

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-037-14

(UNFAIR LABOR PRACTICE)

ILWU LOCAL 8,)	
)	
)	
Complainant,)	
)	
v.)	RULING ON RECONSIDERATION
)	
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.

ILWU Local 8 (Local 8) seeks reconsideration of this Board’s January 23, 2015, order, which dismissed Local 8’s complaint against the Port of Portland (Port) for alleged violations of ORS 243.672(1)(e) and (g). *See* 26 PECBR 350 (2015). In dismissing the complaint, we concluded that there was no disputed issue of fact or law on the dispositive question as to whether the Port currently employed members of Local 8. That conclusion was based, in part, on a recently issued order that dismissed a similar complaint for the same reason—*i.e.*, because the Port did not currently employ members of Local 8. *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 (Port of Portland I)*. In its reconsideration request, Local 8 asserts that we erred in dismissing the complaint (as well as in dismissing the complaint in *Port of Portland I*). We grant Local 8’s request for reconsideration, but adhere to our prior order, as supplemented herein.¹

In *Port of Portland I*, we concluded, and Local 8 did not dispute, that the Port did not currently employ Local 8 members. *See* 26 PECBR at 154 n 2, 163. In its initial submissions to

¹Local 8 also requested oral argument on its motion for reconsideration. We do not believe that oral argument would further edify the Board on Local 8’s position. Therefore, we deny the request for oral argument.

the Board in this case, Local 8 did not take issue with that conclusion, and we reached the same conclusion in this case. *See* 26 PECBR at 352.²

In its request for reconsideration, Local 8 avers, for the first time to this Board, that the Port *does* employ Local 8 members.³ To Local 8, its failure to make this critical assertion to this Board is inconsequential. Rather, Local 8 asserts that it had no obligation to dispute our conclusion regarding the employer/employee relationship in *Port of Portland I*, or to advance such an assertion in its initial submissions in this case. In Local 8's words: "The Board's own rules impose no such requirement and there is no such requirement in order to preserve an issue for appellate review."

To begin, the Court of Appeals, not this Board, will determine whether Local 8 had an obligation to raise this issue to this Board in order to preserve it for appellate review. *See* ORAP 5.45. With respect to Local 8's obligations to this Board, we disagree with Local 8's position, which fails to understand how we process unfair labor practice complaints. Specifically, once a party files a complaint with this Board, we are statutorily charged with "[i]nvestigat[ing] the complaint to determine if a hearing on the unfair labor practice charge is warranted." ORS 243.676(1)(b). "If the investigation reveals that no issue of fact or law exists, [we] may dismiss the complaint." *Id.*

In *Port of Portland I*, we investigated Local 8's complaint and, based on that investigation, it appeared that the Port did not (and had not for decades) employed Local 8 members. However, rather than summarily dismiss the complaint, we provided Local 8 with the opportunity to refute such a conclusion by directly asking it whether the Port currently employed Local 8 members. As set forth in that order, Local 8 did not answer "yes." To the contrary, Local 8 responded: "No, not currently in a direct sense. The Port does direct the work through [the International Container Terminal Services, Inc. (ICTSI)], and has directed the work through another contractor." 26 PECBR at 157 n 2; *see also* 26 PECBR at 350 n 1. We understood this to mean that the Port did not employ members of ILWU. 26 PECBR at 157 n 2.

Local 8 requested reconsideration of our dismissal order, which we granted. Again, Local 8 did not dispute our conclusion regarding whether the Port employed Local 8 members. 26 PECBR at 163. Instead, Local 8 argued that the lack of an employment relationship was irrelevant with respect to its complaint. *Id.* at 163-64. We rejected that argument and dismissed the complaint. *Id.*

When Local 8 filed this complaint, we again investigated the complaint. In its submissions to the Board as part of that investigation, Local 8 again did not assert that the Port employed Local 8 members. Rather, Local 8 attempted to distinguish the dismissal in *Port of Portland I* based on

²In doing so, we noted that there was no evidence or assertion of any change with respect to the employer/employee relationship regarding the Port/Local 8 members between the dismissal in *Port of Portland I* and the filing of the complaint in this case.

³As we noted in our prior order in this case, Local 8 appealed our order in *Port of Portland I* and did make this argument in its opening brief to the Court of Appeals.

the different nature of this unfair labor practice complaint. For the reasons set forth in our prior order in this case, we dismissed this second complaint as well. *See* 26 PECBR at 350-52.

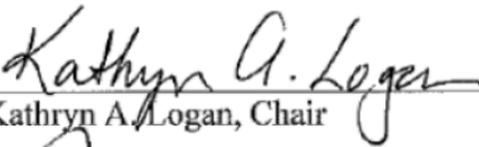
To argue, as Local 8 does now, that it had no prior obligation to contest the issue of whether the Port employed Local 8 members misses the point of our statutorily-charged investigation of unfair labor practice complaints. As a complainant, Local 8 has the affirmative obligation to respond to questions posed by this Board (typically by way of an assigned Administrative Law Judge) in conducting our investigation of an unfair labor practice complaint. If a complainant fails to respond to dispositive questions, or its response to those questions establishes that there is not an issue of fact or law that warrants a hearing, we may dismiss the complaint. *See* ORS 243.676(1)(b). We categorically disagree with Local 8's assertion that it had no obligation during the investigative stage, or in its submissions to this Board at the dismissal and reconsideration stages, to affirmatively assert and provide any other requested information that would establish an issue of fact or law as to whether the Port currently employs Local 8 members.

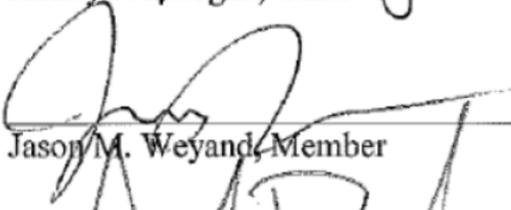
Finally, Local 8 argues that dismissal of the complaint in this case (and in *Port of Portland I*) was premature. According to Local 8, if we had allowed a hearing to take place, it could have proved that the Port continued to employ Local 8 members. Again, this argument bypasses Local 8's obligations during the investigative stage of the complaint process. During that stage, we might ask parties for responses to questions, documents to support a particular position, or anything else that might assist us in determining whether a hearing is warranted in the first place. It is not sufficient for a party to say, in effect, that it has no obligation to participate in the investigative process or that the information produced in that process is inconsequential.

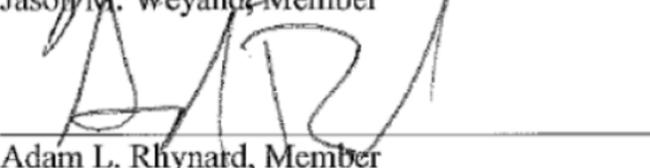
In sum, we grant Local 8's request for reconsideration, but adhere to our prior order, as supplemented by this order.

ORDER

Reconsideration is granted. The complaint is dismissed. DATED this 11 day of February, 2015.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.