MEMORANDUM

TO: Julia Wyman and Evan Matthews
FROM: Alastair Deans
DATE: December 22, 2010
RE: Port Development Labor Issues

I. BACKGROUND

American dockworkers or longshoremen work in an industry that is still heavily unionized. At present, the International Longshoremen's Association ("ILA") represents 65,000 dockyard workers on the east coast of the United States,[1] and the International Longshore and Warehouse Union ("ILWU") represents 42,000 workers on the west coast.[2] Often, the ILA is able to make collective bargaining agreements with entire ports, when the port is privately or publicly owned. When this occurs, the port typically only issues permits to those stevedores who hire union gangs.[3] In this manner, the union provides its members with, in addition to other benefits, a work priority over non-unionized labor gangs.

In Virginia, for example, the Virginia Port Authority ("VPA") was established in 1952 to stimulate commerce at Commonwealth ports.[4] The VPA however, owns only three of Virginia's ports: Norfolk International Terminals, Portsmouth Marine Terminal, and Newport News Marine Terminal.[5] In 1981, Virginia incorporated Virginia International Terminals, Inc. ("VIT") as a non-stock, nonprofit corporation in order to operate the three commonwealth owned terminals through a service agreement with the Virginia Port Authority.[6] The organization allows VIT to

[1] See ILA Homepage available at http://www.ilaunion.org/.
[2] See ILWU Information Page available at http://www.ilwu.org/about/index.cfm.
[3] Longshoremen operate in gangs, the size of which varies. Each ship that arrives in port contracts with a stevedore company for the services of unloading and loading the ship. The stevedore in turn employs a certain number of gangs of longshoremen that are usually available from a union hiring hall.
[4] Port of Virginia Homepage, available at http://www.portofvirginia.com/explore/about-us.aspx (last accessed Dec. 23, 2010).
[5] Id.
[6] Id.

enter contracts with union labor, which is important because Virginia prohibits its agencies from entering these contracts.[7] At present it does not appear that VIT and ILA have an agreement, however, the ILA does have an agreement with the Hampton Roads Shipping Association ("HRSA"),[8] a multi-employer bargaining unit representing terminal operators, stevedores, steamship lines, and other waterfront labor employers.[9] That agreement specifies that with only two exceptions, the ILA shall have all work in the general Hampton Roads port area.[10] Hence, it would appear that in the ports of Hampton Roads, the ILA has priority over the waterfront work via a multiemployer agreement.[11]

In ports that have no collective bargaining agreement ("CBA") through a port authority, terminal operator, or multi-employer bargaining unit, and in which both union (specifically ILA on the east coast) and non-union longshoremen work, the non-union workers might enjoy some benefits that their employers can give them absent ILA standard] TJETBT1 0 0 1 133.3(be)4(n)TTm[(tn(rd] TJ)-

As the Port of Davisville is currently competing for car imports and other shipping business to shift economic power and jobs from areas like New York to Rhode Island, it wants to avoid any labor discord resulting from a misperception that only union members are allowed to work. Such action could hurt business because carriers have no patience for a port that cannot unload and load quickly; they will simply redirect an oceangoing ship away from a port with labor issues to the next nearest one that can get the job done quickly. Therefore, it is in the interest of any port, including the Port of Davisville, to quickly and directly address any possible labor concerns.

II. JURISDICTION

An initial issue with ILA Longshore Gangs is that most of the members are not formally educated or familiar with the law. They are often assured by their union representatives and fellow members that the ILA has jurisdiction throughout the east coast from Maine to Texas, and therefore they believe that only they should be allowed to work at any and all ports. This presents a problem, because it is not necessarily accurate, and a lot of nonunion longshoremen would prefer to work without joining the ILA. As the ILA does not have a CBA with every port authority on the east coast, it is inaccurate that they have jurisdiction in every east coast port.

The ILA and the United States Maritime Alliance, Ltd. ("USMX") entered a Master Contract that became effective on October 1, 2004,[12] and was meant to last until September 30, 2010, but which they agreed to extend until September 30, 2012.[13] This Master Contract defines its areas of applicability, or in other words, where the ILA has jurisdiction. The Master Contract could be interpreted to read that only ILA longshoremen may work at any port on the east coast

[12] Master Contract between USMX and ILA (hereinafter "ILA Master Contract") entered June 28, 2004.
[13] Memorandum of Settlement Between USMX and ILA entered October 16, 2009.

of the United States.[14] However, the Master Contract applies only to the ILA and the USMX because they are the only two signatories to it.[15] The complication begins when examining exactly who is in the ILA and the USMX.

The ILA is a union of maritime workers, which is then broken down into smaller local unions. The union members/dockworkers themselves are employed by stevedores, who hire groups of dockworkers called "gangs" to perform the labor of loading and unloading ships in port. Workers are not necessarily permanently employed by any one stevedore company, and neither is any one stevedore company necessarily a permanent presence in a port. Instead, the stevedore company contracts with a carrier (who actually charters or leases a ship to carry goods from one port to another) through the carrier's shipping agent to perform the labor when a ship arrives in port. Some stevedore companies use ILA labor only, and some prefer to use nonunion members.

USMX is an organization of carriers, port associations, and employers along the eastern and Gulf coasts of the United States.[16] It serves as a management group representative in collective bargaining, and also announces industry standards regarding safety, training, certification, and regulation and it administers fringe benefit funds and programs for its members.[17] Among its members are Maersk, Inc., Jacksonville Maritime Association, Inc., Horizon Lines, LLC, Hampton Roads Shipping Association, South Carolina Stevedores

[14] See ILA Master Contract, Article VII Sec. 3. "The ILA's Master Contract jurisdiction...cover[s] all ports from Maine to Texas..."; ILA Master Contract, Article VII Sec. 1. "...employees covered by this Master Contract have jurisdiction over longshore, checker, maintenance, and other craft work...", See Also ILA Master Contract Appendix A, ¶ 1, "Management and the Carriers recognize the existing work jurisdiction of ILA employees covered by their agreements with the ILA over all container work which historically has been performed by longshoremen and all other ILA crafts at container waterfront facilities." These assertions make it seem as if the ILA has jurisdiction at all eastern ports, and wherever the ILA has jurisdiction, ILA employees (i.e. union longshoremen) have jurisdiction over all work.

[15] Master Contract, p.1.

[16] See USMX website available at http://www.usmx.com (last accessed Dec. 23, 2010).

[17] Id.

Association, Ports of Delaware River Marine Trade Association, and numerous others.[18] Suffice it to say, USMX has a big presence in the world of maritime commerce. Through its subordinate organizations it is made up of many types of employers and in all likelihood there will be some form of USMX presence at one point or another at any port in the United States.

The ILA Master Contract becomes applicable whenever a transaction between a carrier and stevedore involves at least one party who is a member of the ILA or the USMX, or if the transaction is to be completed in a port for which the port authority is a member of the USMX.[19] This means that if the *Maersk Alabama*, as one of Maersk Lines' tankers (Maersk Lines being part of Maersk Inc. which is a member of USMX) were to dock at a port that is not a signatory to the ILA Master Contract, the stevedore hired by the shipping agent to unload the *Maersk Alabama* would have to comply with the terms of the Master Contract, as well as any terms in a contract between the local ILA Union and Maersk Inc. In this manner, a non-signatory port could be within the jurisdiction of the ILA Master Contract because a signatory carrier's ship arrived. The contract can also be enforceable for its term in a port if the terminal operator simply becomes a signatory of it.[20]

According to the ILA Master Contract, "jurisdiction continues on a multiport bargaining unit basis covering all ports from Maine to Texas at which ships of USMX carriers and subscribers may call."[21] Practically speaking, the ships belonging to members of USMX could call at any port in this region, making it appear that the ILA has jurisdiction throughout the region. However, even when USMX ships do call at a port, that does not necessarily make the

[18] Id.
[19] Practically speaking though, this author has not identified any port authorities that are USMX members. That does not mean though, that they are not currently out there, or will not be out there in the future.
[20] ILA Master Contract, Article I Sec. 1. "The...[management] group bound to the Master Contract [includes] the carriers, stevedores, and marine terminal operators that hereafter...subscribe to this Master Contract..."
[21] ILA Master Contract, Article VII Sec. 3.

ILA Master Contract applicable to the entire port, it merely makes it applicable for the transactions of that particular ship. The Hampton Roads CBA with ILA Locals 846, 970, 1248, and 1784 has a provision that might have clarified the limitations of the ILA Master Contract, which states "this agreement does not apply to…work the employers have no legal or contractual right to give to the ILA during the term of this agreement."[22] Yet, as the ILA Master Contract is, it is quite easy for people unfamiliar with the limitations of contract to think that it applies everywhere from Maine to Texas, simply because that is an easy concept and the Master Contract seems to repeat it frequently.

Another example of confusing phraseology appears in the ILA Master Contract, Article 1, Section 3, stating that "This Master Contract is a full and complete agreement on all Master Contract issues relating to the employment of longshore employees…in all ports from Maine to Texas at which ships of USMX…may call." [23] While this phrase seems to make the contract applicable to all longshore work in the geographic area, a legal interpretation of it would be that it is a merger clause, making the ILA Master Contract the full and final agreement between the parties on all subjects contained. People that are unfamiliar with a merger clause could misconstrue this phrase by thinking it makes the ILA Master Contract applicable everywhere from Maine to Texas.[24]

The second part of the misperception is that the ILA Master Contract requires employers to only use union labor. Assuming for the moment that the ILA Master Contract applies to a particular transaction, this perception would probably be true. Section 1 of Article VII states that

[22] Hampton Roads Longshoremen's Agreement. Sec 1(a).
[23] ILA Master Contract, Article I Sec. 3.
[24] See Chelsea Industries, Inc. v. Accuray Leasing Corp., 699 F.2d 58, 62 (1st Cir. 1983) (holding that the phrase "The Provisions of this...Agreement constitute the full and complete agreement..." is a merger clause). Merger clauses, also known as Integration Clauses are intended to invoke "the Parol Evidence Rule, precluding courts from considering extrinsic evidence of prior or contemporaneous agreements in order to 'change, alter, or contradict' the terms of the integrated contract." Ritter v. Grady Auto. Group, Inc., 973 So.2d 1058, 1062 (Ala. 2007).

"Management…reaffirms that employees covered by this Master Contract have jurisdiction of longshore, checker, maintenance, and other craft work…"[25] The appendices also make this fairly clear. In Appendix A, the Containerization Agreement states "Management and Carriers recognize the existing work jurisdiction of ILA employees covered by their agreements with the ILA over all container work…and all other ILA crafts at waterfront facilities. Carriers, direct employers, and their agents covered [by CBA's with ILA] agree to employ employees covered by" the CBA's with the ILA, meaning union longshoremen.[26] This agreement leaves little room for doubt; the signatory employers should hire ILA longshoremen first. The appendix goes on to further declare that management may not contract out such work, or perform it directly, and in the event of a violation the management must pay liquidated damages of $1,000.00 per violation into the appropriate Welfare and Pension Fund.[27] The Preamble to Appendix B repeats that management may not directly perform or contract out "work done on a container waterfront facility" unless the work is done by ILA longshoremen.[28] Taken together, it seems fairly clear that signatories to the ILA Master Contract are bound to use union labor.

In attempting to explain to union longshoremen that a non-signatory port is not compelled to use their labor only, it might be useful to not only explain the limitations of the ILA Master Contract, but to draw their attention to Appendix C. In a letter agreement regarding the ILA jurisdiction, the Carriers Container Council, Inc.[29] it appears that during negotiation for the ILA Master Contract all of the parties were aware that "in some ports the ILA's jurisdiction has

[25] ILA Master Contract, Article VII Sec. 1
[26] ILA Master Contract, Appendix A ¶1.
[27] ILA Master Contract, Appendix A ¶¶2, 9.
[28] ILA Master Contract, Appendix B.
[29] See Carriers Container Council, Inc. v. Mobile S.S. Assn., Inc.-Inte…, 896 F.2d 1330, 1334 (11th Cir. 1990). Carriers Container Council, Inc. is an "association[] of the shipping companies that signed contracts with the ILA and local port unions…[and] was formed by the [shipping companies] to carry out the terms of the [Job Security Program] agreement."

not extended to all work on ships and terminals."[30] To address the concern, the parties agreed to form a joint committee to meet with port authorities to try to get them to except ILA's jurisdiction.[31] This letter exhibits the ILA's own recognition that their jurisdiction does not in fact extend everywhere, and that the only way to address the fact is to go out and ask port authorities to grant them jurisdiction. Were the port authorities already contractually or legally bound to give them jurisdiction, the ILA would simply institute the grievance procedures of the ILA Master Contract, Article XIII, or they would bring suit.

III. TWO GOALS: HARMONY AND QUALIFIED WORKFORCE

A. HARMONY CLAUSE

The Harmony Clause is a fairly familiar clause in labor agreements. In simplest form it calls for any labor employed by an employer to work peacefully, or in harmony, with all other labor employed by the employer.[32] The goal of these clauses is the avoidance of work stoppages or inefficiency resulting when one group of employees either cannot get along with another, or when the two simply begin fighting. The clauses often appear in the context of general contractors hiring different groups of subcontractors,

that are signatories to the PLA.[34] These work preservation clauses are usually created at a union's request in exchange for the union to refrain from actions that might harm the employer.[35] In the recent Glens Falls case, the National Labor Relations Board ("NLRB") held that for such a clause to survive it must clearly be for the purpose of reducing friction between union and nonunion employees.[36] Section 8(c) of the National Labor Relations Act states that it is "an unfair labor practice for any labor organization and any employer to enter into any contract or agreement...whereby such employer ceases...doing business with any other person" and that such a clause shall be void and unenforceable.[37] This is why the courts are at times unwilling to uphold clauses that, even if added under the guise of preserving harmony, requires an employer not to hire a particular class of person such as a nonunion employee. That is exactly what happened in the Glens Falls case, and the court held the clause void.[38]

A case in which the court not only upheld the clause but also held that the contractor must not only warrant that they could work harmoniously, but also had to perform harmoniously, was the Modern Continental case.[39] In Modern Continental, a Port Authority was soliciting bids for one of many construction projects it had underway. State regulations required the project to be awarded to the lowest bidder, and the Port Authority required bidders to agree to a labor harmony clause.[40] While the union employees worked on other projects already underway for the port authority, the low bidder for the project in question, Modern, was a nonunion

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[34] "NLRB Decision Puts Work-Preservation Provisions in Question, March 24, 2008, available at http:// www.businessmanagementdaily.com/articles/7994/1/NLRB-decision-puts-work-Preservation-provisions-in-question/Page1.html#. See Also Glens Falls Bldg. & Constr. Trades Council, 350 N.L.R.B. 417 (2007).
[35] Id.
[36] Id.
[37] See NLRA 8c.
[38] Glens Falls (the signatories sued the employer's replacement, who eventually hired nonunion labor, and the replacement defended his action by arguing that the clause was invalid under Section 8c, which the court agreed with).
[39] 343 N.E.2d 362.
[40] Id. at 362-363.

construction firm.[41] Even though Modern had signed the clause, the unionized labor threatened a picket, on the grounds that they wished to draw attention to Modern's nonobservance of area standards for operating engineers.[42] The Port Authority awarded the project to the next highest bidder and Modern sued, but the judge held for the Port Authority, noting that more was required to satisfy the labor harmony clause than a bidder's unilateral decision that it can work harmoniously.[43] The judge also noted the relatively small size of the project Modern contracted for, and the large amount of work that would suffer if the union employees picketed, and decided that it was in the public's best interest to reject Modern's bid rather than risk labor unrest.[44]

Some statutes reveal the governmental acknowledgment of the value of labor harmony. In Massachusetts, contractors for the construction of public buildings are required to certify that they "can work in harmony with all other elements of labor employed or to be employed on the work."[45] Rhode Island's statutory title on public works also requires contractors to satisfy similar requirements of labor harmony.[46] Finally, the Second Circuit has declared that the purpose of the National Labor Relations Act, particularly the federal encouragement of unionization and collective bargaining, is "to foster and encourage industrial harmony."[47] Even without government endorsement, a common sense approach for employers is to maintain peaceful relations with and between their employees because the converse leads to inefficiency or even work stoppages.

B. QUALIFIED WORKFORCE

[41] Id. at 363.
[42] Id.
[43] Id.
[44] Id.
[45] ALM GL. Ch. 149 § 44A(1).
[46] R.I.G.L. § 37-13-2.
[47] Oneita Knitting Mills, Inc. v. NLRB, (375 F2d 385 (2nd Cir. 1967) *analyzing* 29 U.S.C.S. § 151 et seq.

"Qualified Workforce" is not a phrase that often appears in collective bargaining agreements.[48] However, it is likely a phrase that gets tossed around a lot amongst unionized workers, for it is a goal in labor legislation.[49] The basic idea is that it is good for a country as a whole to train and provide for a long-term workforce.[50] Likewise, it is good for employers to have a population of trained and preferably experienced workers readily available. This means that there is a big incentive for unions to keep their members within the industry, trained, reasonably free of drugs, and adaptable to technological improvements; for in this way they can use their status as a qualified workforce as leverage at the bargaining table.

As mentioned above, a good way for a union or other organization to create a workforce that, compared to the general population, is relatively qualified is to simply keep workers in the same industry.[51] Nations have employed this practice for a long time, as evidenced in the formation and preservation of the military reserve.[52] Likewise, some bargaining agreements provide for their members to continue drawing at least some degree of pay even when not working.[53] The ILA has provided for a number of contributions to trust funds which are used for various employee benefits, including: welfare, healthcare, dependent education, pension, and training.[54] These programs could, at least to some extent, further the goal of a qualified workforce by providing a safety net for employees that increases their loyalty to their line of

[48] This author did not find the phrase "Qualified Workforce" in any of the CBAs reviewed.
[49] For some examples of statutes that explicitly or implicitly state that the goal is a qualified workforce See ALM GL ch. 18C, Sec. 11(d)(11); Cal Unemp Ins Code Sec 15001(a)(6); 110 ILCS 805/2-23.
[50] See Generally Derek Bosworth, Paul Jones, Rob Wilson, "The Transition to a Highly Qualified Workforce" Education Economics Vol 16 Issue 2 June 2008 p.127-147.
[51] See Rules and Guidelines for Stevedores Operating in the Ports of Namibia, Section 2.3.1 (equates a qualified employee with one who is permanently employed by the stevedore because this promotes quality and continuity).
[52] Even in 18th century, the British kept preferred naval officers on half pay between wars, thus providing that if and when the need arose they would already have a well trained and experienced officer corps.
[53] See In re Colo. Springs Symphony Orchestra Ass'n, 308 B.R. 508, 515 (Bankruptcy Court of Colorado 2004)(the CBA at issue provided that "Musicians will be compensated for all guaranteed services, used or unused.").
[54] See ILA Master Contract, Article IV (regarding "Contributions for local pension, welfare, and other employee fringe benefits"); ILA Master Contract, Article XII Sections 1-4 (regarding container royalties contributed to healthcare and supplemental wage benefits); See Also ILA Master Contract Article XII (regarding the Management-ILA Managed Health Care Trust Fund).

work. Other ILA provisions provide for affirmative qualification improvements in the workforce, such jobsite training and anti drug and alcohol programs.[55] By keeping the same employees in the work for a long period, and by providing industry training and anti drug and alcohol incentives, a workforce should become more qualified due to increases in experience, safety, education, and leadership than would a transient workforce.

It is possible that union representatives and employees use the concept of a qualified workforce to justify actions or contractual provisions. For example, employers can implement a layoff policy that focuses on "productivity, versatility, and qualifications of individual employees" as factors rather than use a seniority-based policy.[56] The government also considers it as a purpose for certain laws or actions.[57] Though numerous examples exist in statutes and legislative history of the "qualified workforce" as a consideration and driving factor in government action, a particularly pertinent example can be found in California's legislative findings for its unemployment insurance code, in which the legislature called for a sector strategy approach to provide labor for the industries, and career paths for employees in their large economy.[58] "This strategy will ensure [the] industry has a qualified workforce and can offer opportunities for employment, training, and career advancement for all Californians."[59] Implicit in governmental consideration of the qualified workforce is its utility to the economy, and the necessity of training, benefits, and advancement to attain it.

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[55] ILA Master Contract, Article VI (providing a drug and alcohol program that sets up random testing and standards for dismissal and reinstatement for offences; this program acts as a disincentive for the use of drugs and alcohol on the job site, thus encouraging job awareness and safety); ILA Master Contract, Article XI Section 5 (providing some funds for training purposes); ILA Master Contract, Article X (regarding new technology, and the retraining of affected employees).

[56] See Lester v. M&M Knopf Auto Parts, 2006 WL 2806465, *13 (W.D.N.Y. 2006).

[57] See R.I.G.L. § 16-88-3(b). As part of the planning phase for Rhode Island's public education afterschool and summer learning programs the department of elementary and secondary education was required to "[i]dentify incentives and supports to develop a qualified workforce, including opportunities for professional development, planning time and staff development."

[58] Cal Unemp Ins Code § 15001(a)(6).

[59] Id.

Courts also consider the concept of a qualified workforce when deciding whether an action or provision is justified. For example, the Ninth Circuit in N.L.R.B. v. Advanced Stretchforming Intern., Inc. found that because a new employer could not have found a qualified workforce anywhere except from the union, the new employer would have eventually had to bargain, and therefore might have reached impasse and imposed less favorable terms than the Administrative Law Judge ("ALJ") imposed.[60] In another example the United States Bankruptcy Court has upheld a clause requiring minimum payment to union employees regardless of whether they work or not (despite the general rule that a CBA does not obligate an employee to work or an employer to provide work) in part because it found that the employer had accepted this provision to keep a qualified workforce readily available.[61]

IV. ADDRESSING LABOR ISSUES THROUGH THE PERMIT PROCESS

In approaching the problem of union versus nonunion longshoremen in the Port of Davisville, it is important for the Quonset Development Corporation ("QDC") to first recognize its own goals. As QDC's purpose is to foster economic development in Quonset, QDC will certainly want to facilitate labor harmony, as well as develop a qualified workforce to make the Port of Davisville a stronger competitor among American ports for maritime commerce. These goals would favor unionized labor; however, QDC probably does not want to relinquish its autonomy to the ILA, giving them a virtual monopoly of work in the port, for doing so might weaken Davisville's economic strength amongst other American ports by tending towards a higher cost of labor at a lower efficiency due to a lack of competition. These considerations would favor a nonunion approach. Therefore, QDC will most likely wish to take the middle

[60] 233 F.3d 1176. 1183 (9th Cir. 2000)(this resulted in a remand for the ALJ to consider the possibility, giving the employer a second chance to reduce the judgment because the Court realized a qualified workforce was necessary and the only qualified workforce available was the union).
[61] In re Colo. Springs Symphony Orchestra Ass'n, 308 B.R. 508, 515 (Bankruptcy Court of Colorado 2004).

ground, by not becoming a signatory of the ILA Master Contract,[62] but at the same time providing enough concessions to please ILA employees.

As an example of where a middle ground approach is preferable, take the case of the Poole & Kent Corporation.[63] First, recall that Modern Continental (discussed in the Labor Harmony section) was a Massachusetts case in which a contractor was able to remove a subcontractor that employed non-union labor when the union labor, which comprised the rest of the subcontractors, threatened to picket.[64] On the flip side of the situation, in the Poole & Kent Corporation, the North Carolina Court of Appeals found that a contractor which removed a non-union subcontractor after the union labor began to strike in protest had actually broken the law.[65] The agreement in question contained a labor harmony clause, as did the one in Massachusetts, however, North Carolina found that the non-union workers had done nothing to offend the contractor, they had the appropriate skills, were properly supervised, they had not failed to perform their assigned work diligently and efficiently, and there was no evidence that they had failed to work harmoniously or had caused any delay.[66] Because the non-union subcontractor was for all intents and purposes a qualified workforce, North Carolina did not care that the strike put the contractor in economic danger, because the subcontractor had done nothing to cause the strike.[67] It is important to note however, that Massachusetts focused more on the contractor who was suffering economic harm for hiring a certain employee, as well as the fact that the public had an interest in the work. In the North Carolina case, it appears the parties were all private entities, and most importantly, North Carolina has codified the Right to Work in GS §95-78 and

[62] For the moment, this paper is simply assuming that QDC has the authority to bind the Port of Davisville to the terms of the ILA Master Contract.
[63] Poole & Kent Corp. v. C.E. Thurston & Sons, Inc., 203 S.E.2d 74 (N.C.App.1 1974).
[64] Modern Continental, 343 N.E.2d 362.
[65] Poole & Kent Corp., 203 S.E.2d at 81.
[66] Id. at 80.
[67] Id.

forbidden termination, or failure to hire because of persons' membership or non-membership in a union in GS §95-78 and §95-80.

While Rhode Island has neither codified a right to work in its statutes (with the exception of a right to work with regard to public teachers), nor has it explicitly held that there is a right to work in any Supreme Court cases, though it can be interpreted that there is, one recent Superior Court cases has recognized that there is a right to work free of arbitrary governmental action (though the case was later reversed on other grounds).[68] A second Superior Court case also seems to passively accept that there is a right to work for private parties.[69] The idea that the right to work is a fundamental right that cannot be deprived by governmental action absent a very good reason stems from the Due Process Clause of the Fifth Amendment to the United States Constitution.[70] Accepting that even though Rhode Island has not declared itself a right to work state, and even though the courts have been less than vocal on the subject, were a quasi public corporation like QDC, established by a governmental statute for the purpose of fulfilling government goals, to decide that it would only allow one group of people to work in the Port of Davisville based on their membership in a union, such action would possibly result in legal difficulties with the nonunion workers. Even if QDC were able to prevail in court by showing a sufficient justification for the decision, the court costs and even worse the possible injunctions, would harm or even halt economic progress at the Port of Davisville.

As an example of economic harm, take the Port of Miami Dade. A recent Florida case found that the permit process for the Port of Miami violated the dormant commerce clause of the

[68] Castelli v. Carcieri, 2008 R.I. Super. Lexis 88 (R.I. Super. 2008) *reversed on other grounds* 961 A.2d 277 (R.I. 2008).
[69] Hawkins v. Daly, 2003 R.I. Super. Lexis 14, *6 (R.I. Super. 2003).
[70] U.S. Const. Amend. V.

United States Constitution.[71] In that case, ILA controlled stevedore companies had essentially created a monopoly on all stevedoring work within the port. A Miami Dade County Ordinance permitted "the port director and county commission to issue – or deny – stevedore permits, based on whether the port [needed] more firms to handle the volume of cargo."[72] The problem with the ordinance was that over the years only unionized labor had been allowed into the port, and non union gangs wanted a part of the business. This posed a great threat to the unionized gangs, who were able to jointly raise their prices to provide better work for their members, but only so long as the non-union gangs and their low rates stayed out. The result was that the Port of Miami had to pay $3.5 Million to a stevedoring company that had been barred for years in compensatory damages, and had to change its permit process.[73] Here, a publicly operated port's permit process that excluded non-union labor caused a court to reject its practice based on the dormant commerce clause and required the Port to pay damages.

Miami-Dade has changed its permit process since the case was decided. Though the company that won the lawsuit is still barred from the port, at least two new companies now operate there.[74] Stevedores must still have a special permit in order to operate at the Port of Miami, pursuant to a county ordinance.[75] The Port of Miami is a county owned port; even though the County issues stevedore licenses, providing stevedores the ability to work anywhere in the county except at the port, the Port Director has authority to issue the special permit.[76] The current version of the Miami Dade permit application requires proof of insurance (it has

[71] Fla. Transp. Serv. v. Miami-Dade County, 543 F.Supp. 2d 1315 (S.D.Fla. 2008)
[72] Brannigan, Martha. "Shut out of port, firm cries foul", The Miami Herald, Saturday June 26, 2010.
[73] Id.
[74] Id. According to the article, the county is now barring his application on the grounds of safety violations, but allowing the unionized stevedore applications to issue despite similar safety violations.
[75] Miami-Dade County, 543 F.Supp. 2d at 1319.
[76] Miami-Dade County, 543 F.Supp. 2d at 1319.

minimum insurance requirements that are beyond the scope of this paper), a County Stevedore License, and attachment of a questionnaire.[77]

Additionally, the county requires all applicants to furnish and maintain information on any affiliations or controlling interests in shipping companies.[78] Factors that the port director considers in determining qualitatively which firms to issue one of the limited permits to include: safety record over previous years, suitability to the port'sp] ipre sp] rs, vior

signatory of the ILA's Master Contract. However, as stated before, if the QDC wishes to maintain a certain amount of autonomy, which could be preferable given its goals, it may prefer to avoid binding itself and Rhode Island's stevedoring companies to a long-term contract. It is noteworthy that even though the ILA has a CBA for the Port of Savannah, it was entered into with a local stevedore association rather than the Georgia Ports Authority. Using the lessons of Miami-Dade, an alternate route for QDC could be to set certain requirements in stevedoring permits, the failure with which to comply would result in revocation of a stevedore's permission to operate at the Port of Davisville.

In Savannah, the local contract requires that any Stevedoring Company that performs work for non-USMX ships "to obtain a signed agreement from the party ordering the work to be bound by" the local contract.[84] Failure to obtain the agreement is penalized by imposing container royalties and district escrow fund assessments on the contracting stevedore; typically the parties ordering the work make these payments as provided by the ILA Master Contract.[85] It might be possible in stevedoring permits to require the stevedores to abide by some, but not all of the terms of the ILA Master Contract, or face monetary penalties (in the form of fund contributions to the ILA to keep union employees happy), loss of permit, or something else entirely.

In creating a stevedoring application, some provisions QDC could require all stevedores, union and nonunion alike, to agree to might include a labor harmony clause and specific terms of the ILA Master Contract, while recognizing that neither QDC nor the Port of Davisville is a signatory of the ILA Master Contract. QDC may want to consider including provisions for the following: wages, hours, gang size, and term of the ILA Master Contract as the term of the

[84] "Agreement Between the Georgia Stevedore Association and the International Longshormen's Association", expiring September 30, 2010 at 12-14.
[85] Id. See Generally §3(B)(1)(B) "Container Royalty" at 6-12; See Also ILA Master Contract, Article XI.

application. By setting a minimum wage, gang size, and hours QDC would go a long way to equalizing the competitive edge of nonunion labor to satisfy the ILA longshoremen. The ILA would still have its benefits of contract with USMX carriers that call at the Port of Davisville, and the nonunion stevedores would still have a slight competitive edge in being able to create their own pension and welfare funds if they so desired, and both groups would benefit from the absence of friction between them.

Meanwhile, QDC would retain its autonomy to accept or reject stevedore applications on the basis of quality. Simply rejecting all stevedores who refused to use only ILA workers would probably not work for the reasons stated in the Miami-Dade example. However, employing some of the factors that Miami-Dade now uses could be included in the permit application, including: proof of insurance, furnishing and maintaining information on any affiliations or controlling interests in shipping companies, safety record over previous years, suitability to the port's equipment and business, prior experience at the port, whether the granting of the permit will increase or reduce efficiency at the port or provide savings or deficiency to Rhode Island, financial strength, general qualifications to handle equipment, and an applicant's demonstration of employing, or having access to, properly qualified and experienced longshoremen in sufficient numbers. The end result would be a sufficient amount of information available for QDC to exercise discretion in issuing permits, as well as a sufficient number of concessions by stevedores with regard to labor harmony and certain terms of the ILA Master Contract that will better level the playing field between union and nonunion. The end goal would be a balance whereby both groups get along well enough that there are no work stoppages, with enough competition between them to keep labor costs low and quality high, thereby giving the Port of Davisville a competitive edge over New York and New Jersey for auto imports.