

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-037-14

(UNFAIR LABOR PRACTICE)

ILWU LOCAL 8,)	
)	
)	
Complainant,)	
)	
v.)	DISMISSAL ORDER
)	
PORT OF PORTLAND,)	
)	
)	
Respondent.)	

Kevin Keaney, Attorney at Law, Portland, Oregon represented Complainant.

Randolph C. Foster, Attorney at Law, Stoel Rives LLP, Portland, Oregon, represented Respondent.

This Board recently dismissed a complaint filed by the International Longshore and Warehouse Union Locals 8 and 40 (ILWU) against the Port of Portland (Port). In that complaint, ILWU alleged that the Port violated ORS 243.672(1)(e) and (g) by purportedly refusing to submit disputes with regard to a collective bargaining agreement to arbitration. *See International Longshore and Warehouse Union, Locals 8 & 40 v. Port of Portland*, Case No. UP-019-14, 26 PECBR 156, *recons*, 26 PECBR 163 (2014), *appeal pending*. In dismissing the complaint, we concluded, and ILWU did not dispute, that the International Container Terminal Services, Inc. (ICTSI), and not the Port, employed the ILWU members involved in that case. *See id.* at 163.¹

¹ILWU appealed our order in Case No. UP-019-14 and has submitted a brief to the court contending that we erred in concluding that there was no issue of fact or law regarding whether or not the Port employs ILWU members. In that submission, ILWU contends that the Port *does employ* ILWU members. As set forth above and in our prior order, ILWU did not advance such a position before this Board, despite multiple opportunities to do so. Rather, when specifically asked by the ALJ in the investigative stage of Case No. UP-019-14 if the Port employed any ILWU members, ILWU answered “[n]o, not currently in a direct sense

On November 24, 2014, ILWU Local 8 (Local 8) filed a new complaint against the Port, again alleging violations of ORS 243.672(1)(e) and (g). In this complaint, Local 8 alleged that the Port refused to bargain the decision (and impact) of the Port's issuance of a request for proposal (RFP) from contractors to perform mechanical crane maintenance. The complaint also alleged that the Port's actions with respect to the RFP violated a contractual obligation, and, therefore, ORS 243.672(1)(g).

The Port responded, as it did in Case No. UP-019-14, that it had not employed Local 8 members for decades and, therefore, had no obligation to bargain with Local 8. The Port further averred that no collective-bargaining relationship existed between the Port and Local 8.

An Administrative Law Judge (ALJ) investigated this complaint and then forwarded this matter to the Board, recommending that the complaint be dismissed.

ORS 243.676(1)(b) requires this Board to investigate unfair labor practice charges to determine if a hearing is warranted. If our investigation "reveals that no issue of fact or law exists, the board may dismiss the complaint." *Id.* For purposes of deciding whether to dismiss a complaint without a hearing, we assume that the well-pleaded facts in the complaint are true. *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department*, Case No UP-6-04, 20 PECBR 677, 678 (2004). We may also rely on undisputed facts that we discover during our investigation. *Upton v. Oregon Education Association/UniServ*, Case No. UP-58-06, 21 PECBR 867, 867-68 (2007).

Here, the well-pleaded and undisputed facts are as follows. Under a service contract between the Port and ICTSI, effective through February 2015, ICTSI provides day-to-day mechanical crane maintenance at terminals owned by the Port. ICTSI currently employs Local 8 members to perform that mechanical crane maintenance. Although the Port at one time employed Local 8 members to perform that work, the Port has not done so for decades,² and has instead entered into service contracts in which contractors perform the work with employees hired by the

* * *." We understood that response "to mean that the Port does not employ members of ILWU." *See id.* at 157. If ILWU wanted to take the position that the Port was the employer of ILWU members, which it is now advancing before the Court of Appeals, it merely had to answer "yes" to the ALJ's question. Likewise, after this Board dismissed the complaint because the Port did not employ ILWU members, ILWU could have, in its request for reconsideration, asserted that this Board had somehow misunderstood that ILWU's "no" really meant "yes." However, ILWU accepted our conclusion that there was no issue of fact or law regarding whether the Port employed ILWU members and instead argued that the lack of an employer-employee relationship between the Port and ILWU members was irrelevant. *See id.* at 163. Consequently, the current position taken by ILWU at the Court of Appeals in Case No. UP-019-14 is at odds with the information and arguments presented to this Board in our dismissal of that case.

²As noted above, we understand that Local 8 is now disputing this conclusion before the Court of Appeals in Case No. UP-019-14. However, as also explained above, Local 8 did not dispute this conclusion before this Board. Moreover, Local 8 has not asserted that any type of intervening change has occurred between our dismissal order in Case No. UP-019-14 and this case, with respect to the employment relationship between the Port and Local 8 members.

contractors. Due to the pending expiration of the ICTSI/Port service contract (in February 2015), the Port issued an RFP on October 24, 2014, seeking bids from contractors to perform the mechanical crane maintenance at Terminals 2 and 6. That RFP did not include any provision requiring that a bidding contractor employ Local 8 members to perform the mechanical crane maintenance.

In its complaint, Local 8 contends that the Port was required under ORS 243.672(1)(e) to bargain over the decision to issue the October 2014 RFP, as well as any impacts on mandatory subjects of bargaining resulting from that decision. Although less clear, Local 8 also appears to contend that the Port violated ORS 243.672(1)(g) by not agreeing to arbitrate the issuance of the RFP under a 1984 collective bargaining agreement, which was executed back at a time when the Port, rather than various subcontractors, including ICTSI, actually employed Local 8 members.

As set forth in our order in Case No. UP-019-14, the bargaining obligations of the public employer under the Public Employee Collective Bargaining Act (PECBA) are with respect to “a public employer and the representative of *its employees*.” See 26 PECBR at 163-64 (emphasis in original) (citing ORS 243.650(4)). It is the “law of the case” per our dismissal in Case No. UP-019-14 that the Port does not employ Local 8 members.³ Notwithstanding that conclusion, which Local 8 does not contest in its submissions to this Board, Local 8 asserts that this complaint “presents a different issue.” As we understand Local 8’s argument, even though the Port has not employed Local 8 members for over 20 years, the Port has, until the recent RFP, required subcontractors to use Local 8 members to perform the contracted-out mechanical crane maintenance. Because the Port is allegedly no longer choosing to impose such a requirement on service providers who submit bids in response to the RFP, the Port is, according to Local 8, required to bargain both that decision and its impacts with Local 8.

Like its argument in Case No. UP-019-14, Local 8’s argument here still bypasses the basic statutory requirement that the Port employ members of Local 8 in order for this Board to have jurisdiction over the alleged bargaining dispute. In other words, even assuming, as we must at this stage, that the Port promised Local 8 that the Port would “exercise its control” over subcontractors by requiring those subcontractors to use Local 8 members to perform mechanical crane maintenance, it does not follow that we have jurisdiction over that dispute. In order for this Board

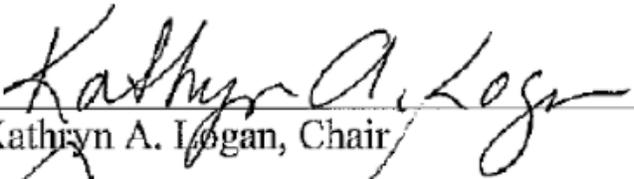
³The “law of the case” doctrine “is a general principle of law and one well recognized in this state that when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review.” See *Kennedy v. Wheeler*, 356 Or 518, 524 (2014) (citations omitted). Although the doctrine typically refers to relitigation of a ruling or decision in the same case, its applicability to this case is apt because, like Case No. UP-019-14, the instant complaint concerns whether the Port has a bargaining obligation under the PECBA with respect to Local 8. As explained in Case No. UP-019-14, if the Port does not employ Local 8 members, there is no such bargaining obligation and the Board does not have jurisdiction over the dispute. Additionally, the policies underlying the doctrine, including “consistency of judicial decision” and “putting an end to litigation of matters once determined,” apply to this matter. See *id.* Finally, we reiterate that there is no assertion in the instant matter that the employer-employee relationship has changed between our dismissal in Case No. UP-019-14 and the filing of this complaint.

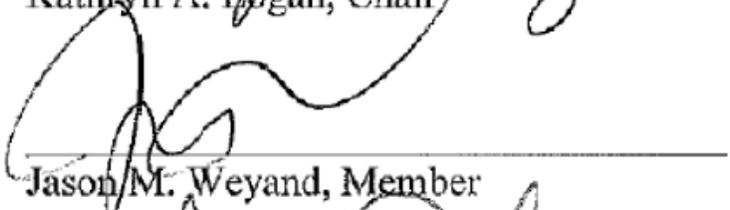
to have jurisdiction over the alleged dispute, there must be an employer-employee relationship between the public employer (the Port) and the employees represented by the exclusive bargaining representative (Local 8). Because the law of the case establishes that there is no disputed issue of fact or law on that dispositive jurisdictional matter, we will dismiss the complaint.

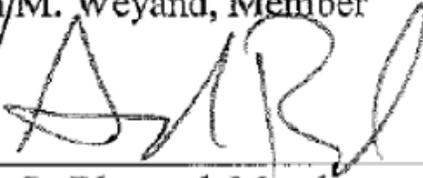
ORDER

The complaint is dismissed.

DATED this 23 day of January, 2015.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.