No. 171, chaptered October 11, 1993.

The California Legislature provided the statutory authority for the line of credit from the OSPR. These efforts resulted in the amendment of the Harbors and Navigation Code to include Article IV pertaining to the VTIS. (Elder Assembly Bill No. 134, filed October 14, 1991.) Among the provisions of this article was language establishing the Marine Exchange VTIS, which states:

§445. Operation by Marine Exchange of Los Angeles-Long Beach Harbor, Inc. in VTS area.

(a) The Marine Exchange of Los Angeles-Long Beach Harbor, Inc., ... may operate a vessel traffic service, in cooperation with, and subject to the supervision of, the United States Coast Guard, for the waters of San Pedro Bay, San Pedro Channel, and Santa Monica Bay with a radius of 25 nautical miles of the Point Fermin Light.

The California Legislature also extended limited governmental immunity to Marine Exchange in its functions as a VTIS provider. (Marks Senate Bill No. 200 - Assembly Bill 748, filed October 14, 1991.) This immunity was formalized in the California Government Code §8670.21, which was amended to read:

(3) No vessel that is required to comply with Article 4 (commencing with Section 445) of Chapter 1 of Division 3 of the Harbors and Navigation Code shall assert any claim against the Marine Exchange or any officer, director, employee, or representative of the Marine Exchange for any damage, loss, or expense, including any rights of indemnity or other rights of any kind, sustained by that vessel or its owners, agents, charterers, operators, crew, or third parties arising out of, or connected with, directly or indirectly, the Marine Exchange's operation of the vessel traffic service, even though resulting in whole or in part from the negligent acts or omissions of the Marine Exchange or of an officer, director, employee, or representative of the Marine Exchange.

(4) Each vessel that is required to comply with Article 4 (commencing with Section 445) of Chapter 1 of Division 3 of the Harbors and Navigation Code shall defend, indemnify, and hold harmless the Marine Exchange and its officers, directors, employees, and representatives from any and all claims, suits, or actions of any nature by whomsoever asserted, even though resulting or alleged to have resulted from negligent acts or omissions of the Marine Exchange or of an officer, director employee, or representative of the Marine Exchange.

(5) Nothing in this subdivision affects any liability or rights that may arise by reason of the gross negligence or intentional or willful misconduct of the Marine Exchange or of an officer, director, employee, or representative of the Marine Exchange in the operation of the VTS system, including any liability pursuant to subdivision (c) of Section 449.5 of th Harbors and Navigation Code.

Marine Exchange has received the use of its current facility from the U.S. Coast Guard rent free. The Coast Guard owns the building that houses Marine Exchange. Marine Exchange uses it pursuant to a revocable license. The Ports of Los Angeles and

Long Beach helped facilitate Marine Exchange's initial move to its current facility by extending a line of credit for costs involved in the relocation.

The Ports also each granted \$250,000 to Marine Exchange for infrastructure costs and forgave the remainder of a \$125,000 loan they had each extended to Marine Exchange to cover the costs of moving into their current facility.

The VTIS operation is funded by vessel user fees, ranging from \$200.00 to \$400.00 per vessel, which are included in the tariffs imposed by the Ports of Los Angeles and Long Beach. VTIS fees can only be set or adjusted by the governing boards of the two Ports. Marine Exchange bills the operators of arriving vessels for fees on a monthly or per-ship basis, and the fees are paid directly by the operators to Marine Exchange. These fees account for approximately 75% of the Employer's total revenues. The balance is provided by fees charged to customers for Marine Exchange's maritime information services and reports.

When it has been determined that revenues from VTIS user fees have exceeded total annual expenses for operating the VTIS system, Marine Exchange has authorized refunds of some portion of the fees to the vessel operators. The decision to refund the fees, and the determination of the amount to be refunded, has been made by the Marine Exchange Board of Directors. The Ports of Los Angeles and Long Beach are not involved in the refund process.

The Los Angeles-Long Beach VTIS operation is composed of four regular watch sections, which are usually referred to as watch "teams." Each team has 3 members. Each 3-person watch team includes one VTS watch supervisor and two VTS vessel traffic specialists, also referred to as "watchstanders". The teams work 12-hour day and night shifts, on a rotating 3-days on/3-days off basis.

There is a high level of cooperation between Marine Exchange and the Coast Guard in operating VTIS. The Coast Guard has set up VTIS operations in a number of ports such as Houston, San Francisco, New York, Saulte St. Marie and Valdez, Alaska. Each of these stations other than Los Angeles/Long Beach are operated and manned exclusively with Coast Guard personnel.

The Coast Guard has substantial involvement in the formulation of the policies that govern the operation of the VTIS. The original written policies that governed the operation of the VTIS were set forth in the VTIS Operations Manual. This document was originally written by Marine Exchange's present Operations and Training Manager when he worked as a Coast Guard Chief stationed at Marine Exchange. It was then circulated among a number of organizations including the Harbor Safety Committee, the Coast Guard Marine Safety Office and Marine Exchange, who were all given the opportunity to offer their input. In subsequent years, the Operations Manual has undergone alterations. In each of these situations, the revised document was not final until it was jointly approved by Marine Exchange and the Coast Guard.

The Coast Guard was also involved in the decision to expand the composition of the VTIS watch from two to three employees. The Coast Guard was involved in interviewing candidates for the watch supervisor positions.

Marine Exchange and the VTIS assist the Coast Guard in preserving the safety of the ports by monitoring the movements of ships for violations of the local rules such as exceeding the speed limit or taking a buoy "on the wrong side." When the VTIS encounters a violation, the Coast Guard has established a reporting mechanism whereby the VTIS watch supervisor files an incident report with the Coast Guard. After the incident report is filed, Marine Exchange has the discretion to call in the ship captain or

the shipping agent for counseling and/or to recommend to the Coast Guard that it take further action.

In more extreme and rare situations, Marine Exchange can recommend that the Coast Guard board a ship. When the circumstances dictate, the VTIS can identify ships that should be boarded. Marine Exchange personnel never board a vessel.

The Coast Guard has delegated to the VTIS the ability to convey orders to vessels under the exercise of “Captain of the Port” authority. Ordinarily, VTIS operations do not have the ability to issue binding orders with respect to certain areas like speed of a vessel. The Coast Guard Captain of the Port has plenary power over the movement of vessels in United States ports and waterways. In emergency situations, the Captain of the Port’s authority can be invoked to command a ship’s actions. The Marine Exchange, through the VTIS watch supervisor and the Coast Guard watchstander on duty, has the ability to exercise the Captain of the Port’s authority in limited circumstances.

Marine Exchange has limited authority to grant “deviations” from the Federal rules governing vessel movement in the harbor. The Federal government promulgates these rules through the Code of Federal Regulations. The VTIS has the authority to independently assess emergency situations and grant deviations when the situation demands. These deviations are generally spelled out in great detail in various operating manuals as to how they are to be handled.

Each VTIS watch team must include at least one active duty U.S. Coast Guard member. This is a legal requirement which must be satisfied in order for VTIS to exercise delegated Coast Guard “Captain of the Port” authority in situations where it is appropriate to do so.

In the absence of a Coast Guard watchstander, VTIS has no authority to order a vessel that it is monitoring to reduce its speed, turn right in order to avoid a collision with another vessel, leave a designated navigation area, or take some other appropriate action. The applicable Coast Guard rules and directives state that VTIS-delegated authority to control vessel movements “may only be exercised in those instances where, in the opinion of the Coast Guard watchstander, the normal procedure of alerting the Captain of the Port of the situation and requesting such an order from the Captain of the Port would cause such a delay in issuing a Captain of the Port directive as to result in substantial aggravation of the danger involved.”

Two of the four VTIS watch teams have regular watch supervisors who are active duty Coast Guard personnel. The other two watch teams have watch supervisors who are Marine Exchange civilian employees. One works day shift and one works nightshift.

During the course of a 12-hour shift, the three members of the team rotate the duties of the watch every two hours. The rotation is among the radar, information, and “off” positions. One team member starts the shift on the radar watch, and is responsible for tracking incoming and outgoing vessels on the radar, establishing and maintaining radio contact with the vessels, and obtaining necessary information from the vessels such as their estimated time of arrival and any equipment or other problems they might be experiencing. Another team member starts at the marine information desk position, and is responsible for inputting vessel information in the VTIS computer system, making entries in the written “rough log” of the watch, handling incoming telephone calls from shipping agents or other Marine Exchange customers, and making any necessary outgoing calls to notify pilots, tugboat companies or other Marine Exchange subscribers regarding ship arrivals or departures, etc. The third team member, who starts the shift in the “off” position, is essentially on a work break and is free to

leave the watch center but not the building. After two hours, the team members rotate the above-described positions among themselves.

In addition to Marine Exchange employees and Coast Guard members assigned to the regular watch teams, there are two “floaters” who are available to fill in for team members who are on vacation, sick, or for some other reason unable to work. Both of the floaters are qualified to work as VTS vessel traffic specialists, and one of them is also qualified to work as a alternate VTS watch supervisor. One or both of the floaters is usually present at the facility during the day shift.

**F. SUPPLEMENTAL BACKGROUND FACTS FROM  
THE HEARING IN CASE 31-RC-8213**

According to the Employer, since September 11, 2001, the collaborative relationship between Marine Exchange and the Coast Guard has grown more expansive, and Marine Exchange has also developed increased ties with other government organizations, such as the United States Navy. According to its Deputy Executive Director, Marine Exchange has become the first line of defense for surveillance purposes for the Ports of Los Angeles and Long Beach. Thus, Marine Exchange is required to provide information regarding incoming ships to the Coast Guard, which, in turn, calls on Marine Exchange’s assistance in assigning anchorages to ships that are not permitted to enter the harbor and in coordinating other Coast Guard initiatives.

One such initiative involves Marine Exchange coordinating with the Sea Marshals, which are Coast Guard Officers and Petty Officers who board and investigate ships that have not been cleared to dock at the harbor. Marine Exchange’s involvement with the Sea Marshals program commenced in November of 2001.

Prior to September 11, 2001, Marine Exchange regularly hosted personnel from the Naval Control of Shipping, hereafter NCS, program. The NCS personnel would

use the Marine Exchange facilities to observe ships and would collect ship data from Marine Exchange.

Also, from October 2001 to June 2002, in response to September 11, six Naval officers participating in the Naval Control and Protection of Shipping, hereafter NCAPS, program used Marine Exchange's conference room as their office. They were provided with maritime shipping reports by Marine Exchange, and used Marine Exchange's observation deck for surveillance and photography of incoming ships.

Additionally, in approximately October 2001, in response to September 11, the Captain of the Port of the United States Coast Guard designated the Marine Exchange facility as the gathering site for Coast Guard hierarchy in the event of any emergency, such as an earthquake, that would require that the Coast Guard evacuate its normal headquarters on Terminal Island.

The Deputy Executive Director of Marine Exchange has been issued a secret security clearance to facilitate communication with the Coast Guard regarding port issues. Marine Exchange's Operations and Training Manager has also received a secret clearance and its Executive Director is presently seeking a secret clearance. In addition, Marine Exchange is presently seeking secret clearances for all of its VTIS personnel. The Coast Guard has also recently suggested that Marine Exchange might benefit from the use of a secure telephone, which would be housed under lock and key in the Deputy Executive Director's office.

Marine Exchange's Deputy Executive Director participated in a planning session for a Coast Guard exercise regarding a terrorist attack in the Port of Los Angeles. The exercise was also attended by representatives from various governmental organizations, including the United States Navy, the Sheriff's Department and the Port Police.

In addition, the Deputy Executive Director serves on the Mayor of Los Angeles's Port Security Task Force.

As a member of an organization known as the Maritime Information Services of North America, hereafter MISNA, Marine Exchange provides the Office of Naval Intelligence with information on arrivals and departures into the ports. MISNA members have also entered into agreements to provide similar information for use by the Coast Guard and the United States Maritime Association.

Through its participation in MISNA, Marine Exchange is involved in plans to introduce a new long-range vessel tracking system, the Automated Secure Vessel Tracking System, hereafter ASVTS. ASVTS would allow Marine Exchange to confirm the locations of ships within 96 hours of port.

In addition, per the suggestion of the Coast Guard, the Ports of Los Angeles and Long Beach have submitted a request to the Transportation and Security Administration requesting additional equipment for Marine Exchange, such as radars and transponders, for Marine Exchange's use in performing port security duties.

Also, in the near future, Marine Exchange will be providing internet-based real-time pictures of offshore traffic. The information will be accessible to the Port Authorities of Los Angeles and Long Beach, their police agencies, tug operators, pilots and Coast Guard personnel.

Finally, the National Oceanic and Atmospheric Administration, hereafter NOAA, is a United States government agency that develops oceanic charts and navigational reference manuals. The Marine Exchange building houses computer servers that NOAA uses to collect data about wind direction and speed, barometric readings, tidal information and other related data. The data collected on the Marine Exchange server is

transmitted to NOAA headquarters in Maryland. If there is a problem with the data, NOAA communicates with Marine Exchange's answering service personnel which, in turn, would communicate with local personnel to investigate the problem.

Based upon its earlier submitted information and the additional information elicited in the present hearing, the Employer contends that it has shown that Marine Exchange is a "political subdivision" or, alternatively, that its operations are so intimately connected with an exempt entity, the Coast Guard, that it should be exempt from the Board's statutory jurisdiction.

### **G. ANALYSIS AND CONCLUSION**

As previously noted, I conclude that the Employer is not a "political subdivision" and I reject the Employer's "intimate connection" test as irrelevant under present case law. In *Management Training Corp.*, 317 NLRB 1355 (1995), the Board overruled *Res Care, Inc.*, 280 NLRB 670 (1986) and its progeny, and determined that jurisdiction would no longer be determined on the basis of whether the employer or the Government controlled most of the employee's terms and conditions of employment. The Board further decided that it should not be deciding as a jurisdictional question which terms and conditions of employment are or are not essential to the bargaining process.

As a result, the Board in *Management Training* concluded that in determining whether it should assert jurisdiction over entities such as Marine Exchange, it will only consider whether the employer meets the definition of "employer" under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards.

As noted, Marine Exchange has admitted that it meets the Board's applicable monetary jurisdictional standards. Thus it must be determined under *Man-*

*agement Training* and *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 91 S. Ct. 1746 (1971), whether Marine Exchange meets the definition of “employer” under Section 2(2) of the National Labor Relations Act.

Section 2(2) of the Act defines as “employer” as:

“any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.”

In *Hawkins*, the Supreme Court noted that the term “political subdivision” is not defined in the Act and the Act’s legislative history does not disclose that Congress explicitly considered its meaning. The legislative history does reveal, however, that Congress enacted the Section 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees do not usually enjoy the right to strike. In the light of that purpose, the Board has limited the exemption for political subdivisions to entities that are either: (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.

Thus it must further be determined whether Marine Exchange is a “political subdivision” under a *Hawkins*-type analysis.

I conclude that the evidence, testimony and records as a whole do not support a finding that Marine Exchange is a “political subdivision.” Marine Exchange is clearly not a wholly-owned Government corporation. It is a California non-profit, mutual

benefit corporation. Nor does the evidence convince me that Marine Exchange was “created directly by the state so as to constitute a department or administrative arm of the government” or that it de facto has “morphed” into a department or administrative arm of the government.

The Employer contends that Marine Exchange has undergone a “sea change” which is tantamount to a “re-creation of the entire corporation.” As a result, the Employer contends that Marine Exchange should now be considered to have been created by the State of California and the Ports of Los Angeles and Long Beach as a quasi-governmental entity providing an essential governmental function - VTIS - to the harbor. The Employer relies on *City Public Service Board of San Antonio*, 197 NLRB 312 (1972) to support its contention. The Employer’s reliance on that case is misplaced. In finding the Employer in *City Public Service* to be a political subdivision, exempt from the Act’s coverage, the Board found, significantly, that the employer had the power, among other things, of eminent domain and could bring condemnation suits in the name of the city. Such significant power, one of the elements specifically noted in *Hawkins* regarding a political subdivision finding, is absent in the present case.

The record reveals that Marine Exchange was established in 1923 by the Los Angeles Area Chamber of Commerce as a private trade organization dedicated to promoting commerce in the Los Angeles-Long Beach Harbors and the interests of the local maritime industry. Neither its original, nor subsequently amended, Articles of Incorporation, nor its bylaws, indicate that it was created by the State of California, or was ever intended by its incorporators, to serve as a “department or administrative arm of the government,” or was intended to be some quasi-governmental arm of the government.

I further do not find that the legislative underpinnings of the Vessel Traffic Information Service somehow converts Marine Exchange into a department or admin-

istrative arm of the government. Marine Exchange remains a nonprofit, mutual benefit corporation which has entered into an agreement, a “unique partnership” with the State, the Coast Guard and the Ports to help provide a service to the maritime industry. Marine Exchange continues to operate as a clearing-house for maritime information and services in addition to the VTIS operation.

Marine Exchange’s Articles of Incorporation and Bylaws were amended in 1996 and 1997, after much of the relevant legislation in this case was filed. The Elder Bill was filed in 1991. The Beverly Bill was chaptered in October 1993. The Marks and Kuykendall bills were filed and chaptered in August 1996. As noted, the amended Articles of Incorporation and Bylaws do not state that Marine Exchange is operating as an arm or department of the State, nor does the legislation enacted for its benefit.

I further conclude that the record also does not support a finding that Marine Exchange is controlled by “individuals who are responsible to public officials or to the general electorate.” Marine Exchange is governed by a Board of Directors with 15 voting members. Only three of those voting members are public officials. The other twelve are representatives of private firms in various sectors of the local maritime industry. Public officials have never constituted a majority of the Marine Exchange voting directors. Indeed, by virtue of the categories of representation required, Marine Exchange’s own bylaws virtually require that its Board of Directors be dominated by private maritime industry interests. See *Spectrum Healthcare Services*, 325 NLRB 1061 (1998); *Kentucky River Community Care*, 193 F.3d 444 (6<sup>th</sup> Cir. 1999).

In addition, the Board, in applying the *Hawkins* test, has consistently held that in order for a corporation governed by a Board of Directors to be found to be “administered by individuals responsible to public officials or to the general electorate,” those individuals must constitute a majority of the board. *Enrichment Services Program*,

*Inc.*, 325 NLRB 818, 819 (1998). As noted, only three of the 15 members of Marine Exchange’s Board of Directors are public officials, clearly fewer than a majority.

The Employer further argues that even if Marine Exchange is not found to be a political subdivision, the Board should nonetheless decline to exercise jurisdiction in this case under the “intimate connection” test articulated in *Rural Fire Protection District*, 216 NLRB 584 (1975). In that case, the Board held that an employer was exempt from Board jurisdiction whenever “the services [provided by the non-exempt employer] are ‘intimately connected’ with the exempted operations of the exempt institution,” at 586. Thus Marine Exchange argues that its operations are so intimately connected with the Coast Guard, an exempt entity, that it too should be exempt.

In making its “intimate connection” argument, the Employer acknowledges that the decision in *Management Training Corp.* militates against its position but argues that *Management Training Corp.* was wrongfully decided and should be overruled. As the present state of law is that *Management Training Corp.* is still the precedent, I conclude that the Employer’s “intimate connection” argument must be rejected as legally irrelevant.

Thus, I conclude that Marine Exchange is an “employer” under Section 2(2) of the Act and subject to the Board’s statutory, as well as discretionary, jurisdiction.

There are approximately 8 employees in the unit.

**III. LABOR ORGANIZATION:** The labor organization involved claims to represent certain employees of the Employer.

**IV. QUESTION CONCERNING COMMERCE:** A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

V. **APPROPRIATE UNIT:** The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

**INCLUDED:** All full-time and regular part-time answering service operators, employed by the Employer at its 3601 So. Gaffey Street, San Pedro, California facility.

**EXCLUDED:** Active Duty U.S. Coast Guard personnel, VTS Watch Supervisors and Vessel Traffic Specialists, Maritime Information Specialists and Managers, Administrative Assistants, confidential employees, managerial employees, professional employees, all other employees, guards and supervisors as defined in the Act.

The Unit is as agreed-to by the parties.

The parties have not resolved the unit placement of the Communication Supervisor Classification but have agreed that the person in that position may vote subject to challenge by either party. I agree that the Communication Supervisor may vote subject to challenge.

**VI. DIRECTION OF ELECTION**<sup>5/</sup>

I shall conduct an election by secret ballot among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations.

**A. ELIGIBLE TO VOTE**

Those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work

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<sup>5/</sup> In accordance with Section 102.67 of the Board's Rules and Regulations, as amended all parties are specifically advised that I will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

during that period because they were ill, on vacation, or temporarily laid off, are eligible to vote. Also eligible are employees engaged in any economic strike which commenced less than 12 months before the election date and who have retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls.

**B. INELIGIBLE TO VOTE**

Employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced are ineligible to vote.

Those eligible shall vote whether they desire to be represented for collective bargaining purposes by **INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 63, MARINE CLERKS ASSOCIATION, OFFICE CLERICAL UNIT.**

**C. LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that an election eligibility list, containing the **FULL** names and addresses of all the eligible voters, must be filed by the Employer with me within 7 days of the date of the Decision and Direction of Election. The list must be of sufficiently large type to be clearly legible. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn,

make the list available to all parties to the election, only after I have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

In order to be timely filed, such list must be received in the Regional Office, 11150 West Olympic Blvd., Suite 700, Los Angeles, California 90064-1824, on or before, **April 3, 2003**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed the preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

**D. RIGHT TO REQUEST REVIEW**

A request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570, under the provisions of Section 102.67 of the Board's Rules and Regulations. This request must be received by the Board in Washington by **April 10, 2003**.

**DATED** at Los Angeles, California this 27<sup>th</sup> day of March, 2003.

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James J. McDermott, Regional Director  
National Labor Relations Board  
Region 31

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