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LOOMING PORT STRIKE THREATENS U.S. SUPPLY CHAINS AND ECONOMY

Approximately 45,000 dockworkers from the International Longshoremen's Association ("ILA") along the U.S. East and Gulf Coasts are on the brink of a strike that could commence on October 1, 2024. The potential strike looms as a significant threat not just to the operations of 36 major U.S. ports—which handle about half of the nation's cargo—but also to the broader U.S. economy and global supply chains.

The ILA is pushing against the increasing automation of ports—a trend seen globally as technology advances. The ILA is demanding significantly higher wages and a complete prohibition on the automation of cranes, gates, and container movements which are fundamental to their roles at the ports. The fear of job redundancy due to technological automation is palpable among the workforce, paralleling global concerns about the balance between technological advancement and employment.

The potential strike threatens severe disruptions. A brief strike might not immediately affect consumer goods' availability due to most holiday retail goods already being stateside. However, a prolonged strike could result in noticeable shortages of some consumer products, especially as the holiday season approaches. Economically, even a short strike would disrupt cargo flow significantly, likely resulting in heavier vehicular traffic around other U.S. ports and a subsequent backlog of ships and cargo that could take days or even weeks to clear. Negotiations have been tense, with no meetings since June when the ILA halted national talks to focus on local port agreements. With the current contract expiring on September 30, 2024, and no further talks scheduled, the possibility of a strike is becoming increasingly likely. The ILA and the United States Maritime Alliance ("USMX"), representing the ports, are reportedly "very far apart" on negotiations, with ILA President Harold Daggett explicitly stating their readiness to strike if their demands are not met.

This wouldn't be the first time dockworkers have gone on strike, but it would be the first national longshoremen's strike since 1977. Historically, such strikes have led to significant economic losses and supply chain disruptions. The context of this potential strike is particularly significant given its timing during a presidential election year, which adds a layer of political pressure and public attention. The implications of a strike extend beyond the ports themselves. Industries such as automotive and pharmaceuticals, which rely on just-in-time supply chains, could face severe disruptions. There is also potential for cargo to be diverted to West Coast ports, where different union dynamics might influence how cargo is handled during the strike period.

This potential strike underscores the critical balance between labor rights and the march towards automation—a theme resonating across various sectors globally.

Stakeholders across the supply chain, from politicians to policymakers and businesses, will be watching closely, hoping for a resolution that prevents widespread disruption.

SCRAP METAL RECYCLING COMPANY ILLEGALLY SCRAPPED OVERTIME FOLLOWING UNION ELECTION

The United States Court of Appeals for the Third Circuit (“Court”) upheld a decision of the National Labor Relations Board (“NLRB” or “Board”) finding that a metal recycling company, United Scrap Metal PA LLC (“Employer”) violated federal labor law when it reduced overtime hours immediately after the announcement that its employees elected as their collective bargaining representative the Laborers International Union of North America, Local 57 (“Union”). Granting the Board’s application for enforcement and denying the Employer’s cross-application for review, the Court also upheld the Board’s certification of the election results. The case is *NLRB v. United Scrap Metal PA LLC*, Docket No. 23-01583 (3d Cir. Mar 30, 2023).

The Court agreed that substantial evidence supported the Board’s determination that the Employer’s decision to change its employees’ work schedules was discriminatory. Under Section 8(a)(3) of the National Labor Relations Act (“NLRA” or “Act”), and employer may not take adverse actions against employees as retaliation for engaging in protected activities under the Act. A successful 8(a)(3) claim must establish that protected employee conduct was a “substantial” or “motivating” factor in the employer’s decision to take adverse action. Then, the burden shifts to the employer, which must show that it would have taken the adverse employment anyway, regardless of the protected activity.

The Union alleged, and the Employer did not dispute, that the Employer changed the hours of its bargaining unit employees by eliminating Saturday overtime shifts and ending weekday shifts at 3:00 PM instead of 5:00 PM. The Employer further did not dispute that it took this action one hour after the election results announcement. The Employer also did not disagree that the evidence supported a prima facie case that it was aware its employees were engaging in protected activities under the Act and that it was both aware of and hostile to these activities. Instead, the Employer argued that it would have reduced work hours regardless of its employees’ protected activities because of COVID-19 and a recent mayoral emergency order extending pandemic-related restrictions on gatherings. The Board rejected this contention, and the Court agreed that the Employer’s stated justification for reducing overtime was not credible because neither the pandemic in general nor the mayor’s order, which was set to last for two months, would have inspired the Employer to take the same action absent the protected activity.

EMPLOYERS' WAR ON ADMINISTRATIVE AGENCIES' NEXT BATTLE IS AGAINST THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

On September 17, 2024, a New Jersey Company, Kenric Steel, LLC (“Kenric”) filed a Complaint in New Jersey federal court for declaratory and injunctive relief (“Complaint”) alleging that the Occupational Safety and Health Review Commission (“Commission”) is unconstitutional. This took place after Kenric received a fine of more than \$348,000 after the Occupational Safety and Health Administration (“OSHA”) cited Kenric for 11 violations of the Occupational Safety and Health Act (“OSH Act”). The Complaint, mirroring a slew of similar actions brought by employers against the National Labor Relations Board (“NLRB”), alleges that the structure of the Commission violates separation of powers.

The Commission is an independent agency that oversees OSHA citation disputes. It reviews the validity of OSHA citations, including proposed penalties and abatement, that OSHA issues to employers following inspections of workplaces. The Commission is a two-tiered administrative court which conducts hearings, receives evidence and renders decisions by its Administrative Law Judges (“ALJs”) and the Commission reviews those decisions. Kenric alleges that the removal process and term limits for Commission members are unconstitutional. Commission members serve staggered six-year terms and “may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” Kenric argues this establishes a twofold harm: “It limits the President’s constitutional authority, of course. But it also produces an administrative bureaucracy that operates on regulated parties without the constitutionally required “degree of electoral accountability.” Kenric argues that the Court should stay or enjoin proceedings to enforce the citations against it.

Kenric also alleges that the Commission’s administrative law judges (“ALJs”) are unconstitutionally appointed and insulated from removal. ALJs are appointed by the Commission, not by the Secretary of Labor or the President. According to Kenric, this violates the Appointments Clause of the Constitution. ALJs can only be removed by the Commission for good cause established and determined by the Merit Systems Protections Board (“MSPB”); MSPB members in turn can only be removed for inefficiency, neglect of duty, or malfeasance in office. Kenric alleges the multiple layers of removal protections also violate the Constitution.

Like the cases against the NLRB, Kenric argues that the penalties imposed by violations of the OSH Act violate the Seventh Amendment’s right to a jury trial because they are meant to punish behavior, and not return parties to the status quo before the alleged violations or compensate victims. Kenric additionally alleges that the Commission should not prosecute claims, but the case should be prosecuted by the Secretary of Labor with the Attorney General’s oversight.

The case is *Kenric Steel LLC v. Occupational Safety and Health Admin.*, No. 1:23-cv-09221 (D.N.J. Sept. 17, 2024).

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