

UCLA

UCLA Public Law & Legal Theory Series

Title

Preemptive Strike: Law in the Campaign for Clean Trucks

Permalink

<https://escholarship.org/uc/item/15w2p36g>

Journal

UC Irvine Law Review, 4(3)

Author

Cummings, Scott

Publication Date

2015

Preemptive Strike: Law in the Campaign for Clean Trucks

Scott L. Cummings*

Introduction	940
I. Law in the Development of the Ports	945
A. Local Power: Annexation and Autonomy	947
B. Federal Power: Industrialization in the Shadow of Regulation	955
C. Global Power: The Logistics Revolution, Free Trade, and Deregulation.....	959
D. Local Impact: Community, Labor, and the Environment	972
II. The Port As a Unit of Legal Analysis.....	981
A. Local Governance	981
B. Nonlocal Governance	984
C. Preemption	987
III. Resisting the Ports: Activism in Separate Spheres.....	989
A. The Hundred Years' War: Community Mobilization Against Port Expansion.....	989
B. Labor's Municipal Strategy: Contracting Around the Independent-Contractor Problem.....	1001
C. The Turning Point: China Shipping and the Clean Air Action Plan	1010
IV. Reforming the Ports: The Campaign for Clean Trucks.....	1042
A. The Alliance: Forming the Coalition.....	1042
1. Personnel	1042
2. Partnerships	1047
3. Policy	1056
B. The Affirmative Phase: Mobilizing Local Law	1059

* Professor of Law, UCLA School of Law. For their critical feedback and support, I am grateful to Rick Abel, Sameer Ashar, Catherine Fisk, Robert Gottlieb, Sean Hecht, Michael Klarman, Doug Nejaime, Sanjukta Paul, Ben Sachs, Noah Zatz, and Jon Zerolnick. I am deeply indebted to the UCLA Institute for Research on Labor and Employment for its generous and enduring support. And I could not have completed this project without the excellent research assistance of Michael Fenne, Doug Smith, and Alyssa Titche, and the incredible efforts of the law review editors, particularly Amy Bowles, Anne Conley, Catriona Lavery, Margaux Poueymirou, Marco Pulido, Joseph Roth, and Thomas Worger.

1. The Outside Game: Developing the Program, Exerting Pressure	1059
2. The Inside Game: Mobilizing Legal Expertise, Moving Policy	1067
3. The End Game: Passing the Clean Truck Program	1079
C. The Defensive Phase: Responding to Federal Law	1094
1. Private Litigation I: The Injunctive Phase	1094
2. Public Litigation: Federal Agency Intervention	1108
3. Private Litigation II: The Merits Phase	1112
4. Private Litigation III: The Supreme Court Phase	1118
D. The Aftermath: Maneuvering Around Preemption	1123
1. A Legislative Window—Closed	1124
2. Law and Organizing—A Renewed Challenge	1130
a. Misclassification Litigation	1130
b. Union Organizing	1141
V. Analysis	1146
A. Context	1146
B. Campaign	1150
1. Scale	1150
2. Opportunity	1152
3. Strategy	1154
4. Lawyering	1155
C. Outcome	1156
1. Constraint	1157
2. Countermobilization	1159
3. Adaptation	1160
4. Accountability	1162
Conclusion	1164

INTRODUCTION

This Article recounts and analyzes the epic campaign to raise work and environmental standards at the ports of Los Angeles and Long Beach. This campaign emerged as a fight over air quality, but developed as a struggle over the conditions of short-haul truckers, whose precarious economic status as independent contractors contributed to poorly maintained trucks that were a key cause of air pollution. The campaign itself thus became a moment of labor-environmental interest convergence and an opportunity to rebuild a historically frayed alliance. It was also viewed by labor as a chance to test a new strategy of investing in campaigns around regionally sticky industries in order to advance a more ambitious project of citywide economic change.

The campaign rested on an innovative legal hook: the port, as a publicly owned and operated entity, had the power to define the terms of entry for trucking

companies through concession agreements—essentially private contracts permitting trucks onto port property. The campaign therefore hinged on how these agreements treated truckers and what types of standards the agreements set. Labor and environmental activists formed a coalition with residents of low-income communities adjacent to the port. Together, they sought to make new law that would convert truckers into employees of their companies (thus enabling unionization), while requiring the gradual upgrading of trucks to reduce pollution. Lawyers working with the coalition crafted that law to minimize ex ante legal risk and ultimately defended it—with mixed results—against a federal preemption challenge.

This Article uses the story of the campaign to examine how contemporary labor law is made, unmade, and remade—and the consequences (sometimes unintended) of doing so, both positive and negative. In broad terms, it focuses on how social movements mobilize law to change economic conditions for workers and how countermovements use law to limit—and even reverse—movement gains.¹

The campaign is, in the end, a story about the shifting geography of legal power and how movements and countermovements seek to use legal tools at different levels of regulatory authority within the structure of federalism to advance their ends.² In Los Angeles and Long Beach, the ports were initially built through assertions of local power to advance regional industrialization in the context of strong federal regulation and limited global trade. Port authorities were given autonomy to promote industrialization and succeeded in facilitating manufacturing-led regional growth, while the rise of the federal regulatory state in the New Deal era empowered labor to share in its benefits. Beginning in the 1970s, globalization disempowered local governments, which lost their manufacturing base, and federal deregulation disempowered port truckers, who lost their union representation. Federal labor and transportation law, created in part to benefit workers, became a hindrance to them by decentralizing industry control and affirmatively preventing collective worker action by truckers—who were recast as independent contractors

1. By focusing on this movement-counter movement dynamic, the Article builds upon scholarship in the burgeoning law and social movement field. For the classics, see, for example, JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978); MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). For important recent work, see TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHT MOVEMENT* (2011); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879 (2007); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663 (2012); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

2. See Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 69 (Austin Sarat & Stuart Scheingold eds., 1998).

prohibited by antitrust and labor law from organizing. In the 1990s, local governments reasserted control over the ports to appropriate their revenue, but externalized the costs of growth on local communities.

In the clean trucks campaign, these communities fought back by turning to still-potent federal and state environmental law. Organized labor seized the opportunity to reshape the entire port trucking industry by redirecting city power over the ports to advance labor goals—harnessing the city as a market participant to create local law that enabled labor organizing and avoided federal preemption. Organized labor thus attempted to re-regulate a sector of the globalized logistics industry—port trucking—tethered to the regional economy by *keeping law local*: changing the rules of the ports to facilitate trucker unionization, while simultaneously addressing the environmental and community impacts of port growth. The trucking industry responded by taking law out of the local arena, using litigation to bring the policy outcome of the campaign back under the very federal regulatory regime labor sought to avoid.

It is against this backdrop that the Article examines how the clean trucks campaign operated and what it achieved. The analysis proceeds from the perspective of movement actors advancing the campaign, and draws upon interviews and a systematic review of campaign documents and legal materials.³ The arc of the story builds from separate and uncoordinated activism by different movement actors around the negative impact of port operation and expansion on local communities, to a moment of interest convergence resulting in the passage of the Clean Truck Program, to an industry-led legal challenge that succeeded in carving apart what the coalition had done.

Focusing on campaign formulation and execution, the Article explores why labor activists and lawyers came to focus on the ports as a target, how they developed an alliance with environmentalists, and what factors influenced decisions about legal objectives (legislation revising concession agreements) and the mix of tactics to achieve it. It emphasizes three main themes.

First, in terms of campaign objectives, the Article shows how law shaped the way movement actors understood labor and environmental issues at the ports and how to address them. There were top-down and bottom-up movement processes at work. The study traces how these forces were joined around a mutual analysis of convergent legal interests. From the top-down, organized labor had developed a sophisticated legal analysis of the trucking industry, identifying its independent-contractor structure as the main impediment to unionization. Labor strategists identified the ports as a target of legal opportunity: they were sticky to the region—not vulnerable to capital flight—and the Los Angeles port was under the authority of a local government friendly to labor interests. From the bottom-up, community

3. For this Article, I conducted interviews with twenty-five key movement actors (pursuant to UCLA Institutional Review Board protocol #G08-06-076-02), reviewed legal materials related to all litigation and administrative proceedings, and reviewed internal campaign documents made available by the Coalition for Clean and Safe Ports.

groups, increasingly in concert with environmentalists, understood the local impacts of port expansion as a problem of regulatory capture: port governance was controlled by logistic industry firms and their governmental allies, who excluded communities from meaningful participation. Community groups also identified trucking as a key cause of local pollution and congestion, and focused on participation in port governance as the path to change. The clean trucks campaign was explicitly designed to harmonize labor, environmental, and community interests by crafting a master legal solution to the intertwined problems of deunionization and pollution. The drivers' independent-contractor status was defined as the causal link: forcing low-paid, mostly immigrant drivers to operate as owners simultaneously decreased their pay and increased pollution since they could not afford to upgrade and maintain their trucks. Changing the drivers' legal status was the campaign's lynchpin.

The Los Angeles Alliance for a New Economy—known as LAANE—organized the Coalition for Clean and Safe Ports with key labor, community, and environmental allies, particularly the International Brotherhood of Teamsters (Teamsters) and the Natural Resources Defense Council (NRDC). Together, they sought to redesign local law to advance mutual interests: “greening” the ports, while improving economic conditions for drivers. In 2008, after two years of impressive organizing, the coalition won a Clean Truck Program in Los Angeles that amended port rules to permit trucking companies to enter port property only if they completed a double conversion: of trucks (from dirty old diesel-fuel to modern low-emission vehicles) and of drivers (from independent contractors to employees). From the campaign's perspective, using the legal power of the city to force trucking companies to internalize the costs of employment and maintenance would create a sustainable foundation for clean trucking over time and permit trucker unionization.

Achieving this policy reform required more than just a well-designed plan—it required that local politics lined up in the coalition's favor and coalition actors executed their plan at a high level. This points to the second theme of the case study: understanding the complex interplay of opportunity and resources in framing the legal campaign and moving it forward. Since trucking deregulation in the 1980s, the Teamsters had long sought ways to organize port truckers. The confluence of a prolabor Los Angeles mayor and a decisive environmental legal challenge by NRDC to block port expansion created the possibility of achieving labor's goals. The launch of Change to Win, and its association with successful local labor organizations, provided the resources to make it happen. And the formation of a coalition of labor, environmental, and community groups brought the political muscle necessary to move local officials to produce change. In this way, top-down labor planning intersected with bottom-up resistance to port activities at a moment of political opportunity to create a powerful coalition with the political leverage to make law, which the coalition succeeded in doing.

The Article's third theme focuses on how law shaped campaign tactics. In a system of weak federal labor regulation, organized labor relied on environmental

law—with the crucial legal power to delay port growth—as the initial lever to create space for legal reform. From there, labor turned to the local government, where it had built political power, to advance legal change that would facilitate employee conversion. However, for political and legal reasons, the frame of that local legal change sounded in environmental justice: employee conversion was necessary to green the port and reduce impacts on local communities. Politically, this facilitated forming the coalition and persuading local officials. Legally, employee conversion was linked to the goal of reducing port emissions and thus avoiding further environmental legal challenge—which was deemed critical for the port, as a market participant, to ensure orderly and efficient operations. In this way, federal preemption law shaped how movement lawyers, in particular, thought of the possibilities for regulatory change at the local level—and how those understandings were translated into policy reform. The Article thus highlights how federal preemption was a primary battleground on which the contest over labor's local strategy played out. Movement lawyers mobilized law in the administrative and legislative process to support readings of preemption doctrine in a context of jurisprudential uncertainty in order to minimize preemption risk and validate the Clean Truck Program. Although they succeeded in getting the law passed, they were not entirely successful in defending the law from a preemption attack by the trucking industry in a case that ultimately made its way to the Supreme Court.

How should the campaign be judged and what can be learned from it? In its conception and execution, the campaign was highly effective. Powerful alliances were built, a sophisticated policy was crafted that achieved labor and environmental goals, opposition was thwarted, and legislative passage secured. Yet the policy was only partially implemented. The Los Angeles Clean Truck Program's labor centerpiece—the provision converting port truckers to employees to enable unionization—was enjoined and invalidated by the industry's preemption challenge under the Federal Aviation Administration Authorization Act. Yet, the industry lawsuit did not challenge the entire Clean Truck Program and left standing the conversion of the port trucking fleet to low-emission vehicles. As a result, what remained of the Clean Truck Program advanced environmental interests by mandating clean trucks, but undercut labor interests by withdrawing the legal basis to organize drivers. In so doing, the drivers themselves suffered a setback: with employee conversion undermined in federal court, drivers assumed the burden of purchasing and maintaining clean trucks without the economic benefits promised by employee status.

This outcome suggests the tradeoffs of using alternate legal frameworks—here, environmental and local government law—as proxies for advancing economic rights. This move is necessitated by weak labor law, but to be successful it must thread a difficult needle. On the one hand, these proxy battles, at best, result in industry restructuring that indirectly facilitates unionization. This is a powerful tool

that has been successfully used in other contexts.⁴ But it also raises challenges. Joining labor policy to stronger regulatory frameworks—like environmental law—risks the stronger regulatory claim being validated to the detriment of the labor claim. Thus, if the argument for a Clean Truck Program is centrally about reducing port pollution and avoiding environmental lawsuits (rather than unionization), then the environmental objective could be read by policy makers or courts as trumping the labor one. The joinder of labor and environmental claims, which strengthens the coalition, also makes it vulnerable to industry countermobilization that seeks to “divide and conquer.” As the case study shows, industry litigation on preemption grounds succeeded in splitting apart and reallocating the gains from a policy campaign built upon mutual interest—resulting in environmental victory but labor setback.

The nature of this challenge—federal preemption—also highlights the difficulty of nesting labor-facilitating regulation in local government law. Ultimately, labor’s local strategy is never entirely local. Rather, it is framed by the overhang of federal law—and not just labor law, as it turns out, but other federal regulatory structures as well—that both shapes legal strategy and pulls activists back into the federal system to either defend or circumvent challenges to carefully crafted local policy. Planning for preemption is thus a key part of the lawyering process during the campaign, but one fraught with uncertainty, since predicting judicial outcomes is such an inexact science.

Finally, the outcome of the campaign for port truck drivers—burdened with the costs of acquiring and maintaining expensive new clean trucks, but without employee status and potential union benefits—spotlights the issue of constituency representation and how it operates in the context of bottom-up law reform campaigns. Within law, the classic accountability concern is with top-down lawyers making choices that are inconsistent with constituent interests. Here, movement lawyers effectively served as outside counsel to the organizations driving policy development. It was movement leaders, and not movement lawyers, making the major campaign policy calls—and deciding to take the risk to pursue reform, even though there was a small, but nontrivial, chance that truck drivers might bear the brunt of clean truck conversion without reaping the benefit.

I. LAW IN THE DEVELOPMENT OF THE PORTS

The Port of Los Angeles sits in the San Pedro Bay, directly adjacent to the Port of Long Beach to the east. The bay itself is tucked under the Palos Verdes Peninsula, which juts out prominently south of Santa Monica Bay. The ports are located in distinct municipalities, subjecting them to different rules and political pressures—and making them competitors for cargo business. However, as a functional matter, they form an integrated unit: sharing the same land mass,

4. See generally Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011).

benefitting from the same infrastructure, and connecting to a unified transportation system of roads and rail.⁵ Individually, the ports of Los Angeles and Long Beach are the first and second largest, respectively, in the United States; together, they form one of the largest port complexes in the world.⁶

The geography of the ports, both physical and man-made, is a central feature in the struggle over their impact and control. This geography—and the inequality it demarcates—has been shaped by interlocking international, federal, state, and local legal decisions. These decisions have facilitated the ports' development as an engine of regional economic growth—and a gateway to globalization—while concentrating its most harmful externalities in some of the region's lowest income communities. As law has contributed to the growth of the ports complex, it has also distributed the costs and benefits of that growth unequally—enabling some communities to escape the worst impacts, while appropriating others in the project of expanding global trade. This project has resulted in transportation and land use decisions that have contributed to segregation and environmental degradation in surrounding communities, while also creating winners and losers among workers.

The history of the port's legal development can be roughly broken into three phases. In the first, from the mid-1800s through the 1920s, law was used to appropriate the harbor—created by and beholden to outside capital—to the project of city building. In Los Angeles and Long Beach, the ports were wrested from private ownership, constituted as public entities, and given broad powers as independent agencies to build the infrastructure necessary to promote economic development. This process was led by local business elites advancing a vision of the ports as key to regional industrialization. While both ports fueled this growth, they increasingly began to compete, establishing an inter-port dynamic that would shape future development.

The second phase, from the Depression to the 1970s, was marked by the rise of the regulatory state and a working compromise among business elites, labor, and local communities to share the benefits of port growth. In this period, the ports were harnessed to fuel industrialization and facilitate U.S. exports, building the Los Angeles region as a manufacturing stronghold, led by aerospace and auto production. Strong federal regulation of transportation and labor produced stable industry patterns and powerful unions, which were able to negotiate their share of the peace dividend. Trade barriers permitted internal manufacturing development. Port expansion occurred, but had yet to achieve a scale that impaired surrounding communities, whose residents reaped economic benefits of jobs and local investments (though began to suffer from intensifying oil extraction).

5. See EDNA BONACICH & JAKE B. WILSON, GETTING THE GOODS: PORTS, LABOR, AND THE LOGISTICS REVOLUTION 45 (2008).

6. *Id.* (noting that, as of 2004, the two ports combined were the third largest in the world). As of 2011, the Port of Los Angeles was the sixteenth largest in the world by container volume, while the Port of Long Beach was ranked twenty-first; combined, they formed the eighth largest port in the world. Marsha Salisbury, *The JOC Top 50 World Container Ports*, J. COM., Aug. 20–27, 2012, at 24, 26.

In the third phase, beginning in the 1970s, this arrangement unraveled in the face of globalization and the decline of the regulatory state. Against the backdrop of free trade, the ports became conduits of globalization, powered by the rise of intermodalism, which connected the U.S. market to East Asian exporters and fueled prodigious growth. Federal deregulation and weakened labor laws contributed to industry reorganization that empowered shippers and negatively impacted the least powerful workers in the logistics supply chain—namely, port truck drivers, whose downgrading to independent contractors undermined their economic position. Globalization also disempowered city governments, which saw the development benefits of export-led growth dwindle, and with it, the job and tax benefits of local manufacturing. Los Angeles and Long Beach responded by reasserting greater legal control over the ports in order to shore up faltering city budgets and harness port growth to power development of the regional service economy. This move allied cities with the project of continuous port expansion—since it was through expansion that jobs were created and local revenues grew. Although the ports continued to compete, they also made joint investments in transportation and logistics infrastructure to maintain their comparative advantage over other locations.

Increasingly, this growth came at a cost to regional air quality, which was polluted by the diesel-fuel-driven port transportation network. The ports' negative externalities fell with greatest force on adjacent low-income communities, which were made to absorb the most significant environmental and land use impacts. Disempowered by a legal system in which local elites worked with global capital to expand port capacity, these communities—in collaboration with a resurgent labor movement—sought to gain greater input into port governance in order to adapt local control to their own ends. To do so, they turned back to a tool from the regulatory state—environmental law—to leverage changes to local policy that would better align port growth with community and labor interests. That is where the campaign for clean trucks began.

A. Local Power: Annexation and Autonomy

The creation of the Port of Los Angeles was shaped by the clash of competing economic ambitions for the region.⁷ As local business elites used law to ultimately wrest control of the port from outside capital around the turn of the twentieth century, they built the foundations of a transportation infrastructure within the city's jurisdictional boundaries that connected shipping, rail, and roads. In this process, local elites used legal strategies to annex the harbor property—facilitating dramatic growth in city territory and population—and created a municipal governance

7. See STEVEN P. ERIE, *GLOBALIZING L.A.: TRADE, INFRASTRUCTURE, AND REGIONAL DEVELOPMENT* 47 (2004). See generally *BD. OF HARBOR COMM'RS, THE PORT OF LOS ANGELES* 23–38 (1913) (providing a history of the Port of Los Angeles); CHARLES F. QUEENAN, *THE PORT OF LOS ANGELES: FROM WILDERNESS TO WORLD PORT* 27–56 (1983) (discussing the growth and evolving role of the Port of Los Angeles between the late nineteenth and early twentieth centuries).

structure that conferred broad legal authority on the Port of Los Angeles to pursue dynamic expansion plans. The goal was to take port control away from outside entrepreneurs in order to build the economic foundations for manufacturing-driven city growth.

First used as an outpost to supply Spanish missionaries in the late 1700s, the San Pedro harbor became an important trading center after Mexico took control in 1822, and American land acquisition and commercial activity expanded.⁸ The U.S. annexation of California after the Mexican-American War, followed by the Gold Rush, brought American settlers streaming west.⁹ As the volume of passenger and commercial shipping increased, the need for transportation infrastructure grew. Investment was spurred by the struggle for control over lucrative regional trade. Rancheros gained early advantage, developing the first San Pedro-to-Los Angeles stagecoach shipping route after the war,¹⁰ but the balance quickly shifted to new entrepreneurs.

Delaware transplant Phineas Banning entered the market and swiftly established a staging business between the harbor and Los Angeles that extended on to Salt Lake and Fort Yuma.¹¹ When competition for the San Pedro route became too fierce, Banning bypassed it altogether, transferring his shipping business to land he purchased north of the harbor, which he named Wilmington.¹² While Banning's quest for market dominance was disrupted by the Civil War, his postwar strategy sought to monopolize trade to Los Angeles through the construction of a rail line from the harbor.¹³ Banning thus entered politics, where he used his influence as a state senator to gain passage of a bill authorizing the Los Angeles & San Pedro Railroad charter, and then won a hard-fought local ballot initiative authorizing municipal bond financing.¹⁴ Construction of the line, which ran along Alameda Street, was completed in 1869, marking the creation of the Alameda transportation corridor.¹⁵ With the rail line in place, Banning then turned to improving the port itself, which was too narrow and shallow for large sea vessels. He persuaded the federal government to add two jetties and then dredged the channel to a serviceable depth—thereby facilitating a nearly hundredfold increase in total port commerce between the late 1860s and 1886.¹⁶

8. See CHARLES F. QUEENAN, *LONG BEACH AND LOS ANGELES: A TALE OF TWO PORTS* 13–16 (1986). Cowhide was the major trading commodity. *Id.* at 23.

9. *Id.*

10. *Id.*

11. See REMI A. NADEAU, *CITY-MAKERS: THE MEN WHO TRANSFORMED LOS ANGELES FROM VILLAGE TO METROPOLIS DURING THE FIRST GREAT BOOM, 1868–76*, at 24 (1948).

12. QUEENAN, *supra* note 8, at 26.

13. See *id.* at 29–30. During the war, Banning ceded some of his property to the Union army to build a new base; he was rewarded with a construction contract and he profited from the shipment of military supplies. *Id.* at 29.

14. NADEAU, *supra* note 11, at 26–27.

15. *Id.* at 27–29.

16. See ROBERT M. FOGELSON, *THE FRAGMENTED METROPOLIS: LOS ANGELES, 1850–1930*, at 108–09 (1967).

The Los Angeles & San Pedro Railroad did not stay within Banning's control for long. Indeed, its initial construction was motivated in part by the desire to connect Los Angeles to the approaching transcontinental railroad, which local elites believed could only be secured by offering its owner—Leland Stanford's powerful Southern Pacific Railroad—ready-made rail access to the harbor.¹⁷ The Southern Pacific, anchored in San Francisco, threatened to bypass Los Angeles without a generous public subsidy,¹⁸ which included acquiring Banning's rail line.¹⁹ After fierce lobbying, Congress passed a law directing the transcontinental railroad to run through Los Angeles.²⁰ Yet the terms of any deal between Los Angeles and the Southern Pacific were yet to be worked out and ultimately subject to local voter approval. Determined to bring transcontinental service to Los Angeles, Banning—along with other elite Angeleno businessmen who formed the “Committee of Thirty”—reluctantly agreed to support a \$600,000 subsidy to the Southern Pacific, which included a controlling share in Banning's Los Angeles & San Pedro Railroad.²¹ A bitter election contest ensued, but the Southern Pacific subsidy was passed handily by county voters in 1872.²² Four years later, the construction of the Southern Pacific line to Los Angeles was completed²³—officially connecting the city, and the San Pedro harbor, to the national market. The population of Los Angeles at the time was approximately 10,000.²⁴

Growth occurred rapidly, yet the position of the San Pedro harbor as the gateway to Los Angeles was still uncertain. Local boosterism helped attract a wave of new immigrants, who the Southern Pacific eagerly transported west.²⁵ Yet, with Los Angeles firmly within its grasp, “The Octopus” (as the Southern Pacific was called) squeezed local shippers subject to its virtual monopoly.²⁶ Saddled with debt and eager to protect its investment in the San Francisco port, the Southern Pacific raised rates on Los Angeles shippers and refused to build out the San Pedro harbor.²⁷ Competitors sought to challenge the Southern Pacific with rival rail lines and ports—provoking harsh reprisals by the railroad. In the 1870s, the Southern Pacific crushed a plan to build a new railroad and port in Santa Monica; and as Banning's efforts to dredge the San Pedro harbor began to pay off in the 1880s, the

17. See NADEAU, *supra* note 11, at 23–24.

18. See FOGELSON, *supra* note 16, at 52.

19. See ERIE, *supra* note 7, at 49; see also Steven P. Erie, *How the Urban West Was Won: The Local State and Economic Growth in Los Angeles, 1880–1932*, 27 URB. AFF. REV. 519, 526–27 (1992).

20. See NADEAU, *supra* note 11, at 73.

21. *Id.* at 78; see also *The “Committee of Thirty,”* L.A. HERALD, Feb. 3, 1883, at 3.

22. NADEAU, *supra* note 11, at 79–86; see also ERIE, *supra* note 7, at 49.

23. ERIE, *supra* note 7, at 49.

24. See *id.* at 46; see also FOGELSON, *supra* note 16, at 56 (reporting that, in 1880, the population of the city of Los Angeles was 11,183 and the county population was 33,381).

25. FOGELSON, *supra* note 16, at 63–66. For the classic account of the construction of the California Dream, see KEVIN STARR, *INVENTING THE DREAM: CALIFORNIA THROUGH THE PROGRESSIVE ERA* (1985).

26. ERIE, *supra* note 7, at 49–50; QUEENAN, *supra* note 8, at 33.

27. ERIE, *supra* note 7, at 49; QUEENAN, *supra* note 8, at 33.

Southern Pacific rerouted its own line from Los Angeles to the west side of the main channel in San Pedro, thereby circumventing Wilmington—and effectively putting the Wilmington port out of business.²⁸

Yet the competition was unrelenting: with one rival building a port in Redondo Beach and another laying new rail tracks through East Wilmington, the Southern Pacific made a dramatic play to defeat both threats by abandoning San Pedro altogether.²⁹ With local businessmen consumed by the threat of losing regional shipping to San Diego's superior natural harbor, the Los Angeles Chamber of Commerce, led by *Los Angeles Times* owner Harrison Gray Otis, pressed Congress to fund construction of an artificial deep-water harbor at San Pedro.³⁰ As Congress vacillated, the Southern Pacific, under the control of Collis Huntington, surprised local leaders by opposing the selection of San Pedro as the harbor site, instead endorsing Santa Monica, where it had quietly made significant waterfront investments.³¹ The Chamber, which resented the Southern Pacific's power and opposed its tourism-oriented vision for Los Angeles development,³² seized the chance to have a decisive confrontation with the railroad. With Congress unwilling to choose sides without the backing of the California delegation, the Chamber lobbied Senator Stephen White (Otis's personal lawyer),³³ who championed San Pedro and vilified the already-unpopular Southern Pacific.³⁴ After a bitter political struggle, the California delegation eventually coalesced around White's leadership, defeating a proposed \$3 million appropriation for Santa Monica. The delegation secured massive federal funding for the Army Corp of Engineers to build a breakwater in the San Pedro Bay, which commenced in 1899 (and was completed in 1912)—finally securing San Pedro's place as the port of entry to the Los Angeles region.³⁵

The "free harbor" movement, however, was not a complete success. The city of Los Angeles lacked legal control over the harbor, which lay sixteen miles to the south of downtown, within San Pedro and Wilmington.³⁶ And despite its failed Santa Monica gambit, the Southern Pacific still monopolized port operations in the San Pedro harbor through its ownership of the waterfront.³⁷ Municipal control was therefore necessary to build the port and ultimately break the Southern Pacific monopoly. The U.S. acquisition of the Panama Canal in 1904 and its impending completion heightened the sense of urgency among local businessmen eager to

28. QUEENAN, *supra* note 8, at 37–44.

29. *Id.* at 49–51.

30. FOGELSON, *supra* note 16, at 110.

31. *See* QUEENAN, *supra* note 8, at 51.

32. *See* ERIE, *supra* note 7, at 50.

33. *Id.* at 52–53.

34. ERIE, *supra* note 7, at 53; *see also* FOGELSON, *supra* note 16, at 112–14.

35. FOGELSON, *supra* note 16, at 112–14.

36. ERIE, *supra* note 7, at 54.

37. FOGELSON, *supra* note 16, at 114–15.

solidify Los Angeles's place as the major western port city.³⁸ So, too, did the machinations of adjacent Long Beach—on the east side of San Pedro harbor—which had been incorporated in 1888 and steadily grew with the arrival of rail connection.³⁹ As the free harbor fight solidified plans to dredge and improve the west side of the harbor, Long Beach expansionists sought to exploit the commercial prospects of the east side. After securing federal funds for inner harbor dredging in 1903, business leaders urged Long Beach to annex Terminal Island, the massive landmass running the width of the San Pedro Bay that separated the outer harbor from an inner channel connected to a tributary of the Los Angeles River.⁴⁰ Although this effort failed, an annexation battle ensued, with Los Angeles unsuccessfully trying to annex Long Beach as the latter acquired more land up to the Wilmington border. In 1909, Long Beach won an election to acquire the eastern half of Terminal Island.⁴¹ In the face of this incursion, Los Angeles moved to exert greater control over the western part of the harbor.

Doing so required a series of legal maneuvers. Because state law only allowed the consolidation of contiguous cities, Los Angeles first had to extend the reach of its jurisdictional border down to the port, which it did in 1906 by annexing the unincorporated “shoestring district”⁴²—a one-mile-wide strip of land from Los Angeles's southern border due south to San Pedro.⁴³ From there, the Los Angeles City Council took the symbolic step of creating a board of harbor commissioners in 1907,⁴⁴ as it turned to the more formidable task of actually acquiring the harbor itself by annexing San Pedro and Wilmington, whose skeptical residents had to be convinced to vote for consolidation.⁴⁵

Before annexation could be formally considered, state law had to be amended to authorize the consolidation of charter cities (those, like Los Angeles, that had chosen home rule by ratifying their own city constitution) and noncharter cities (those, like San Pedro and Wilmington, which had not opted for charter status and were thus governed under the state's general law). The consolidation law was duly amended in 1908, after spirited lobbying by local business elites—and over the Southern Pacific's objection.⁴⁶ In the electoral campaign for consolidation, Los Angeles used its most powerful form of persuasion: the promise of its vast resources. Realizing that they lacked the funds to significantly improve the port,

38. ERIE, *supra* note 7, at 60–61.

39. QUEENAN, *supra* note 8, at 37, 45–46.

40. *Id.* at 61.

41. *See* ERIE, *supra* note 7, at 65.

42. FOGELSON, *supra* note 16, at 115.

43. QUEENAN, *supra* note 8, at 62.

44. *Id.* at 62–63.

45. The consolidation required a majority vote of the residents of the annexing city, Los Angeles, and the cities to be annexed. Wilmington was incorporated in 1872. Donna St. George, *Wilmington: Community of Contradictions*, L.A. TIMES, Oct. 6, 1985, at SB1. San Pedro was incorporated in 1888. Sheryl Stolberg, *No Longer the City It Once Was, San Pedro to Mark 100th Birthday*, L.A. TIMES, Feb. 26, 1988, at M8.

46. *See* FOGELSON, *supra* note 16, at 115.

which powered the local economies, San Pedro and Wilmington residents acceded to the annexation plan, in exchange for Los Angeles committing \$10 million for harbor improvement, agreeing to build a truck highway from the harbor to downtown, and promising additional infrastructure investments.⁴⁷ San Pedro and Wilmington formally voted in favor of consolidation with Los Angeles in 1909,⁴⁸ within days of Long Beach's Terminal Island annexation.⁴⁹

Consolidation did not fully settle the matter since ownership of much of the waterfront property remained in dispute. The city of Los Angeles challenged title of the Southern Pacific and other purported landowners under the antiquated State Admissions Act, which assigned ownership of navigable waters to the state.⁵⁰ Los Angeles brought a series of lawsuits to perfect its title, which was settled once and for all by the 1911 passage of the state Tidelands Trust Act, which made Los Angeles trustee of the tidelines—land under the normal ebb and flow of the tide, as well as submerged land and navigable waterways—that constituted the harbor.⁵¹ Now firmly located on city-owned land, the Port of Los Angeles—an independent municipal department governed by an appointed board of harbor commissioners—was officially born.

The history of the port as an instrument of private enterprise appropriated to municipal control influenced its subsequent role in regional growth. After consolidation, the port remained semiautonomous, but its mission was shaped by local business elites who sought to build its power in order to facilitate Los Angeles's growth as an export-led manufacturing economy. To accomplish this, the port was placed under the power of a proprietary department established in the model of the city's formidable Department of Water and Power, and governed by the harbor commission.⁵² Under the 1913 Los Angeles charter amendment, a board of three harbor commissioners, appointed by the mayor and approved by the city council, was given "possession and control . . . of the entire water front of the city."⁵³ The commission's power included broad authority to manage and lease port property, hire personnel, and pass rules of operation, as well as the right to set rates (subject to city council approval), collect revenue, and issue bonds (subject to voter approval).⁵⁴ Although technically independent, the harbor commission in its early phase relied on support from local business elites to win greater authority and control. In collaboration with the Chamber of Commerce, the commission secured a series of charter amendments that enlarged its bureaucratic authority, expanding

47. See QUEENAN, *supra* note 8, at 63.

48. See *id.*; see also Fleming *Tells of Campaign to Secure Harbor*, L.A. HERALD, Aug. 25, 1909, at 1.

49. ERIE, *supra* note 7, at 65.

50. See QUEENAN, *supra* note 8, at 74.

51. ERIE, *supra* note 7, at 55.

52. *Id.*

53. L.A., CAL., CITY CHARTER art. XVI, § 176 (1911) (amended 1913).

54. See *id.* §§ 168–186. The proprietary nature of the Port of Los Angeles is atypical: only seventeen percent of U.S. ports are governed by municipal authorities and of the eight ports in the largest American cities, Los Angeles's is the only one under city control. See ERIE, *supra* note 7, at 31.

its size to five commissioners, and giving it greater power over budget, personnel, policy making, and contracting in ways that further diminished mayoral and city council control.⁵⁵ Because it kept shipping rates low to promote trade, the port required public financing for major improvements and leveraged local business support to win approval of over \$30 million in municipal bond funds by 1932.⁵⁶ However, as Progressive Era citizen resistance to public subsidies grew, the harbor commission eventually was forced to abandon bond referenda and become self-financing through shipping fees and tariffs.⁵⁷ Thus dependent on revenue from shipper and carrier use to fund operations and improvements, the commission became increasingly focused on the satisfaction of its main customers: import-exporters, ocean steamship liners, railroads, and trucking companies.⁵⁸ Yet—still insulated from intense competition—the harbor commission was at this point able to strike bargains that fueled Los Angeles's rapid growth.

Powered by the real estate boom in the late 1880s (and undeterred by the bust),⁵⁹ Los Angeles's population grew tenfold to 100,000 in 1900 and then more than tripled to 320,000 in 1910; by 1930, the city's population had surpassed one million.⁶⁰ During this time, port commerce shifted from imports to a more balanced two-way flow, as the discovery of oil and the beginnings of Los Angeles's industrialization significantly increased export traffic. In the period before World War I, immigrants in search of the California dream fueled a strong demand for building construction and, as a result, lumber imports dominated port trade, driving an eleven-fold increase in total port commerce from 1900 to 1917.⁶¹ After the war, oil production skyrocketed with a series of major oil strikes around Long Beach beginning in 1921, and oil exports—which had been growing in the prewar period—increased dramatically, facilitated by the opening of the Panama Canal that same year, which permitted oil to be immediately shipped for refining on the East Coast.⁶² Port commerce doubled by 1922 to over ten million net tons.⁶³ As a Chamber-led push to promote Los Angeles industrialization won some early success—with Ford Automobile and major tire companies opening regional plants

55. ERIE, *supra* note 7, at 55, 57–60.

56. *Id.* at 55–56.

57. *Id.* at 57.

58. *Id.* The development of the port continued to benefit from federal support, with the federal government appropriating another nearly \$10 million during this period to “dredge the outer harbor, widen the main channel, and double the length of the breakwater.” *Id.* at 56.

59. David L. Clark, *Improbable Los Angeles*, in *SUNBELT CITIES: POLITICS AND GROWTH SINCE WORLD WAR II* 268, 270 (Richard M. Bernard & Bradley R. Rice eds., 1983).

60. FOGELSON, *supra* note 16, at 78.

61. *Id.* at 119. During this time, commercial fishing also became a central industry in the harbor, with the rise of canned tuna drawing new investment and labor, including Japanese fishermen who built an active community on Terminal Island until they were interned during World War II. QUEENAN, *supra* note 8, at 66, 117.

62. ERIE, *supra* note 7, at 61; QUEENAN, *supra* note 8, at 82–83.

63. FOGELSON, *supra* note 16, at 119. Port trade at this stage was still dominated by lumber imports and oil exports, despite a \$15 million bond-financed effort to attract other industries by doubling wharf space. QUEENAN, *supra* note 8, at 90.

to take advantage of Los Angeles's shipping facilities—exports surged and port commerce grew further, reaching nearly thirty million net tons by 1930 and establishing the Port of Los Angeles as the largest on the West Coast.⁶⁴

The Port of Los Angeles's growing regional dominance occurred alongside the upstart ambitions of neighboring Long Beach. As the Port of Los Angeles began to take shape in the early 1900s, local developers purchased harbor property and began dredging to create a rival deep-water port in Long Beach.⁶⁵ The arrival of new industry—most notably the Craig Shipyard and then the Southern California Edison power plant—added momentum to the harbor project, which remained in the hands of private developers even after the official creation of the Port of Long Beach in 1911.⁶⁶ Despite a series of city-backed bond measures to support harbor development,⁶⁷ World War I and major flooding reinforced the perception that the harbor's private owners were unable to undertake improvements at the necessary scale to build and maintain a world-class port. As a result, the city of Long Beach finally acquired ownership of its port in 1916, promptly issuing bonds for further upgrades.⁶⁸

The 1921 Signal Hill oil strike radically changed the fortunes of Long Beach, newly awash in “black gold” and able to finance the massive improvements necessary to create a world-class port.⁶⁹ That year, the city passed a new charter, establishing a harbor department, with authority to manage the city-owned harbor asset.⁷⁰ A \$5 million bond issue in 1924 financed a breakwater that transformed the port into a deep-water rival to its Los Angeles neighbor,⁷¹ separated by an invisible jurisdictional line, but otherwise integrated into a massive port complex. On the Long Beach side, a series of ballot initiatives through the early 1930s gave the harbor department proprietary status along the model of Los Angeles, with a harbor commission that possessed similar independent powers.⁷² Los Angeles, appreciating the threat, attempted again to consolidate authority by creating a unified port district, but Long Beach rejected the overture.⁷³ A wealthy city with larger aspirations, Long Beach preferred to challenge Los Angeles head-on, quadrupling its port tonnage to four million between 1926 and 1930.⁷⁴ Though still far below the Port of Los Angeles in overall volume, the Port of Long Beach had established

64. FOGELSON, *supra* note 16, at 119.

65. QUEENAN, *supra* note 8, at 65.

66. *See id.* at 67–78.

67. ERIE, *supra* note 7, at 67.

68. QUEENAN, *supra* note 8, at 79.

69. *Id.* at 82.

70. ERIE, *supra* note 7, at 71.

71. QUEENAN, *supra* note 8, at 83.

72. ERIE, *supra* note 7, at 71–72.

73. *Id.* at 72.

74. QUEENAN, *supra* note 8, at 89. There was some cooperation between the ports, most crucially the joint establishment of the Harbor Belt Line Railroad in 1929, which linked multiple harbor rail lines to permit seamless rail travel around the two port complexes. *Id.* at 92.

itself as a serious competitor, causing each city to ratchet up investment to secure its share of trade.

B. Federal Power: Industrialization in the Shadow of Regulation

Although the Depression slowed growth dramatically at both ports, wartime mobilization and the postwar prosperity that flowed from U.S. economic dominance once again transformed the ports—and their relationship with the communities connected to them. The regulatory state that emerged from the Depression set the template for postwar growth. Wartime industrial investment fueled a postwar manufacturing boom, particularly in Southern California, where wartime manufacturing of aircraft and ships was retooled for the peacetime economy. Import tariffs reduced foreign competition and encouraged export-driven industrialization, in which the ports became key distribution centers. Federal regulation of transportation permitted the ports to negotiate favorable terms with shippers and carriers, which they could then reinvest in infrastructure development. Transportation regulation, coupled with newly minted federal labor laws, also gave unions power to negotiate a favorable share of growth for port workers. Those workers, particularly truck drivers, benefitted from the postwar regime, while local communities—increasingly under stress from oil production—had not yet incurred the blight of rapid port expansion. It was a fragile stability that rested on federally regulated industrial prosperity.

Trade was significantly interrupted by the Depression—which decreased port revenues and forced greater reliance on federal assistance for harbor improvements⁷⁵—and World War II. These events nonetheless drew attention to two aspects of port development that would prove crucial in the postwar period. One was oil production, which despite decreased demand, remained a mainstay of harbor exports during the 1930s and, in Long Beach, generated revenues that financed ongoing harbor improvements. The 1932 discovery of the Wilmington Oil Field under the harbor (the third largest oil field in the United States) triggered increasing oil extraction and refining activities in the harbor area, while also contributing to harbor subsidence on the Long Beach side.⁷⁶ By the mid-1930s, Wilmington and Long Beach were marked by the relentless rise and fall of oil pumps, and significant areas had been conveyed to oil companies, whose operations often abutted the houses, schools, and stores that residents used.⁷⁷ At the beginning of World War II, seventy-five percent of all cargo shipped through the Port of Los

75. ERIE, *supra* note 7, at 79.

76. See GORDON LAIRD, *THE PRICE OF A BARGAIN: THE QUEST FOR CHEAP AND THE DEATH OF GLOBALIZATION* 130–31 (2009). For an analysis of the subsidence problem, which briefly caused Long Beach to earn the title of “The Sinking City,” see QUEENAN, *supra* note 8, at 119–20 (quoting *Time Magazine*). Earlier oil discoveries in the area had already attracted refineries. *See id.* at 83; *see also California Oil Refinery History*, CAL. ENERGY COMM’N (Aug. 2012), http://energyalmanac.ca.gov/petroleum/refinery_history.html (noting the creation of refineries by Union Oil of California in 1917 and California Petroleum Corporation in 1923).

77. See QUEENAN, *supra* note 8, at 91–92.

Angeles was oil.⁷⁸ The cataclysm of World War II appropriated the ports to the national interest, while simultaneously laying the foundation for an even greater postwar role building regional industrialization. Petroleum was needed in huge amounts to support the war effort and drilling intensified around the ports, reaching 17,000 barrels a day in 1943.⁷⁹ Wartime brought naval bases to the strategically valuable San Pedro harbor, which became the central conduit for the transportation of military personnel and the distribution of locally manufactured aircraft and ships to Allied forces in the Pacific.⁸⁰

Manufacturing production spurred by the war became the basis for regional economic growth after the war's end. Both ports invested substantially in postwar repurposing to convert facilities back to civilian uses and to build for increasing trade afforded by the peacetime dividend.⁸¹ Under pressure to be financially self-sufficient, the ports promoted new local development,⁸² while also cultivating global connections, sending trade missions to Asia and Europe.⁸³ The pressure on Long Beach, in particular, to increase port revenues grew more intense in the 1950s, when it lost control over its lucrative oil revenue after the state amended the Tidelands Trust Act in 1951 to allocate fifty percent of oil revenues to the state for purposes unrelated to the harbor.⁸⁴ Faced with a dwindling oil subsidy, the Port of Long Beach launched an aggressive pricing strategy to lure shipping away from Los Angeles, which allowed Long Beach to quadruple its port tonnage in the 1960s, causing it to nearly equal its rival Los Angeles's total by 1971.⁸⁵

The rise of manufacturing powered postwar economic growth in the Los Angeles region and the ports grew in relation to regional prosperity. Ports and their workers shared in some of the benefits of growth under a set of federal laws that regulated transportation and labor, giving ports and unions negotiating strength to extract benefits. Port transportation was tightly controlled by an interlocking federal regulatory system governing carriers: the ocean steamship companies, railroad lines,

78. *The Union Oil Co.: The Trend*, PORT L.A.: VISUAL HIST. TOUR, http://www.laporthistory.org/level4/Berth150/berth150_trend2.html (last visited Apr. 1, 2014).

79. ERIE, *supra* note 7, at 80.

80. *Id.*

81. Erie notes that from 1945 to 1954, the Port of Los Angeles spent \$25 million on construction. *Id.* Long Beach financed its improvements with money from its vast oil reserves. QUEENAN, *supra* note 8, at 127. In addition to new wharves and other facilities, the harbor breakwater was finally completed in 1949. *See id.* at 126.

82. QUEENAN, *supra* note 8, at 126, 129 (noting establishment of Star-Kist Foods Inc. in 1952).

83. ERIE, *supra* note 7, at 81.

84. QUEENAN, *supra* note 8, at 123. This occurred after Long Beach voters approved a charter amendment allowing the city to use oil revenues for nonharbor improvements. ERIE, *supra* note 7, at 85. The state sought to block diversion of oil funds under the new law, which the state supreme court upheld. The state then sued to recover back payments and a political compromise was struck in Assembly Bill 77, which let Long Beach keep fifty percent of oil revenues if they were dedicated to harbor improvement. QUEENAN, *supra* note 8, at 123. However, over time, the state took more of the oil funds. *See* ERIE, *supra* note 7, at 85. The Tidelands Trust Act was again amended in 1965 to give the state an even greater percentage of oil revenues, effectively ending Long Beach's reliance on oil for harbor development. *Id.*

85. QUEENAN, *supra* note 8, at 128, 137.

and trucking firms that moved cargo. This system gave ports more authority to set rates, while consolidating the trucking industry in ways that facilitated unionization. Part of this structure predated the New Deal. The Interstate Commerce Act of 1887 governed interstate railroad companies and established the Interstate Commerce Commission (ICC) to police unfair competition by mandating reasonable shipping rates.⁸⁶ The Shipping Act of 1916 similarly regulated ocean carriers, establishing the Shipping Board (which became the Federal Maritime Commission) to police anticompetitive practices⁸⁷—by setting uniform price schedules and exempting port-to-port rate agreements from antitrust law.⁸⁸ The Motor Carrier Act, which regulated trucking, was passed in 1935.⁸⁹ The Act set routes, regulated rates, and limited market entry to firms able to secure a certificate of “convenience and necessity” from the federal government.⁹⁰

Taken together, this regulatory system had two important effects that benefited the ports and organized labor. First, it strengthened port negotiating power relative to shippers and carriers. Companies that wanted to ship goods had to contract with ocean steamship lines to transport cargo along authorized routes from port-to-port, and then separately contract with inland carriers (rail or trucking) to haul cargo to and from the ports.⁹¹ Because federal agencies controlled shipping rates and routes, shippers were not able to negotiate single “through rates” to move their cargo from door-to-door on a single bill of lading.⁹² Fixed carrier pricing meant that shippers saw little financial advantage to rerouting, which gave ports greater bargaining power to negotiate higher fees for access.⁹³ These fees supported further port expansion.

Federal regulation also shaped labor relations for port workers. For these workers, the Depression exacerbated what had long been the painful reality of substandard and often inhumane working conditions.⁹⁴ Harbor railroads had been built using low-paid and sometimes forced labor, while maritime workers on ships and their longshore counterparts, who loaded and unloaded cargo on the docks, labored in dangerous settings and often for little pay.⁹⁵ The labor militancy of the 1930s—culminating in the 1935 passage of the National Labor Relations Act (NLRA), which established employee collective bargaining rights—began to

86. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

87. Shipping Act, ch. 451, §§ 3, 14–22, 39 Stat. 728, 729, 733–36 (1916) (repealed in part and amended in part 1984).

88. WAYNE K. TALLEY, *PORT ECONOMICS* 150 (2009).

89. Motor Carrier Act, ch. 498, 49 Stat. 543 (1935).

90. See MICHAEL H. BELZER, *SWEATSHOPS ON WHEELS: WINNERS AND LOSERS IN TRUCKING DEREGULATION* 60–61 (2000).

91. TALLEY, *supra* note 88, at 150.

92. See Fred Thompson III, Note, *Challenges to the Legality of Minibridge Transportation Systems*, 1978 DUKE L.J. 1233, 1236–37.

93. See Wayne K. Talley, *Wage Differentials of Intermodal Transportation Carriers and Ports: Deregulation Versus Regulation*, 3 REV. NETWORK ECON. 207, 211–12 (2004).

94. See QUEENAN, *supra* note 8, at 96.

95. See *id.*

challenge these conditions. Labor discontent erupted in 1934, when the International Longshoremen's Association (ILA) struck ports along the West Coast, including those in San Pedro, demanding uniform wage rates and union-controlled hiring halls.⁹⁶ Ship owners refused, brought in strikebreakers, and enlisted local police in cracking down on the protesters.⁹⁷ After two ILA members were killed on "Bloody Thursday," the federal government intervened and brokered an agreement that established the first industry-wide collective bargaining unit. The International Longshore and Warehouse Union (ILWU) was created shortly thereafter and became a powerful force at the ports.⁹⁸

Following this victory, the Teamsters also achieved success in organizing the growing number of port truck drivers, who hauled cargo to and from the ocean steamships.⁹⁹ During the first part of the twentieth century, the Teamsters had made little progress against the strong open-shop forces in Los Angeles.¹⁰⁰ The turning point occurred in an audacious 1937 campaign that used the threat of the then-legal secondary boycott to force Los Angeles trucking companies to recognize the union and negotiate a contract.¹⁰¹ The 1935 Motor Carrier Act prevented a carrier from shipping cargo outside its region if another carrier refused to connect.¹⁰² Because the San Francisco trucking firms had already unionized, the Teamsters used the pressure of their refusal to accept Southern California hauls to force Los Angeles firms to unionize upon risk of losing access to the lucrative Bay Area market.¹⁰³ This, combined with the ILWU's refusal to cross the Teamsters picket lines at the port, succeeded in unionizing the largest—and most antiunion—regional carrier, Pacific Freight Lines, and to subsequently win an agreement that unionized the regional trucking industry.¹⁰⁴ Building on the foundation of this agreement, the Teamsters became one of the most successful unions in the state (and also the nation), achieving dramatic union growth that helped increase trucker wages and benefits through the 1960s.¹⁰⁵ The Teamsters' success contributed to the broader rise of the postwar labor movement in Los Angeles, which at its height in the mid-1950s had over thirty-five percent of nonagricultural private sector workers under union contract.¹⁰⁶ Much of the increase in union density was attributable to the

96. BONACICH & WILSON, *supra* note 5, at 173.

97. *Id.*

98. *Id.* at 173–74.

99. For the definitive account of this history, see generally DONALD GARNEL, *THE RISE OF TEAMSTER POWER IN THE WEST* (1972).

100. RUTH MILKMAN, *L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT* 46 (2006).

101. *Id.* at 46–49. See generally LOUIS B. PERRY & RICHARD S. PERRY, *A HISTORY OF THE LOS ANGELES LABOR MOVEMENT, 1911–1941* (1963).

102. MILKMAN, *supra* note 100, at 47.

103. *Id.* at 47–48.

104. *Id.* at 49.

105. *Id.* at 51. Belzer reports that in the 1970s, the trucking industry was almost completely under union contract. BELZER, *supra* note 90, at 107.

106. MILKMAN, *supra* note 100, at 60 fig.1.2.

growth of manufacturing, particularly in the aerospace industry.¹⁰⁷ This growth depended on the ports to facilitate exports to the expanding global marketplace. During this time, the interests of the ports, local business, and organized labor aligned over the project of port expansion.

This alignment, which lasted from World War II to the 1970s, marked a transitional moment. As the growth engine of local trade shifted from city building to globalization, and the federal regulatory regime governing transportation and labor relations crumbled, the ports and some workers—specifically truckers—lost power. Globalization, deregulation, and new transport technologies shifted power to global shipping firms, which were increasingly able to set terms with the ports and other carriers. As the ports grew to meet demands for expanded facilities to accommodate rapidly increasing global trade, the ports' relations with workers and local communities was once again recast—with new tensions emerging.

C. *Global Power: The Logistics Revolution, Free Trade, and Deregulation*

Globalization would lift port activity to new heights and also fundamentally change its nature. As the volume of global trade through the ports began to expand dramatically in the 1970s, it also changed in composition from a balanced export-import flow to an import-dominated stream.¹⁰⁸ This transformation profoundly altered the role of the ports: from building the local economy to facilitating the global one.

The result was a growth ratchet. Rapidly expanding global trade, deregulation, and more powerful shippers weakened port negotiating strength, as shippers of goods could drive a harder bargain by threatening to direct cargo to different West Coast ports. To maintain their advantage, the ports had to outcompete rivals—and each other—at the level of infrastructure and service. This required massive new investments, typically publicly financed, in port facilities and transportation networks. As port infrastructure was developed, it became more attractive for shippers; as more goods flowed through the ports, the transportation infrastructure had to be expanded to accommodate the increased volume; as infrastructure was built out, the harbor attracted even more shipping in an iterative cycle. Competition between Los Angeles and Long Beach contributed to this growth pressure, which was no longer consistent with the interests of labor unions and surrounding communities. Indeed, the ports' emergence as the global ports of entry to the United States depended on industry restructuring, which undermined the labor bargain struck in the postwar period, and infrastructure expansion, which encroached on the ports' low-income community neighbors. As a result, the ports' integration into the global market imposed significant local externalities and generated intense local friction—provoking political efforts to reign in port autonomy and ultimately igniting community and labor mobilization against port expansion.

107. *Id.* at 61.

108. BONACICH & WILSON, *supra* note 5, at 47.

During this period, global trade—and port growth—was facilitated by technological and legal changes that served to reinforce one another. Beginning in the 1950s, transportation innovations promoted growth by making it more efficient and cost-effective to move production farther away from the point of sale. The key advance was the advent of containerization and, from that, the rise of intermodalism, which dramatically reduced the cost of moving goods from one form (or modality) of transportation to another.¹⁰⁹ Containerization was the term given to the creation of shipping containers in standardized sizes (typically eight by six by twenty feet, often called twenty-foot equivalent units, or TEUs) that could be locked in place on different types of transport systems—steamships, trains, and trucks—and could also be stacked on top of each other for maximum shipping volume.¹¹⁰ This allowed goods to be packed in containers at the point of origin and then shipped unaltered via an interconnected transport system to the destination. Costly and time-consuming loading and unloading of cargo under the break-bulk system—in which pallets of cargo would be transported by crane and loaded by hand—was thereby eliminated.¹¹¹ As a result, goods production could be increasingly remote from the point of sale and transportation could be made more mechanized and efficient.¹¹² This appealed to shippers, which sought to reduce labor costs by outsourcing production to countries with lower labor standards, and carriers, which could begin to create standardized equipment and envision door-to-door service.

109. *Id.* at 50–54.

110. *Id.* at 51.

111. *Id.* at 50; *see also* QUEENAN, *supra* note 8, at 133 (“While the average longshore gang of sixteen to eighteen men could handle eight to ten tons of cargo in regular packaging, a five-man team could move 450 tons of containerized goods and expend only a fraction of the effort and energy doing it.”).

112. BONACICH & WILSON, *supra* note 5, at 51.

Figure 1: Container Ship Entering Port of Los Angeles¹¹³

Achieving the long-term efficiencies of containerization, however, required substantial short-term capital investment to create the necessary port facilities. With interport competition constraining how much the ports could exact through user fees, the resources for infrastructure development came from public subsidies, as the cities competed to maintain their share of trade. In 1960, Los Angeles launched a \$50 million project, financed by municipal bonds, to build new berths and terminals, and to upgrade other facilities.¹¹⁴ Long Beach used its declining oil revenues to follow suit.¹¹⁵ Although Long Beach lost its oil revenues in 1965, it turned to municipal bond financing to fund further improvements in 1970, including the creation of new container terminals and a freight station. Los Angeles also issued more bonds to finance the expansion of its container terminal.¹¹⁶

Despite parity in infrastructure investment, the port rivalry began to tilt in Long Beach's favor as Los Angeles's too-shallow harbor impeded entry of the large "post-Panamax" containerships that moved containers from Asia (so named because they were too big to fit through the Panama Canal).¹¹⁷ These ships were the logical extension of containerization, which incentivized shipping lines to build bigger ships to haul more containers per trip, thus reducing the number of trips (and

113. Photograph taken by author.

114. QUEENAN, *supra* note 8, at 135.

115. ERIE, *supra* note 7, at 88–89.

116. QUEENAN, *supra* note 8, at 143.

117. Dan Weikel, *Freighters Enter the Age of the Mega-Ship*, L.A. TIMES, June 15, 1999, at A1.

their associated costs), while increasing revenue per trip.¹¹⁸ In the Port of Long Beach, oil-extraction-induced subsidence had the benefit of naturally deepening the harbor and permitting the docking of post-Panamax vessels.¹¹⁹ As Los Angeles began to lag behind, local political officials lobbied for federal financial assistance for additional dredging, which it won in 1981; the project was completed two years later.¹²⁰ By this point, the Port of Long Beach had surpassed its Los Angeles counterpart in total cargo, although Los Angeles remained more profitable because of higher fees and rents.¹²¹ Containers constituted an increasing share of port cargo: the proportion of cargo shipped via containers through West Coast ports grew from roughly fifteen percent in 1970 to thirty percent by 1980.¹²² By 2000, containers comprised fully two-thirds of West Coast port traffic, and approximately seventy percent of those containers came through the ports of Los Angeles and Long Beach.¹²³

Containerization promoted, and was also a product of, rapidly expanding global trade routed through the ports. Despite the global recession in the mid-1970s, port traffic continued to grow geometrically, increasingly as a result of manufactured imports from the emerging markets of the Pacific Rim.¹²⁴ Still critical to regional economic activity, with one estimate suggesting that over 200,000 jobs depended on maritime trade,¹²⁵ the ports became increasingly geared toward facilitating imports,¹²⁶ and routing them to delivery points deep within the national economy—and often times beyond to Europe. This transformation of the ports into central nodes in the global supply chain was authorized and promoted by interrelated legal change.

The decline of trade barriers permitted the rise of Asian imports. Trade liberalization through multilateral agreements, particularly the General Agreement on Tariffs and Trade, and bilateral agreements with trading partners, significantly reduced the costs of imports to the United States and thus helped fuel the growth of export-driven economies, particularly China and the so-called East Asian Tigers.¹²⁷ As manufactured goods could be produced more cheaply in foreign countries with lower labor standards, production was outsourced and U.S. trade shifted toward imports. Whereas in 1970, the United States still had a \$3 billion trade surplus, by 1976, it had turned into a deficit, with exported manufactured goods running increasingly behind imports beginning in 1983.¹²⁸ The postwar

118. TALLEY, *supra* note 88, at 150.

119. ERIE, *supra* note 7, at 90.

120. *Id.*; see also QUEENAN, *supra* note 8, at 150 (describing the \$61 million dredging project).

121. ERIE, *supra* note 7, at 91.

122. BONACICH & WILSON, *supra* note 5, at 59.

123. *Id.* at 59–60.

124. QUEENAN, *supra* note 8, at 147, 149; see also BONACICH & WILSON, *supra* note 5, at 47.

125. QUEENAN, *supra* note 8, at 147.

126. See *id.* at 149.

127. See ERIE, *supra* note 7, at 22.

128. BONACICH & WILSON, *supra* note 5, at 47.

industrialization enabled by trade barriers gave way to deindustrialization associated with free trade. As Asia came to dominate the import market, the strategically positioned San Pedro ports reinvented themselves, becoming the gateway of this new trading regime.¹²⁹

That this occurred was not preordained by geographic advantage. The northwest ports of Seattle and Tacoma were closer to East Asia.¹³⁰ However, the Los Angeles and Long Beach ports offered shippers superior infrastructure and service—an advantage that had to be maintained.¹³¹ Because of their political autonomy, both ports were able to move quickly—and in coordination—to build facilities for container traffic and upgrade the transportation infrastructure required to move it.¹³² Intermodalism became even more important with the development of landbridge, by which containers shipped into the ports were loaded onto trains for further transport across the United States.¹³³ Landbridge was quicker and more cost-effective for large volume exporters from China, which could load up post-Panamax ships and bypass the Panama Canal for East Coast and transatlantic shipments.¹³⁴ But landbridge's efficiency depended on robust intermodalism—an integrated transportation system that relied on legal deregulation to permit ocean steamships, railroads, and truckers to enter into rate-setting agreements that allowed door-to-door service.¹³⁵

Deeper integration began to take shape in the 1970s, when the federal system of transportation regulation that had enabled the ports to set favorable rates was dismantled. Railroad deregulation came first, followed by the 1980 Motor Carrier Act, which deregulated trucking. The Act dramatically changed the trucking industry: making it easier for new companies to enter the market, deregulating routes, and reducing industry authority to set general rates,¹³⁶ which permitted discriminatory pricing (through, for example, high-volume discounts).¹³⁷ In 1984, Congress passed the U.S. Shipping Act, which deregulated ocean steamshipping,¹³⁸ allowing rates and routes to be set by individual companies.¹³⁹ In addition, the Shipping Act permitted ocean steamship lines to contract directly with trucking and

129. See Daryl Kelley, *Edgerton on Junket with Port Officials to Asia*, L.A. TIMES, June 27, 1985, at LB8. Politicians also did outreach to other regions, such as Latin America, to promote harbor trade. See *The Region*, L.A. TIMES, Oct. 2, 1985, http://articles.latimes.com/1985-10-02/news/mn-16051_1_los-angeles-mayor-tom-bradley.

130. BONACICH & WILSON, *supra* note 5, at 61.

131. *Id.* at 62–63.

132. *Id.* at 63.

133. *Id.* at 53.

134. *Id.*

135. *Id.* at 54.

136. BELZER, *supra* note 90, at 64–65.

137. BONACICH & WILSON, *supra* note 5, at 54, 103.

138. *Id.* at 54.

139. TALLEY, *supra* note 88, at 150.

rail carriers to set door-to-door rates,¹⁴⁰ thus authorizing them to establish “single through rates on intermodal shipments” without incurring antitrust liability.¹⁴¹

Taken together, deregulation completed the legal transformation necessary to achieve intermodalism. By authorizing intermodal contracts, shippers (i.e., manufacturers and retailers that owned cargo) were able to negotiate through rates directly with ocean steamship carriers, which contracted with trucking and rail carriers to provide door-to-door service on one bill of lading¹⁴²—without regulatory barriers or antitrust exposure.¹⁴³ Because standardized rates were no longer required, ocean carriers could negotiate directly with individual rail and trucking carriers for the best prices to reduce overall shipping costs.¹⁴⁴ Because ocean carriers dealt in such high container volume, they could exert downward price pressure on rail and trucking companies, which were forced to compete among themselves (and authorized to do so by deregulation) in order to be part of intermodal contacts. In addition, the ability to set door-to-door rates gave shippers greater power vis-à-vis the ports. By threatening to run their intermodal routes through other ports, shippers could negotiate more favorable port access fees and demand improvements to facilitate intermodal connections.

To maintain their dominance over container traffic, the Los Angeles and Long Beach ports were forced to respond to these changes. This required building the infrastructure needed to permit efficient container transport from steamship to rail, which became the critical mode of transportation in the landbridge system.¹⁴⁵ Containers coming off steamships were placed on rail cars in two locations: some were moved directly from steamships to railcars at on-dock rail facilities, while others were transported to off-dock rail yards by short-haul, or drayage, trucks.¹⁴⁶ On-dock loading required interconnected rail lines and loading facilities at the port. The Harbor Belt Line Railroad, unifying the tangle of separately owned railways in the port complex, was completed by the Los Angeles harbor commission and railroad companies in the 1930s.¹⁴⁷ This system was augmented and loading facilities expanded to permit intermodalism.¹⁴⁸

140. *Id.* at 150.

141. EDWARD JAMES TAAFFE ET AL., GEOGRAPHY OF TRANSPORTATION 161 (1996).

142. Talley, *supra* note 93, at 211–12.

143. *See* TAAFFE ET AL., *supra* note 141, at 161–62.

144. Talley, *supra* note 93, at 212, 214.

145. ERIE, *supra* note 7, at 23 (stating that containerization “placed a premium on the capacity, efficiency, and ground accessibility of local port and airport facilities”).

146. *See* David Jaffee, Kinks in the Intermodal Supply Chain: Longshore Workers and Drayage Drivers 16 (June 2010) (unpublished manuscript), available at https://www.unf.edu/uploadedFiles/aa/coas/cci/ports/REPORT_Port%20Paper%2010-%20SASE-Kinks%20in%20the%20Intermodal%20Supply%20Chain.pdf. Bonacich and Wilson cite estimates that sixty-five percent of Los Angeles/Long Beach containers are bound for U.S. destinations; of these, twenty-five percent are loaded to rail on dock, while forty percent are drayed to rail heads. BONACICH & WILSON, *supra* note 5, at 115.

147. FOGELSON, *supra* note 16, at 118.

148. Whether containers are loaded directly onto rail on-dock or go to trucks first depends in part on the condition of the containers. If they come in full, they are typically loaded to rail on-dock. If

Off-dock shipping required new investments to create massive areas where trucks could congregate to transfer their loads to rail cars that could then easily connect to transcontinental lines. To achieve this, the San Pedro ports coordinated their first major joint project, in concert with the Southern Pacific Railroad (later Union Pacific, or UP): construction of a \$50 million Intermodal Container Transfer Facility (ICTF), completed in 1986, to allow mass movement of containers from ships to off-dock rail lines operated by UP.¹⁴⁹ The other major off-dock rail connection was located near downtown Los Angeles, with four major intermodal rail yards: three operated by UP (the East LA yard in Commerce, the LA Trailer and Intermodal Container Facility just east of the Los Angeles River, and the City of Industry Yard) and the fourth (Hobart, just west of the Interstate 710 freeway in Commerce) operated by Burlington Northern Santa Fe (BNSF).¹⁵⁰ All of these yards were serviced by drayage trucks.¹⁵¹

The 150-acre ICTF was built five miles from the ports in Carson (on the border of Wilmington), at the terminus of State Highway 103 (called the Terminal Island Freeway),¹⁵² and adjacent to the interchange of two major freeways (Interstate 405 and Interstate 710).¹⁵³ The ICTF was designed to alleviate truck impacts at the ports by routing traffic to a massive facility with ample parking and faster loading service.¹⁵⁴ Yet in its attempt to reduce port congestion, the ICTF introduced a new source of gridlock into the community: increasing drayage truck traffic on the freeways and surface streets coming to and from the ports. This

they have to be consolidated with other partially full containers, they are loaded onto trucks and then transported to consolidator warehouses, some of which are located near the port but others are as far away as Riverside. Interview with John Holmes, Deputy Exec. Dir., Port of L.A. (July 19, 2013). Two-thirds of the containers arriving from Asia are full. *Id.*

149. QUEENAN, *supra* note 8, at 156–57; *see also* Tim Waters, *Railhead Is Competitive Edge for Port*, L.A. TIMES, Nov. 23, 1986, at SB1 (“The new rail facility was financed primarily through the sale of \$53.9 million in bonds that will be paid back with money collected by a \$30-per-container gate charge that shippers must pay.”). The ICTF is now operated by UP; the other major rail line, Burlington North Santa Fe (BNSF), does not use the ICTF, but rather has its Los Angeles Intermodal Facility downtown at Hobart. BONACICH & WILSON, *supra* note 5, at 108. There is currently a controversial effort by BNSF to create an intermodal facility closer to the port. In May 2013, the Los Angeles City Council approved a new rail yard in Wilmington, adjacent to one of the city’s major high schools. Dan Weikel, *Rail Yard for Port Complex OKd*, L.A. TIMES, May 9, 2013, at AA3. “The 153-acre project would be capable of handling up to 2.8 million 20-foot shipping containers a year by 2035 and 8,200 trucks a day.” *Id.* Public officials and advocates disputed its environmental impact, with proponents claiming that it would reduce the number of truck trips each year by one million, while opponents argued that overall emissions would increase and local community residents would be disproportionately affected. *Id.*

150. BONACICH & WILSON, *supra* note 5, at 108–09.

151. *Id.* at 109.

152. *Id.* at 108. State Highway 103 was built in the 1940s to connect the naval base on Terminal Island to the mainland, but eventually became a main conduit for port trucking. *See* Christine Mai-Duc & Laura J. Nelson, *Turning Freeway to Park?*, L.A. TIMES, Nov. 20, 2013, at A1. The highway was never connected to the interstate freeway system and has become less important with the creation of the Alameda Corridor rail project and the expansion of the 710 freeway. *Id.* Part of it is now being considered for demolition and conversion to green space. *Id.*

153. BONACICH & WILSON, *supra* note 5, at 108.

154. *Id.*; ERIE, *supra* note 7, at 93.

increase in truck traffic highlighted a counterintuitive problem. Although landbridge placed railroads at the center of trade distribution, drayage trucking was essential to move containers from steamship to off-dock rail lines—and also to move cargo from the ports to local warehouses.¹⁵⁵ Containerization thus increased demand for trucking in proportion to rail, placing strain on the region's overtaxed freeway system, while overtaking local roadways in port communities and in the communities around the downtown intermodal yards.

The symbols of Southern California mobility—the freeways—were supposed to alleviate the burdens of local traffic. But freeway expansion in Los Angeles and Long Beach occurred without containerization in mind—and ultimately could not handle the ever-increasing volume of truck traffic necessary to serve the ports. Freeway development was fueled by postwar suburbanization that created the vast car-dependent metropolis. The design of the freeways was, however, done with the ports in mind. Construction began in the 1950s, spurred by federal investments and local pressures. The primary route into the Port of Los Angeles was built through northern San Pedro via the Harbor Freeway (Interstate 110), running due south from downtown Los Angeles. That freeway, funded by a state gas tax and federal interstate highway money,¹⁵⁶ was built between 1952 and 1970, extending piece-by-piece from Pasadena, south of downtown Los Angeles, and then bisecting African American communities in the south central part of the city.¹⁵⁷ What is now known as the Long Beach Freeway (Interstate 710) forms the eastern border of Wilmington. With federal money, Interstate 710 was built from 1954 to 1975, designed to connect Long Beach to Pasadena, bypassing downtown Los Angeles; however, it was only extended just past the Interstate 10 freeway in Alhambra as the proposed link to Pasadena was thwarted by community opposition.¹⁵⁸ These freeways became the main conduits for the increasing volume of heavy-duty drayage trucks pulled to the harbor by free trade.

Increasingly linked through a dense intermodal transportation system, container shipments through Los Angeles and Long Beach surged, increasing from 9 million tons to 122 million tons between 1970 and 1994.¹⁵⁹ In 1986, the San Pedro port complex passed New York-New Jersey as the largest in the United States; the next decade, container volume doubled.¹⁶⁰ Auto imports, particularly from Asia, powered this growth—with over 150,000 autos coming into the Port of Los Angeles

155. BONACICH & WILSON, *supra* note 5, at 102.

156. WILLIAM FULTON, *THE RELUCTANT METROPOLIS* 133–34 (2001).

157. *See Final Harbor Freeway Link to Be Opened*, L.A. TIMES, Sept. 24, 1962, at 25; *Harbor Freeway Link Opens Today*, L.A. TIMES, July 30, 1952, at A1; *South L.A.: Harbor Freeway Sector Opens with Ceremony*, L.A. TIMES, Sept. 25, 1958, at B1; *see also* JOSH SIDES, L.A. CITY LIMITS: AFRICAN AMERICAN LOS ANGELES FROM THE GREAT DEPRESSION TO THE PRESENT 113–14 (2003).

158. *See City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106 (C.D. Cal. 1999).

159. ERIE, *supra* note 7, at 23.

160. BONACICH & WILSON, *supra* note 5, at 58–59. In 1985, the Port of Los Angeles led the nation in car imports. James Risen, *Japanese Shipments to GM Soar, L.A. Port Now Leads Nation in Car Imports*, L.A. TIMES, Sept. 4, 1985, at B1.

in the first five months of 1985—creating jobs in the regional auto processing industry, but also producing severe space constraints in the port itself.¹⁶¹ In 1990, nudged forward by frequent trade missions of public officials,¹⁶² the Port of Los Angeles surpassed New York as the nation's busiest by volume.¹⁶³

Once again, this growth—achieved by creating better intermodal connections—placed new pressures on existing infrastructure. Specifically, enhanced links to rail transport began to overtax the rail system itself. More—and more efficient—rail connection was thus needed to avoid another bottleneck. By the end of the 1980s, the rail system—operated primarily by the two major railroads, UP and BNSF—was a complex web viewed as impeding the movement of ports-related goods by forcing rail cars to travel old branch lines, pass through numerous crossings, and share track with other freight and passenger trains. This slowed on-dock rail loaded directly at the terminals and off-dock rail loaded at the ICTF.¹⁶⁴ In response, Los Angeles and Long Beach created a joint powers authority in 1985 authorizing the development of the Alameda Corridor project, a twenty-mile high-speed, elevated line from both ports connecting to the transcontinental railroad.¹⁶⁵ The Alameda Corridor rail, running through Wilmington (then north through Carson, Compton, Lynwood, Watts, South Gate, Huntington Park, and Vernon), was completed in 2002 with \$2.4 billion in federal, state, and local financing.¹⁶⁶ Carrying roughly 15,000 trains a year,¹⁶⁷ it consolidated track to more efficiently link on-dock rail to eastern destinations,¹⁶⁸ while creating better connections to the ICTF for off-dock transfer.¹⁶⁹

161. Tim Waters, *Wave of Imported Autos Floods Ports*, L.A. TIMES, June 5, 1986, at SB1.

162. Jane Fritsch, *Trade Missions Prime Pump for L.A. Port*, L.A. TIMES, May 29, 1990, at B1 (“Los Angeles port officials said the presence of Bradley on trade missions gives them a secret weapon not available to port representatives from other cities. Bradley’s stature as mayor of the nation’s second-most populous city and now its busiest port opens doors in the Far East that would otherwise be inaccessible, they said.”).

163. Douglas Jehl, *Port of L.A. Steams Past New York as Busiest in U.S.*, L.A. TIMES, Mar. 30, 1990, at A1.

164. BONACICH & WILSON, *supra* note 5, at 107–08. Long Beach proposed additional on-dock rail lines to also address this problem. See Daryl Kelley, *Opposition Rises to Proposal for Dockside Cargo Trains*, L.A. TIMES, Jan. 16, 1986, at SE9. However, the proposal ran up against opposition for creating noise pollution and was ultimately shelved. See Daryl Kelley, *Dockworkers Stage Sickout on Project Delay*, L.A. TIMES, Dec. 2, 1986, at M1; Daryl Kelley, *Plan for Dockside Rail Yard Yanked Amid Opposition*, L.A. TIMES, Dec. 4, 1986, at LB9.

165. MYRA L. FRANK & ASSOCS., INC., ALAMEDA CORRIDOR: ENVIRONMENTAL IMPACT REPORT S-1 (1993); see also Nona Liegeois et al., *Helping Low-Income People Get Decent Jobs: One Legal Services Program’s Approach*, 33 CLEARINGHOUSE REV. 279, 289 (1999).

166. Liegeois et al., *supra* note 165, at 289.

167. *Number of Trains Running on the Alameda Corridor*, ALAMEDA CORRIDOR TRANSP. AUTH., <http://www.acta.org/pdf/CorridorTrainCounts.pdf> (last visited Aug. 30, 2013).

168. Currently, there are six on-dock rail lines, all of which are connected to the Alameda Corridor. Interview with John Holmes, *supra* note 148.

169. In addition, the Alameda Corridor also connects to UP’s East Los Angeles Yard near downtown. BONACICH & WILSON, *supra* note 5, at 109. However, it bypasses the BNSF downtown yards, including Hobart, which operate as alternatives to the Alameda Corridor for shippers loading onto BNSF trains off-dock. *Id.*

The Alameda Corridor was one of several large-scale megaprojects coordinated between both ports to deal with massive projected increases in port traffic.¹⁷⁰ In the mid-1980s, both ports adopted the “2020 Plan” to upgrade and integrate maritime trade and land transport systems to deal with an anticipated 250% increase in tonnage.¹⁷¹ A 1998 study predicted that, with appropriate infrastructure investments, cargo at the ports would double by 2020, making Los Angeles the “trading center of the world.”¹⁷² Although Long Beach eventually withdrew from formal coordination, both ports nonetheless completed nearly \$4 billion in joint investments by 2000, with Long Beach focusing on land acquisition and redevelopment, and Los Angeles on dredging and the creation of new terminals and rail lines.¹⁷³ These investments correlated with growth. From 1990 to 2000, total TEUs increased by 130% in the Los Angeles port and by 188% in Long Beach.¹⁷⁴ By 2005, the Los Angeles-Long Beach ports complex was the fifth largest in the world, with a combined fourteen million TEUs of traffic.¹⁷⁵ Three-quarters of trade into the Los Angeles Customs District were imports and most of those (eighty-five percent in 2005) were from Asia (with nearly half from China).¹⁷⁶

170. ERIE, *supra* note 7, at 147; *see also* Daryl Kelley, *L.B. Port Looks to New Growth Spurt in 1985: Harbor's 35-Year Plan Will Expand Size to Match Its Increasing Cargo*, L.A. TIMES, Jan. 6, 1985, at SE1 (“The Port of Long Beach, straining at its seams after two decades of robust growth, is looking to 1985 to complete \$150 million in wharf, road and rail construction and to firm up another \$400 million in building for 1986.”).

171. ERIE, *supra* note 7, at 92; *see also* Dean Murphy, *Ports Cheer Promising Major Growth of Harbor*, L.A. TIMES, Oct. 26, 1986, at SB1.

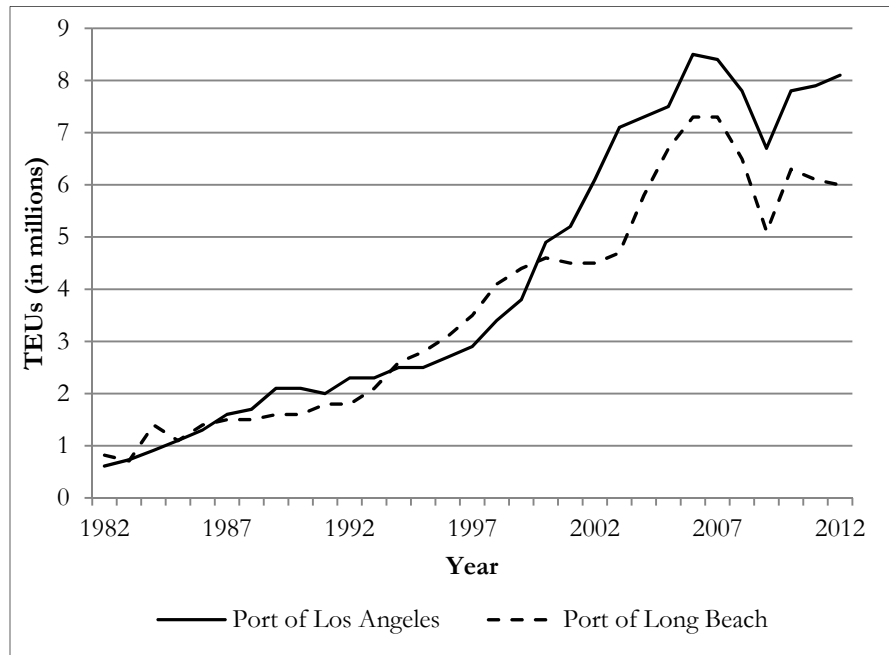
172. Dan Weikel, *L.A., Long Beach Ports Will See More Cargo Volume*, L.A. TIMES, Dec. 18, 1998, at C1 (quoting Mark Pisano, executive director of the Southern California Association of Government).

173. ERIE, *supra* note 7, at 119–23.

174. *Id.* at 141 tbl.5.4.

175. BONACICH & WILSON, *supra* note 5, at 45.

176. *Id.* at 49. China trade increased as part of a concerted effort by port officials. In the early 1990s, Mayor Tom Bradley led a delegation of port officials to expand Los Angeles’s share of the booming China import business. George White, *Port of Los Angeles Seeks More China Business*, L.A. TIMES, Sept. 23, 1991, at D3.

Figure 2: Annual Container Trade in TEUs¹⁷⁷

Despite the ports' joint investment, growth produced new challenges. Port space for tenants remained a concern.¹⁷⁸ Although the ports coordinated on megaprojects, they continued to compete on price and service to attract more tenants and cargo.¹⁷⁹ As Figure 2 shows, during the 1990s, both ports saw containerized cargo increase at roughly the same rate, with one port surging ahead and then the other. In 1995, Long Beach surpassed Los Angeles as the nation's biggest port.¹⁸⁰ Scoring a major coup by enticing Maersk, the world's largest

177. Graph based on TEU data provided by the ports. *TEU Statistics (Container Counts)*, PORT L.A., <http://www.portoflosangeles.org/maritime/stats.asp> (last visited Nov. 20, 2014); *Yearly TEUs*, PORT LONG BEACH, http://www.polb.com/economics/stats/yearly_teus.asp (last visited Nov. 20, 2014). Data for Long Beach from 1982 to 1994 are based on information from the Los Angeles Almanac. *Ocean-Going Cargo Container Traffic Los Angeles and Long Beach Harbors (TEUs*)*, LOS ANGELES ALMANAC, <http://www.laalmanac.com/transport/tr46.htm> (last visited Nov. 20, 2014).

178. George White, *Packing In at Port of L.A.*, L.A. TIMES, May 8, 1989, at C1 ("In all, about 99% of the space at the Port of Los Angeles is leased. Of the 3,800 acres of land at the port's locations in Wilmington, San Pedro and Terminal Island, only one berth—a 25-acre site—is unleased.")

179. Tim Waters, *Activity Rises Sharply at Port of Los Angeles*, L.A. TIMES, Sept. 19, 1985, at SD C1 ("The Port of Los Angeles lured six steamship companies from berths at rival Long Beach last year and, as a result, handled a third more general cargo. According to figures released this week, 22.2 million metric tons of general cargo—that is, containerized cargo and all loose cargo except liquid or dry bulk—passed through the Los Angeles port during the 12 months ended June 30, a 34.5% increase from the 16.5 million tons the year before.")

180. Edmund Newton, *The Ship Has Come in: Long Beach Steams Past L.A. to Become Nation's No. 1 Port*, L.A. TIMES, Apr. 23, 1995, at D1.

container carrier,¹⁸¹ to move from Long Beach,¹⁸² Los Angeles eked back ahead in 2000, handling 4.9 million TEUs to Long Beach's 4.6 million.¹⁸³

Even with new infrastructure, however, the ports were tested by the surge in overall volume.¹⁸⁴ The most prominent challenge came in 2004, when over 100 ships were diverted to other ports because of an unanticipated increase in ship traffic, which could not be handled by existing longshore, rail, and trucking systems.¹⁸⁵ To prevent future bottlenecks, more longshoremen were hired and the acute stress was alleviated.¹⁸⁶ Yet the episode underscored the transformation of labor relations in the context of intense port competition.¹⁸⁷

The advent of containerization had initially threatened longshore jobs. No longer needed for the difficult and time-consuming loading process, longshoremen were redeployed for container transport, which involved movement via overhead crane and attachment to trucks and trains.¹⁸⁸ The immediate consequence of containerization was to reduce the demand for longshore work since container transport, which relied on mechanization, required fewer labor hours.¹⁸⁹ This provoked labor unrest and the ILWU struck both ports in 1971.¹⁹⁰ The strike lasted roughly four months and caused a cargo reduction of two million tons at Los Angeles.¹⁹¹ With the power to choke port traffic, longshore workers demonstrated that even though they were fewer in number, they remained a force to be reckoned with.¹⁹² As container trade grew rapidly following deregulation, demand for dockworkers began to grow again and their bargaining position strengthened as the ports became crucial nodes in the import chain. Just as intermodalism forced the ports to invest in infrastructure and service to keep shipping lines satisfied, it also made the ports invest in labor peace, since even a minor disruption could send

181. THE WORLD BANK & PUBLIC-PRIVATE INFRASTRUCTURE ADVISORY FACILITY, PORT REFORM TOOLKIT, MODULE 2: THE EVOLUTION OF PORTS IN A COMPETITIVE WORLD 48 (2d ed. 2007), available at http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Portoolkit/Toolkit/pdf/modules/02_TOOLKIT_Module2.pdf.

182. Dan Weikel, *Major Shipping Firm to Leave Long Beach Port for Los Angeles*, L.A. TIMES, Oct. 28, 1999, at B1.

183. ERIE, *supra* note 7, at 142–43.

184. Asian imports continued to lead the way. See *Asian Imports Up 20% Over a Year Ago*, L.A. TIMES, June 18, 1998, at D2; Gregory Stephen, *Imports Climb at L.A., Long Beach*, L.A. TIMES, Nov. 20, 1998, at C2.

185. BONACICH & WILSON, *supra* note 5, at 120–21.

186. *Id.*

187. See, e.g., Chris Kraul, *Mexican Port Hopes to Be Big in Containers*, L.A. TIMES, Dec. 17, 1991, at D2.

188. BONACICH & WILSON, *supra* note 5, at 177.

189. QUEENAN, *supra* note 8, at 132–33. This reduction in longshoremen was welcomed by the ports, which had seen shippers divert cargo to San Francisco and San Diego as a result of labor unrest in the 1950s. See *id.* at 131.

190. *Id.* at 143.

191. *Id.* at 143–44.

192. See, e.g., James Flanigan, *Striking Costs: Region Has Much to Lose if Shippers Decide to Go Elsewhere*, L.A. TIMES, July 16, 1997, at D1.

shippers elsewhere.¹⁹³ This significantly bolstered the longshoremen's bargaining position relative to the ports, permitting them to grow their membership, bid up wages, and build the ILWU's organizational strength.¹⁹⁴

The longshoremen's new position reflected a broader power shift. As a gateway to the regional market, the ports in the industrial era were empowered by federal regulation to charge higher fees and align port growth with local interests. However, deregulation and intermodalism changed this equation,¹⁹⁵ rendering the ports a pass-through to the global market. Particularly as shippers could divert cargo to different ports, they gained more bargaining power to drive down rates and demand port amenities that permitted larger volume. The ports were forced to continuously invest in new infrastructure to maintain their advantage. This investment no longer fostered local industrial development as it had in the postwar period. To the contrary, Los Angeles and Long Beach found themselves increasingly under fiscal strain because of deindustrialization, which was now itself intrinsically linked to the ports. The political autonomy the ports had acquired to build the regional economy became an increasing liability, as port revenues were used to benefit the ports' global shipping clientele by continuously upgrading the intermodal system.¹⁹⁶

No longer reaping a return on local industrial development, Los Angeles and Long Beach sought to assert greater control over the ports in an effort to claim more local fiscal benefit. By the early 1990s, the Los Angeles harbor commission's vaunted independence still existed, but had been reined in by charter amendments that gave the city council greater oversight authority: imposing limits on significant contracts, requiring council approval for certain types of leases, making it easier to terminate key personnel, and ultimately giving council authority to approve important commission decisions.¹⁹⁷ Long Beach underwent similar changes to limit

193. Talley, *supra* note 93, at 213–17; *see also* Tim Waters, *Cargo Moves Again After Accord Ends Port Strike*, L.A. TIMES, July 8, 1986, at B1 (reporting that the strike by longshoremen in support of port office workers over job security was the longest in fifteen years and resulted in a three-year contract, under which “employers agree not to transfer jobs out of the union’s jurisdiction”).

194. BONACICH & WILSON, *supra* note 5, at 177–79; *see also* Talley, *supra* note 93, at 214–16; Henry Weinstein, *4,000 Dockers Walk Out Over 5 Deaths in a Year*, L.A. TIMES, June 28, 1985, at A1. For the same reasons, harbor pilots, a small group that steered cargo ships through the ports, also exerted great leverage to negotiate large salaries and benefits (they were set to make over \$140,000 in 2001 after a year-long strike in 1997–1998). Dan Weikel, *Port Chief Agrees to Sign Harbor Pilots’ Delayed Contract*, L.A. TIMES, July 10, 1998, at B5.

195. BONACICH & WILSON, *supra* note 5, at 57.

196. *Id.* (“Ports used to invest mainly for the benefit of their region. Now they are being asked to invest for the benefit of the entire country, without the security of knowing that the investment will pay off. Even if a port is successful, the regions that are nearby may have to bear additional costs on top of the financial ones, such as congestions and pollution.”).

197. ERIE, *supra* note 7, at 82–83 tbl.4.1.

harbor commission power.¹⁹⁸ These changes made it easier for local politicians to adapt port activity to city agendas shaped by declining revenues.¹⁹⁹

In the late 1980s and early 1990s, Los Angeles and Long Beach—suffering from manufacturer outsourcing and the end of Cold War-driven defense production—sought a share of port resources to infill dwindling city taxes.²⁰⁰ In 1992, state lawmakers permitted the two cities to divert some port discretionary reserves to replace property tax taken by the state to fund its own budget shortfall.²⁰¹ Once this temporary provision expired, the cities sought to use their greater power over the harbor commissions to extract revenue—by charging more for city services (like police and fire).²⁰² When this practice was challenged under the Tidelands Trust Act,²⁰³ cities changed course by using port funds to build tax-revenue-generating harbor projects, like the Long Beach Aquarium, under an expanded definition of public benefit.²⁰⁴ With the ports no longer fueling local industrialization, city governments looked to them to play a new regional role: creating logistics industry jobs and spurring retail growth foundational to the ascendant service-based economy. While this strategy sought to address local fiscal needs, it exacerbated the impact of port expansion on local port communities as infrastructure megaprojects like the ICTF and Alameda Corridor rail resulted in increased congestion and pollution. By linking municipal finances to port growth, cities committed themselves to a development program with increasingly serious local consequences.

D. Local Impact: Community, Labor, and the Environment

The ports' local impact is a function of their dual identity: at once “an integral function in the globalization of production,” the ports are also “one of the most

198. *Id.* at 86–87 tbl.4.2. These changes included asserting council approval over budgets and department salaries, and shifting control over the department from the city manager to the mayor, who was given the power to appoint commissioners subject to term limits. *Id.*

199. *Id.* at 127.

200. *Id.* at 109; *see also* Mark Gladstone & Ralph Frammolino, *Funds of San Diego, Other Port Districts Under Siege*, L.A. TIMES, July 8, 1992, at A1.

201. ERIE, *supra* note 7, at 124; *see also* Mark Gladstone & Greg Krikorian, *Port Cities Might Dodge a Fiscal Bullet*, L.A. TIMES, Sept. 3, 1992, at J9 (noting that the legislation would permit four charter cities with ports to use port revenues for two years to fund services such as fire and police, allowing them to balance budgets in light of lost state funding; the city of Los Angeles was expected to receive \$44 million from the Port of Los Angeles). A class action was filed arguing that the law was unconstitutional and seeking recovery of \$69 million to the Port of Los Angeles and \$21 million to the Port of Long Beach. Susan Woodward, *Harbor to Help L.A., Long Beach Fight Suit*, L.A. TIMES, Sept. 29, 1994, at J15.

202. Jeff Leeds & John Cox, *L.A. Harbor Panel Votes to Pay City \$80 Million in Fees*, L.A. TIMES, Aug. 25, 1995, at B3 (“The Los Angeles Harbor Commission, hoping to end a two-year dispute, has decided to pay the city about \$80 million in fees after a private study found that the port has underpaid for municipal services since 1977.”).

203. Dan Weikel, *City to Repay \$62 Million to Port of L.A.*, L.A. TIMES, Jan. 20, 2001, at B1 (stating that the State Lands Commission and some shipping companies sued Los Angeles in 1996, arguing that the payments violated the state Tidelands Trust Act requiring that port revenue be used only on harbor projects; that suit was settled in 2001, with the city agreeing to repay \$62 million to the port).

204. ERIE, *supra* note 7, at 126–29.

localized and embedded industries of all.²⁰⁵ As such, they are special kinds of agglomeration economies, where cargo distribution facilities—steamships, rail, trucks, and support services—cluster.²⁰⁶ It is precisely this clustering that creates externalities, both positive and negative, for local communities. These externalities stem from two types of organizational relationships within the global supply chain.²⁰⁷ One is *interorganizational*: the relationship between different economic actors linked across the chain—from shippers to ocean liners to dock workers to rail and trucks to warehouses.²⁰⁸ From a geographic point of view, there has to be space appropriated to permit “transshipment”: the transfer of cargo, especially containerized cargo, from one transport mode to the next. Over time, with port growth, that space becomes more built out, putting more pressure on surrounding communities and increasing environmental risk. The second type of relationship is *intraorganizational*: the formal division of labor within specific firms, like trucking.²⁰⁹ In firms connected to port logistics, there are different models of providing services—through employees and independent contractors—which are authorized by distinct legal standards. These intraorganizational relationships have significant implications for workers in two key areas of intermodal logistics: terminal operations and drayage trucking.²¹⁰ This section examines how these inter- and intraorganizational relationships have contributed to the creation of environmental justice problems in low-income communities with weak political power and the degradation of labor standards in industries with weak legal protections.

205. Yuko Aoyama et al., *Organizational Dynamics of the U.S. Logistics Industry: An Economic Geography Perspective*, 58 *PROF. GEOGRAPHER* 327, 335 (2006).

206. JEAN-PAUL RODRIGUE ET AL., *THE GEOGRAPHY OF TRANSPORT SYSTEMS* 90, 259 (2009), available at <http://people.hofstra.edu/geotrans/eng/glossary.html#T>.

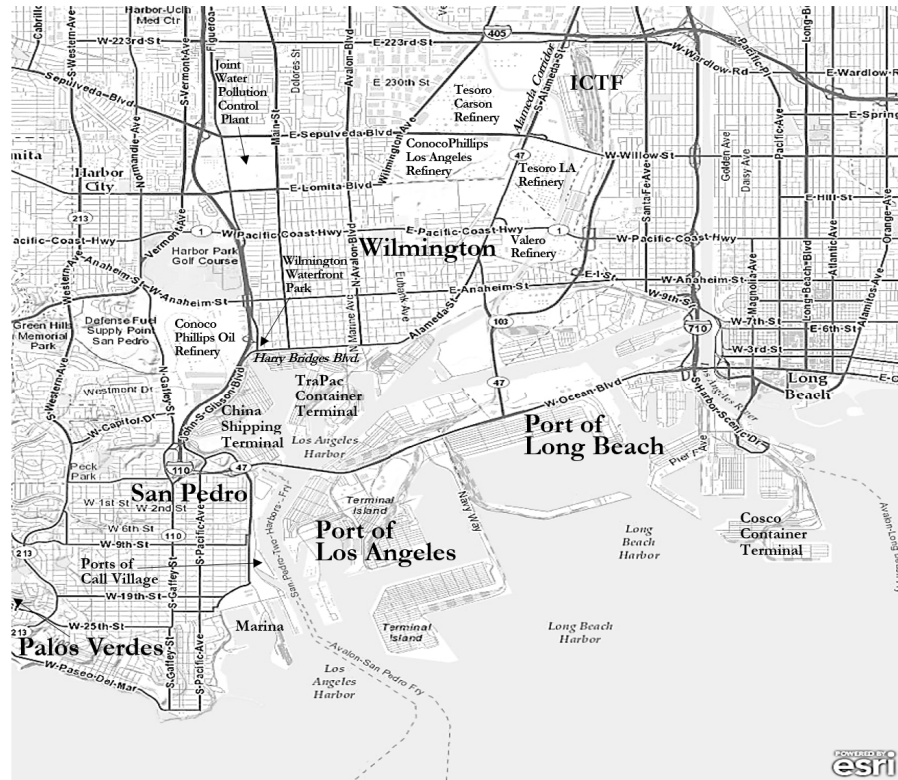
207. For these concepts, see Jaffee, *supra* note 146, at 6.

208. *Id.*

209. *Id.*

210. *Id.* at 12.

Figure 3: The Ports of Los Angeles and Long Beach and Surrounding Communities²¹¹



The communities of San Pedro and Wilmington (shown in Figure 3) have been shaped in inverse relationship to port development—suffering economically as the ports, and the global economy they serve, have thrived. The impact can be measured in relation to neighboring communities. On the north face of the San Pedro Peninsula, rising dramatically above the coastline, is a group of cities collectively known as Palos Verdes—an area associated with stunning bluffs, excellent public schools, and some of the most coveted real estate in the Los Angeles area (as the city names—such as Palos Verdes Estates and Rolling Hills Estates—suggest). These cities, formally within Los Angeles County, are all legally separate, with small populations (Rolling Hills Estates has only 8000 residents), some of which are enclosed in gated communities, and all of which enjoy high levels of services and amenities—a function of their legal distinction from the city of Los Angeles, with which they do not share their tax base.²¹²

211. Map created by author using Esri ArcGIS.

212. Palos Verdes, within the unincorporated area of Los Angeles County, was largely undeveloped in the early twentieth century—used for cattle and farming. Its purchase by development interests in the early 1900s and eventual sale to a mining company led to the creation of a master plan

As the peninsula slopes southeastward, toward the ports, its change in municipal jurisdiction is marked by dramatically different socioeconomic conditions. Although separated by only a few miles, San Pedro is distinguished from Palos Verdes in crucial respects. It encompasses the Port of Los Angeles, which lies on the eastern edge of the community, abutting the harbor's main channel, and also includes the western part of Terminal Island. San Pedro is therefore a key point of access to the port, which drayage trucks traverse from the Harbor Freeway (Interstate 110) either in order to cross into Terminal Island or to travel down to facilities along the main channel.²¹³ On-dock rail lines also run along San Pedro's eastern edge as they snake their way to the Alameda Corridor exchange. The neighborhood's northeastern border also abuts the ConocoPhillips Oil Refinery in Wilmington, which creates a cluster of environmental hazards in that corner. Because it is within Los Angeles city proper, San Pedro receives a lower level of services than Palos Verdes, symbolized by the chasm between the public school systems.²¹⁴ There are other markers of socioeconomic divide. Palos Verdes is nearly four-fifths white, highly educated (nearly sixty percent holding a college degree), older on average (median age of fifty), and more affluent (median income of approximately \$130,000) than San Pedro, whose residents—two-fifths Latino and a quarter immigrant—are relatively younger (median age of thirty-four), less educated (roughly one-quarter are college educated), and less well-off (median household income of \$57,000).²¹⁵

Just before it terminates in San Pedro, the Harbor Freeway cuts along the western border of Wilmington, which is bounded by the Long Beach Freeway (Interstate 710) on the east. Wilmington's northern border is defined by the ConocoPhillips Los Angeles Refinery (in addition to the ConocoPhillips Oil Refinery to the west and Tesoro Los Angeles to the east), thus encircling it with environmental hazards. The strip of land on its southern border is part of the port's

for real estate development in the 1950s; as a building boom commenced, developers and homeowners pushed for separate incorporation to both facilitate and control the expansion. The last incorporation—for the city of Rancho Palos Verdes—was completed in 1973, after dramatic litigation that went to the California Supreme Court, which determined that municipal incorporation had to occur based on a vote of a majority of individual residents and not a majority of the ownership of assessed land value. *Curtis v. Bd. of Supervisors*, 501 P.2d 537 (Cal. 1972).

213. The port, in an effort to mitigate the negative impact of its facilities in San Pedro, created the Cabrillo Beach Recreational Complex on the peninsula's southern tip, which includes a park, picnic area, bird sanctuary, and marina. QUEENAN, *supra* note 8, at 157. Developers built up the surrounding area, which included an \$18 million, 216-room hotel two blocks from the port. *\$18-Million Hotel Planned in San Pedro*, L.A. TIMES, Nov. 3, 1985, at H26.

214. Palos Verdes Peninsula High School was recently ranked as the 286th best public or private high school in the United States. See *America's Most Challenging High Schools: Palos Verdes*, WASH. POST, <http://apps.washingtonpost.com/local/highschoolchallenge/schools/2011/list/national/palos-verdes-palos-verdes-estates-ca/> (last visited Oct. 2, 2013).

215. See *Mapping L.A., Palos Verdes Estates*, L.A. TIMES, <http://maps.latimes.com/neighborhoods/neighborhood/palos-verdes-estates/> (last visited Oct. 24, 2013); *Mapping L.A., San Pedro*, L.A. TIMES, <http://projects.latimes.com/mapping-la/neighborhoods/neighborhood/sanpedro/?q=San+Pedro%2C+Los+Angeles%2C+CA%2C+USA&lat=33.7360619&lng=-118.2922461&g=Geocodify> (last visited Oct. 2, 2013).

functioning inner channel, lined with terminals (including the massive TraPac Container Terminal) and crossed by streets and rail lines, separated from the residential part of the city by Harry Bridges Boulevard (named after the founder of the ILWU) and above that, in the western part of the community, the recently developed Wilmington Waterfront Park. Trucks access this part of the port from the freeways on both sides, as well as the surface streets, which are often travelled by trucks connecting between the docks and the ICTF. In this way, Wilmington, even more so than San Pedro, exists as an adjunct to the port transportation system. As a result, the community itself is more disadvantaged, with a higher level of segregation and lower socioeconomic indicators than San Pedro. Nearly ninety percent of Wilmington residents are Latino and almost half are immigrants; the community has a median household size of four and a median income of \$40,000; and only five percent of residents have a college degree.²¹⁶

Figure 4: Trucks Waiting on Figueroa Street, Wilmington²¹⁷



As with land use, the labor impacts of port development also vary.²¹⁸ The market for landside workers at the port is highly segmented in ways that reflect legal differentiation. All port workers, from longshoremen to truckers, are theoretically

216. *Mapping L.A., Wilmington*, L.A. TIMES, <http://projects.latimes.com/mapping-la/neighborhoods/neighborhood/wilmington/?q=Wilmington%2C+CA%2C+USA&lat=33.7857948&lng=118.2643567&g=Geocodify> (last visited Oct. 2, 2013).

217. Photograph taken by author.

218. *See generally* BONACICH & WILSON, *supra* note 5, at 159–240; Arin Dube et al., *On the Waterfront and Beyond: Technology and the Changing Nature of Cargo-Related Employment in the West Coast* (2004) (unpublished manuscript) (on file with the UC Irvine Law Review).

in a position to choke distribution along the supply chain. But the legal power to take advantage of that position differs. Because longshoremen are employed by port firms, they are legally empowered to organize and exempted from antitrust law. It is the combination of their legal and market position that gives them significant bargaining power, which they have been able to use to unionize and negotiate relatively high wages and benefits.²¹⁹ From a market perspective, their leverage rests not just in complete shutdown, but also in delay. Given the “just-in-time” nature of global distribution, slowdowns pose a significant threat to shippers, who prefer to buy labor peace to ensure logistical efficiency.²²⁰ The risk of capital flight is minimized because of the massive up-front investments required to facilitate transport, which enhances longshoremen’s bargaining power.²²¹

In the 1990s, the ILWU used its power to negotiate a contract with the Pacific Maritime Association (PMA)—the West Coast employer trade group—that increased wages nine percent, expanded the union’s jurisdiction into harbor trucking, and rejected the creation of a computerized job-dispatch system that longshoremen believed would take job assignment power away from the union hiring hall.²²² In 2002, alleging work slowdowns, the PMA locked out the longshoremen in an effort to decrease their clout,²²³ producing a six-week backlog and causing President George W. Bush to invoke the Taft-Hartley Act to reopen the ports.²²⁴ As shippers began to reroute cargo to the East Coast, the PMA backed down, agreeing to a six-year contract—“the most lucrative in the union’s 70-year history”—that increased hourly wages to thirty dollars, substantially increased pension benefits, and provided strong employment security protections.²²⁵ As the episode reinforced, longshoremen had become the ports’ “labor aristocracy.”²²⁶

Drayage truck drivers, in contrast, had sunk to the bottom of the labor hierarchy.²²⁷ Although also in a position to choke supply, their status as independent contractors—a consequence of deregulation—meant that they could not organize and therefore lacked the ability to coordinate labor action that would allow them to

219. See THE WORLD BANK & PUBLIC-PRIVATE INFRASTRUCTURE ADVISORY FACILITY, PORT REFORM TOOLKIT, MODULE 1: FRAMEWORK FOR PORT REFORM (2d ed. 2007), available at http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Portoolkit/Toolkit/pdf/modules/01_TOOLKIT_Module1.pdf; see also BONACICH & WILSON, *supra* note 5, at 199–224.

220. See Jaffee, *supra* note 146, at 15. Power resides in the “upstream/downstream impact of failure to deliver goods.” BEVERLY J. SILVER, FORCES OF LABOR: WORKERS’ MOVEMENTS AND GLOBALIZATION SINCE 1870, at 100 (2003); see also Edna Bonacich, *Pulling the Plug: Labor and the Global Supply Chain*, 12 NEW LAB. F. 41 (2003).

221. Jaffee, *supra* note 146, at 15.

222. Talley, *supra* note 93, at 215.

223. Nancy Cleeland, *Dispute Shows a Union Firmly Anchored at West Coast Ports*, L.A. TIMES, Oct. 13, 2002, at C1.

224. Nancy Cleeland, *Long Lines at the Ports Are Gone*, L.A. TIMES, Nov. 11, 2002, at C2.

225. Talley, *supra* note 93, at 216.

226. Jaffee, *supra* note 146, at 14.

227. David Bensman, *Port Trucking Down the Low Road: A Sad Story of Deregulation*, DEMOS 3 (2009), available at <http://www.demos.org/sites/default/files/publications/Port%20Trucking%20Down%20the%20Low%20Road.pdf>.

leverage collective gains. Prior to deregulation, strong transportation and labor regulation permitted the Teamsters to organize firm employees, which they did with great success.²²⁸ Deregulation introduced fierce competition and increased the number of firms, particularly in the drayage sector.²²⁹ Drayage trucking companies also systematically moved to a system of contracting out,²³⁰ under which firms assigned work to nominally “independent” owner-operators,²³¹ who purchased or rented their own trucks and were paid by the load or trip, rather than by the hour.²³² This insulated companies from trucker liability and also significantly reduced labor costs by eliminating the need to pay employment taxes and benefits (such as health care and retirement). It also shifted the downside industry risks, particularly the cost of bottlenecks and delays associated with port clearance and cargo identification, to the drivers—who became responsible for truck maintenance, fuel, tolls, taxes, and other expenses. As such, trucking firms became “non-asset-based companies,” shedding fixed expenses to increase their share value.²³³ In addition, and most crucially, the move to independent contractors undermined unionization, since independent contractors were banned from union organizing under antitrust law.²³⁴

As a result, the conditions of port truckers deteriorated sharply.²³⁵ Belman and Monaco reported that truckers’ wages fell by twenty-one percent from 1973 to 1995, and that one-third of that decrease was attributable to deregulation.²³⁶ In Los Angeles and Long Beach, the independent-contractor form came to predominate in

228. BONACICH & WILSON, *supra* note 5, at 209–10.

229. *Id.* at 211–12.

230. This was part of an overall employer strategy to promote labor flexibility. Jaffee, *supra* note 146, at 11.

231. Despite the “independent” designation, researchers have suggested that contract relationships between trucking companies and drivers are not that distinct from the prederegulatory employment system. *See* REBECCA SMITH ET AL., THE BIG RIG: POVERTY, POLLUTION, AND THE MISCLASSIFICATION OF TRUCK DRIVERS AT AMERICA’S PORTS 26 (2010) (concluding that “[t]rucking companies exert a high degree of control over the work activities of the truck drivers”); *see also* BELZER, *supra* note 90, at 37; Bensman, *supra* note 227, at 11–12. Jaffee notes that independent-contractor drivers are typically prevented from working for more than one company. Jaffee, *supra* note 146, at 17. Milkman and Wong state that drivers rely on companies to finance the acquisition of trucks and insurance. Ruth Milkman & Kent Wong, *Organizing Immigrant Workers: Case Studies from Southern California*, in REKINDLING THE MOVEMENT: LABOR’S QUEST FOR RELEVANCE IN THE 21ST CENTURY 99 (Lowell Turner, Harry C. Katz & Richard W. Hurd eds., 2001).

232. Jaffee, *supra* note 146, at 17.

233. BONACICH & WILSON, *supra* note 5, at 104.

234. *See, e.g.*, *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143 (1942); *see generally* Note, *Employee Bargaining Power Under the Norris-LaGuardia Act: The Independent Contractor Problem*, 67 YALE L.J. 98 (1957) (arguing that there should be exceptions to the ban on organizing for independent contractors). On the challenges to unionization after deregulation, *see* Michael H. Belzer, *Collective Bargaining After Deregulation: Do the Teamsters Still Count?*, 48 INDUS. & LAB. REL. REV. 636 (1995).

235. *See, e.g.*, Ronald D. White, *The Ports’ Short-Haul Truckers Endure Long Hours, High Costs*, L.A. TIMES, Nov. 21, 2005, at C1.

236. Dale L. Belman & Kristen A. Monaco, *The Effects of Deregulation, De-Unionization, Technology, and Human Capital on the Work and Work Lives of Truck Drivers*, 54 INDUS. & LAB. REL. REV. 502, 502 (2001).

the drayage trucking sector, with nearly ninety percent of truckers so designated.²³⁷ For these drivers, the average annual salary, after expenses, was \$28,000.²³⁸ In part because of delays, they worked on average fifty-six hours per week, thereby earning an effective wage rate of less than ten dollars per hour.²³⁹

The drayage labor force also came to be defined by workers of color. By 2000, in Los Angeles and Long Beach, port truckers were almost entirely Latino and nearly half were immigrants.²⁴⁰ Bonacich and Wilson describe the shift from white drivers at mid-century to predominantly nonwhite drivers beginning in the mid-1980s as a product of deregulation and immigration. Entrepreneurialism was long part of the trucker ethos and, in the immediate wake of deregulation, some white drivers became owner-operators. Yet the industry rapidly shifted. The increase in immigration during the 1980s, powered by Central American civil wars, brought more immigrant job seekers into the industry in part because “you didn’t need a green card or an I-9 form.”²⁴¹ Firms became smaller, more immigrants entered, and wages declined.²⁴² Bonacich and Wilson report that by 1985 the Teamsters had “lost the harbor.”²⁴³ They called a strike, but the “Central Americans did not want the union because of the green card issue,” and the strike failed.²⁴⁴ Tensions between truckers and longshoremen flared as truckers felt disrespected by the largely white longshoremen, whose hourly pay structure made them in no hurry to reduce the transport delays that plagued truckers.²⁴⁵ Observers identified the drayage sector as the most problematic element of port logistics, characterized by delay, poor safety, and pollution.²⁴⁶ The “handoff” from ocean steamships to trucks was viewed as inefficient:²⁴⁷ to pick up their cargo, truckers had to idle in long queues to enter the

237. Jaffee, *supra* note 146, at 18.

238. Bensman, *supra* note 227, at 1.

239. Some studies of the overall industry, not just Los Angeles/Long Beach, put the wage rate much lower. See Ted Prince, *Endangered Species*, J. COM. 12, 13 (2005); see also Bonacich, *supra* note 220, at 46. Studies of drivers at other ports have found similarly low pay. See, e.g., EAST BAY ALLIANCE FOR A SUSTAINABLE ECONOMY, TAKING THE LOW ROAD: HOW INDEPENDENT CONTRACTING AT THE PORT OF OAKLAND ENDANGERS PUBLIC HEALTH, TRUCK DRIVERS & ECONOMIC GROWTH (2007), <http://www.workingeastbay.org/downloads/Coalition%20Port%20Trucking%20Report.pdf> (finding that Oakland drivers made \$10.69 per hour on average and that one-quarter made less than \$7.64 per hour).

240. KRISTEN MONACO, INCENTIVIZING TRUCK RETROFITTING IN PORT DRAYAGE: A STUDY OF DRIVERS AT THE PORTS OF LOS ANGELES AND LONG BEACH 18–19 (2008), <http://www.mettrans.org/research/final/06-02%20Final%20Report.pdf> (finding that 91.24% of port truck drivers were Hispanic and 44% were noncitizens). Bonacich and Wilson cite sources estimating that 90% of port truckers are from Central America, while the remainder are Mexican. BONACICH & WILSON, *supra* note 5, at 218.

241. BONACICH & WILSON, *supra* note 5, at 212 (quoting Ernesto Nevarez, a port trucking activist).

242. *Id.*

243. *Id.* at 212–13.

244. *Id.*

245. *Id.* at 223–24 (noting also that some longshoremen viewed immigrants as responsible for the labor movement’s decline).

246. See Bensman, *supra* note 227, at 8–10.

247. See *id.* at 10; see also ANTOINE FRÉMONT, EMPIRICAL EVIDENCE FOR INTEGRATION AND

port, access the terminal, obtain their chassis, and load their containers.²⁴⁸ Yet it was a system that benefited trucking companies (which externalized the cost of labor and pollution) and shippers (which were able to pay trucking firms less for their services).²⁴⁹ Accordingly, those with economic power in the system had no incentive to change the arrangement.²⁵⁰

At the start of the new millennium, there were roughly 16,000 drayage trucks servicing the Los Angeles and Long Beach ports each day.²⁵¹ Because drivers could not generally afford to upgrade, this fleet was aging—the ports were the place where “old trucks went to die”²⁵²—and ran on diesel fuel, a known carcinogen.²⁵³ Truck emissions, combined with those from ocean carriers and dock transport equipment, caused significant air pollution, which threatened trucker and broader community health. A 2007 NRDC report showed that the black carbon inside truck cabs increased “health risks by up to 2,600 excess cancers per million drivers.”²⁵⁴ Overall, the California Air Resources Board found that diesel particulate matter emissions from all port-related activities constituted roughly one-fifth of all such emissions in the Los Angeles basin.²⁵⁵ Communities near the ports had cancer risk levels that “exceeded 500 in a million”; further from the port, the risk was less but still significant.²⁵⁶ From the perspective of community and labor groups, law had contributed to these harmful effects—by disempowering local communities and

DISINTEGRATION OF MARITIME SHIPPING, PORT AND LOGISTICS ACTIVITIES (2009) (OECD/ITF Joint Transport Research Centre Discussion Paper); David Bensman, Barriers to Innovation in Global Logistics: The Deregulated Port Trucking Sector (2009) (unpublished presentation to the Industry Studies Association) (on file with the UC Irvine Law Review).

248. A study by Monaco and Grobar found that, for each trip, port truck drivers spent more time waiting than driving. Kristen Monaco & Lisa Grobar, A Study of Drayage at the Ports of Los Angeles and Long Beach 11 (2005) (on file with author).

249. Jaffee, *supra* note 146, at 24.

250. *Id.* at 9.

251. See Deborah Schoch, *Study Details Port Pollution Threat*, L.A. TIMES, Mar. 22, 2004, at C1.

252. SMITH ET AL., *supra* note 231, at 10 (quoting Art Marroquin, *Judge Rules Port of L.A. Can Fully Implement Clean Trucks Program*, DAILY BREEZE, Aug. 26, 2010). In 2008, Monaco reported that the median model year of trucks driven by independent contractors in Los Angeles was 1995–1996. MONACO, *supra* note 240, at 12. Port director of operations John Holmes described the market this way: “Generally, big companies like Swift would own trucks for 5 years, then sell to regional carriers which would own them for a few years, then the trucks would be sold into the drayage market.” Interview with John Holmes, *supra* note 148. A survey commissioned by the ports in 2007 found that the “vast majority of drivers engaged in Port drayage” were independent owner operators and that the average truck was from 1994. CGR MGMT. CONSULTANTS, A SURVEY OF DRAYAGE DRIVERS SERVING THE SAN PEDRO BAY PORTS 1 (2007).

253. See, e.g., Diane Bailey et al., *Driving on Fumes: Truck Drivers Face Elevated Health Risks from Diesel Pollution*, 8 tbl.1, NAT. RESOURCES DEF. COUNCIL, <http://www.nrdc.org/health/effects/driving/driving.pdf>.

254. *Id.* at 4.

255. PINGKUAN DI, DIESEL PARTICULATE MATTER EXPOSURE ASSESSMENT STUDY FOR THE PORTS OF LOS ANGELES AND LONG BEACH: FINAL REPORT 2 (2006), available at <http://www.arb.ca.gov/ports/marinevess/documents/portstudy0406.pdf> (report for the California Environmental Protection Agency, Air Resources Board).

256. *Id.*

truck drivers relative to the port. Their response would be to try to reshape the law to fix the problems it had produced.

II. THE PORT AS A UNIT OF LEGAL ANALYSIS

Changing law requires understanding the law sought to be changed, what levers exist to do so, and what constraints are in place. Restructuring the port thus meant analyzing its distinct legal character as a local government entity bound to the national and global marketplace. The port possessed broad, locally derived, regulatory powers over operations; yet those local powers shaped nonlocal activities and thus overlapped with state and federal regulatory regimes—particularly those that related to transportation, labor, and the environment. Nonlocal regulation asserted minimum standards and demanded uniformity. This could be a spur to local reform—requiring port action to comply with nonlocal regulatory mandates—but could also operate as a limit on any port legal change deemed inconsistent with federal authority. Reforming port policy to respond to environmental and labor problems required evaluating and connecting three aspects of this legal regime: (1) the port's local power as a city entity to make law through its internal governance structure; (2) nonlocal governance schemes that could be leveraged to pressure the port to act, but could also limit that power; and (3) the potential scope of local authority within the federal preemption doctrine.

A. Local Governance

Port governance is a function of the spatial organization of port activity and the relation between its constituent parts. The essential unit is the port itself, which is defined as a facility at which ships dock and are loaded and unloaded (with cargo or passengers), providing a conduit between the sea and “hinterland.”²⁵⁷ As a geographic matter, a port is divided between maritime and land domains. Port waterways include an inner harbor, inside the breakwater, and in some cases, channels to access different areas of the port. In terms of landmass, a port may be constructed on the landside area of the harbor or adjacent islands. The port facility is broken down into smaller units. Ports are constructed with wharves—technically, structures that permit ships to dock—and these are divided into quays (parallel to the shoreline) and piers (perpendicular to the shoreline). Each type of structure is further divided into berths, which are the slips into which an individual ship fits for loading and unloading.

Overlaid on these structures is a basic unit of port organization: the terminal. A terminal is the place where freight and passengers either originate or terminate.²⁵⁸ In practice, there are multiple terminals within a port that are distinguished by function. Contemporary ports are divided into terminals dedicated to different types

257. Guido G. Weigend, *Some Elements in the Study of Port Geography*, 48 GEOGRAPHICAL REV. 185, 185 (1958).

258. RODRIGUE ET AL., *supra* note 206.

of cargo: containers, break-bulk (goods packed in boxes or other noncontainerized forms), dry bulk (loose cargo like grain or coal), liquid bulk, automobiles, and passengers. Terminals may be run directly by the local port authority, but with increasing worldwide “port devolution,” large global ports typically contract out to private “terminal operators” that coordinate the passage of cargo from marine to land transportation.²⁵⁹ Within a given terminal, there may be multiple terminal operators leasing sections that encompass specific berths and the surrounding land, which contains loading equipment, access to road and rail, and storage. In most large ports around the world, terminals are run by transnational corporations within the global supply chain.²⁶⁰

There are different types of terminal operators. Some are vertically integrated with shippers or ocean carriers, while others are independent terminal operating firms that provide systematic logistical services at the ports—unloading to truck and rail (on dock and off), as well as warehouse transport. In the contemporary port industry, there has been increasing corporate consolidation such that there are a small number of logistics companies that offer comprehensive intermodal services.²⁶¹ In addition, some carriers have sought to integrate port services by setting up port terminal subsidiaries, as have a few shippers. For instance, at the Port of Los Angeles, there are terminals leased to shippers (e.g., ExxonMobil), carriers (e.g., China Shipping), and dedicated terminal operators (e.g., TraPac).²⁶² Workers for companies in the terminal areas are generally employees of the terminal operators or firms subcontracted by them. These include longshoremen and the clerks responsible for checking in goods from the steamships and ensuring they are conveyed to the correct railcar or truck.

How a port is legally structured depends on its relation to local government. Based on their peculiar history, the ports of Los Angeles and Long Beach are city departments with the power to control port property. This power ultimately derives from the public trust doctrine, codified in the Tidelands Trust Act, under which the state holds the tidelands in trust for the use and benefit of the people in promoting navigation and commerce.²⁶³ The state has granted some trust lands to local governments, including Los Angeles and Long Beach, which hold the property as legislative trustees to advance defined trust purposes.²⁶⁴ The cities, in turn, have created propriety harbor departments to manage trust property.²⁶⁵

259. Jaffee, *supra* note 146, at 12–13; *see also* Mary R. Brooks, *The Governance Structure of Ports*, 3 REV. OF NETWORK ECON. 168, 168 (2004).

260. Jaffee, *supra* note 146, at 13.

261. *Id.*

262. PORT OF L.A., HANDBOOK & BUSINESS DIRECTORY 34–42 (2011–2012).

263. *See* *City of Long Beach v. Morse*, 188 P.2d 17, 21–22 (Cal. 1947); *see also* *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (holding that the trust also encompasses using the tidelands for open space, ecological preservation, scientific study, and recreation).

264. *See Morse*, 188 P.2d at 19.

265. Under the current Los Angeles city charter, the Board of Harbor Commissioners is granted “possession, management and control of all navigable waters and all tidelands and submerged lands.” L.A., CAL., CITY CHARTER art. VI, § 651(a) (2014).

Port governance is established by city charter. In Los Angeles and Long Beach, the current port structure—the product of amendments over the past twenty-five years reigning in port independence—gives local officials significant control over port personnel and policy. The Los Angeles Board of Harbor Commissioners consists of five members appointed by the mayor, subject to city council approval; board members may be removed by the mayor without council confirmation.²⁶⁶ The board delegates day-to-day operations to a professional staff, particularly the executive director (also called the general manager), who is given supervisory authority.²⁶⁷ The executive director has substantial enforcement and implementation power,²⁶⁸ but is constrained by the board, which has the power to hire and fire the director.²⁶⁹ This structure confers significant mayoral control since the mayor appoints the commissioners who then appoint a director subject to termination at will.²⁷⁰ Creating and implementing new port rules may therefore be advanced through mayoral selection of harbor department personnel. Those personnel are empowered to make port rules and enter into port contracts, subject to approval by city council, which thereby wields ultimate legislative authority. The board has the statutory power to “[m]ake and enforce all necessary rules and regulations governing the maintenance, operation and use of the Harbor District,” and “[f]ix and collect rates and charges for the use of the Harbor Assets”²⁷¹—in both cases subject to council approval.²⁷² It also has the power to enter into “any franchise, concession, permit, license, or lease” in furtherance of departmental purposes, subject to council approval for agreements of more than five years.²⁷³ Certain decisions, including leasing large (more than 3000 feet) port space, must be approved by four-fifths of the board and two-thirds of city council.²⁷⁴ As this suggests, significant port rule change can be effectuated through internal board approval validated by city council, thus requiring cooperation between the mayor and council members to change port policy.

The port operates, and generates revenue to cover costs and capital improvements, through the board’s exercise of its charter powers. It generates revenue primarily from two sources: shipping income, which comes from fees imposed on cargo, and permit (or rental) income, which consists of charging port occupants for the right to use port property.²⁷⁵ Permit income is negotiated via individual contracts with port users, which include terminal operators as well as

266. *Id.* § 502(a), (d).

267. *Id.* § 655.

268. *Id.*

269. *Id.* § 604(a).

270. *Id.* § 508(e). The manager possesses the right to appeal termination to the city council. *Id.*

271. *Id.* § 652(e).

272. *Id.* § 653(a).

273. *Id.* §§ 605(a), 606.

274. *Id.* § 654(a)(1).

275. *See* CITY OF L.A. HARBOR DEP’T, ADOPTED BUDGET: FISCAL YEAR 2013–2014, at 4 (2013) (stating that 87.2% of port revenues come from shipping services and 11.0% from rentals; another 1.8% come from royalties and fees, and other operating revenues).

carriers. Terminal operators enter into leases allowing them to operate, maintain, and build cargo-handling facilities and related infrastructure, while carriers enter concessions that give them the right to enter and use port property for specified purposes and under negotiated conditions.²⁷⁶ In this way, the port's operations are defined through contract, with the board negotiating the terms of use and rates. Port rules set by the board establish the permissible scope and conditions of port contracts, thus giving the harbor commission—and ultimately the local officials to whom it is accountable—the power to define who can enter the port and under what terms.

B. *Nonlocal Governance*

Because they are linked to regional economies and globally networked transportation systems, when ports exercise local power, they invariably affect nonlocal interests. Ports thus act in a regulatory environment in which local authority intersects with—and ultimately is limited by—federal and state laws designed to promote minimum standards and uniformity. These laws can cut in two different directions. On one side, federal and state authority can force a port to take action and internalize costs that it may otherwise resist. Those seeking reform of port operations may turn to nonlocal law as leverage to do so. On the other side, federal law may preclude action a port may want to take—or at least limit action to specific circumstances in which it has a defined local impact. In this way, any legal change must be sensitive to the preemptive force of federal jurisdiction.

The effect of nonlocal law depends on whether it seeks to regulate or deregulate, and how its standards have been interpreted relative to the interests of specific constituencies. When nonlocal law regulates a field in a manner viewed by a constituency as harmful, that constituency is forced to seek alternative legal avenues of redress. Federal labor law fits into this category: a national scheme designed to promote worker interests, which has been interpreted over time in ways deemed hostile to those interests.²⁷⁷ At its inception, New Deal-era legislation codified the collective bargaining system,²⁷⁸ which was validated by courts,²⁷⁹ ushering in a period of robust private sector unionization.²⁸⁰ However, what began

276. See RODRIGUE ET AL., *supra* note 206; see also Nicholas Miranda, *Concession Agreements: From Private Contract to Public Policy*, 117 YALE L.J. 510 (2007). The Port of Los Angeles also leases property to “various shipyards, fish markets, boat repair yards, railroads, restaurants and other similar operations.” CITY OF L.A. HARBOR DEP’T, FINANCIAL POLICIES 7 (2013).

277. See NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 260–64 (2002).

278. See Norris LaGuardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101–115 (2012)); see also National Labor Relations (Wagner) Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69 (2012)).

279. See generally *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

280. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1571 (2002).

as a framework to enable worker collective action ultimately became a constraint.²⁸¹ Reactionary legislative amendments,²⁸² damaging judicial interpretations,²⁸³ and industry capture of administrative processes reshaped the legal playing field.²⁸⁴ As a result, the system of workplace elections established under the NLRA is now viewed by organized labor as disadvantaging unions, which do not have effective tools to respond to employer retaliation. Unions have therefore turned away from the federal system of collective bargaining to advance unionization, seeking instead to leverage other sources of legal pressure to gain employer recognition and negotiate contracts.²⁸⁵

In contrast, when nonlocal law provides strong regulatory standards and empowers constituency action, it can be an effective tool for reform. In the case of the ports, state and federal environmental policy has played this role. In 1970, Congress passed the National Environmental Policy Act (NEPA), covering projects funded or approved by federal agencies, while California passed a similar state law, known as the California Environmental Quality Act (CEQA), covering projects requiring state or local agency approval.²⁸⁶ NEPA requires that new developments evaluate potential negative environmental impacts and mitigation measures; CEQA requires environmental impacts to be mitigated to the extent feasible, and may permit development despite negative impacts if it is determined there are overriding benefits.²⁸⁷ These laws apply to port infrastructure expansion and add a layer of environmental review that can be asserted by stakeholders to try to mitigate harms.²⁸⁸ Neither law can completely block expansion, but both can delay it (and increase costs) by permitting public comments on environmental review plans and potentially requiring that incomplete plans be redone.

The federal Clean Air Act—the key parts of which were also passed in 1970—requires compliance with air quality standards for pollutants from stationary and mobile sources.²⁸⁹ The Act requires compliance with national standards and sets up federal-state partnerships to establish state implementation plans, which may be enforced against regulated sources through citizen lawsuits.²⁹⁰ California has its own

281. See Catherine Fisk, *Law and the Evolving Shape of Labor: Narratives of Expansion and Retrenchment*, 8 LAW, CULTURE, & HUMAN. 1, 2, 9 (2012).

282. See Taft-Hartley Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C. (2012)); see also Landrum-Griffin Act of 1959, Pub. L. No. 86-257, § 101, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C. (2012)).

283. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) (validating the use of permanent replacements for striking workers).

284. See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2694–2700 (2008).

285. See *id.*

286. *ERIE*, *supra* note 7, at 106–09.

287. *Id.* NEPA applies to federal agency decisions, while CEQA applies to state and local agency decisions.

288. *Id.*

289. The California Coastal Commission, established in 1972, also has the power to approve all development in the coastal zone. *Id.* at 108.

290. See 42 U.S.C. § 7604(a) (2012).

state Clean Air Act, which also requires the creation of local air quality plans to regulate certain pollutants at more stringent levels than those mandated by federal law.²⁹¹ State standards are set by the California Air Resources Board (CARB), which oversees local air quality management districts (AQMDs).²⁹² AQMDs have authority to set and implement state plans in compliance with state and federal law, subject to approval by CARB, which is charged with submitting the state plans to the EPA.²⁹³ CARB is also responsible for regulating mobile sources of air pollution and sets specific motor vehicle emission standards.²⁹⁴ AQMDs regulate fixed sources of air pollution, which require AQMD permits to operate.²⁹⁵ Together, these federal and state environmental laws give government officials and local citizen groups tools to challenge port development and implement higher environmental standards.

Federal law designed to deregulate a marketplace—imposing a ceiling rather than setting a floor—has the opposite effect: disabling local regulation that proposes to raise standards above a minimum baseline. Federal transportation deregulation asserts federal law as one such ceiling. The Shipping Act of 1984 gives the Federal Maritime Commission jurisdiction over ports to promote competition, requiring “just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.”²⁹⁶ The commission polices interport coordination on rulemaking in order to ensure that it does not reduce competition by producing “an unreasonable reduction in transportation service or an unreasonable increase in transportation cost.”²⁹⁷ Any effort to set joint standards between the Los Angeles and Long Beach ports is subject to this check on anticompetitive measures, which can be enforced by the Federal Maritime Commission through a civil injunctive action.

For trucking, the deregulatory framework centers on the Federal Aviation Administration Authorization Act (FAAA),²⁹⁸ passed in 1995 to prevent states and localities from passing trucking standards that would circumvent the deregulatory provisions of the 1980 Motor Carrier Act. The FAAA explicitly preempts nonuniform state regulation of motor carriers.²⁹⁹ Designed to be identical with the

291. See generally California Clean Air Act, CAL. HEALTH & SAFETY CODE §§ 40910–40930 (West 2006).

292. South Coast Air Quality Management District, Authority, <http://sfdev.aqmd.gov/home/about/authority>.

293. *Id.*

294. CAL. HEALTH & SAFETY CODE §§ 40000, 43103(b), 43018 (West 2006). CARB exercises this authority under a Clean Air Act waiver permitting it to set its own on-road vehicle emission standards. See 42 U.S.C. § 7543(b) (2012).

295. CAL. HEALTH & SAFETY CODE § 40000 (West 2006).

296. Shipping Act, 46 U.S.C. § 41102(c) (2012); see also Marva Jo Wyatt, *Ports, Politicians and the Public Trust: The Los Angeles Port Funds Controversy Comes Face to Face with Federal Law*, 9 U.S.F. MAR. L.J. 357, 363 (1997).

297. 46 U.S.C. § 41307(b)(1) (2012).

298. 49 U.S.C. § 14501 (2012).

299. *Id.* § 14501(a)(1).

preemption provision contained in federal airline legislation,³⁰⁰ the FAAA provides that a state or locality “may not enact or enforce a law, regulation, or other provision having the force or effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.”³⁰¹ Ports seeking to enact any policy change affecting trucking have to avoid the preemptive effect of the FAAA.

C. Preemption

The possibility of FAAA preemption highlights a fundamental challenge facing proponents of legal reform at the ports: to make local policy change affecting environmental and labor interests, the ports would have to position any rulemaking within the ambiguous space for local action afforded by federal preemption doctrine.³⁰² Federal preemption derives from the Supremacy Clause,³⁰³ but courts have started from the premise that local laws are not automatically precluded by federal law without a clear showing of congressional intent to do so.³⁰⁴ Such intent may be explicitly stated in the statutory text of federal law or may be implied from the purposes federal law serves.³⁰⁵ Implied preemption occurs either when local law actually conflicts with federal law or the federal regulatory scheme is so pervasive that it is deemed to occupy the legislative field.³⁰⁶ Federal labor law has been held to impliedly preempt local laws interfering with the NLRA’s “integrated scheme of regulation,”³⁰⁷ and precludes local regulation in other areas left to be controlled by the free play of market forces.³⁰⁸ Environmental laws such as the Clean Air Act are generally viewed as asserting “floor preemption”—prohibiting local laws that fall below minimum standards, but permitting local regulations exceeding federal minimums and giving states significant roles in regulatory development and enforcement.³⁰⁹ The FAAA explicitly preempts state or local laws contrary to the federal policy of trucking deregulation.³¹⁰

Whether federal law is determined to preempt a specific local act depends not

300. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir. 1998).

301. 49 U.S.C. § 14501(c)(1).

302. See Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 283–85 (2003); Catherine L. Fisk, *The Anti-Subordination Principle of Labor and Employment Law Preemption*, 5 HARV. L. & POL’Y REV. 17, 18 (2011).

303. See U.S. CONST. art. VI, cl. 2.

304. See, e.g., *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

305. *Id.*

306. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983).

307. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

308. See *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132 (1976).

309. See Jim Rossi & Thomas Hutton, *Federal Preemption and Clean Energy Floors*, 91 N.C. L. REV. 1283, 1294–1303 (2013).

310. *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 367–68 (2008).

just on the scope of the federal law, but also on the nature of the local act itself.³¹¹ A key doctrinal distinction is between local action that is regulatory and proprietary. Federal law only preempts local actions that are “tantamount to regulation,”³¹² not market participation by a local entity in its proprietary capacity.³¹³ Thus, even when federal law has preemptive effect, a local government is not generally preempted if it directly participates in the marketplace as a proprietor through the purchase of goods and services.³¹⁴ However, the line between regulation and participation is vague and contested. Courts have recognized that even local procurement can be used in ways that constitutes regulation and thus may be preempted.³¹⁵ The seminal market participation case in the labor law context—which upheld a state-negotiated project labor agreement—asserted that the state was acting in a proprietary role when it had “no interest in setting policy” and when its action was “specifically tailored to one particular job” and “aimed to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost.”³¹⁶ The market participation exception cuts across substantive legal domains and could give space for local action despite other federal regulatory schemes, namely, environmental and transportation law. Thus, in theory, the market participant exception to the preemption doctrine provides a pathway for localities to pass rules affecting port operations designed to protect local investment and promote efficient operations.

Yet in the early 2000s, on the cusp of the clean trucks campaign, the precedent interpreting market participation in the labor, environmental, and transportation contexts was thin. Within the Ninth Circuit, no appellate case applying the exception in the labor context had moved beyond permitting project labor agreements.³¹⁷ In 2004, the United States Supreme Court held that the Clean Air Act preempted an effort by the South Coast Air Quality Management District

311. See Michael Burger, “*It’s Not Easy Being Green*”: *Local Initiatives, Preemption Problems, and the Market Participant Exception*, 78 U. CIN. L. REV. 835, 843–44 (2010).

312. Wis. Dep’t of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 289 (1986).

313. Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 227 (1993). The market participation doctrine had its origins in dormant commerce clauses cases, where it was used to permit some local action impacting interstate commerce if done for proprietary reasons. See generally Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). Although the market participation doctrine developed to permit state lawmaking, some jurisdictions, like the Ninth Circuit, apply the exception to municipal government entities as well. See Big Cnty. Foods, Inc. v. Bd. of Educ. 952 F.2d 1173, 1178–79 (9th Cir. 1992).

314. See Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1041 (9th Cir. 2007).

315. *Gould Inc.*, 475 U.S. at 287 (finding that a Wisconsin law prohibiting the state from doing business with companies that had violated the NLRA served “plainly as a means of enforcing the NLRA” and thus was preempted by it).

316. Bldg. & Constr. Trades Council, 507 U.S. at 229, 232; see also Chamber of Commerce of U.S. v. Brown, 554 U.S. 60, 70 (2008). The Ninth Circuit has adopted a similar test. See *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1023–24 (9th Cir. 2010) (citing *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999)).

317. See *Associated Gen. Contractors of Am. v. Metro. Water Dist. of S. Cal.*, 159 F.3d 1178, 1183–84 (9th Cir. 1998); see also *Brown*, 554 U.S. at 70.

(SCAQMD) to set fleet emission standards;³¹⁸ however, it invited the parties to consider the market participation exception and, on remand, the district court held that the rules “as applied to state and local government actors, fall within the market participant doctrine and are therefore outside the scope of” the Act.³¹⁹ In the only reported case on the issue, the Ninth Circuit applied the market participant exception to the FAAA, upholding a Santa Ana law requiring vehicles be towed by city-approved trucks as an exercise of the city’s proprietary power.³²⁰ While market participation offered a route for local action on port trucking, there was thus little doctrinal guidance on how to navigate that route in practice.³²¹ It was into this uncertain space that the campaign for clean trucks cautiously stepped.

III. RESISTING THE PORTS: ACTIVISM IN SEPARATE SPHERES

Although the legal road to clean trucks ultimately ran through the doctrine of preemption, the activism that generated the port challenge emerged from the specific grievances of local residents affected by port expansion. Through the 1990s, community activists sought a greater voice in port governance to fight the local impacts produced by the ports’ global role. This bottom-up mobilization came to focus on the dysfunctional drayage truck sector as a key source of community concern. It thus ran on a parallel—and independent—track relative to top-down planning processes within the labor movement, which were also directed toward trucking reform. Labor lawyers focused on legal strategies to transform the independent-contractor structure of trucking at the ports, but lacked the immediate legal and political hook to advance their plan. The entry of environmental advocates aligned with community interests—but also motivated by the regional effects of port pollution—altered the political balance. Wielding the power of environmental law, these advocates succeeded in blocking a crucial port expansion project—and, in so doing, created the opening for a broader challenge to port trucking that would unite community, labor, and environmental groups.

A. The Hundred Years’ War: Community Mobilization Against Port Expansion

Activism against port growth—and particularly against its environmental and community impacts—took root in the areas most affected by it: San Pedro,

318. *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004). The SCAQMD’s jurisdiction is over the South Coast Air Basin, which includes most of Los Angeles County, all of Orange County, and parts of San Bernardino and Riverside Counties.

319. *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, No. Cv00-09065FMC(BQRX), 2005 WL 1163437, at *12 (C.D. Cal. May 5, 2005), *aff’d* *Engine Mfrs. Ass’n v. South Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1041 (9th Cir. 2007).

320. *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *abrogated on other grounds by City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002) (reversing that part of *Tocher* which held that a state may not delegate its regulatory authority to a municipality under the FAAA’s safety exception).

321. *See, e.g., Estlund, supra* note 280, at 1571 (noting that the market participation exception is so difficult to ascertain that even incremental state and local reforms are subject to challenge as preempted).

Wilmington, and adjacent neighborhoods through which the port transportation system cut. Tensions were long simmering and erupted around proposed terminal and transportation infrastructure expansion. Opposition emerged within different communities, responding to the encroachment of particular projects, and reflecting the differential impact of port development.

Antagonism between the ports and surrounding communities was not always rancorous, and varied over time and by location. The early years of port development helped to build San Pedro and Wilmington, with each community receiving resources for schools and services, and experiencing housing and commercial development.³²² By the 1930s, the port communities enjoyed prosperity supported by tourism and local entrepreneurship.³²³ The growth of postwar aerospace manufacturing further buoyed middle-class life in the South Bay.³²⁴ But this began to change in the 1980s, and particularly with the recession of the early 1990s, when aerospace downsizing cost the area more than 15,000 jobs.³²⁵ This economic decline coincided with continued port expansion, driven by growing Asian imports, and codified in the joint infrastructure projects encompassed in the 2020 Plan.³²⁶ As port growth inexorably encroached on surrounding communities, tensions with residents grew.³²⁷ However, the distinctive geographies and histories of Wilmington and San Pedro meant that the impacts of port development and the responses to them were different.

Wilmington, occupying nine-square miles at the ports' northern border, had long been the region's industrial workhorse. Perched on the massive Wilmington Oil Field, by the 1980s the community of 40,000 residents was home to dozens of oil refineries and over 100 working oil wells, as well as numerous waste disposals, auto-wrecking plants, and junk yards.³²⁸ It also contained rail-switching yards and was well traveled by trucks coming to and from the ports. In a 1985 series, the *Los Angeles Times* described Wilmington in ravaged terms:

It is planted atop one of the nation's most productive oil fields, and dozens of petroleum-related companies have interests here, but residents see few signs of the millions of dollars that those firms and other industries make.

322. See QUEENAN, *supra* note 8, at 63.

323. See St. George, *Wilmington: Community of Contradictions*, *supra* note 45 ("In that era—as near as the community ever came to a heyday—Wilmington attracted tourists who traveled on cruise lines from the port to Santa Catalina Island, Hawaii and the South Pacific. What is now a pawn shop was a J.C. Penney store. The Don Hotel, where rooms now rent for \$15 a night, catered to affluent steamship passengers.").

324. See Deborah Belgum, *A School's Not-So-Golden Anniversary*, L.A. TIMES, July 5, 1996, at B10.

325. Kenneth J. Garcia & Janet Rae-Dupree, *Aerospace Slump Casts Its Shadow*, L.A. TIMES, Jan. 5, 1992, at B3; see also Janet Rae-Dupree, *These Trying Times: Job Security Evaporates as Economic Ripple Effect Hits Home*, L.A. TIMES, May 19, 1991, at B3.

326. Dean Murphy, *Port in a Storm: Harbor Profits Are Rising, but So Are Neighbors' Complaints*, L.A. TIMES, Nov. 27, 1987, at SB12; Nancy Yoshihara, *2020: A Southland Port Plan for the Long Haul*, L.A. TIMES, Oct. 19, 1987, at E3.

327. See Murphy, *Port in a Storm*, *supra* note 326.

328. See St. George, *Wilmington: Community of Contradictions*, *supra* note 45.

Instead, residents say, they see only industry's noxious fumes, noise and truck traffic Situated near the geographical bottom of Los Angeles, Wilmington also appears to be at the bottom of government priorities [seen in its] debris-cluttered vacant lots and side streets, in its growing number of homeless people, in its withering business district, and in the hundreds of junked automobiles that line city streets.³²⁹

In the *Times's* view, Wilmington served as a "regional dumping ground with 13 closed waste dumps—one of the largest concentrations in the city of Los Angeles—and six toxic-waste storage or treatment plants. It also [was] the proposed site of one of the largest hazardous-waste treatment facilities in the state."³³⁰

Many reasons were cited for Wilmington's decay. Land use planning had been haphazard and short sighted. Wilmington's community plan, a zoning document that had been promulgated in 1970, created a hodgepodge of development, with residential, commercial, and industrial uses mixing uneasily in the same areas.³³¹ Despite efforts to protect residents from industrial use, sixty residential dwellings were in areas zoned for manufacturing; new high-density apartment development was adding to a sense of overcrowding.³³² Other resident complaints were that toxic waste cleanup was poor despite a number of legislative efforts to secure financing; and the city-led redevelopment of a 232-acre industrial park near the waterfront, though designated in 1974, lagged due to lack of financing and government will.³³³ Most of the community's ire, however, focused on the Port of Los Angeles, which owned substantial property (including twenty percent of decaying East Wilmington) and dominated land use decisions, often in disregard of community concerns.³³⁴ Responding to that ire, the port's executive director, Ezunial Burts, declared: "The port does not have a responsibility to develop a community."³³⁵

Faced with these interlocking problems, community members began to take action in the 1980s. Residents—about two-thirds Latino, primarily blue collar, and roughly one-half homeowners—drew upon existing institutions and a sense of cultural pride to begin challenging what many viewed as the community's subservience to the port's industrial needs.³³⁶ As one activist put it, "We are

329. *Id.*

330. *Id.*

331. Sheryl Stolberg, *Wilmington, Harbor City Plan Will Be Revised Again: L.A. Planners Delay Action After Hearing*, L.A. TIMES, June 30, 1989, at B10 (South Bay ed.).

332. St. George, *Wilmington: Community of Contradictions*, *supra* note 45.

333. *See id.*

334. *See* Murphy, *Port in a Storm*, *supra* note 326.

335. St. George, *Wilmington: Community of Contradictions*, *supra* note 45.

336. Donna St. George, *Wilmington—Battered but Not Broken: Pride and Community Spirit Persevere Despite Area's Problems*, L.A. TIMES, Oct. 10, 1985, at SB1. The *Times* reported that "[a]bout 45% of Wilmington's 11,518 dwelling units are owner-occupied homes." *Id.* "[T]he area remains largely blue-collar and union-oriented, with 63% of its population employed as laborers and 12 union halls located in the community." *Id.* "Latinos now make up at least 67% of Wilmington's population, compared to 27.5% citywide." *Id.* The remaining population was 22% Anglo, 8% Asian and American Indian, and 4% black. *Id.* Unemployment stood at 8%. *Id.* Undocumented immigrants were estimated at 10–20% of the population. *Id.*

subsidizing the existence of the harbor with our city streets and the air we breathe.”³³⁷

Activism sought to both advance an affirmative development agenda, while simultaneously seeking to mitigate port externalities. On the affirmative side, residents attempted to assert greater control over community development and to promote city and port investment in community-sensitive ways. Overcrowding was an early target, with a homeowners’ group pressing for a moratorium on high-density apartments,³³⁸ and defeating a proposed 189-unit apartment development in East Wilmington.³³⁹ But the major demand was commercial development and recreational access to the harbor, which was completely blocked off by port facilities south of Harry Bridges Boulevard, depriving Wilmington of a public beach. Despite a city-led effort in the mid-1980s to enlist activists and business interests to address land use problems,³⁴⁰ tensions remained high. To defuse the situation, the city chose former head of the Los Angeles City Planning Commission, Calvin Hamilton, to conduct a \$35,000 study of waterfront development in Wilmington,³⁴¹ in order to seek ways that the port could be a “better neighbor.”³⁴² His plan, released in October 1987, proposed a wish-list of revitalization projects, totaling \$1 billion, that among other things called for the creation of a Mexican-themed waterfront marketplace at Slip No. 5 (at the intersection of Harry Bridges and Avalon Boulevards), simultaneously promoting commercial development and achieving the goal of beach access.³⁴³ The basic principles of the Hamilton proposal were adopted by the Wilmington Home Owners in their twenty-eight-point proposal to the harbor commission.³⁴⁴ They were also the foundation for a study plan offered by City Council Member Joan Milke Flores,³⁴⁵ a former city hall secretary who lived in San Pedro and had represented the South Bay in the Fifteenth District since 1984.³⁴⁶ However, the Hamilton proposal quickly ran into problems. Most notably, it clashed with the port’s own Hazardous Facilities Relocation Plan, which proposed relocating several hazardous oil terminals (primarily in San Pedro) to a new landfill

337. Murphy, *Port in a Storm*, *supra* note 326.

338. Donna St. George, *Moratorium on Building Sought in Wilmington*, L.A. TIMES, Nov. 3, 1985, at SB1.

339. Donna St. George, *Wilmington Activists Chalk Up Another Win*, L.A. TIMES, Oct. 24, 1985, at SB1.

340. Donna St. George, *Wilmington Woes to Get Closer Look in City Plan*, L.A. TIMES, Jan. 19, 1986, at SB1.

341. *Wilmington: Hamilton to Conduct Study*, L.A. TIMES, Feb. 12, 1987, at SB2.

342. Murphy, *Port in a Storm*, *supra* note 326.

343. Sheryl Stolberg, *Cinderella-by-the-Sea*, L.A. TIMES, Dec. 13, 1987, at U24.

344. Sheryl Stolberg, *Homeowners Offer Plan to Upgrade Community*, L.A. TIMES, Dec. 13, 1987, at M24 (South Bay ed.).

345. Sheryl Stolberg, *Flores Unveils Plans for Port Traffic Study, Other Projects*, L.A. TIMES, Jan. 22, 1988, at ASB8 (indicating Flores’ plan offered \$750,000 in government funding to develop a port transportation plan, waterfront promenade, and athletic fields).

346. Dean Murphy, *Flores Has an Anchor: She’s Coasting Toward Reelection in Diverse District*, L.A. TIMES, Apr. 2, 1989, at B1.

but pointedly did not propose moving the notoriously hazardous Wilmington Liquid Bulk Terminals, the existing tenant at Slip No. 5.³⁴⁷

Activists thus took a different tack. They lobbied Los Angeles planning officials to include zoning changes to facilitate waterfront development in a citywide rezoning project initiated in 1988.³⁴⁸ They also pressured the city's Industry and Economic Development Committee (on which Flores sat) to recommend moving the Wilmington Liquid Bulk Terminals from Slip No. 5.³⁴⁹ These efforts ultimately bore fruit, with the planning commission's new zoning scheme permitting commercial development on the waterfront alongside industrial use; as a result, the harbor commission agreed to create community access to the waterfront at Slip No. 5 and to relocate the Wilmington Liquid Bulk Terminals and its attendant hazardous materials.³⁵⁰ That sparked new activity: the city appointed a resident advisory group to plan the details of the waterfront development and jumpstarted its flagging industrial park redevelopment plan.³⁵¹ Some observers began to imagine a "revival" in Wilmington.³⁵² To achieve it, community energy poured into shaping a revision of the Wilmington community plan—a process initiated by Flores in 1983³⁵³—which residents argued should include new buffer zones to protect residential areas, preservation of the historic Banning Park neighborhood, traffic mitigation, downtown revitalization, and waterfront development.³⁵⁴ ExxonMobil resisted a proposal to redesignate the Wilmington Oil Field as "urbanized," potentially requiring it to cap some active oil wells; yet the city ultimately backed the redesignation, paving the way for the plan's approval in 1990³⁵⁵—and raising hopes for a community renaissance.

Yet it was not meant to be. The harbor commission rejected the resident advisory committee's call for incorporating the historic Heinz Pet Food Cannery, located near Slip No. 5, into the proposed waterfront development,³⁵⁶ and the city

347. Sheryl Stolberg, *Catch-22 for Wilmington Hazardous Facilities Bar Recreation Uses*, L.A. TIMES, Jan. 28, 1988, at 8.

348. Sheryl Stolberg, *Rezoning Debate: Harbor Activists See Opportunity*, L.A. TIMES, Mar. 13, 1988, at M6 (South Bay ed.).

349. Dean Murphy, *L.A. Port Urged to Relocate Waterfront Petroleum Plant*, L.A. TIMES, Apr. 21, 1988, at 8.

350. Sheryl Stolberg, *Wilmington Residents Win in Bid for Waterfront Access*, L.A. TIMES, July 28, 1988, at SB8.

351. Sheryl Stolberg, *Long-Stagnant Industrial Park Rushing to Life in Wilmington*, L.A. TIMES, Oct. 15, 1988, at H22; Sheryl Stolberg, *Harbor Plan Brings New Wilmington a Little Closer*, L.A. TIMES, Dec. 25, 1988, at SB6. The city also initiated plans for the further redevelopment of Avalon Boulevard as a commercial corridor. *Id.*

352. Sheryl Stolberg, *Revival of Wilmington Depends on 2 Key Projects: Officials Say Hotel, Waterfront Plans Will Affect Growth*, L.A. TIMES, May 28, 1989, at N8.

353. Dean Murphy, *Area Plan Revision Inches Slowly Ahead: Wilmington, Harbor City Waiting 6 Years*, L.A. TIMES, June 23, 1989, at J8A.

354. Sheryl Stolberg, *Final Polish Put on Harbor Area Plan Before Vote*, L.A. TIMES, Dec. 1, 1989, at B3.

355. Clay Evans, *Groups in Wilmington Oppose Junkyard Pact*, L.A. TIMES, Apr. 5, 1990, at B6.

356. Clay Evans, *Proposal for Former Cannery Rejected by Harbor Director*, L.A. TIMES, Apr. 26, 1990, at B3.

ultimately agreed to allow the port to raze the cannery to make way for an equipment storage facility.³⁵⁷ Although the port continued to agree in principle to a waterfront development, its resistance to the cannery underscored that its support was limited to a modest development that would not fundamentally interfere with port expansion.

Figure 5: Road in East Wilmington³⁵⁸



Zoning changes in notorious East Wilmington—wedged between the Dominguez Channel and Terminal Island Freeway, adjacent to a sulphur processing plant at the port—could not unwind the damage created by decades of neglect and incompatible land uses, giving rise to its status as a “Third World” community marked by “unpaved dirt tracks,” “garbage piles,” “[f]eral dogs,” prostitutes, and drug dealers.³⁵⁹

Residents in the Far East Wilmington Improvement Association alleged that the port and city were conspiring to intentionally neglect the community to enable the port to purchase land for expansion at low prices.³⁶⁰ As recession swept through the region in the early 1990s, the community’s fortunes declined further, with the *Los Angeles Times* calling East Wilmington “arguably the most run-down section of

357. Greg Krikorian, *Cannery Monument Proposal Is Canned*, L.A. TIMES, Aug. 4, 1990, at B13.

358. Photograph taken by author.

359. See Clay Evans, *They Call this Part of Wilmington “Third World,”* L.A. TIMES, May 6, 1990, at B1.

360. Greg Krikorian, *East Wilmington Business Owner Sues City over Area’s Blight, Crime*, L.A. TIMES, Sept. 6, 1991, at B3.

Los Angeles.”³⁶¹ The economic downturn also caused interest in redevelopment to falter. Plans for waterfront commercial development waned, while the port offered to make good on its promise to provide waterfront access with a modest community center at the original port site, known as “Banning’s Landing,” which was already a public landing at the base of Avalon Avenue.³⁶² This concept was first proposed in 1988 and approved by the harbor commission in 1995; however, by 2000, Banning’s Landing—beset by cost overruns and structural problems—still sat incomplete.³⁶³ Although the port insisted the project would be completed the next year, residents were dubious. Longtime activist Gertrude Schwab remarked, “We don’t put much faith in what the port tells us any more. If it’s ever finished, we will shout hallelujah.”³⁶⁴

Alongside the push to promote a positive development agenda in Wilmington were resident efforts to mitigate the harms imposed by port activity and growth. The impact of transportation was a constant concern as truckers increasingly used Wilmington streets to access the port and dumped empty containers on vacant lots around the community.³⁶⁵ In 1987, Schwab reported to the harbor commission that two trucks per minute passed through the intersection at Avalon Boulevard and Anaheim Street—Wilmington’s main crossroads.³⁶⁶ The commission promised to create a dedicated truck route that would bypass residential streets, but the timeline was over a decade long,³⁶⁷ and the port’s immediate decision to approve the Wilmington Liquid Bulk Terminals’ concrete importing plant fueled further resentment about increased trucking.³⁶⁸ Community efforts focused on keeping trucks off residential streets. Resident complaints that police neglected Wilmington resulted in sporadic traffic enforcement spikes,³⁶⁹ followed by a city-ordered ban on heavy trucks from three of the community’s main streets.³⁷⁰ The city commissioned

361. Susan Woodward, *This “Third World” May Be the Most Run-Down Section of Los Angeles*, L.A. TIMES, Nov. 10, 1994, at 9.

362. Dan Weikel, *Wilmington Still Waits for Its Ship to Come in*, L.A. TIMES, May 28, 2000, at B1.

363. *Id.*

364. *Id.*

365. See Dean Murphy, *As Wilmington Suspected, Study Finds Port Gets More Containers than It Ships*, L.A. TIMES, Nov. 16, 1989.

366. Sheryl Stolberg, *End to Traffic Sought: Wilmington Residents Hungry for Truck Stop*, L.A. TIMES, Oct. 18, 1987, at SB1.

367. *Id.*

368. Sheryl Stolberg, *Cement Plant OKd Despite Traffic Fear*, L.A. TIMES, Nov. 19, 1987, at SE14; Murphy, *Port in a Storm*, *supra* note 326.

369. Tim Waters, *Police Crack Down on Faulty Big Rigs in Port Area Traffic*, L.A. TIMES, Aug. 30, 1990, at B3 (South Bay ed.) (“For the fourth time in eight months, law-enforcement officers fanned out in the Harbor area Tuesday to crack down on errant truck drivers traveling into and out of the ports of Los Angeles and Long Beach.”).

370. Greg Krikorian, *Wilmington Bans Trucks on 3 Streets*, L.A. TIMES, July 11, 1991, at B3 (South Bay ed.) (“Under the restrictions adopted Tuesday, the trucks will be banned from Avalon Boulevard, between B Street and the Carson border; Wilmington Boulevard, from C Street, to the Carson border, and on Anaheim Street, from Eubank Avenue to Figueroa Street, unless they have local deliveries or pickups in Wilmington.”).

a half-million dollar traffic study,³⁷¹ which resulted in a 1994 harbor commission traffic plan that included a proposal to build a sound wall on Wilmington's southern border.³⁷² Yet as off-dock rail connections intensified drayage around the port, truck travel continued to increase.

Residents also contested other port externalities. As more containers came into the ports than went out,³⁷³ residents complained that they were being haphazardly stored throughout the community creating visual blight and physical risks.³⁷⁴ Council Member Flores introduced a motion in the city council requiring the port to track container movement in order to devise a plan to minimize community impact,³⁷⁵ yet containers continued to pile up and increasingly became targets of theft.³⁷⁶ Residents also voiced discontent about ongoing environmental degradation, particularly in light of the 2020 Plan, which the port's own environmental impact report noted would worsen air quality and further restrict commercial fishing and public recreation.³⁷⁷ As one leader of the Wilmington Home Owners put it, "The conclusion seems to be if it is economically beneficial for the ports, to hell with local communities."³⁷⁸ Community groups also fought against the debris and noise created by scrap metal processors, beating back a port proposal to relocate one company from San Pedro,³⁷⁹ but having their complaints about the renewal of a twenty-seven-year lease for a large processor on Terminal Island fall on deaf ears.³⁸⁰

San Pedro, to the west, also had similar complaints about scrap yards,³⁸¹ as well as others focused on the environmental impact of port tenants, like Kaiser International, the Los Angeles port's largest commodity exporter, which bulk loaded coal and petroleum coke. Residents and pleasure boaters lodged a complaint with the SCAQMD to prohibit coke storage on the ground that it spewed black

371. *Port Traffic Study Ordered*, L.A. TIMES, Apr. 21, 1988, at M10 (South Bay ed.).

372. Susan Woodward, *Harbor Area: Report on Improving Truck Traffic Approved*, L.A. TIMES, Aug. 4, 1994.

373. Murphy, *As Wilmington Suspected, Study Finds Port Gets More Containers*, *supra* note 365 (reporting that over a recent twenty-month period, the Los Angeles port received 117,000 more containers than it shipped out, raising concerns about storage in Wilmington).

374. *See Curb Sought on Containers*, L.A. TIMES, July 14, 1988, at M9 (South Bay ed.).

375. *Id.*

376. Sheryl Stolberg, *Thefts of Container Cargo Soaring in Harbor Area*, L.A. TIMES, Dec 22, 1989, at B3A.

377. Greg Krikorian, *Plan to Expand Ports Meets with Public Criticism*, L.A. TIMES, Oct. 11, 1990, at B3 (South Bay ed.).

378. *Id.*

379. Greg Krikorian, *Hiuka Drops Its Plans for Scrap Yard in Wilmington*, L.A. TIMES, Sept. 4, 1992, at B3 (South Bay ed.). The Hiuka America Corporation Plant, which shipped 500,000 tons of scrap through the Port of Los Angeles each year, was forced to leave San Pedro after residents mounted a successful five-year campaign to have the scrap yard declared a nonconforming use. Dean Murphy, *San Pedro Zone Change May Push Scrap Yard Out*, L.A. TIMES, Aug. 2, 1990, at B3 (South Bay ed.).

380. Susan Woodward, *Scrap Metal Firm's Lease Creates a Ruckus*, L.A. TIMES, Aug. 25, 1994.

381. Sheryl Stolberg, *L.A. Planners Won't Downzone Gaffey St. for Light Industry*, L.A. TIMES, Feb. 2, 1990, at B3 (South Bay ed.).

dust, causing air pollution and sullyng nearby boats and houses.³⁸² Although district officials initially denied Kaiser a key permit, an appeals panel decided to allow continued operations, citing the fact that the harbor was a “working port.”³⁸³ Residents carried on the fight, eventually prompting city council to move Kaiser’s bulk loading facility away from San Pedro’s recreational facilities.³⁸⁴

The fact that the Kaiser complaint emanated from recreational boaters highlighted a key difference between San Pedro and Wilmington. While Wilmington’s zoning made it the “backland” for the port’s industrial uses, San Pedro had emerged as the port’s recreational and commercial hub—a fact that Wilmington residents often highlighted with internecine frustration to emphasize their differential treatment.³⁸⁵ San Pedro’s position resulted from a different geography and distinct history. Abutting the harbor’s west and main channels, San Pedro’s recreational development grew partly from the obsolescence of its older port facilities, which became incompatible with the need for larger berths and calmer waters to accommodate container vessels; the federal government’s handover of Fort MacArthur on the West Channel’s Cabrillo Beach in the 1970s also provided the land necessary for recreational development.³⁸⁶ With greater recreational use mandated by state law in 1976, the port adopted a strategy of bifurcation, with San Pedro the recreational choice given its geographic benefits and higher proportion of residentially and commercially zoned land, which precluded Wilmington-style industrial expansion.³⁸⁷ Against this backdrop, the port and city sought to exploit San Pedro’s advantages. The port itself owned several properties on the tidal lands and in the late 1980s pursued aggressive development, investing over \$3 million to upgrade Ports O’ Call Village, the 1960s-era shopping center on the main channel, while also moving forward with plans to develop a \$100 million marina (with over 1000 slips) and recreational complex on Cabrillo Beach,³⁸⁸ as well

382. Tim Waters, *Dust Pollution Problem Remains in Doubt: Firms May Evade Petroleum Coke Rule*, L.A. TIMES, Jan. 10, 1985, at SE4; Tim Waters, *Kaiser Ordered to Stop Storing Coal, Petroleum Coke at Port*, L.A. TIMES, Mar. 31, 1985, at SB2.

383. *Petroleum Coke OKd*, L.A. TIMES, Oct. 24, 1987, at M2.

384. Murphy, *Port in a Storm*, *supra* note 326. The struggle over coal and petroleum coke lasted a decade, with residents challenging the approval of a new coal export facility on the Los Angeles Export Terminal. Kevin O’Leary, *Air Board Seeks More Surveys on Port Coal*, L.A. TIMES, Nov. 16, 1997, at B3. Terminal operators agreed to build domes to cover stored coke, Dan Weikel, *Coal Terminal Has New Plan to Build Dust Control Domes*, L.A. TIMES, Sept 12, 1998, at B3, yet disputes remained, with local investigations and a lawsuit filed by the San Pedro-Wilmington Coalition for Environmental Justice and Santa Monica BayKeeper over the environmental impact of the coal terminal. See *Environmentalists Sue Port over Coal Terminal*, L.A. TIMES, June 24, 2000, at B4; *Feuer Urges Study of Coke Dust Hazard at Port*, L.A. TIMES, Jan. 8, 2000, at B4.

385. Murphy, *Port in a Storm*, *supra* note 326.

386. *Id.*

387. *Id.*

388. *Id.* (“When completed in the next few years, the new development will provide slips for more than 3,000 private boats and will include a hotel, a youth aquatics camp, restaurants, shops, offices, parks, a salt marsh and bicycle paths.”).

as a \$60 million facility for cruise ships that included commercial development and a hotel.³⁸⁹

The city also saw economic opportunity: in 1985, the Los Angeles Community Redevelopment Agency approved a hotel in the Beacon Street redevelopment area overlooking the main channel, envisioned as a place for corporate visitors to the port and tourists disembarking from the World Cruise Center.³⁹⁰ The city also agreed to provide funding for a downtown revitalization plan.³⁹¹ Despite concerns that redevelopment would rob San Pedro of its ethnic distinctiveness,³⁹² for many residents, the overdue investment was producing a welcome boom, particularly as the cruise center—with day trips to Catalina Island—made San Pedro a tourist destination.³⁹³ The recession, however, made sure the good times did not last and the promise of port-led redevelopment turned into another disappointment. A decade of financial and legal problems stalled the redevelopment of Ports O' Call Village,³⁹⁴ which entered a steep decline,³⁹⁵ while the opening of a Carnival cruise terminal in Long Beach undercut San Pedro's position as the cruise industry's regional hub.³⁹⁶

Beset with difficulties, San Pedro and Wilmington began serious efforts to secede from the city of Los Angeles in the late 1990s³⁹⁷—a threat made more credible by the simultaneous effort by Hollywood and the San Fernando Valley.³⁹⁸ In a play to tamp down secessionist fever, and quell what activists called the “Hundred Years’ War,” Republican Mayor Richard Riordan and other city officials made gestures to promote greater community involvement in port planning.³⁹⁹ As a harbor commissioner noted when rolling out the new community plan, “There

389. St. George, *Wilmington: Community of Contradictions*, *supra* note 45; *see also* Sheryl Stolberg, *L.A. Port's New Terminal Ready for Cruise Ships, Era of Growth*, L.A. TIMES, Apr. 29, 1988, at E1.

390. Tim Waters, *San Pedro Hotel Seen as “Jewel” for Business District*, L.A. TIMES, July 18, 1985, at A1 (South Bay ed.).

391. David Ferrell, *Redevelopment Projects Brighten San Pedro's Once Dreary Horizon*, L.A. TIMES, Aug. 1, 1985, at SB1; Bob Williams, *The Changing Face of South Bay: Downtowns*, L.A. TIMES, Jan. 4, 1987, at SB2.

392. Sheryl Stolberg, *On the Waterfront: Wave of Development in San Pedro Threatens Entrenched Ethnic Community*, L.A. TIMES, June 19, 1988, at B1 (noting that some feared redevelopment would threaten the community's ethnic distinctiveness, with immigrants from Italy, Yugoslavia, and Latin America).

393. Sheryl Stolberg, *Drop In, Stay Awhile: With Its Traditional Industries in Decline, San Pedro Chases the Tourist Dollar*, L.A. TIMES, Aug. 6, 1989, at M4.

394. Louis Sahagun, *Face Lift to Raze Shops at Harbor*, L.A. TIMES, Aug. 15, 2001, at B3; Susan Woodward, *Some Have Reservations About Ambitious Port Plan*, L.A. TIMES, May 11, 1995, at 13.

395. *Judge Clears Way for Ports of Call Redevelopment*, L.A. TIMES, May 26, 1999, at B4 (“According to port statistics, revenue has declined from \$25.5 million a year in 1989 to \$8.2 million in 1998. Vacancy rates soared from 8% to 50% over the same period.”).

396. *See* Jerry Hirsch, *Ships Trying to Get Everybody on Board*, L.A. TIMES, June 23, 2003, at C1.

397. *See* Eric Malnic, *Harbor Area Secession Drive Nears Key Number of Backers*, L.A. TIMES, July 3, 1999, at B5. Wilmington had joined an earlier effort by westside communities to secede in 1990. Greg Krikorian, *Grass-Roots Unrest Wilmington, Westside Areas to Join in Bid to Secede from L.A.*, L.A. TIMES, Oct. 3, 1990, at B3 (South Bay ed.).

398. *See* Sharon Bernstein, *Report Bolsters Bid to Secede*, L.A. TIMES, Mar. 7, 2002, at B1.

399. Dan Weikel, *Port Officials Extend Olive Branch to Communities*, L.A. TIMES, Jan. 11, 2001, at B1.

has been unparalleled expansion and prosperity in the port The one frontier not tackled has been port-community relations. We need to round out the mayor's tenure in order to be a complete success."⁴⁰⁰ The secessionists were not placated. Despite conciliatory efforts by the newly elected mayor—South Los Angeles native and scion of a powerful Democratic family, James Hahn⁴⁰¹—the secessionists proceeded to advance their bid by making the economic case for independence to the Los Angeles County Local Area Formation Commission (LAFCO), whose approval was required before the issue could be put to city voters.⁴⁰² Despite an aggressive case by secession supporters, LAFCO ultimately concluded that an independent harbor city would not be economically viable,⁴⁰³ particularly in light of a California State Lands Commission recommendation to keep the port with the city of Los Angeles in the event of secession.⁴⁰⁴

It was fitting that the secession movement's decline occurred against the backdrop of yet another dispute between the port and Wilmington residents that tested the genuineness of the port's new community partnership. In 2001, as part of its drive to add twenty-five acres to the TraPac container terminal in the West Basin by expanding it north across Harry Bridges Boulevard to C Street, the port proposed building a twenty-foot-high concrete wall to separate the community from the new terminal boundary.⁴⁰⁵ The plan, which had been previously proposed early in the 1990s, brought a firestorm of controversy, as residents once again complained that the port's talk of community collaboration did not match its actions, which would further undermine the goal of harbor access.⁴⁰⁶ As one community activist put it bluntly, "We don't need the Berlin Wall."⁴⁰⁷ At a community meeting in April, when the details of the port's plan to expand Harry Bridges Boulevard to accommodate six lanes of truck traffic was revealed, residents exploded.⁴⁰⁸ At that meeting was Jesse Marquez, a former aerospace electrician born and raised in Wilmington. As a high school track athlete whose lungs burned when he ran, Marquez was radicalized by a chemical plant fire that injured his family members.⁴⁰⁹ At the moment the expansion plan was unveiled, Marquez recalled shouting, "Hell

400. *Id.* at B9 (quoting Commissioner Jonathan Y. Thomas).

401. Matea Gold & Patrick McGreevy, *Hahn, Council Woo Harbor Area with Visit*, L.A. TIMES, Dec. 13, 2001, at B3. In August 2001, it was revealed that the harbor commission had scaled back its contract with the community relations firm hired to promote a better community partnership because the firm was too supportive of community concerns. Louis Sahagun, *Local Storm Clouds Brew over Port*, L.A. TIMES, Aug. 10, 2001, at B4.

402. Patrick McGreevy, *New Slant on Harbor Area Bottom Line*, L.A. TIMES, June 10, 2001, at B1.

403. Kristina Sauerwein, *Fever for Secession in Harbor Area Cools*, L.A. TIMES, Sept. 15, 2002, at B3; *see also* Patrick McGreevy, *Harbor Cityhood Found Unfeasible*, L.A. TIMES, Apr. 26, 2001, at B1; McGreevy, *New Slant on Harbor Area Bottom Line*, *supra* note 402.

404. Sharon Bernstein, *Panel Urges Port Remain with L.A.*, L.A. TIMES, Apr. 10, 2002, at B5.

405. Dan Weikel, *Barrier Rift*, L.A. TIMES, Jan. 30, 2001, at B1.

406. *See* Telephone Interview with Jesse Marquez, Executive Director, Coalition for a Safe Environment (May 20, 2013).

407. Weikel, *Barrier Rift*, *supra* note 405, at B4.

408. *See* Telephone Interview with Jesse Marquez, *supra* note 406.

409. *Id.*

no, over my dead body. If anybody wants it, tell them that [at] my house this Saturday we'll form a committee. We're going to fight this project."⁴¹⁰ A working group of about fifteen residents met to establish the Wilmington Coalition to stop the wall.⁴¹¹ In the weeks that followed, the meetings grew to fifty residents and the following year the group secured funding from the Liberty Hill Foundation to set up an independent organization that in 2003 changed its name to the Coalition for a Safe Environment—which ultimately succeeded in preventing the wall's construction.⁴¹²

Other port-related projects caused similar disruption—and produced similar community responses. The Alameda Corridor rail line cut through East Wilmington, eliminating many of the gritty neighborhood's only businesses,⁴¹³ while intermodal truck and rail traffic disrupted community life in adjacent cities like Carson and around the downtown rail yards.⁴¹⁴ Commerce, home of the UP East LA and BNSF Hobart yards servicing the ports and bisected by the 710 freeway, experienced drayage truck increases as port traffic grew in the 1990s.⁴¹⁵ A series of town hall meetings brought out residents concerned with the safety and environmental impact of the trucks.⁴¹⁶ City neglect prompted a handful of families to begin meeting as an ad hoc group. An informal survey confirmed the extent of community concern with the impact of the rail yards and trucking on safety, health, and property.⁴¹⁷ With the leadership of Angelo Logan, an aerospace mechanic, the families formed East Yard Communities for Environmental Justice in 2000.⁴¹⁸ Galvanized by the Alameda Corridor project and plans for a massive expansion of the 710 freeway to accommodate more port trucks, East Yard became focused on strategies to address the trucks' noxious byproduct: diesel exhaust.⁴¹⁹ Resident research into truck pollution revealed that while infrastructure design disproportionately impacted their community, the underlying cause of pollution stemmed from the nature of the port trucking industry itself.⁴²⁰ This point was brought home at a community forum in 2005 to address diesel exhaust, at which resident truck drivers spoke. Logan recalled the event:

They . . . really laid out their situation in terms of the way in which they were being exploited and their hands being tied in terms of . . . not being able to get into trucks that were safer, that were cleaner and that [allowed]

410. *Id.*

411. *Id.*

412. *Id.*

413. See Louis Sahagun, *Evictions Loom for Many in Wilmington's 'Third World,'* L.A. TIMES, May 13, 2001, at B1.

414. Telephone Interview with Angelo Logan, Co-Director, East Yard Communities for Environmental Justice (May 1, 2013).

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

them to be good environmental health stewards. And immediately thereafter . . . [we] realized that there was a real issue in terms of the trucking industry and the way that the trucking industry was exploiting the drivers themselves.⁴²¹

B. Labor's Municipal Strategy: Contracting Around the Independent-Contractor Problem

During this time, leaders within organized labor were also focused on ports, but from a distinct perspective. For the Teamsters, trucking deregulation decimated the ranks of what had been one of the strongest unions in the United States.⁴²² Whereas forty-six percent of the country's approximately one million truckers were unionized in 1978, only twenty-three percent of the roughly two million truck drivers were in unions by 1996.⁴²³ An even lower percentage of the nearly four million truckers nationwide were in unions by the early 2000s.⁴²⁴

In the wake of deregulation, truckers tried to organize independent associations. Central American drivers, who comprised the vast majority of truckers at the Los Angeles and Long Beach ports, formed their own organizations in the 1980s as vehicles for community support and labor struggle. One of these associations, the Waterfront Rail Truckers Union (WRTU), formed in 1986, spearheaded a series of strikes to address delays and other disputes,⁴²⁵ one of which involved WRTU members withholding containers until they received payment from a bankrupt trucking company.⁴²⁶ Members were radical and militant. In the late 1980s, they began challenging their classification as independent contractors by roughly two dozen port trucking companies, including H&M Terminals Transport, Inc.⁴²⁷ In tax filings with the IRS, the truckers argued that by not classifying them as employees, the companies were evading Social Security, state disability, and unemployment taxes.⁴²⁸ The IRS agreed in some cases and in 1991 initiated an audit of H&M and other companies.⁴²⁹ WRTU truckers also picketed H&M, highlighting the fact that although many drivers worked exclusively for one firm and even carried company identification cards, they were unable to organize unions or apply for workers' benefits.⁴³⁰ As one organizer asserted, the drivers "don't want to be made fools of anymore."⁴³¹ Although the WRTU receded in importance, independent

421. *Id.*

422. BONACICH & WILSON, *supra* note 5, at 210–11.

423. James Peoples, *Deregulation and the Labor Market*, 12 J. ECON. PERSP. 111, 112 (1998).

424. BONACICH & WILSON, *supra* note 5, at 211.

425. See Chris Woodyard, *Truckers Told to Avoid Violence in Port Strike*, L.A. TIMES, July 22, 1988, at D1 (stating that the union's goal was to get companies to agree to talks with container terminals to decrease wait times of up to eight hours; the union asked the Federal Maritime Commission to make terminals pay sixty-eight dollars per hour for wait time).

426. BONACICH & WILSON, *supra* note 5, at 219.

427. See Anthony Millican, *IRS Probing Trucking Companies: Possible Reclassification of Drivers as Employees Could Cost Area Firms Millions*, L.A. TIMES, Aug. 29, 1991, at B3.

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

organizing continued into the 1990s,⁴³² with other groups such as the Latin American Truckers' Association protesting the impact of fuel costs.⁴³³ Some of these independent groups reached out to unions, which were unwilling to invest the resources to support an organizing campaign.⁴³⁴

The situation changed in the mid-1990s when truckers initiated a large-scale union organizing drive—led not by the Teamsters, but the Communications Workers of America (CWA).⁴³⁵ The truckers' connection to the CWA was partly driven by personal contacts with CWA organizers, but was also a function of the lack of interest shown by the Teamsters.⁴³⁶ CWA Local 9400 began holding meetings for workers in 1995 and 1996, quickly attracting thousands.⁴³⁷ To demonstrate this growing strength, in May 1996, CWA organized picketing in front of terminal gates, which was enjoined when the Pacific Maritime Association (PMA) filed suit in Long Beach Superior Court.⁴³⁸ The truckers organized convoys from the ports to highlight their plight and labor leaders persuaded the Los Angeles City Council to pass a resolution in support of unionization.⁴³⁹

However, there remained the thorny problem of the drivers' predominantly independent-contractor status, which precluded them from organizing. To get around this problem, CWA launched a dual campaign. One part was a traditional unionization effort directed at the handful of companies that still used employees; the second involved an ambitious plan, to be financed by entrepreneur Donald Allen, to create a new trucking company, the Transport Maritime Association (TMA), which would hire truckers as employees and then contract them out to the existing companies at higher rates.⁴⁴⁰ In May 1996, roughly 4000 truckers declined to accept contracts from their existing companies and instead signed up to be TMA employees with the promise of pay at twenty-five dollars per hour.⁴⁴¹ Despite a diversion of some cargo, the trucking companies held fast and refused to contract with TMA.⁴⁴² When one of the lead organizers suffered a heart attack and it turned out that Allen lacked the resources to bring TMA to scale, the campaign died, with some faulting the CWA for not investigating Allen's finances and for lacking sophisticated knowledge of the port trucking industry.⁴⁴³ Although the campaign

432. See Jesus Sanchez, *Wildcat Strike Idles Cargo at L.A.-Area Ports*, L.A. TIMES, Nov. 13, 1993, at D1.

433. MILKMAN, *supra* note 100, at 179.

434. *Id.*

435. *Id.*

436. *Id.* Some insiders speculated that the alliance between the CWA and the truckers may have been orchestrated by the ILWU to keep the Teamsters out of the harbor, which is the ILWU's base. BONACICH & WILSON, *supra* note 5, at 220.

437. MILKMAN, *supra* note 100, at 179–80.

438. *Court Order Limits Picketing of Truckers at Port Gates*, L.A. TIMES, May 9, 1996, at B5.

439. MILKMAN, *supra* note 100, at 180–81.

440. *Id.* at 181.

441. Jeff Leeds, *Long Beach, L.A. Ports Face Crisis in Labor Dispute*, L.A. TIMES, May 8, 1996, at A1.

442. MILKMAN, *supra* note 100, at 182.

443. *Id.* at 183–84.

failed to advance trucker unionization,⁴⁴⁴ it did reveal a deep desire among the workers for change, their willingness to take action, and the economic vulnerability of the port to a trucking strike.

The CWA campaign also refocused efforts to address the independent-contractor problem. Labor leaders identified two approaches. One was to find a way to directly organize truckers as independent contractors without running afoul of antitrust law. Without amending federal antitrust law, which seemed politically impossible, the value of this approach was uncertain, since any state effort to permit independent-contractor organizing could be deemed preempted. The Teamsters did put some effort into this strategy, pursuing a legislative campaign to permit direct organizing of independent contractors; but its effort to pass a state law exempting independent contractors from antitrust law failed when Governor Arnold Schwarzenegger vetoed it in 2005.⁴⁴⁵ From there, the Teamsters abandoned that project.

Instead, the Teamsters pursued a second approach, in which truckers would be legally converted into employees and then organized under the NLRA. The CWA campaign attempted to do this by creating the labor-leasing firm, TMA, which was to hire drivers as employees, who would then be unionized—passing the increased costs onto trucking firms in the form of higher contract rates.⁴⁴⁶ In the wake of that failed campaign, truckers adopted another strategy that echoed earlier WRTU efforts: litigation challenging the truckers' misclassification. In 1996, lawyer Fred Kumetz brought suit on behalf of thirty drivers who claimed that they had been misclassified as independent contractors by forty transportation companies.⁴⁴⁷ The suit sought class action certification to represent a larger class of 6500 harbor truckers claiming \$250 million in damages—primarily to recover payments made for insurance coverage (which included workers' compensation).⁴⁴⁸ Kumetz, a plaintiff's lawyer not associated with organized labor, was approached by truckers after TMA collapsed.⁴⁴⁹ In filing the suit, Kumetz argued that “the drivers, nearly all Latino immigrants, frequently are coerced by ‘fly-by-night’ companies into signing exploitative contracts without understanding the contents and are duped into paying for workers' compensation and liability insurance without understanding the law.”⁴⁵⁰ Some plaintiffs alleged that having to pay for insurance (and other ownership costs) reduced their earnings to below the poverty level.⁴⁵¹ In

444. Milkman & Wong, *supra* note 231, at 101–02. Milkman and Wong note that as a result of the campaign, the ILWU was able to win the right to represent intra-harbor truckers. *Id.* at 129.

445. BONACICH & WILSON, *supra* note 5, at 222.

446. MILKMAN, *supra* note 100, at 181.

447. Jeff Leeds, *Transport Firms Sued on Behalf of Port Truck Drivers*, L.A. TIMES, July 12, 1996, at B3.

448. *Id.* In addition to claims under the Labor Code, the drivers also brought claims for unfair business practices under section 17200 of the California Business and Professions Code. *Albillo v. Intermodal Container Servs., Inc.*, 8 Cal. Rptr. 3d 350, 354 (Cal. Ct. App. 2003).

449. Leeds, *Transport Firms Sued on Behalf of Port Truck Drivers*, *supra* note 447.

450. *Id.*

451. *Id.* (“Cardoza, 34, said he grossed \$42,000 last year, but that deductions and the costs of

response, Robert Millman, a lawyer from labor defense powerhouse Littler Mendelson, claimed that “[i]t would not be economically feasible to treat these people as drivers. The cost of goods would just go skyrocketing.”⁴⁵²

The contracts at issue in the case gave truckers the choice of obtaining their own insurance or getting it through the trucking firms’ less expensive group policies, the cost of which would be deducted from the truckers’ compensation.⁴⁵³ The companies charged the drivers more than the cost of premiums paid and also made the drivers responsible for a \$1000 deductible payment that was not specified in the contracts.⁴⁵⁴ In 1999, the case—*Albillo v. Intermodal Container Services*—was certified as a class action and tried before a special panel of three retired judges appointed by the California Superior Court and the Workers’ Compensation Appeals Board.⁴⁵⁵ In 2000, after trial, the panel ruled that there had been no violation of the workers’ compensation provision of the Labor Code, nor had plaintiffs proven a violation of the state unfair business practices law, or shown fraud or deceit.⁴⁵⁶ However, the trial court did find that the firms failed to comply with insurance disclosure requirements and consequently awarded the truckers injunctive relief and restitution, although the court refused to award attorneys’ fees. The California Court of Appeal, in a 2003 published decision reversing the trial court in part, held that the firms did violate the Labor Code by electing to be covered by workers’ compensation while “requiring [drivers] to bear the cost of obtaining workers’ compensation insurance.”⁴⁵⁷ Yet even this success, while compensating workers for wrongful payments, did not achieve the large-scale goal of employee conversion; in fact, it produced the opposite effect by making firms less likely to elect workers’ compensation coverage in the first instance.

As the Teamsters watched the CWA campaign and *Albillo* lawsuit unfold, they began devising plans for their own initiative. In 2000, the Teamsters, through its Port Division, announced a nationwide port trucker campaign, run by assistant director Ron Carver.⁴⁵⁸ Coming on the heels of the trial court set back in *Albillo*, lead Teamsters organizer Ed Berk was undaunted: “I don’t think they’re going to throw in the towel on this one court case.”⁴⁵⁹ However, the Teamsters had absorbed the lessons of that case, and the CWA campaign before it, concluding that the way to win was not through piecemeal organizing or lawsuits, but through broad change

maintaining the truck left him with only \$12,000. With his daughters Samantha, 3, and Jennifer, 11, at his feet, he told reporters that he has been borrowing money from family members to make ends meet.”).

452. Nancy Cleeland, *Harbor Drivers Independent, Panel Says*, L.A. TIMES, Jan. 19, 2000, at C2. Littler Mendelson represented defendants Intermodal Container Service Inc., Interstate Consolidation Inc., and Cartage Service.

453. *Albillo*, 8 Cal. Rptr. 3d at 353.

454. *Id.*

455. *Id.* at 354.

456. *Id.*

457. *Id.* at 362.

458. MILKMAN, *supra* note 100, at 184.

459. Cleeland, *Harbor Drivers Independent, Panel Says*, *supra* note 452.

that could convert large numbers of independent contractors back into employees. Although many inside the union believed that independent contractors were misclassified as such, the barriers to individual enforcement were too high to justify a case-by-case strategy and, as *Albillo* highlighted, even success in court did not ensure change in industry practice. As Teamsters attorney Mike Manley reflected, the union's view was that "you really can't [address the industry] through a campaign of Board elections and slugging it out in representation cases. The industry is too vast . . . you'd be doing it forever."⁴⁶⁰ In Los Angeles, there were some unionized firms, like Horizon, and others that still hired truckers as employees, like Toll, but without addressing the independent-contractor problem, the industry would remain low wage. The key was to "transform the market."⁴⁶¹

The Teamsters' national campaign initially pursued different tracks. In Miami, the Teamsters joined forces with an existing effort by independent truckers to gain recognition as employees. In 2000, the truckers cancelled their leases and refused to sign new contracts, instead demanding that the companies hire them as employees through the Teamsters hiring hall.⁴⁶² The union had reached out to a handful of small companies that agreed to hire truckers as employees; the strategy was to send truckers to work for those companies, which, along with a few other companies that the ILA had already unionized, would gain market share, forcing other companies to follow suit.⁴⁶³ However, the trucking companies held firm, and the campaign fizzled, resulting in a small increase in hauling fees after a campaign marred by lawsuits and allegations of harassment.⁴⁶⁴ Organizers complained, "We didn't get even 25 percent of what we wanted,"⁴⁶⁵ reinforcing the limited effect of striking without first securing employee status. In Los Angeles, the Teamsters focused on the policy arena at an early stage. Although the union suggested that it might reintroduce a new version of the failed TMA, only on more solid financial footing, its major efforts were directed toward disrupting port operations and pressuring local decision makers to act to address trucker conditions.⁴⁶⁶ In February 2000, the Teamsters unveiled a port truckers' "bill of rights," and generated publicity for it by organizing truck convoys from the ports to Los Angeles City Hall.⁴⁶⁷ However, these efforts did not show a clear path around the independent-contractor problem.

Despite significant challenges, port trucker unionization remained one of the

460. Telephone Interview with Michael Manley, Staff Att'y, Int'l Bhd. of Teamsters (Feb. 20, 2013).

461. *Id.*

462. *Id.*

463. *Id.*

464. Doreen Hemlock, *Strike Ends at Port of Miami*, SUN-SENTINEL, Feb. 23, 2000, http://articles.sun-sentinel.com/2000-02-23/business/0002220813_1_independent-truckers-miami-dade-county-strike.

465. *Id.*

466. Nancy Cleeland & Dan Weikel, *Truckers at Area Ports Demanding Wage, Health and Pension Benefits*, L.A. TIMES, Feb. 18, 2000, at C1.

467. *Id.*; see also BONACICH & WILSON, *supra* note 5, at 221–22.

major prizes of Teamsters organizing in the new millennium. In raw numbers, the scale of port trucking was modest, with approximately 40,000 port truckers operating as independent contractors out of an overall trucking industry of almost four million.⁴⁶⁸ However, port trucking was an area of historic strength, and there were practical and strategic reasons to pursue unionization in that sector. As a practical matter, there was a potential legal hook for organizing: the legal status of ports (like Los Angeles and Long Beach) as proprietary departments under the umbrella of local government meant that they could potentially influence the nature of trucking through their contracting power. Discussions of how to make this happen were underway in 2004 when Mike Manley was hired in the Teamsters' office of general counsel, headed by Pat Szymanski.⁴⁶⁹ Manley, from Kansas, worked as an organizer at the East Lawrence Improvement Association before deciding to become a lawyer.⁴⁷⁰ In 1980, he enrolled in Kansas Law School, and then went to a Kansas City law firm, Blake & Uhlig, where he eventually became partner.⁴⁷¹ The firm was general counsel to the International Brotherhood of Boilermakers, and Manley remembered that when he was hired, there was "great interest in the fact that I had done a lot of work for the boilermakers and shipyards—which I guess shows how deep the department was in the [ports] campaign at that point."⁴⁷² When Manley got the Teamsters job, and was assigned to the Port Division to help organize port drivers, he remembered incredulously asking Szymanski: "What are you doing? . . . They are independent contractors."⁴⁷³

As Manley quickly learned, the plan was to change that status by focusing on the ports' role as market participants. In conversations with Ron Carver, the question was: "Is there a way to kind of leverage the port to declare [truckers] to be employees?"⁴⁷⁴ Figuring out an affirmative answer to that question was not only important on its own terms but had broader strategic implications. The ports were key nodes in the larger supply chain that led from manufacturing exporters to regional warehouses, and ultimately to large retail chains, such as Wal-Mart. Some labor leaders believed that if unions could gain a stronger foothold in the ports, it would contribute to a longer-term campaign to organize retail giants.⁴⁷⁵ This was something that the Teamsters had argued for, but "didn't get necessarily a lot of traction . . . in terms of resources" from union leadership at the AFL-CIO.⁴⁷⁶

That changed with the formation of Change to Win—an alliance of progressive unions that broke away from the AFL-CIO in September 2005.⁴⁷⁷

468. BONACICH & WILSON, *supra* note 5, at 211, 222.

469. Telephone Interview with Michael Manley, *supra* note 460.

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.*

Change to Win—established with “little structure, [but a] big focus on organizing”⁴⁷⁸—set up the Strategic Organizing Center, which was built around different industry sectors, with the goal of identifying “how the pool of existing resources at Change to Win could expand the pace [of] organizing.”⁴⁷⁹ The center was “like a startup” that put “together experienced organizers and campaigners [to take] a fresh look at industries that were basically nonunion.”⁴⁸⁰ By bringing together organizers and researchers from different unions, the goal was to innovate according to “best practices.”⁴⁸¹ It divided up the economy into different industry sectors: transportation, retail, home construction, and food processing.⁴⁸²

John Canham-Clyne and Nick Weiner both volunteered to work on transportation.⁴⁸³ Canham-Clyne was a former freelance writer who covered the Iran-Contra affair for *In These Times* and wrote a book on single-payer health care.⁴⁸⁴ He left journalism in 1996 to work as the research director for Congress Watch at Public Citizen, and from there was recruited to the Hotel Employees and Restaurant Employees International Union (HERE) to direct campaign research for their hospital-organizing campaigns, first in Las Vegas and then in New Haven.⁴⁸⁵ After Change to Win was formed, Canham-Clyne was recruited to its core staff.⁴⁸⁶ There, he was joined by Nick Weiner, who also came from HERE, where he first worked with locals in Baltimore and Washington, D.C., and then joined the national hotel organizing effort at the UNITE-HERE office in D.C.⁴⁸⁷

Together Canham-Clyne and Weiner set out to research the trucking industry, becoming the bridge between Change to Win and the existing Teamsters leadership. Through their research, Canham-Clyne and Weiner identified the ports as a potential target of opportunity for organizing. As one of the few publicly owned pieces of freight infrastructure, ports offered “potential hooks” for organizing: many were in friendly political jurisdictions and drayage was a relatively sticky industry because of the massive infrastructure investment at the ports.⁴⁸⁸ On the basis of this research, Change to Win launched a national ports campaign, directed by Canham-Clyne, to build upon the Teamsters’ existing organizing efforts and

478. *Id.*

479. Telephone Interview with John Canham-Clyne, Campaign Dir., Change to Win (May 20, 2013).

480. Telephone Interview with Nick Weiner, Nat’l Campaigns Organizer, Change to Win (Apr. 17, 2013).

481. *Id.*

482. *Id.*

483. Canham-Clyne and Weiner also worked with Rich Yeselson. *Id.*; see also Telephone Interview with Michael Manley, *supra* note 460.

484. Telephone Interview with John Canham-Clyne, *supra* note 479.

485. *Id.*

486. *Id.*

487. Weiner had started in the AFL-CIO’s Food and Allied Service Trade department. Telephone Interview with Nick Weiner, *supra* note 480. In 2004, HERE joined with the Union of Needletrades, Industrial, and Textile Employees (UNITE) to form UNITE-HERE, which withdrew from the AFL-CIO to join Change to Win a year later.

488. *Id.*

“move [that] work forward faster.”⁴⁸⁹ The larger goal, in line with that articulated by the Teamsters, was to “organize the supply chain.”⁴⁹⁰ The ports were the first link in this chain because they were a “chokepoint” that could be used to leverage other wins.⁴⁹¹

Although the Teamsters had invested in port trucking, the involvement of Change to Win was a crucial step forward.⁴⁹² Teamsters leaders believed that any port campaign had to be comprehensive: even though individual ports were sticky, the power of shippers to divert cargo to competitor ports meant that there had to be a unified national strategy, otherwise there was a “real risk” that any individual port campaign could be easily broken.⁴⁹³ As Canham-Clyne reflected, “The Teamsters were trying to find a way to help poor drivers get out of the legal box that they were in . . . since deregulation.”⁴⁹⁴ Change to Win attempted to build on “a foundation of real commitment from the Teamsters to try to figure out this knotty puzzle,” recognizing that the workers had the will to strike, but because of the independent-contractor problem, “there had to be an additional lever to discipline the industry.”⁴⁹⁵ Canham-Clyne understood that his job was to “essentially sew together a lot of really good work that had been done before and build the alliance in a much deeper way than had previously existed, so that we would make sure that as we went down the road, both politically and legally, that we couldn’t be divided.”⁴⁹⁶

With Change to Win staff and resources in place, a working group was formed and serious planning commenced in 2006.⁴⁹⁷ Within the Teamsters, Manley, Carver, and Chuck Mack (West Coast Vice President of the Teamsters and head of the Port Division) met repeatedly with Canham-Clyne and Weiner to develop an organizing theory and strategy, which focused on “strengthening the local political control over the ports.”⁴⁹⁸ The plan was to target ports in “blue” states or localities with friendly political climates: Los Angeles-Long Beach, Seattle-Tacoma, Oakland, New York-New Jersey, and Miami. From Manley’s perspective, if the campaign could get these ports to “adopt a model that made drivers employees,” “more than 50 percent of what was coming into the country would be through facilities where port drivers are employees. And then you’d go to second tier targets . . . [which] are harder nuts to crack.”⁴⁹⁹ During these meetings, organizers like Weiner drew on their past experiences dealing with local governments and airports to develop a strategy

489. Telephone Interview with John Canham-Clyne, *supra* note 479.

490. *Id.*

491. Telephone Interview with Nick Weiner, *supra* note 480.

492. See Harold Meyerson, *Hard Labor*, AM. PROSPECT (June 18, 2006), <http://www.prospect.org/article/hard-labor>.

493. Telephone Interview with Michael Manley, *supra* note 460.

494. Telephone Interview with John Canham-Clyne, *supra* note 479.

495. *Id.*

496. *Id.*

497. Telephone Interview with Michael Manley, *supra* note 460.

498. Telephone Interview with John Canham-Clyne, *supra* note 479.

499. Telephone Interview with Michael Manley, *supra* note 460.

predicated upon a concession model: contractually linking the entry of trucking firms onto port property to the conversion of truck drivers from independent contractors to employees. As Weiner recalled, “once we started looking into port trucking, we kind of came up with [the concession] theory. And then we vetted the theory and that took a few months.”⁵⁰⁰

An early question focused on the legality of different possible options for organizing port truckers specifically and low-wage workers in contingent work arrangements more broadly. In 2006, there was a meeting of the “legal tribes” in Washington, D.C., where prominent labor lawyers gathered to discuss new strategies.⁵⁰¹ This meeting included the Teamsters’ Manley, as well as Szymanski, who had left the Teamsters to become general counsel to Change to Win; Brad Raymond, the new general counsel of the Teamsters; Judy Scott, general counsel to the Service Employees International Union; and long-time outside union counsel, Stephen Berzon of Altshuler Berzon, and Richard McCracken, of Davis, Cowell & Bowe.⁵⁰² One of the issues discussed was the legal feasibility of using the port’s status as a city entity to convert truck drivers into employees.⁵⁰³ It was a familiar idea to those present, discussed in various forms for some time. But at that point, with Change to Win backing, the time had finally come to advance the strategy. The question was: “Is this doable?”⁵⁰⁴

The concession model held appeal for a number of reasons. For one, it had been tested in other forms and had proven an effective tool for organizing. In particular, lawyers associated with the unions had done work on airport organizing in which the airport authorities, as public agencies, had used concession agreements, or franchises, to require food and beverage vendors to remain neutral in union organizing campaigns.⁵⁰⁵ Thus, from a mechanical point of view, union lawyers were familiar with the technical aspects of city contracting and how it potentially related to labor issues. Perhaps most crucially, the concession model was viewed as legally defensible against the backdrop of federal preemption. The union lawyers involved had experience with city contracting models to create living wage laws and job training programs, and believed that the same concept could be adapted to the ports under a market participant theory.⁵⁰⁶ For this analysis to work, there had to be a justification for the market participation itself. That justification turned out to lie less in trucking’s labor relations than in its environmental impact.

500. Telephone Interview with Nick Weiner, *supra* note 480.

501. Telephone Interview with Michael Manley, *supra* note 460.

502. *Id.*

503. *Id.*

504. *Id.*

505. Telephone Interview with Nick Weiner, *supra* note 480. A similar concept had been used in connection with city development subsidies to attach card-check neutrality to new development agreements. Scott L. Cummings & Steven A. Boucher, *Mobilizing Local Government Law for Low-Wage Workers*, 2009 U. CHI. LEGAL F. 187.

506. For instance, attorney Richard McCracken had advised UNITE-HERE on the market participant exception in connection with these projects. Telephone Interview with John Canham Clyne, *supra* note 479.

C. *The Turning Point: China Shipping and the Clean Air Action Plan*

That labor and environmental legal analyses would harmonize around the market participant exception to preemption was not clear on the cusp of the clean trucks campaign. Unlike the labor movement, mainstream environmental organizations still could wield some power through federal and state regulatory regimes, and had not yet clearly defined their relation to locally based initiatives. Judicial recognition of a market participant exception to the Clean Air Act did not occur until 2005.⁵⁰⁷ It was at that point, at least in theory, that the legal interests of the labor and environmental movements in asserting the market participant exception were in unison. But there still needed to be a cause upon which to act jointly. That cause would be port pollution.

Throughout the “Hundred Years’ War,” port communities had become all-too-familiar with the immediate reality of port pollution.⁵⁰⁸ The storage and transport of hazardous materials created a number of risks.⁵⁰⁹ Oil spills were a continuous problem.⁵¹⁰ Toxic chemicals stored at the ports occasionally sparked fires.⁵¹¹ There were ongoing battles over debris and noise caused by scrap metal processors,⁵¹² and struggles over the location of coal exporting facilities.⁵¹³ Other port-related problems drew increasing environmental attention. South Bay traffic

507. Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., No. CV00-09065FMC(BQRX), 2005 WL 1163437, at *12 (C.D. Cal. May 5, 2005).

508. For example, infrastructure development had eroded the tidal ecosystem. *See A Proposal Worth Pursuing*, L.A. TIMES, July 28, 1985, at A2 (noting that the port and Pacific Texas Pipeline Company had offered to spend \$10 million restoring the Batiquitos Lagoon in San Diego County in compliance with a federal regulation requiring mitigation for destroying tidal lands).

509. Sheryl Stolberg, *Stiff Rules Focus on Port’s Many Risks*, L.A. TIMES, Feb. 24, 1990, at A30. In 1998, the port and one of its contractors paid a million dollar fine to settle a federal action against them for illegally dumping polluted sediments into the ocean. Dan Weikel, *L.A. Port, Firm Fined in Dredging Case*, L.A. TIMES, July 22, 1998, at B3.

510. A 1985 spill of nearly 19,000 gallons of crude oil occurred after a Mobil employee accidentally left a valve open at a storage facility. Tim Waters, *Mobil Corp. Faces Fine in Spill: Mop-Up Continues After Oil Fouls San Pedro Beach*, L.A. TIMES, Jan. 12, 1985, at B5. A 1991 spill of 12,000 gallons was the result of a tanker’s fuel tank overflow. Judy Pasternak, *Oil Spill Damage Estimate Expands*, L.A. TIMES, Jan. 16, 1991, at B1. Port congestion produced other near misses. George Hatch, *Near-Misses at Sea Spur Call for ‘Traffic Cop’*, L.A. TIMES, Feb. 3, 1991, at B1 (describing proposal passed by legislature to create private vessel tracking system to guide port traffic).

511. *Sparks Start L.A. Port Blast, Fire*, L.A. TIMES, May 9, 1985, at A1.

512. Lisa Richardson, *Neighbors Want Scrap Yard to Clean Up Its Act*, L.A. TIMES, Aug. 6, 1993, at B3 (“Harbor-area boat- and homeowner groups have asked the Port of Los Angeles to demand sharp reductions in noise, air and water pollution at the Hugo Neu-Proler scrap yard, which wants the port to renew its 27-year Terminal Island lease. Labor leaders, meanwhile, have warned harbor officials not to take steps that would endanger the 165 jobs at the yard, where discarded cars, refrigerators and other metal refuse are shredded and the scrap is loaded aboard ships for export.”). The residents ultimately failed to prevent the lease renewal, while union leaders later charged Hugo with labor violations. *See Dan Weikel, Firm at Port in Hot Water over Lawsuit*, L.A. TIMES, Jan. 6, 1999, at C2.

513. Greg Krikorian, *City Council Approves Port of L.A. Coal Facility Despite Long Beach Suit*, L.A. TIMES, July 29, 1993, at B3.

ranked among the city's worst,⁵¹⁴ and traffic impacts were a key cause of community discontent.

Slower to develop was the recognition of the ports as an environmental problem susceptible to challenge by the environmental movement. This recognition grew as port expansion increasingly bumped up against environmental regulation. As the early 1990s brought Plan 2020, large-scale port development came to hinge on environmental clearance.⁵¹⁵ The California Coastal Commission—a quasi-judicial body charged with approving all coastal development, including port expansion, under the land and water stewardship provisions of the California Coastal Act⁵¹⁶—emerged as an important actor. The commission initially withheld approval of a dredging-and-landfill project deemed crucial to Plan 2020's expansion plan until the Port of Los Angeles agreed to offset the loss of 582 acres of waterways.⁵¹⁷ When the port agreed to replace the waterways on an acre-for-acre basis elsewhere in Southern California, the commission gave the project a green light, but retained authority to review each stage.⁵¹⁸

Regulatory attention increasingly focused on the defining environmental problem of the Los Angeles basin: smog. Regulation was shaped by the different tools available to federal and state agencies to deal with key pollution sources. Ships, which used dirty “bunker” fuel high in sulfur content,⁵¹⁹ were known to be significant polluters, but the ports' power to regulate them was ambiguous. Shipping lines generally asserted that federal and local regulators did not have power to control vessel emissions while they were in international waters—a view that had some precedential support.⁵²⁰ Within U.S. boundaries, the EPA had deferred the

514. George Stein, *Tomorrow's Menu: Today's Traffic Jam*, L.A. TIMES, Dec. 26, 1985, at B7.

515. Federal environmental laws requiring clean-up before new development projects could proceed placed the ports in the position of forcing leaseholders to remediate contamination—or face the prospect of having to pay for remediation themselves. George Hatch, *Port Bedeviled by Pollution Sins of the Past*, L.A. TIMES, Aug. 17, 1991, at B1 (stating that the Port of Los Angeles had to pay \$12 million to cleanup a scrap metal site vacated by National Metal and Steel before the port knew of the extent of environmental contamination).

516. California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000–30900 (West 2007).

517. Greg Krikorian, *Coastal Commission Delays Action on Plan for \$2-Billion Port Project*, L.A. TIMES, Aug. 13, 1992, at B4 (noting that the waterway was “home to a variety of sea life, including the endangered California least tern and brown pelican”).

518. Greg Krikorian, *Coastal Panel Staff Urges Approval of Dredging Plan*, L.A. TIMES, Oct. 14, 1992, at B7; see also Lisa Richardson, *State OKs Port of L.A. Plan for Expansion, Phase by Phase*, L.A. TIMES, Oct. 16, 1992, at B3 (“The Harbor Department must now seek final federal approval for the project and then ask Congress for \$100 million—the federal share of the \$580-million plan. The balance will be paid with port funds.”).

519. Deborah Schoch, *Port Air Cleanup Plan May Become a Model*, L.A. TIMES, Apr. 1, 2003, at B1 (“On an average day, 16 ships arrive at Los Angeles and Long Beach, releasing more pollution than a million cars.”).

520. See, e.g., *Bigelow v. Virginia*, 421 U.S. 809 (1975); see also *Pioneering Cleanup at Ports*, L.A. TIMES, Mar. 17, 2003, at B10. The United States failed to ratify a 1978 treaty setting global environmental standards on ships. *Pioneering Cleanup at Ports*, *supra*.

question of whether it had authority to regulate foreign-flagged ships.⁵²¹ There was a strong argument that ports could, however, impose rules on ships once docked under an exception to the Clean Air Act permitting local in-use regulations for nonroad sources of emissions.⁵²² This focused attention on what such on-dock rules should look like. A 1984 SCAQMD study revealed that two percent of the area's nitrogen oxide—a key component of smog—came from port ships burning diesel fuel while idling.⁵²³ In response, the SCAQMD issued a proposed rule requiring ships to plug into dockside electric power⁵²⁴—an operation known in the industry as “cold ironing”—which became an important goal of environmental advocacy. Regulators also searched for ways to address diesel truck pollution. While CARB had been granted authority by the EPA to set vehicle emission standards, the “in-use” exception to the Clean Air Act also allowed the ports to regulate the “use, operation, or movement” of trucks,⁵²⁵ which opened the possibility of imposing restrictions on idling.

The immediate battle revolved around setting regional air quality standards in the first instance. From the earliest period of federal clean air regulation, there were fights about regional compliance with the Clean Air Act. California's first State Implementation Plan for the South Coast Air Basin was rejected by the EPA in 1972.⁵²⁶ After a series of delays and revisions, California submitted a proposed plan for ozone and carbon monoxide in 1982, but conceded that even if implemented, it would not meet mandatory national air quality standards.⁵²⁷ When the EPA nonetheless approved the state plan, a citizen lawsuit was filed, resulting in a Ninth Circuit order reversing the approval and ordering the EPA to “face up” to its obligation to implement national standards.⁵²⁸ The Coalition for Clean Air and Sierra Club promptly filed another lawsuit to force the EPA to do so, which resulted in a settlement agreement committing the EPA to finalize its own plan.⁵²⁹ After further backtracking,⁵³⁰ the Ninth Circuit again ordered the EPA to finalize smog control regulations requiring the South Coast Air Basin to dramatically reduce ozone ingredients hydrocarbon and nitrogen oxide by 2010.⁵³¹ When it was unveiled, the EPA's plan focused on reducing emissions from trucks, ships, and

521. Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters Per Cylinder, 68 Fed. Reg. 9746, 9759 (Feb. 28, 2003) (codified at 40 C.F.R. pts. 9 & 94).

522. Engine Mfrs. Ass'n v. E.P.A., 88 F.3d 1075 (D.C. Cir. 1996).

523. Daryl Kelley, *Port Employers Attack Plan to Curb Ship Smog*, L.A. TIMES, Mar. 8, 1987, at SE1.

524. *Id.*

525. 42 U.S.C. § 7543(d) (2012).

526. *Coal. for Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 222 (9th Cir. 1992).

527. *Id.*

528. *Abramowitz v. EPA*, 832 F.2d 1071, 1073 (9th Cir. 1987). A number of environmental groups intervened on the side of the petitioner in the case, including the Sierra Club, Citizens for a Better Environment, and the Coalition for Clean Air.

529. *Coal. for Clean Air*, 971 F.2d at 222–23.

530. The EPA tried to wiggle out of the settlement agreement after the Clean Air Act Amendments of 1990 were passed by Congress, arguing that the amendments effectively reset the clock for compliance; however, the Ninth Circuit ultimately ruled that the EPA remained bound. *Id.* at 230.

531. Marla Cone, *EPA Smog Plan Is Just the Start of Negotiations*, L.A. TIMES, Feb. 21, 1994, at A3.

airplanes—mobile sources over which the SCAQMD did not have regulatory jurisdiction.⁵³²

Yet the federal plan's release provoked a local outcry over the scope of its proposed changes, which included taxing shipping and airline companies, requiring trucking companies to replace diesel engines, limiting out-of-state trucks to one Southern California stop, and forcing ocean liners to steam 100 miles offshore.⁵³³ Government officials and industry representatives expressed concern over the plan's \$5.4 billion total price tag and argued that, if fully implemented, it would preclude the construction of the Alameda Corridor project and effectively shut down the Los Angeles and Long Beach ports.⁵³⁴ With that threat looming, officials negotiated a compromise that deferred federal compliance for another three years.⁵³⁵ In 1997, the SCAQMD adopted a new state plan that relaxed approximately thirty control measures. The EPA disapproved this part of the state plan and environmental groups again sued the SCAQMD to enforce the previous standards—leading to a revised plan in 1999 to strengthen ozone control measures, accelerate the implementation timeline, and provide an explicit commitment to attaining the federal standard.⁵³⁶

While the ports thus received a temporary reprieve, it was clear that they could no longer expect to conduct business as usual. The environmental and health impacts of diesel fuel vehicles were receiving increasing attention.⁵³⁷ In 1999, a front-page *Los Angeles Times* story reported on the danger of diesel-fuel-burning vehicles, whose higher fuel content and intense heat-burning engines produced greater concentrations of carbon, sulfur, and nitrogen oxide.⁵³⁸ “At the Ports of Long Beach and Los Angeles—massive operations that are filled with trucks, ships, trains and cranes—workers breathe some of the most severe doses of diesel exhaust

532. James Flanigan, *Deals in Smoke-Filled Rooms Could Help Clear the Region's Air*, L.A. TIMES, Nov. 9, 1994, at D1.

533. *Id.*

534. *Id.*

535. *Id.*

536. S. COAST AIR QUALITY MGMT. DIST., FINAL 1999 AMENDMENT TO THE 1997 OZONE STATE IMPLEMENTATION PLAN FOR THE SOUTH COAST AIR BASIN ES-2 (1999), available at <http://www.aqmd.gov/docs/default-source/clean-air-plans/ozone-plans/ozone-plan-final-1999-amendment.pdf?sfvrsn=2>. The amended state implementation plan was accompanied by an agreement settling the environmental lawsuit. A revised plan, based on new scientific modeling data that increased emissions projections, was submitted in 2003, though portions related to emission attainment goals were later withdrawn. The EPA disapproved this part of the plan in 2008, but did not order California to submit a revised attainment plan, prompting yet another lawsuit by environmental groups, which resulted in still another court order mandating that EPA request a new state implementation plan. *Ass'n of Irrigated Residents v. EPA*, 686 F.3d 668 (9th Cir. 2012).

537. In 2000, the EPA issued regulations requiring diesel trucks to dramatically reduce emissions beginning in the 2007 model year. EPA, EPA420-F-00-026, REGULATORY ANNOUNCEMENT: FINAL EMISSION STANDARDS FOR 2004 AND LATER MODEL YEAR HIGHWAY HEAVY-DUTY VEHICLES AND ENGINES (2000), available at <http://www.epa.gov/otaq/regs/hd-hwy/2000frm/f00026.pdf>.

538. Marla Cone, *Diesel—the Dark Side of Industry*, L.A. TIMES, May 30, 1999, at A30.

found anyplace in California.”⁵³⁹ A seminal 2000 SCAQMD study on the relation between air pollution and cancer, entitled the Multiple Air Toxics Exposure Study (MATES II), concluded that about seventy percent of the carcinogenic risk in the basin was “attributed to diesel particulate emissions.”⁵⁴⁰ The study made specific reference to the negative impact of diesel emissions coming from the ports and connected transportation networks.⁵⁴¹ The communities of greatest risk, unsurprisingly, were adjacent to the ports.⁵⁴² A map published with the study (Figure 6) highlighted the increased cancer risk in harbor communities and galvanized residents who began to mobilize around environmental justice—distributing the map at official meetings and public actions.⁵⁴³

At a 2001 conference on air pollution at the University of Southern California (USC), Coalition for a Safe Environment director Jesse Marquez challenged assembled scientists to link their findings on air pollution to the unregulated growth of the ports and their impact on local low-income communities.⁵⁴⁴ New partnerships between community activists and the scientific community began to develop. The stage for environmental action against the ports was set—though that action initially would play out once again in court.

539. *Id.*

540. S. COAST AIR QUALITY MGMT. DIST., MULTIPLE AIR TOXICS EXPOSURE STUDY FINAL REPORT (MATES II) ES-3 (2000) [hereinafter MATES II], available at <http://www.aqmd.gov/docs/default-source/air-quality/air-toxic-studies/mates-ii/mates-ii-contents-and-executive-summary.pdf?sfvrsn=4>.

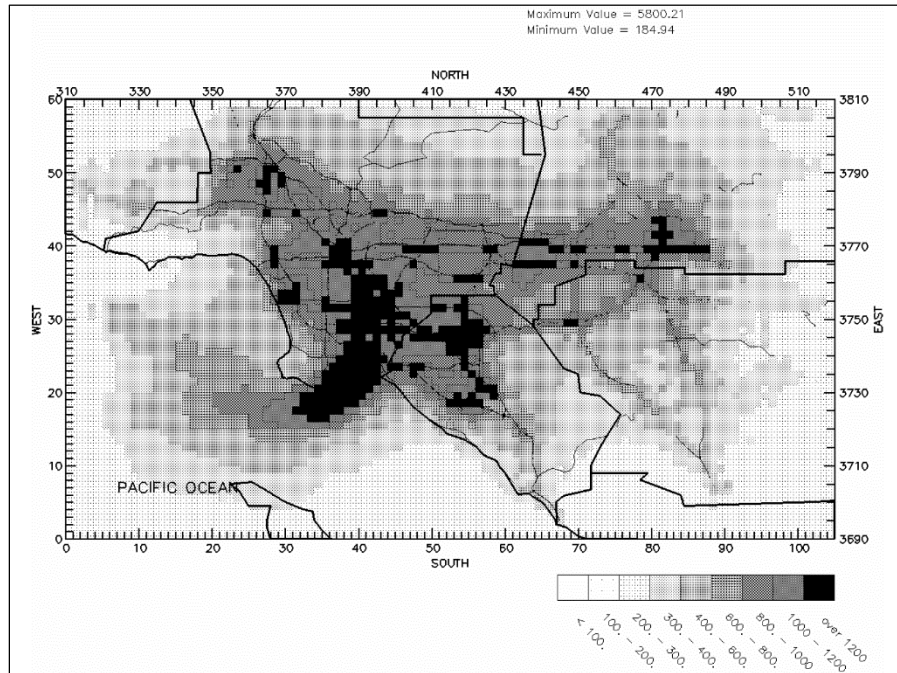
541. *Id.* at ES-5.

542. *Id.* at ES-5 to ES-12. Some efforts to reduce pollution were spurred by these findings. For example, Marine Terminals Corp. purchased five low-emission trucks under a state incentive program. *Cargo Terminal Operator Using Low-Emission Trucks*, L.A. TIMES, Sept. 16, 2000, at B4. In 2001, the EPA settled a suit by Bluewater Network under which it agreed to “begin developing rules to cut smog-forming exhaust from the largest, diesel powered ships, including cargo vessels, tankers and cruise liners.” Gary Polakovic, *EPA Settlement Seeks to Curb Air Pollution from Big Ships*, L.A. TIMES, Jan. 17, 2001, at A15.

543. See Schoch, *Port Air Cleanup Plan May Become a Model*, *supra* note 519.

544. See Martha M. Matsuoka & Robert Gottlieb, *Environmental and Social Justice Movements and Policy Change in Los Angeles: Is an Inside-Outside Game Possible?*, in NEW YORK AND LOS ANGELES: THE UNCERTAIN FUTURE 445, 452 (David Halle & Andrew A. Beveridge eds., 2013).

Figure 6: Model Estimated Risk for the Basin
(Number in a million, all sources)⁵⁴⁵



It was fitting that in the pivotal environmental fight against the ports, the focal point would be containers arriving from China, which by the mid-1990s was the Los Angeles region's second-largest trading partner, accounting for \$18 billion of cargo.⁵⁴⁶ In 1996, the Los Angeles and Long Beach ports vied for the crucial business of China Ocean Shipping Company (COSCO), a state-run carrier handling a quarter of Chinese trade with the United States.⁵⁴⁷ Though it had been operating at the Port of Long Beach since 1981, COSCO sought expanded terminal facilities.⁵⁴⁸ Long Beach initially won an agreement by the company to lease space at the Port of Long Beach,⁵⁴⁹ which officials predicted would create 300 to 600 jobs.⁵⁵⁰ In September 1996, the Long Beach Harbor Commission approved the creation of a new \$200 million terminal on the site of a naval station, with 140 acres reserved for COSCO.⁵⁵¹

Yet opposition from diverse quarters derailed the plan. Conservatives argued

545. MATES II, *supra* note 540, at fig.5-3a.

546. Jeff Leeds, *Long Beach Port Faces Rising Tide of Criticism*, L.A. TIMES, Mar. 24, 1997, at B1.

547. To secure COSCO's business, each port sent delegations to lobby Chinese officials. *Id.*

548. Jeff Leeds, *Ruling May Block Long Beach Port Project*, L.A. TIMES, May 21, 1997, at B1.

549. Leeds, *Long Beach Port Faces Rising Tide of Criticism*, *supra* note 546.

550. Leeds, *Ruling May Block Long Beach Port Project*, *supra* note 548.

551. *Id.* The naval station had been closed in 1991 and turned over to the port in 1995.

that the lease created security risks, with Congressman Duncan Hunter—a Republican from military stronghold San Diego—proposing federal legislation to bar foreign entities from leasing the naval station property.⁵⁵² Objections also came from the Audubon Society, which wanted to preserve a habitat for black-crowned night herons, and the California Coastal Commission, which initially expressed concern about contamination from dredging (though it ultimately granted its approval).⁵⁵³ The preservationist group Long Beach Heritage challenged the commission's decision to permit the demolition of naval station buildings, which had been deemed eligible for listing on the National Register of Historic Places.⁵⁵⁴

Long Beach Heritage took its challenge to court. Represented by environmental lawyer Jan Chatten-Brown, the group filed suit under CEQA to oppose terminal development. The challenge rested on the timing of the Port of Long Beach's environmental approval, which was conducted after the port had already entered into a letter of intent with COSCO to lease a container storage facility on "Pier T in the former Naval Station."⁵⁵⁵ The board approved the project environmental impact report (EIR) on September 3, 1996, and two months later the city of Long Beach entered into a "Preferential Assignment Agreement" giving COSCO "a nonexclusive preferential assignment of the wharf and contiguous wharf premises" of over 100 acres on the Pier T site.⁵⁵⁶ Long Beach Heritage filed a petition for writ of mandate, which was consolidated with similar suits filed by the Audubon Society and the cities of Vernon and Compton.⁵⁵⁷ In February 1997, after trial, Superior Court Judge Robert O'Brien rejected Long Beach's EIR as a "foregone conclusion" and ordered the city to "reconsider the project free and clear of any pre-commit[ment] . . . and with a complete evaluation of the EIR *before* deciding on the project."⁵⁵⁸ Long Beach held a public hearing and issued another approval, but Chatten-Brown argued it was still marred by the fact that it was made for property already encumbered by an existing lease.⁵⁵⁹ When Judge O'Brien agreed, rejecting the EIR for a second time, the Port of Long Beach rescinded the lease and disavowed the letter of intent in order to reconsider the plan—which it promptly reapproved.⁵⁶⁰ Stating that the entire environmental review process had become "simply something to get through," Judge O'Brien agreed once again to consider its adequacy.⁵⁶¹ On September 2, 1997, O'Brien—for the third time—

552. Leeds, *Long Beach Port Faces Rising Tide of Criticism*, *supra* note 546.

553. Leeds, *Ruling May Block Long Beach Port Project*, *supra* note 548; Jeff Leeds, *Coastal Commission OKs Permit for Long Beach Port Terminal*, L.A. TIMES, Jan. 9, 1997, at B3.

554. Leeds, *Ruling May Block Long Beach Port Project*, *supra* note 548.

555. *City of Vernon v. Bd. of Harbor Comm'rs of Long Beach*, 74 Cal. Rptr. 2d 497, 500 (Cal. Ct. App. 1998).

556. *Id.*

557. *Id.* at 501.

558. *Id.*

559. Jeff Leeds, *Harbor Panel OKs Terminal for Chinese Line*, L.A. TIMES, Mar. 25, 1997, at A1.

560. *City of Vernon*, 74 Cal. Rptr. 2d at 501; Jeff Leeds, *Port Cancels Lease with Chinese Firm*, L.A. TIMES, Apr. 22, 1997, at B1.

561. Leeds, *Ruling May Block Long Beach Port Project*, *supra* note 548.

rejected the EIR as a “post hoc rationalization for the Board’s approval of the Project” and ordered a new review “without pre-commitment, pre-approval, or pre-disposition, as required by the California Environmental Quality Act.”⁵⁶² The city appealed and the Navy began considering alternative uses for the site.⁵⁶³ The CEQA process for the COSCO terminal plan, however, was rendered moot when Congress passed a defense bill that contained a prohibition on leasing the base to COSCO.⁵⁶⁴ Representative Hunter, along with his colleagues James Inhofe (R-OK) and Randy “Duke” Cunningham (R-CA) had argued that China could use the base for “military purposes and intelligence-gathering.”⁵⁶⁵ This argument aligned anticommunists and veterans organizations, which joined with environmentalists and preservationists to permanently block the port from permitting a company flying a Chinese flag from using the old naval base site.

With Long Beach thwarted, the Port of Los Angeles pursued its own China partner. Residents had made inquiries to the harbor commission about plans for the West Basin site of the former Todd Shipyard and Chevron area just north of the Vincent Thomas Bridge in San Pedro. Their answer came on March 28, 2001, when the harbor commission approved a lease with China Shipping Holding Company (China Shipping).⁵⁶⁶ Under the terms of the \$650 million lease,⁵⁶⁷ China Shipping would occupy a 174-acre terminal built by the port, which would support entry of up to 300 vessels—approximately 1.5 million containers—a year.⁵⁶⁸ The terminal—to be located at berths 100 and 102—would be designed to accept 9100 TEU container vessels, which were larger than any at the time.⁵⁶⁹

Community resistance was swift. San Pedro Peninsula Homeowners United, led by activist Noel Park, and the San Pedro and Peninsula Homeowners Coalition challenged the proposed terminal, which was to include two new wharves and ten massive cranes (up to sixteen stories high) 500 feet from resident homes, along with a backland area with new roads to accommodate traffic.⁵⁷⁰ On May 8, 2001, at a tense meeting in which residents were given only five minutes to speak, the Los Angeles City Council rejected resident demands that it conduct an EIR prior to

562. *City of Vernon*, 74 Cal. Rptr. 2d at 502.

563. Douglas P. Shuit, *Cities, Counties Join Long Beach in Port Fight*, L.A. TIMES, Jan. 15, 1998, at B11.

564. Dan Weikel, *Port Shifts Focus After Cosco Deal for Base Unravels*, L.A. TIMES, Sept. 19, 1998, at B1.

565. *Id.*

566. *NRDC v. City of Los Angeles*, 126 Cal. Rptr. 2d 615, 622 (Cal. Ct. App. 2002).

567. Louis Sahagun, *Lawsuit Seeks to Block Shipping Terminal Plan*, L.A. TIMES, June 15, 2001, at B5.

568. Louis Sahagun, *Judge Halts Work on New Port of L.A. Terminal*, L.A. TIMES, July 24, 2002, at B3; Sahagun, *Lawsuit Seeks to Block Shipping Terminal Plan*, *supra* note 567.

569. *NRDC*, 126 Cal. Rptr. 2d at 622.

570. *Id.*; Sahagun, *Judge Halts Work on New Port of L.A. Terminal*, *supra* note 568.

approving the project.⁵⁷¹ Instead, the council approved the project by a unanimous vote.⁵⁷² Residents thus turned to court, contacting NRDC to pursue legal action.

On June 14, 2001, NRDC—representing the resident groups San Pedro and Peninsula Homeowners Coalition and San Pedro Peninsula Homeowners United, as well as the Coalition for Clean Air and NRDC’s own members—filed suit against the city, port, and harbor commissioners.⁵⁷³ Petitioners—represented by Gail Ruderman Feuer and Julie Masters of NRDC along with Chatten-Brown and another private environmental lawyer, Roger Beers—argued that, in approving the project, the city had failed to comply with CEQA,⁵⁷⁴ which required an EIR of significant developments that identified environmental issues and how they would be mitigated, and provided a period for public comment.⁵⁷⁵ Petitioners thus sought a writ of mandate directing the city to conduct a new project-specific EIR.⁵⁷⁶ “It’s time for the port to consider the needs of local communities before it approves a massive expansion in their backyard,” claimed NRDC’s Masters.⁵⁷⁷ The suit emphasized the environmental impact of the incoming ships themselves, as well as increased tugboat activity (over 500 trips per year) and truck traffic (an estimated one million new trips) to support them.⁵⁷⁸

The technical legal issue focused on the port’s effort to exempt the China Shipping project from CEQA review by arguing that its approval was encompassed within two EIR processes that predated the lease agreement. The first was a 1997 EIR conducted by the harbor department that approved the development of a multifaceted West Basin Transportation Project to “optimize container transport capabilities,” which included plans to deepen and widen the basin, create a new on-dock railway linked to the Alameda Corridor, and build a new wharf at berths 98 through 100 to accommodate the largest container vessels.⁵⁷⁹ The second was a 2000 Environmental Impact Statement/Environmental Impact Review (EIS/EIR) conducted by the U.S. Army Corp of Engineers to evaluate the impacts of a harbor dredging operation that proposed using dredged material to create a landfill between berths 97 through 109 as a potential site for container storage or docking in order

571. Schoch, *Port Air Cleanup Plan May Become a Model*, *supra* note 519.

572. *Id.*

573. Petition for Writ of Mandate, NRDC v. City of Los Angeles, No. BS070017, 2002 WL 34340562 (Cal. Super. Ct. May 30, 2002) (filed June 14, 2001).

574. *Id.* at 13–19. Petitioners also argued that the port’s approval of the project violated the city’s General Plan. *See id.* at 20. Petitioners filed an amended complaint with two additional causes of action, one for abuse of discretion for approving a project inconsistent with the port’s master plan and the second for violating the coastal act. Amended Petition for Writ of Mandate at 26–29, NRDC, No. BS070017, 2002 WL 34340562 (filed Oct. 19, 2001).

575. For CEQA rules, see CAL. PUB. RES. CODE §§ 21000 et seq. (West 2007).

576. Petition for Writ of Mandate, *supra* note 573.

577. Sahagun, *Lawsuit Seeks to Block Shipping Terminal Plan*, *supra* note 567.

578. Amended Petition for Writ of Mandate, *supra* note 574, at 9.

579. NRDC v. City of Los Angeles, 126 Cal. Rptr. 2d 615, 617–20 (Cal. Ct. App. 2002).

2014]

PREEMPTIVE STRIKE

1019

to “accommodate the most modern vessels.”⁵⁸⁰ In preparing for the lease agreement, the harbor commission told China Shipping that the “elements contained in the lease have been adequately assessed in the [1997] West Basin Transportation Improvements Program EIR . . . and have been adequately assessed in the [2000] Port of Los Angeles Channel Deepening EIS/EIR. . . . As such, the Director of Environmental Management has determined that the proposed activity is exempt.”⁵⁸¹ The city attorney’s office approved a permit authorizing the construction of the China Shipping terminal from landfill taken from the harbor dredging project.⁵⁸² Under the final twenty-five-year lease agreement, China Shipping was granted the right to use berths 100 and 102 to construct terminal, wharf, and backland space, to be built in three phases: phase one included construction of the container terminal and first wharf at berth 100 by November 2002; phase two involved the extension of the first wharf and the completion of the second (at berth 102) by March 2005; and phase three involved the construction of backland space to support the terminal.⁵⁸³ Apparently concerned that the scale of the new project might not be encompassed in the prior EIRs, the city also entered into a “side letter agreement,” approved by city council, which stated that the port and city “will use their best efforts to minimize negative environmental impacts” with respect to emissions from container ships, tugboats, trucks, and rail lines accessing the new terminal.⁵⁸⁴

Petitioners argued that the lease committed the port to all three phases of the development, and that the 1997 and 2000 EIRs did not even address the potential impacts of phase one—much less all three.⁵⁸⁵ In particular, the 1997 EIR emphasized near-dock rail access, not container terminal construction, and did not contemplate the much larger scope of environmental impacts—including bigger wharves, larger operation space, more ships, and more trucks—while the 2000 review emphasized dredging.⁵⁸⁶ The defendants—represented by lawyers from the city attorney’s office and outside counsel Morrison & Foerster and McCutchen, Doyle, Brown & Enersen—denied these allegations.⁵⁸⁷

In 2002, after the suit was filed, activists held a protest in the Knoll Hill neighborhood of San Pedro, just next to the proposed China Shipping project.⁵⁸⁸ In a convergence of political interests, harbor secessionists had seized on the project

580. *Id.* at 620. In April 2001, the Army Corps issued China Shipping a permit to build the first wharf, which the coalition also challenged under NEPA. Louis Sahagun, *Work to Resume on Port of L.A.*, L.A. TIMES, July 27, 2002, at B4.

581. NRDC, 126 Cal. Rptr. 2d at 622 (citation omitted).

582. *Id.*

583. *Id.* at 622.

584. *Id.* at 623.

585. *Id.*

586. *Id.* at 622.

587. Answer to Amended Petition for Writ of Mandate, NRDC v. City of Los Angeles, No. BS070017, 2002 WL 34340562 (Cal. Super. Ct. May 30, 2002) (filed Dec. 31, 2001).

588. Louis Sahagun, *Anger at Habn Brings Unusual Allies Together*, L.A. TIMES, Feb. 21, 2002, at B3.

to rally support for their cause, inviting African American leaders angry at newly elected Mayor James Hahn (a San Pedro resident) for breaking his promise to endorse African American Bernard Parks for a second term as police chief.⁵⁸⁹ Hahn's sister, Janice, also a San Pedro resident, represented the Fifteenth District (which linked Watts to the Harbor communities of San Pedro and Wilmington) and supported residents pushing for a new environmental review of the China Shipping project.⁵⁹⁰ In an effort to tamp down community controversy, Mayor Hahn had appointed a Port Community Advisory Committee, which a week prior to the protest had recommended that the U.S. Army Corp of Engineers conduct a new environmental review of the China Shipping site.⁵⁹¹ But that recommendation was rejected by the harbor commission and Hahn remained in political hot water.⁵⁹²

The state trial court in the NRDC suit provided no relief.⁵⁹³ On May 30, 2002, the trial court rejected the environmentalists' challenge, holding that the first phase of the China Shipping project was within the scope of the 1997 EIR and therefore did not have to be redone; because the city and port had apparently conceded that an EIR would have to be done on subsequent project phases for berth expansion, the trial court held those challenges to be moot.⁵⁹⁴

On appeal, the petitioners asserted that the trial court lacked substantial evidence to support a CEQA exemption.⁵⁹⁵ In doing so, their brief placed front and center the issue of air pollution caused by diesel-powered vehicles:

[T]he transportation of . . . containers to and from the site would generate a tremendous increase in the use of diesel trucks, diesel tugboats, and off-road diesel equipment, polluting the air and water and burdening the local streets and freeways. Of particular concern to Appellants who live nearby, and to members of the Appellant environmental groups, is the tremendous quantity of diesel exhaust—a known carcinogen—that would be pumped into the surrounding community.⁵⁹⁶

In response, the defendants focused on the scope of the earlier environmental reviews. They argued that the prior approvals clearly encompassed the development contemplated in phase one, and that the lease approval was conditioned on a subsequent environmental review for phases two and three—which were therefore not at issue.⁵⁹⁷ In their brief, the defendants contended that berth 100, formerly the

589. *Id.* Hahn's father was longtime county board of supervisor Kenneth Hahn, who served the predominately African American Baldwin Hills community. *Id.*

590. *Id.*

591. *Id.*

592. *Id.*

593. Judgment Denying Petition for Writ of Mandate, *NRDC v. City of Los Angeles*, No. BS070017, 2002 WL 34340562 (Cal. Super. Ct. May 30, 2002).

594. *Id.* at 9–11.

595. Appellants' Opening Brief at 3, *NRDC v. City of Los Angeles*, 126 Cal. Rptr. 2d 615 (Cal. Ct. App. 2002) (No. B159157) (filed Aug. 23, 2002).

596. *Id.* at 1.

597. Respondents' Brief at 39–40, *NRDC*, 126 Cal. Rptr. 2d 615 (No. B159157) (filed Sept. 18, 2002). Defendants argued that there were three approvals issued: the first a "use" approval to redesign

site of Chevron's wharf, was used for container storage and handling at the time of the lease and that the proposed changes would actually "increase efficiency and reduce impacts because it puts the wharf closer to the Berth 100 backlands."⁵⁹⁸ The defendants further contended that the selection of the West Basin site for China Shipping was the result of listening to residents, who had earlier proposed that any growth in container handling should be conducted there and that resident failure to participate in the 1997 EIR process showed their acquiescence.⁵⁹⁹ In addition, defendants asserted that the 1997 EIR explicitly contemplated the berth 100 wharf, and the 2000 EIS/EIR clearly proposed using dredged material to expand the China Shipping site "to provide more backlands and allow construction of an additional container wharf."⁶⁰⁰ In their view, the impacts had already been accounted for and to the extent that they had not, the residents only had themselves to blame for not participating in the earlier processes.

The attorney general of California weighed in with an amicus brief on behalf of petitioners, arguing that by committing itself to construct all three phases of the development but only purporting to approve phase one, the defendants had improperly segmented the project in direct violation of CEQA, reducing it "to a process whose result will be largely to generate paper, to produce an EIR that describes a journey whose destination is already predetermined and contractually committed to before the public has any chance to see either the road map or the full price tag."⁶⁰¹ As part of its appeal, petitioners asked the appellate court to stay the terminal's construction,⁶⁰² which the court declined to do, although it did expedite hearing the case, setting argument for October 18, 2002.⁶⁰³

In the meantime, NRDC's Feuer went to federal court arguing that the Army Corps had failed in its 2000 environmental review to adequately evaluate the China Shipping project, again asking for an injunction against further development.⁶⁰⁴ District Court Judge Margaret Morrow agreed, issuing a temporary restraining order (TRO) on July 24 "as work crews were pouring 100 feet of new concrete in a rush to complete the China Shipping Holding Co. terminal," which was over halfway done.⁶⁰⁵ Fifty residents attended the court hearing, including community activist

the West Basin that was clearly within the 1997 EIR; the second an "occupancy" approval encompassed in the China Shipping lease; and the third a "construction" approval for phase I, evidenced in the port's issuance of a coastal development permit for that phase only in October 2001. The defendants contended that the prior EIRs addressed potential impacts from these three decisions. *Id.* at 2–3.

598. *Id.* at 4.

599. *Id.* at 5.

600. *Id.* at 9.

601. Amicus Brief of the State of California, Ex Rel. Attorney General Bill Lockyer in Support of Appellants at 4, NRDC, 126 Cal. Rptr. 2d 615 (No. B159157) (filed Oct. 2, 2002).

602. Petition for Writ of Supersedeas or Other Appropriate Stay Order, and for an Immediate Stay; Memorandum of Points and Authorities; Supporting Declaration, NRDC, 126 Cal. Rptr. 2d 615 (No. B159157) (filed June 7, 2002).

603. Order Denying Petition for Writ of Supersedeas and Setting Expedited Briefing Schedule and Oral Argument for Appeal, NRDC, 126 Cal. Rptr. 2d 615 (No. B159157) (filed Aug. 5, 2002).

604. *Court Expected to Rule on Port Injunction*, L.A. TIMES, July 23, 2002, at B4.

605. Sahagun, *Judge Halts Work on New Port of L.A. Terminal*, *supra* note 568.

Marquez, who was astonished by the court decision: “This kind of thing has never happened before.”⁶⁰⁶ But the community’s enthusiasm was short lived. Three days later, Judge Morrow refused to convert the TRO into a preliminary injunction, holding that the petitioners had not proved sufficient harm in letting the project proceed, while the port asserted that delay would cost it \$1.2 million per day and undermine its reputation in the competitive shipping world.⁶⁰⁷

The state court took a different view. After hearing the case on October 18, the appellate panel decided to issue a stay, blocking construction of the key phase-one element: the 1200-foot wharf at berth 100, which had already been nearly completed.⁶⁰⁸ Reversing the decision below, the appellate court curtly dismissed the port’s contention that the China Shipping project was encompassed under the previous EIR as “supported neither factually nor legally.”⁶⁰⁹ Specifically, the court held that because the China Shipping project did not arise until after the completion of either EIR, it could not “be considered part of the overall ‘project’ addressed in those documents.”⁶¹⁰ “The fact that the port and China Shipping entered into a side letter agreement . . . provides adequate support for appellants’ argument that the port was required to prepare an initial study leading to either preparation of an EIR or a negative declaration for this Project. This was not done.”⁶¹¹ In a stunning blow to the port, the appellate court not only found the city to have violated CEQA and ordered a new EIR addressing all phases of the project, it also directed “the trial court to issue an injunction consistent with the stay we have issued precluding further construction or operation of the Project pending completion of the environmental review process.”⁶¹² The *Los Angeles Times* reported that the injunction “bars the pouring of 200 additional feet of concrete needed to complete the wharf,” which was nearly ninety percent finished.⁶¹³ The Court of Appeal rejected the city’s request for re-hearing by the city,⁶¹⁴ and the California Supreme Court denied a petition for review.⁶¹⁵

Court victory did not end the terminal fight. Under the rules of CEQA, it simply required the city and port to go back and conduct an appropriate EIR.⁶¹⁶

606. *Id.*

607. Sahagun, *Work to Resume on Port of L.A.*, *supra* note 580.

608. Eric Malnic, *Environmentalists Win a Battle over L.A. Port Terminal*, L.A. TIMES, Oct. 24, 2002, at B4.

609. NRDC v. City of Los Angeles, 126 Cal. Rptr. 2d 615, 625 (Cal. Ct. App. 2002).

610. *Id.* at 627.

611. *Id.* at 625.

612. *Id.* at 617.

613. Louis Sahagan, *Court Halts Work at L.A. Port*, L.A. TIMES, Oct. 31, 2002, at B1.

614. Order Denying Petition for Rehearing, NRDC v. City of Los Angeles, No. B159157, 2002 Cal. App. Lexis 5076 (Cal. Ct. App. Nov. 18, 2002). In its petition, the city argued that the court had failed to adopt an appropriately deferential standard of review and misstated crucial facts. Petition for Rehearing, Modification of Stay and/or Depublication at 10, NRDC, No. B159157, 2002 Cal. App. Lexis 5076 (Cal. Ct. App. Nov. 18, 2002) (filed Nov. 14, 2002).

615. Order Denying Application for Stay and Petition for Review, NRDC v. City of Los Angeles, No. S111953, 2002 Cal. Lexis 8631 (Cal. Super. Ct. Dec. 18, 2002).

616. NRDC, 126 Cal. Rptr. 2d at 628.

Skirmishes continued, with the environmental groups failing to block delivery of four sixteen-story high cranes to the China Shipping site as the court held that unloading the already assembled cranes fell outside of the injunction.⁶¹⁷ Yet time was of the essence: “In the competitive world of global trade, the Port of Los Angeles did not want to lose an important customer such as China Shipping to another port.”⁶¹⁸ The coalition therefore had important leverage, which it used to negotiate an unprecedented—and game-changing—settlement.

On March 5, 2003, in order to circumvent a lengthy battle over the project, the port and environmentalists entered into a \$60 million settlement agreement, financed entirely through port revenue.⁶¹⁹ The agreement, approved by Superior Court Judge Dzintra Janavs, permitted the port to finish phase one of the project within weeks while it awaited completion of the EIR, which it was still required to do (the coalition reserved the right to challenge any inadequacy in the EIR).⁶²⁰ In exchange, the port—in an unprecedented concession to environmental improvements—agreed to specific mitigation measures, which included requiring container handling equipment to use alternative fuels,⁶²¹ installing “low profile” cranes,⁶²² building facilities for “shoreside electrical power for ship hoteling,” retrofitting China Shipping ships to use electrical power while docked,⁶²³ creating a traffic mitigation plan,⁶²⁴ and setting aside \$50 million over five years for community-specific mitigation.⁶²⁵ This community mitigation fund included \$10 million for the Gateway Cities Program to provide “incentives to replace, repower or retrofit existing diesel-powered on-road trucks,” \$20 million for air quality mitigation, and \$20 million for aesthetic improvements to the community, including parks and landscaping.⁶²⁶ In Feuer’s words, “Today is Day 1 in the greening of the Port of Los Angeles.”⁶²⁷

Yet the greening project was nearly over as soon as it began. In a startling setback, it was quickly revealed that the port had not consulted China Shipping about the settlement terms, particularly the requirement that all docked ships turn

617. Louis Sahagun, *Shipping Cranes Cleared to Land at Port*, L.A. TIMES, Nov. 6, 2002, at B3.

618. Schoch, *Port Air Cleanup Plan May Become a Model*, *supra* note 519.

619. Stipulated Judgment, Modification of Stay, and Order Thereon, NRDC v. City of Los Angeles, No. BS070017, 2002 WL 34340562 (Cal. Super. Ct. May 30, 2002) (filed Mar. 6, 2003).

620. *Id.* at 6.

621. *Id.* at 16.

622. *Id.* at 17.

623. *Id.* at 18.

624. *Id.* at 18–19.

625. *Id.* at 19–23.

626. *Id.* at 20–22.

627. Deborah Schoch, *Port Project Suit Settled*, L.A. TIMES, Mar. 6, 2003, at B1. The environmental groups also settled the federal action, contingent on the approval of the state court settlement, which required the Army Corps of Engineers to conduct “a full environmental impact review of the project and reconsider its issuance of the permits in light of the review.” NRDC, Press Release, City of Los Angeles and Community and Environmental Groups Reach Record Settlement of Challenge to China Shipping Terminal Project at Port (Mar. 3, 2005), <http://www.nrdc.org/media/pressreleases/030305.asp>.

off their diesel engines and plug into electrical outlets.⁶²⁸ As it turned out, China Shipping leased its ships and would not commit to the retrofitting needed to convert them to electrical power, which it estimated would cost \$300,000 per ship.⁶²⁹ With a fleet of 100 ships, the cost would be well beyond the \$5 million the port committed in the settlement for retrofitting. With the deal in jeopardy, city and port officials engaged in damage control. Port executive director Larry Kelly flew to Shanghai to meet with China Shipping representatives, while city officials indirectly blamed NRDC for the failure to notify China Shipping of the settlement terms—arguing that a confidentiality requirement imposed by the plaintiffs prevented city officials from revealing the terms of the settlement until after it was executed.⁶³⁰ NRDC's Feuer responded in disbelief: "It never actually dawned on us that they weren't talking to China Shipping."⁶³¹ If the city had asked for permission to run the settlement by China Shipping—whose buy-in was obviously critical to effectuating the deal—Feuer was sure the plaintiffs would have provided permission to do so.⁶³² As the prospect of a lease renegotiation grew, the Los Angeles city controller issued an audit stating that the true cost of the settlement would be twice as much as the city had advertised⁶³³—a figure that city officials vehemently rejected.⁶³⁴

A year after the landmark settlement, the completed terminal sat vacant as city officials worked to salvage the lease. As negotiations unfolded, NRDC agreed to a revised proposal under which China Shipping would commit to plug in seventy percent of docked ships rather than the one hundred percent proposed in the original agreement, while only making two cranes low profile; however, NRDC held fast to its demand that the port include language in the EIR recognizing the project's "aesthetic impacts" on the surrounding communities.⁶³⁵ At this the port balked, claiming it did not want to "prejudge" the outcome of the environmental review.⁶³⁶ After a flurry of meetings, an amended settlement was hammered out, with the port agreeing to make clear that the original \$20 million community fund was "being created in part to allow for the mitigation of the aesthetic impacts of the China Shipping terminal off of port lands," while the environmentalists agreed to language that the port was "not prejudging whether these impacts are adverse or significant."⁶³⁷ This resolution cleared the way for China Shipping to take

628. Deborah Schoch & Peter Nicholas, *Plans for 1st 'Green' Ship Terminal in U.S. Stall*, L.A. TIMES, June 14, 2003, at B3.

629. *Id.*

630. *Id.*

631. *Id.*

632. *Id.*

633. Deborah Schoch, *Port's Settlement of Environmental Suit Gets Costlier*, L.A. TIMES, July 10, 2003, at B3.

634. Deborah Schoch, *Port Officials Dispute Chick on Settlement Cost*, L.A. TIMES, July 11, 2003, at B4.

635. Deborah Schoch, *Residents Feel Ignored in L.A. Harbor Deal*, L.A. TIMES, Mar. 11, 2004, at B11.

636. *Id.*

637. Deborah Schoch, *Accord Clears Way for '03 Plan to Clean Up Air at Port*, L.A. TIMES, Mar.

occupancy, which it did in May 2004⁶³⁸—marking the creation of what was hailed as the world’s first green terminal, with cold ironing (i.e., dockside electrical plug-in) capability “expected to eliminate more than three tons of nitrogen oxides (NOx) and 350 pounds of diesel particulate matter for each ship that plugs in.”⁶³⁹ Council Member Janice Hahn summed up what activists hoped would be the foundation for future change: “The China Shipping Settlement sets a precedent of how we do things at the Port today and into the future.”⁶⁴⁰

Figure 7: China Shipping Container Terminal⁶⁴¹



12, 2004, at B3. The final amended agreement was filed with the court on June 21, 2004. Amended Stipulated Judgment, Modification of Stay, and Order Thereon, NRDC v. City of Los Angeles, No. BS070017, 2002 WL 34340562 (Cal. Super. Ct. May 30, 2002) (filed June 21, 2004).

638. See Deborah Schoch, *Port and Shipper End Fight*, L.A. TIMES, May 26, 2005, at B6. Although the terminal opened in May, the legal wrangling continued, with the port settling a lawsuit by China Shipping for over \$20 million to compensate the company for delays. *Id.*

639. See *Port of Los Angeles Hosts First Plugged In Container Ship*, ENV'T NEWS SERVICE (June 21, 2004), www.ens-newswire.com/ens/jun2004/2004-06-21-04.asp. The port circulated draft EIRs in July 2006 and then again in April 2008. ENVTL. MGMT. DIV., PORT OF L.A. REGULATORY BRANCH, BERTH 97-109 [CHINA SHIPPING] CONTAINER TERMINAL RE-CIRCULATED DRAFT EIS/EIR (2008), available at http://www.portoflosangeles.org/EIR/ChinaShipping/DEIR/_Public_Meeting_Presentation.pdf. The city approved them at the end of 2008. Press Release, Port of L.A., China Shipping Container Terminal Expansion Is Approved by Port of Los Angeles (Dec. 19, 2008), http://www.portoflosangeles.org/newsroom/2008_releases/news_121908cs.asp. China Shipping completed phase II in 2011. See *China Shipping Celebrates Major Terminal Expansion at Port of Los Angeles*, LONGSHORE & SHIPPING NEWS (Apr. 28, 2011), <http://www.longshoreshippingnews.com/2011/04/china-shipping-celebrates-major-terminal-expansion-at-port-of-los-angeles/>.

640. *Port of Los Angeles Hosts First Plugged In Container Ship*, *supra* note 639.

641. Photograph from China Shipping, PORT OF L.A., http://www.portoflosangeles.org/img/ChinaShipping_hi-res.jpg (last visited Nov. 20, 2014).

Hahn's claim turned out to be prescient, as the China Shipping victory reinforced other efforts to stem port-related diesel emissions. At the federal level, the EPA passed a series of rules setting more stringent diesel emission controls on heavy-duty highway vehicles (trucks) to take effect in the 2007 model year,⁶⁴² as well as similar standards on nonroad vehicles (trains and ships).⁶⁴³ At the local level, resident and environmental groups, in newfound alliance, began pressing Mayor James Hahn for stronger city regulation. The ground was laid by Mayor Hahn, who as a candidate promised harbor residents that he would commit to a "no net increase" policy capping port emissions at 2001 levels.⁶⁴⁴ In the face of an expected quadrupling of container traffic at Los Angeles and Long Beach by 2025,⁶⁴⁵ particulate matter from port sources was predicted to increase from 1000 to over 2700 tons per year.⁶⁴⁶ In a letter to San Pedro activist Noel Park, Hahn also committed to "review all past, present and future environmental documents in an open public process to ensure that all laws—particularly those related to environmental projects—have been obeyed, all city procedures followed, and all adverse impacts upon the communities mitigated."⁶⁴⁷ As secession fever raged and the China Shipping fight was at its height, Mayor Hahn, in his first "state of the harbor address," promised to promote a greener port by moving industrial uses to Terminal Island and creating a recreational waterfront promenade from Vincent Thomas Bridge to the breakwater.⁶⁴⁸ As part of his address, Hahn indicated that the port was developing green policies, such as a conversion of port machines to low-emission technology and the creation of a no-net-increase plan.⁶⁴⁹ Some of the items in the speech, such as cold ironing, found their way into the China Shipping agreement. How Hahn planned to implement "no net increase" remained unclear.

Hahn's plan interacted with—and was pushed forward by—the continuous flow of evidence of port pollution and regulatory responses to it. In an environmental report card issued in early 2004, NRDC and the Coalition for Clean Air issued Los Angeles a C– and Long Beach a C for their environmental

642. Control of Air Regulation from New Motor Vehicles, 66 Fed. Reg. 5002, 5002 (Jan. 18, 2001) (codified at 40 C.F.R. pts. 69, 80, 96) (claiming that new regulation "will reduce particulate matter and oxides of nitrogen emissions from heavy duty engines by 90 percent and 95 percent below current standard levels, respectively").

643. Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 69 Fed. Reg. 38,958, 38,960 (June 29, 2004) (codified at 40 C.F.R. pts. 9, 69, 80, 86, 89, 94, 1039, 1048, 1051, 1065, 1068) (regulating nonroad diesel fuel by (among other controls) limiting sulphur levels to fifteen parts per million); see also Jerilyn Lopez Mendoza, Testimony on EPA's Proposed Rulemaking for "Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel," (June 17, 2003) (stressing the importance of the fifteen part per million limit for locomotives and commercial marine engines), available at <https://www.yumpu.com/en/document/view/16924523/testimony-on-epas-proposed-rulemaking-for-environmental->.

644. Deborah Schoch, *City Downplays Port Pollution, Critics Say*, L.A. TIMES, July 9, 2004, at B4.

645. *Id.*

646. Deborah Schoch, *Plan to Cut Port Smog to Be Unveiled*, L.A. TIMES, Dec. 27, 2004, at B1.

647. Deborah Schoch, *Hahn Shift on Port Cleanup Is Criticized*, L.A. TIMES, Nov. 16, 2004, at B3.

648. Louis Sahagun, *Hahn Outlines His Vision for Port*, L.A. TIMES, Dec. 7, 2002, at B4.

649. *Id.*

practices.⁶⁵⁰ In its press release announcing the report card, NRDC stated that the two ports released as much diesel exhaust as 16,000 idling trucks per day.⁶⁵¹ In a subsequent report, NRDC systematically reviewed the negative health impacts of port emissions and made a number of proposals to mitigate them.⁶⁵² Among those recommendations were replacing extremely old trucks, retrofitting others, and mandating the use of cleaner burning fuels.⁶⁵³ In addition, following the China Shipping model, the report recommended moving ships to shoreside electrical power⁶⁵⁴—a proposal advanced by CARB in April. The NRDC report also identified the need for stricter rules on truck idling,⁶⁵⁵ noting that a 2002 bill sponsored by Democratic state Assemblyman Alan Lowenthal from Long Beach, which banned idling for more than thirty minutes outside the port, had been largely circumvented by moving the trucking queue inside port property.⁶⁵⁶ In July 2004, CARB approved a rule prohibiting diesel vehicles of 10,000 pounds or more from idling more than five minutes anywhere.⁶⁵⁷

During this period, Assemblyman Lowenthal upped the pressure on Mayor Hahn to make good on his no-net-increase promise. In February 2004, Lowenthal introduced Assembly Bill 2042, which required the ports of Los Angeles and Long Beach, in concert with the SCAQMD, to set the ports' air quality baseline at 2001 levels and required the ports to "ensure that all future growth . . . will have a zero net increase in air pollution."⁶⁵⁸ The bill, backed by NRDC (fresh off its China Shipping win) and other environmental groups, was strongly opposed by shippers, local chambers of commerce, and the ports themselves. In objecting to the proposed bill, the Pacific Merchant Shipping Association (PMSA)—the industry trade group representing shipping lines and terminal operators—argued that the ports were already developing emission-reducing technology and that the bill "erects

650. See DIANE BAILEY ET AL., NRDC, HARBORING POLLUTION: THE DIRTY TRUTH ABOUT U.S. PORTS 11 (2004), available at <http://www.nrdc.org/air/pollution/ports1/ports.pdf>.

651. Press Release, Natural Res. Def. Council, New Study Says U.S. Seaports Are Largest Urban Polluters (Mar. 22, 2004), <http://www.nrdc.org/media/pressreleases/040322.asp>.

652. DIANE BAILEY ET AL., NRDC, HARBORING POLLUTION: STRATEGIES TO CLEAN UP U.S. PORTS at ix–xii (2004), available at <http://www.nrdc.org/air/pollution/ports/ports2.pdf>.

653. *Id.* at 43.

654. *Id.* at 21.

655. *Id.* at 49.

656. *Id.* at 73. That bill was supported by the Teamsters. Bill Mongelluzzo, *Big Win for Truckers*, TEAMSTER.ORG (Sept. 9, 2002), <http://www.teamster.org/content/joc-big-win-truckers>.

657. CAL. AIR RES. BOARD, FINAL STATEMENTS OF REASONS FOR RULEMAKING (2004), available at <http://www.arb.ca.gov/regact/idling/fsor.pdf> (discussing rationales for and evolution of proposed regulation entitled "Airborne Toxic Control Measure to Limit Diesel-fueled Commercial Motor Vehicle Idling"). The rule was codified at CAL. CODE REGS. tit. 13, § 2485 (2012). CARB later approved a rule requiring 2008 and newer trucks to be equipped with a sleeper switch to automatically shut down idling trucks after five minutes. CAL. CODE REGS. tit. 13, § 1956.8 (2012).

658. *News: Assemblyman Lowenthal Introduces Bill to Require Zero Net Increase in Air Pollution from Future Growth at Ports of LB and LA*, LBREPORT.COM (Feb. 21, 2004), <http://www.lbreport.com/news/feb04/lowprtai.htm>. The bill was part of a trio of bills designed to reduce port emissions, including AB 2041, which imposed a fee on containers shipped by trucks during working hours, and AB 2043, which established a task force to deal with port growth and environmental issues. *Id.*

a vague and potentially prohibitive obstacle to future growth (that would) send a negative message to the international trade community.”⁶⁵⁹ The PMSA also tried to use the complexity of environmental agency jurisdiction to its advantage.⁶⁶⁰ The legislative record stated that the PMSA “cautions against assigning mobile source emission regulation to a regional agency [i.e., the SCAQMD], a prospect that could create ‘islands of divergent authority for sources that travel between air districts (and other state and federal jurisdictions).’ For this reason, they believe authority should remain with the ARB and federal EPA.”⁶⁶¹ Marching in lockstep, the Long Beach Chamber of Commerce similarly objected to the bill’s “conflicting approach to mobile source emissions,” while decrying the 2001 baseline as unrealistic.⁶⁶² Similarly, the Port of Long Beach rejected the baseline as “unachievable,” particularly in light of its lack of authority over ocean going vessels, and reiterated the lack of regulatory clarity.⁶⁶³ In response, Lowenthal amended the bill to reset the emissions baseline to 2002.⁶⁶⁴ Nonetheless, the Long Beach Board of Harbor Commissioners voted to oppose AB 2042,⁶⁶⁵ setting up a conflict with the Long Beach City Council, which the next day unanimously voted to support “AB 2042 in order to protect public health and safety by avoiding an increase in air pollution from the ports of San Pedro Bay.”⁶⁶⁶ The city council thereby directed the city clerk “to transmit a copy of th[e] resolution to the Governor, to the members of the California Legislature representing the Long Beach and Los Angeles areas, and any other officials, agencies, entities, and individuals as may be deemed appropriate.”⁶⁶⁷

It was against this backdrop that environmentalists and harbor residents, armed with the China Shipping victory, set their sights on Long Beach, which had begun to move forward with its own 115-acre expansion project at Pier J in a new attempt to accommodate COSCO—away from the forbidden naval station property.⁶⁶⁸ Pier J, at the southern tip of the port below the venerable Queen Mary, had nearly doubled in size in the early 1990s to accommodate Maersk’s container

659. *Port of Long Beach and Port of Los Angeles: Air Pollution: Hearing on A.B. 2042 Before the Assemb. Comm. on Transp.*, 2003–2004 Leg. Reg. Sess. (Cal. April 12, 2004) (comments of the Pacific Merchant Shipping Association).

660. *Id.*

661. *Id.*

662. *News in Depth: LB Port & LB Council On Collision Course – Again – This Time Over Assemblyman Lowenthal’s AB 2042 For Zero Net Increase In Port Air Pollution*, LBREPORT.COM (May 1, 2004), <http://www.lbreport.com/news/may04/lowbilz.htm>.

663. *Id.*

664. Assemb. B. 2042, 2003–2004 Leg., Reg. Sess. (Cal. 2004) (as amended by Leg. Assembly, May 5, 2004).

665. *News*, LBREPORT.COM (May 3, 2004), <http://www.lbreport.com/news/may04/lowbilz2.htm>.

666. *News: Council Backs AB 2042 (Lowenthal Zero Net Increase in Port Air Pollution) Bill & And Two Related Port-Pollution Bills*, LBREPORT.COM (May 5, 2004), <http://www.lbreport.com/news/may04/lowbilz3.htm>.

667. *Id.*

668. Rick Holguin, *New Terminal Opens, Along with Scores of Jobs*, L.A. TIMES, Apr. 15, 1993, at J1.

vessels and a new on-dock rail yard.⁶⁶⁹ A decade later, the site was targeted for further expansion via landfill designed to increase the pier complex to 385 acres in three phases, to be completed by 2015.⁶⁷⁰ Toward that end—and careful to avoid the problems that beset the China Shipping project next door—the Long Beach Board of Harbor Commissioners circulated a draft EIR for Pier J in 2003.⁶⁷¹ In response, the SCAQMD staff issued two comment letters. The first, sent on February 7 by the CEQA section program supervisor, argued that increased port traffic could contribute to a carbon monoxide hotspot and proposed mitigation measures that included turning off idling trucks and installing electrical connections to plug in docked ships.⁶⁷² The second letter, sent by the planning and rules manager on October 8, homed in on what would become a key objection: that the port had not adequately accounted for increased diesel emission from the project.⁶⁷³ Specifically, the letter argued that in modeling the health risk assessment, the port had assumed a seventy-five percent reduction of diesel emissions from heavy-duty vehicles based on the phase-in of the EPA's 2001 diesel rules and CARB's 2001 Risk Reduction Plan.⁶⁷⁴ However, the SCAQMD contended that because those rules applied prospectively, with the EPA rule not fully phased in until 2010, the port had to factor in delays in emission reduction due to truck turnover—which it had not done, thus understating the impact of increased truck traffic caused by the expansion.⁶⁷⁵

The SCAQMD reiterated this central objection in its July 30, 2004 comments on the final EIR.⁶⁷⁶ NRDC, pivoting from its negotiations on the amended China Shipping settlement, also provided comments critical of the expansion plan.⁶⁷⁷ Although the threat of litigation was only thinly veiled, in August the port nonetheless approved the EIR, triggering an appeal to the city council by NRDC and other groups.⁶⁷⁸ While awaiting the meeting, NRDC's position received further

669. *Id.*

670. Deborah Schoch, *Residents Fight Port Expansion*, L.A. TIMES, Sept. 12, 2004, at B1.

671. Notice of Availability for the Revised Draft Environmental Impact Statement /Environmental Impact Report for the Pier J South Marine Terminal Expansion Project, Los Angeles County, CA, 68 Fed. Reg. 48344 (Aug. 13, 2003).

672. Letter from Steve Smith, Program Supervisor, Cal. Env'tl. Quality Act Section, S. Coast Air Quality Mgmt. Dist., to Dr. Robert Kanter, Dir. of Planning, Port of Long Beach (Feb. 7, 2003) (on file with the UC Irvine Law Review).

673. Letter from Susan Nakamura, Planning & Rules Manager, S. Coast Air Quality Mgmt. Dist., to Dr. Robert Kanter, Dir. of Planning, Port of Long Beach (Oct. 8, 2003) (on file with the UC Irvine Law Review).

674. *Id.*

675. In effect, the port had assumed in its emissions analysis that as of 2007, the first year the EPA rule went into effect, all trucks entering the port would have 2007 model year compliant engines, even though the rule only applied to the production of new trucks—not their purchase. *Id.*

676. Letter from Susan Nakamura, Planning & Rules Manager, S. Coast Air Quality Mgmt. Dist., to Dr. Robert Kanter, Dir. of Planning, Port of Long Beach (July 30, 2004) (on file with the UC Irvine Law Review) (“The AQMD staff remains concerned that operational emissions are underestimated for on-road vehicles.”).

677. Deborah Schoch, *Port's Effort to Cut Smog Is Criticized*, L.A. TIMES, Sept. 15, 2004, at B1.

678. Schoch, *Residents Fight Port Expansion*, *supra* note 670.

support. On September 9, USC researchers released a study in the *New England Journal of Medicine* finding that children who lived in smoggy areas, particularly those surrounding the ports, were more likely to have permanently underdeveloped lungs.⁶⁷⁹ Another USC study found increased rates of cancer downwind of the ports.⁶⁸⁰ Armed with this evidence at the city council meeting on September 14, NRDC's Feuer offered a powerful critique of the Pier J EIR, emphasizing that it did not harmonize with the no-net-increase approach to which the council had already committed and that it incorrectly set 2015 as the air quality baseline despite the fact that phase one construction would be done in 2007.⁶⁸¹ She cited China Shipping as precedent, noting that the EIR did not address feasible plans to reduce emissions like cold ironing. In parrying council member questions about the port's legal authority to mandate cold ironing,⁶⁸² she stressed the port's authority as the landlord: "[T]hat's the power the Port has. The Port can say as a condition of the lease that you need to have plug ins at this facility . . . I think there's no question there's legal authority to do it."⁶⁸³ NRDC was supported by staff from the SCAQMD, but was opposed by some labor union representatives, who questioned the impact on jobs, as well as the port's director of planning, who characterized the NRDC proposals as "pie in the sky."⁶⁸⁴ NRDC, however, carried the day. In the words of Council Member Jackie Kell, Feuer had made the port's EIR "look like a complexion full of zits."⁶⁸⁵

The Long Beach city council decided to delay a vote on the EIR and port staff recommended its rescission. This came on the heels of a harsh letter from the SCAQMD that reiterated its main technical objections, "strongly" recommending that the port "reconsider" the EIR in order to "ensure that requirements" under CEQA and NEPA were met.⁶⁸⁶ Litigation was again threatened.⁶⁸⁷ In light of this, port director of planning Geraldine Knatz supported the EIR's rescission, stating

679. W. James Gauderman et al., *The Effect of Air Pollution on Lung Development from 10 to 18 Years of Age*, 351 *NEW ENG. J. MED.* 1057, 1057 (2004).

680. Deborah Schoch, *County Cancer Pockets Are a Puzzle*, *L.A. TIMES*, Sept. 3, 2004, at B1.

681. *News: Port Pummeled in Hearing on Pier J EIR; Council Gives Both Sides Until Nov. 16 to Discuss Issues Before a Council Vote*, *LBREPORT.COM* (Sept. 14, 2004), <http://www.lbreport.com/news/sep04/pierj.htm>.

682. Long Beach had recently entered into a voluntary agreement with BP to convert two of its vessels to cold ironing by 2006. Deborah Schoch, *Long Beach Port Goes "Green,"* *L.A. TIMES*, Aug. 31, 2004, at B3.

683. *News: Port Pummeled in Hearing on Pier J EIR*, *supra* note 681.

684. *Id.*

685. *Id.*

686. Letter from Barry Wallerstein, Exec. Officer, S. Coast Air Quality Mgmt. Dist., to Dr. Robert Kanter, Dir. of Planning, Port of Long Beach (Sept. 22, 2004) (on file with the UC Irvine Law Review).

687. *Id.* In addition, the SCAQMD flatly rejected the port's claim that the SCAQMD had previously accepted the port's emissions calculation. The SCAQMD denied that it had received a letter from the port addressing its emissions calculation, which the port distributed at the September 14 council meeting to suggest that the SCAQMD had approved of the port's methodology. Deborah Schoch, *Expansion of Port Faces Vote*, *L.A. TIMES*, Sept. 29, 2004, at B1.

that “[o]ur feeling is that we want to have the best document that we can have.”⁶⁸⁸ The board agreed, formally rescinding its approval at a September 29, 2004 meeting.⁶⁸⁹ Keeping on the pressure, Feuer urged the board “not just to go back to address and analyze these issues but . . . to please send the message [to staff] that what they have adopted is not enough, that this Board wants more and that more can be done.”⁶⁹⁰ In response, Commissioner James Hankla applauded NRDC for doing “this Board a great service,” and said that “staff should consider the Board is directing it to evaluate this process de novo and evaluate every single aspect of the EIR from the standpoint of NRDC, Coalition for Clean Air, Earth Corps as well as AQMD.”⁶⁹¹ In recalling this outcome, one NRDC lawyer emphasized its significance, noting that although China Shipping had received the most attention, the Pier J victory was a “pretty big deal because . . . it’s very rare to have an agency go back on its position and win at an administrative level.”⁶⁹²

As a vindication of Long Beach’s no-net-increase stance, Pier J also set the stage for the final battle over AB 2042. As the political debate neared its resolution, no-net-increase opponents succeeded in scaling the bill back—setting the air quality baseline at a more recent year (2004),⁶⁹³ while weakening enforcement.⁶⁹⁴ Even in this watered down state, Governor Arnold Schwarzenegger was not willing to anger the ports and Chamber of Commerce on this issue. Although he asserted that “[i]mproving the quality of our air is a priority of my Administration,” he stated that “this bill will not reduce pollution in any way,” and instead directed the California EPA and CARB “to work with the ports, the railroads, other goods movement facilities, local air districts, the U.S. Environmental Protection Agency . . . and local communities to develop such a program for our ports throughout the state.”⁶⁹⁵ In a nod to industry arguments of jurisdictional competence, he concluded that “[a]s

688. *Id.*

689. *In Depth: LB Bd of Harbor Rescinds Pier J EIR; Port Staff Will Revise It; Emviro Groups Urge Broad Revision; Several Harbor Commissioners Pledge Revision Will Address All Issues*, LBREPORT.COM (Sept. 29, 2004), <http://www.lbreport.com/news/sep04/pierjci2.htm>.

690. *Id.*

691. *Id.*

692. Telephone Interview with Adrian Martinez, Staff Att’y, Natural Res. Def. Council (Apr. 1, 2010).

693. Emissions from ocean vessels, cargo handling equipment, railroad cars, and trucks were to be included. Assemb. B. 2042, 2003–2004 Leg., Reg. Sess. § 40459.1(a)(2) (Cal. 2004) (the bill was passed by the Legislative Assembly on August 25, 2004).

694. Under the revised version, the SCAQMD was required to develop a Memorandum of Agreement (MOA) with CARB and the ports of Los Angeles and Long Beach that would include a “requirement that, on or before January 1, 2006, and on or before January 1 of each year thereafter, the level of air pollution at the Port of Los Angeles and the Port of Long Beach not exceed the baseline.” However, the amended bill did not impose sanctions for failure to enter into an MOA; instead, in the event an MOA could not be negotiated with regulators, the law permitted the ports to develop their own emission baselines and to “operate . . . in a manner that prevents the level of air pollution at the port from exceeding the baseline.” *Id.* §§ 40459.1(c)(1), 40459.2(b), 40459.3(b).

695. AB 2042 Veto Statement by Governor Arnold Schwarzenegger, http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2001-2050/ab_2042_vt_20040929.html (Sept. 29, 2004).

most of the pollution is generated by federally regulated sources, I urge the federal government to provide the necessary incentives and regulations.”⁶⁹⁶

The defeat of no net increase at the state level had the effect of galvanizing efforts around Mayor Hahn’s local initiative. On July 7, 2004, residents were outraged by the release of a Plan to Achieve No Net Increase of Air Emissions at the Port of Los Angeles, authored by the port with the aid of the Houston-based Starcrest Consulting Group.⁶⁹⁷ The plan was presented to the Hahn-created Port Community Advisory Committee.⁶⁹⁸ What upset residents most was the plan’s claim that the port could achieve Hahn’s promise of “no net increase” without any major new programs by assuming a sharp reduction in air pollution based on the China Shipping truck retrofitting program.⁶⁹⁹ Residents objected that the program would only replace 400 of the more than 6000 trucks that were more than twenty years old—and noted even that would not be completed until 2008.⁷⁰⁰

Embarrassed by the blowback, Mayor James Hahn and Council Member Janice Hahn instructed port director Larry Keller to establish a task force to develop a credible strategy.⁷⁰¹ In the wake of the conflict, Keller resigned.⁷⁰² Mayor Hahn appointed a twenty-eight-member No Net Increase Task Force, which began meeting in October 2004 and included Noel Park (also on the Port Community Advisory Committee) and Feuer, along with representatives from industry, labor unions, and other community and environmental groups. Despite this, critics continued to blast the mayor for failing to keep his promise to remediate projects completed prior to 2001.⁷⁰³

The task force persevered, considering a range of initiatives to deal with port emissions, which included an ambitious (and, at \$35 million, expensive) replacement program to convert 1000 old diesel trucks to 2004 clean models.⁷⁰⁴ Industry groups participated but were wary, with one terminal operator suggesting that a plan

696. *Id.* The following year, Schwarzenegger appointed NRDC’s Feuer to be a judge on the Los Angeles County Superior Court. *News: Gov. Schwarzenegger Appoints NRDC’s Gail Ruderman Feuer to Judgeship on L.A. County Superior Court*, LBREPORT.COM (July 27, 2005), <http://www.lbreport.com/news/jul05/feuer.htm>.

697. Schoch, *City Downplays Port Pollution*, *supra* note 644.

698. See Port of Los Angeles Community Advisory Committee, *Joint Subcommittee Meeting with Wilmington Waterfront Development Subcommittee Traffic Committee: Minutes* (Jan. 13, 2005).

699. *Id.*

700. *Id.* Truck pollution remained a significant concern despite the Alameda Corridor rail project, which was proving disappointing. By August 2004, only 40 trains per day ran on the corridor, which was built for 150; in contrast, there were 47,285 trucks per weekday traveling on the 710 freeway, a number expected to increase to 99,300 in 2020. This was the result of changes in the shipping industry in which shippers, instead of loading cargo directly to trains, hauled “most of their imports by truck to hubs in Riverside and San Bernardino counties,” where the cargo was repackaged before being sent to recipients, such as large retail chains. Sharon Bernstein & Deborah Schoch, *New Routes Just for Trucks Urged*, L.A. TIMES, Aug. 22, 2004, at B1.

701. Deborah Schoch, *Mayor Tells Port to Create New Air Plan*, L.A. TIMES, Aug. 13, 2004, at B3.

702. Patrick McGreevy & Deborah Schoch, *L.A. Port Director Resigns*, L.A. TIMES, Sept. 18, 2004, at B1.

703. Schoch, *Hahn Shift on Port Cleanup Is Criticized*, *supra* note 647.

704. Schoch, *Plan to Cut Port Smog to Be Unveiled*, *supra* note 646.

mandating cold ironing would not “survive a constitutional challenge.”⁷⁰⁵ Although the task force was supposed to present a plan to Hahn by December 31, 2004, election year politics appeared to intervene, with the group’s draft proposal delayed until just before the hotly contested primary between Hahn and challenger Antonio Villaraigosa in March 2005.⁷⁰⁶ Yet the delay did not dampen the efforts of the panel, which received a boost from state and federal environmental regulators who began collaborating with members to produce a sustainable plan.⁷⁰⁷ A draft plan was released on March 3, which contained proposals—without attending to cost or feasibility—for cleaner fuel, subsidized new truck conversion, and cold ironing.⁷⁰⁸ The most controversial proposal—converting rail lines to electricity—drew strenuous objection from BNSF and UP, whose attorney complained that “[i]t’s a real stretch when you consider these things don’t exist.”⁷⁰⁹ Despite progress, the plan was perhaps most notable for what it did not include: support from neighboring Long Beach, which rejected an invitation to participate and instead produced its own green port plan in January 2005 without input from air quality regulators.⁷¹⁰ Opining on the Los Angeles plan, Port of Long Beach Planning Director Robert Kanter reiterated the complaints he voiced in the Pier J fight, stating that “[t]here are some radical ideas, pie-in-the-sky ideas, that I don’t think are likely to take place in the near term.”⁷¹¹

Nonetheless, the Los Angeles task force forged ahead, producing an emission-reduction plan projected to prevent 2200 premature deaths over twenty years at a cost of \$11 billion.⁷¹² Yet industry resistance to aspects of the plan prevented consensus; as a result, the task force did not vote to endorse the plan,⁷¹³ but rather simply turned over its recommendations to Mayor Hahn one week before the end of his term.⁷¹⁴ The 600-page report was impressive in its detailed scientific analysis of emissions and in the scope of its policy proposals,⁷¹⁵ which included sixty-eight separate control measures for different emission source categories (ocean going vessels, harbor craft, cargo handling equipment, rail, and heavy duty vehicles).⁷¹⁶

705. Jack Leonard & Deborah Schoch, *Plans for L.A. Port Focus on Pollution*, L.A. TIMES, Dec. 30, 2004, at B3.

706. Deborah Schoch, *Meeting Delay for Hahn Task Force Stirs Concern*, L.A. TIMES, Feb. 10, 2005, at B6.

707. Deborah Schoch, *Port Clean-Air Plan Nearly Set*, L.A. TIMES, Mar. 3, 2005, at B3.

708. Deborah Schoch, *Panel Backs Plan to Curb Pollution at Port*, L.A. TIMES, Mar. 4, 2005, at B3.

709. *Id.*

710. Schoch, *Port Clean-Air Plan Nearly Set*, *supra* note 707.

711. Deborah Schoch, *2 Ports Split on How to Clear the Air*, L.A. TIMES, Mar. 13, 2005, at B1.

712. Deborah Schoch, *Hahn’s Harbor Pollution Plan Faces an Uncertain Future*, L.A. TIMES, June 22, 2005, at B10.

713. *Id.*

714. NO NET INCREASE TASK FORCE, REPORT TO MAYOR HAHN AND COUNCILWOMAN HAHN (2005), available at http://www.portoflosangeles.org/DOC/REPORT_NNI_Final.pdf.

715. *Id.*

716. *Id.* at ES-2. The control measures included proposals to move ocean vessel engines to low sulfur fuel, mandate low-emission rail engines, electrify the Alameda Corridor, expand the low-emission

The plan's basic structure was to offer analysis and recommendations proposed by air regulators and environmentalists, while interlineating industry objections throughout.

In addition to fighting over specific regulations, industry and environmentalists clashed on the issue of the port's legal authority to implement the proposals—a harbinger of fights to come. Section 5 of the report provided a detailed legal analysis that focused primarily on the issue of federal preemption, particularly with respect to the Clean Air Act.⁷¹⁷ That analysis was drafted through rancorous negotiations between SCAQMD and NRDC (particularly Gail Feuer) on one side, and lawyers for the PMSA and rail lines on the other. The result was a carefully worded analysis that offered a sweeping review of preemption doctrine and a proposal-by-proposal legal analysis, which was impressive in its comprehensiveness, while exposing the deep differences between environmental and industry lawyers on the issue of local authority.

While the SCAQMD and NRDC asserted that the port's implementation of no-net-increase measures “could be characterized as proprietary conduct that is exempt from federal preemption under the market participant exemption,”⁷¹⁸ rail and PMSA lawyers were much more skeptical, arguing that the Port of Los Angeles “may not adopt a sweeping set of control measures through its contracts and leases in order to implement broad social policy regarding air quality under the guise of the market participant exception.”⁷¹⁹ The legal gauntlet was thus thrown down. On July 30, 2005—his last day in office—Hahn endorsed the No Net Increase Task Force report and recommended “that the Villaraigosa administration adopt the report's finding to make sure that the Port of Los Angeles is the nation's leader in clean air standards.”⁷²⁰ Although many task force members had hailed the plan as a step in the right direction, some community representatives were disappointed with Hahn's failure to keep his no-net-increase promise, instead tossing the “hot potato” to the next mayor.⁷²¹

For his part, the new mayor seemed determined not to drop it. To the contrary, Villaraigosa—a former union organizer and Democratic speaker of the California Assembly, who had campaigned on a platform of green growth and swept into the mayor's office with a progressive coalition of labor, environmental, and other liberal constituencies—appeared committed to aggressive action to meet the seemingly intractable problem of reconciling port expansion with environmental and community health. His first moves signaled the priority he was to give to greening the ports and building upon the ultimately inadequate Hahn no-net-increase effort.

truck conversion program, retrofit diesel trucks with filters, and impose truck idling reduction measures. *Id.* at 3-4 to 3-9.

717. *Id.* at 5-1 to 5-100.

718. *Id.* at 5-44.

719. *Id.* at 5-50.

720. Deborah Schoch, *Hahn Supports Port Task Force's Plan*, L.A. TIMES, June 30, 2005, at B10.

721. *Id.*

Attention focused on his choice of city commissioners, which constituted a critical exercise of influence that set policy direction for the powerful agencies that shaped Los Angeles.⁷²² For Villaraigosa, filling vacancies on the harbor commission at the Port of Los Angeles was high on his priority list upon taking office. Against the backdrop of China Shipping and the sense that port expansion was threatened by ongoing environmental clashes, the mayor was committed at the outset to appointing board members with environmental experience and community credibility.⁷²³ In addition, the recent resignation of port director Keller left a vacuum in leadership, which the mayor wanted to quickly fill.

The process Villaraigosa initiated to find qualified city commissioners was designed to not simply reward supporters or promote insiders. Upon his election, Villaraigosa convened an advisory group of seventy-five diverse stakeholders and asked them to create a pipeline of applicants for commission positions who were “not the usual suspects,” but rather people “who think outside the box, who are creative, who come from all over the city.”⁷²⁴ One of those people was Jerilyn López Mendoza, a UCLA School of Law graduate and long-time environmental lawyer, who headed the Environmental Justice Project at the Environmental Defense Fund, where she had been for five years.⁷²⁵ In addition to environmental expertise, Mendoza had a deep familiarity with labor issues and the complexity of Los Angeles’s proprietary departments, having just been lead lawyer on the campaign that produced a multi-million dollar community benefits agreement with the Los Angeles International Airport.⁷²⁶ Mendoza was contacted by two members of the Villaraigosa transition team, Paula Daniels, former member of the California Coastal Commission, and Cecilia Estelano, a partner at Munger, Tolles & Olson.⁷²⁷ With their encouragement, Mendoza filled out an application and was soon contacted by a screening firm that, she recalled, “asked me . . . pointed questions, like what was my theory of social change and how did I define my work in terms of environmental justice?”⁷²⁸ Mendoza made it to the final stage, where she met with the mayor, along with Bud Ovrom, deputy mayor for housing and economic development, and Sharon Delugach, who was coordinating commission appointments. At that meeting, Mendoza and the mayor engaged in a lengthy “exchange of monologues, where he would sort of explain things to me from his perspective and then I would

722. Deborah Schoch & Richard Fausset, *Villaraigosa’s Port Panel Choices Suggest New Direction*, L.A. TIMES, July 27, 2005, at B3.

723. Telephone Interview with Jerilyn López Mendoza, Comm’r, L.A. Bd. of Pub. Works & Former Comm’r, L.A. Bd. of Harbor Comm’rs. (Apr. 26, 2013).

724. *Id.*

725. *Id.*

726. *Id.* Mendoza had previously been involved in helping negotiate the first-ever community benefits agreement in connection with the development of the L.A. Live complex in the downtown area.

727. *Id.*

728. *Id.*

sort of explain my perspective based on his perspective.⁷²⁹ In this conversation, Mendoza recalled the mayor laying out his position:

[The Port of Los Angeles is] always going to be a working port It really is just one of our most important economic assets. It's never going to be Marina del Rey. It's never going to be a tourist location My vision for the port is I want to see the cleanest, greenest port in the world Do you think that's possible?⁷³⁰

Mendoza's answer was yes, "if you have the political will."⁷³¹ Her selection as commissioner indicated that the will was indeed there—a view underscored by the appointment of David Freeman, who was former energy secretary to President Carter, general manager of the Tennessee Valley Power Authority, energy czar to Governor Grey Davis, and head of the Los Angeles Department of Water and Power.⁷³² Freeman, a close adviser to Villaraigosa, was considered someone able to get things done.⁷³³ Freeman and Mendoza were appointed in July 2005, and confirmed in September, along with Kaylynn Kim, a private attorney; Doug Krause, general counsel of East West Bank; and Joe Radisich, president of the Southern California District Council of the ILWU.⁷³⁴

The new board immediately signaled a different approach, holding its first scheduled meeting in an overflowing community center in Wilmington,⁷³⁵ rather than its traditional spot in the San Pedro Harbor Administration Building.⁷³⁶ There, Freeman, as board president, criticized the Hahn no-net-increase plan's 2001 emissions baseline, telling the crowd, "[s]urely, you can't settle on that."⁷³⁷ He asked port staff to evaluate the Hahn task force plan, moving with a greater sense of urgency by requesting a review of which proposals could be accelerated and expanded.⁷³⁸

This urgency was heightened as multiple regulatory bodies vied to restrict port emissions. The SCAQMD's chairman calculated that the ports produced 100 tons of NOx a day, more than six million cars, while also producing twenty percent of the region's diesel particulate matter, responsible for 1700 premature deaths a year.⁷³⁹ In response, the SCAQMD sought guidance from its lawyers to find

729. *Id.*

730. *Id.*

731. *Id.*

732. *Id.*

733. Schoch & Fausset, *Villaraigosa's Port Panel Choices Suggest New Direction*, *supra* note 722.

734. *Id.*

735. Deborah Schoch, *A Radical Shift in Tone for L.A. Harbor Panel*, L.A. TIMES, Sept. 16, 2005, at B4.

736. Deborah Schoch, *Wilmington Looks to Step Out from Under Port's Shadow*, L.A. TIMES, Sept. 14, 2005, at B4.

737. Schoch, *A Radical Shift in Tone for L.A. Harbor Panel*, *supra* note 735.

738. Deborah Schoch, *New Harbor Panel Aims to Cut Pollution While Expanding Port*, L.A. TIMES, Sept. 29, 2005, at B6.

739. Deborah Schoch, *Panel to Target Air Pollution at Southland Ports*, L.A. TIMES, Nov. 5, 2005, at B3.

authority to regulate the port complex as a single stationary source.⁷⁴⁰ CARB kept the pressure up, finding that the port increased cancer risk up to fifteen miles away,⁷⁴¹ while also linking cargo transportation, particularly near the port, to a host of health problems, which it estimated cost over \$6 billion to treat.⁷⁴² CARB's study found that 2400 people died annually as a result of port-related air pollution, many of them in surrounding neighborhoods.⁷⁴³

Public health care costs and ongoing community opposition pushed forward regulatory action.⁷⁴⁴ In April 2006, as part of a Governor Schwarzenegger-sponsored initiative to meet federal clean air deadlines, CARB approved a plan to reduce goods-movement emissions to 2001 levels through a variety of proposals—including cleaner ship fuel, cold ironing, and replacing old diesel trucks.⁷⁴⁵ Yet the lack of funding or mandatory requirements caused Harbor Commission President David Freeman to scoff: “Are they ordering people to do things? No? Then what the hell good are they?”⁷⁴⁶ Community residents also complained.⁷⁴⁷ Regulatory agencies and environmentalists pointed fingers, with state agencies contending that they had no authority to regulate the biggest polluters—ocean going vessels and railroads—while NRDC disagreed.⁷⁴⁸ The port, for its part, attempted to negotiate emission reductions into ocean vessel leases, while the shipping industry was developing its own market-based emission control plan.⁷⁴⁹ The challenge for the Villaraigosa administration was promoting the Los Angeles port as a regional growth engine, while dealing with its “bad reputation” as a source of pollution and other community detriments.⁷⁵⁰

Commissioners Freeman and Mendoza explicitly viewed meeting this challenge as their primary goal. As Freeman remembered, tackling the green growth problem

was the reason the mayor named me and [Mendoza] and people like that to get the job done. . . . I mean, obviously the exact details of how we were going to go about it were not preordained, but . . . I was put on there because of my environmental credentials and the fact that the mayor knew

740. *Id.*

741. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, DIESEL PARTICULATE MATTER EXPOSURE ASSESSMENT STUDY FOR THE PORTS OF LOS ANGELES AND LONG BEACH 2 (2005), available at <http://www.arb.ca.gov/ports/marinevess/documents/100305draftexposrep.pdf> (draft version).

742. Deborah Schoch, *Study Links Diesel Fumes to Illnesses*, L.A. TIMES, Dec. 3, 2005, at B3.

743. AIR RES. BD., *supra* note 741, at 4.

744. Janet Wilson, *Trade Boom's Unintended Costs*, L.A. TIMES, Apr. 23, 2006, at B1.

745. Janet Wilson, *Pollution Plan on Haulers Nears OK*, L.A. TIMES, Apr. 20, 2006, at B3.

746. *Id.*

747. Wilson, *Trade Boom's Unintended Costs*, *supra* note 744.

748. *Id.*

749. *Id.*

750. Ronald D. White, *Growing Problems Give Ports a Bad Reputation*, L.A. TIMES, May 4, 2005, at C1 (referencing the L.A. County Economic Development Corp. study indicating that “the ports and their related industries continue to be a reliable job generator, adding 42,600 jobs in the five-county area last year to a total of 404,600 workers”).

me as a person that wasn't just a bullshit artist but kind of made things happen that we talked about.⁷⁵¹

As Mendoza recalled, the board viewed its mission as executing the mayor's goal of making the Port of Los Angeles "the cleanest, greenest port in the world."⁷⁵² In discussing how to do that, the commissioners quickly

realized two things: one was everything we did had to be in close coordination with Long Beach. [Without coordination,] the customers and other people who work and live at the port would just move over to Long Beach where they didn't have to deal with it The second thing we realized was that we weren't going to get anything done unless we adjust all sources of pollution . . . even though we knew that trucks were of primary concern⁷⁵³

The commission moved assertively on both fronts.

To promote inter-port cooperation, the first order of business was hiring a port director that could reach across the bay to her Long Beach counterparts. That process was managed within the mayor's office by small group of advisors that included David Libatique, who became part of Villaraigosa's transition team and then was assigned to the Los Angeles Business Team as port liaison, under the supervision of Deputy Mayor Bud Ovrarm.⁷⁵⁴ Libatique joined Villaraigosa's transition team in 2005 after working as a deputy to Council Member Martin Ludlow.⁷⁵⁵ With a master's degree in public policy from Harvard, Libatique was a policy generalist who was charged during the mayoral transition with preparing background memos on the ports. It was "a natural fit" and Libatique immediately found himself enmeshed in port-related air quality work.⁷⁵⁶ Libatique helped vet the port director candidates, ultimately presenting three to the mayor.⁷⁵⁷ The goal was to find a new director who would "focus on dealing with the environmental impacts but create a path forward for the port to continue to be an economic engine for . . . the city."⁷⁵⁸ In January 2006, the mayor selected Geraldine Knatz, formerly managing director of the Port of Long Beach, who held a doctorate in biological science and was viewed as a strong supporter of "greening and growing."⁷⁵⁹ With twenty-three years of experience at Long Beach, Knatz was also seen as a bridge builder who could advance the coordination agenda.⁷⁶⁰

With Knatz in place, the commission reached out to Long Beach to advance

751. Telephone Interview with S. David Freeman, Interim Gen. Manager, L.A. Dep't of Water & Power Water Sys. & Former Comm'r, L.A. Bd. of Harbor Comm'rs (Apr. 29, 2013).

752. Telephone Interview with Jerilyn López Mendoza, *supra* note 723.

753. *Id.*

754. Telephone Interview with David Libatique, Senior Dir., Gov't Affairs, Port of L.A. (June 2, 2013).

755. *Id.*

756. *Id.*

757. *Id.* Libatique also vetted the candidates for the harbor commission.

758. *Id.*

759. Jim Newton, *Once Rivals, Local Ports Clear Air in Partnership*, L.A. TIMES, July 4, 2006, at A1.

760. *Id.*

a joint plan that would attempt to comprehensively address the port complex's multiple sources of pollution—recognizing that when it came to pollution, there was no “dividing line in the air.”⁷⁶¹ Although the mayor made his harbor commission and port director selections with “green growth” in mind, Libatique recalled that “there wasn’t that much advanced planning about how everything was going to roll out.”⁷⁶² Instead, the mayor entrusted his new team to develop a plan, which it quickly set to do. Shortly after Knatz was hired, she and Freeman met with their Long Beach counterparts to set a framework for discussions that would lead to a comprehensive policy—to be called the Clean Air Action Plan (CAAP).⁷⁶³ With the process and goals agreed upon, both ports’ harbor commissions began holding joint monthly meetings to discuss the details. Mayor Villaraigosa reached out to union leaders to gain their support, arguing that enhanced environmental standards at the port were good for the health of union members.⁷⁶⁴ Commissioners and port staff also met with industry leaders to get them on board. With labor and environmentalists aligned behind a new plan, industry was on the defensive. According to Freeman, the message to industry representatives was clear: the ports could promise expansion only if shippers and other industry players agreed to clean up the system. In Freeman’s terms, the board said “you come to us with an expansion proposal and we’ll approve it . . . [if you] clean up what you’re doing.”⁷⁶⁵

Both commissions were in a position to facilitate growth plans provided that they complied with environmental goals. It was ultimately the ports’ power to reject or delay expansion that provided the leverage needed to get industry buy in. And although shippers and carriers had other ports they could use, those ports were generally not as attractive because of preexisting infrastructure investments in Los Angeles and Long Beach, as well as access to the lucrative regional market.⁷⁶⁶ It was in this context that the Los Angeles and Long Beach harbor commissions developed the outlines of CAAP, a draft of which was circulated in July 2006.⁷⁶⁷ The main approach was to regulate emission sources tied to the ports—by, for example, requiring docked ships to burn cleaner fuel or adopt cold ironing.⁷⁶⁸ Other parts of the plan referenced ambitious goals for overall emission reductions, but the outlines were still tentative.⁷⁶⁹

By the time the final plan was released in November 2006, a focus on trucks had crystallized.⁷⁷⁰ While the draft plan was vague on the trucks piece, the final plan

761. Telephone Interview with Adrian Martinez, *supra* note 692.

762. Telephone Interview with David Libatique, *supra* note 754.

763. *Id.*

764. Newton, *Once Rivals, Local Ports Clear Air in Partnership*, *supra* note 759.

765. Telephone Interview with S. David Freeman, *supra* note 751.

766. At the Port of Los Angeles, approximately fifty percent of containers are routed locally to Los Angeles, Riverside, San Bernardino, and Ventura Counties. Interview with John Holmes, *supra* note 148.

767. Newton, *Once Rivals, Local Ports Clear Air in Partnership*, *supra* note 759.

768. *Id.*

769. *Id.*

770. Other proposals were also important, including the recommendation to require ships to

emphasized replacing the diesel trucks that accessed the port and offered a clearer road map to effectuate that goal.⁷⁷¹ Although explicitly presented as a “living document,” the CAAP Technical Report, through Control Measure HDV1, provided a clear emission control framework for “Heavy-Duty Vehicles”—which formed the foundation for what would ultimately become the Clean Truck Program. The report’s central contribution was to recognize that port drayage trucks, on average over ten years old, were a significant source of air pollution and to call for the rapid greening of the entire drayage truck fleet serving the ports within a five-year period.⁷⁷² In order to cut diesel emissions by nearly half, the report focused on replacing and retrofitting what it estimated to be the 16,800 “frequent and semi-frequent trucks” that accounted for roughly eighty percent of all port calls.⁷⁷³ The goal was to achieve “clean” standards, which meant replacing or upgrading all “frequent caller” trucks (those that made more than seven calls per week) to meet EPA 2007 emission standards; for “semi-frequent caller” trucks (3.5 to 7 calls per week), the goal was to replace or upgrade trucks that were model year 1992 or older, while retrofitting newer trucks with certified emission reduction technologies.⁷⁷⁴ To do this, the report proposed to provide “significant incentives to owner/operators to encourage accelerated turnover/retrofits, and on the terminal side to maximize the use of ‘clean’ trucks through lease requirements and/or other mechanisms.”⁷⁷⁵

The financial impacts of various incentive programs were modeled, with the main proposal to replace roughly half the trucks and retrofit the other half estimated to cost approximately \$1.8 billion.⁷⁷⁶ The report acknowledged that even with ports contributing \$300 million and the SCAQMD another \$36 million,⁷⁷⁷ “additional funding on a massive scale will be needed.”⁷⁷⁸ Only a tentative implementation framework was provided, with several options put on the table to move the ambitious plan forward, ranging from those imposing costs directly on drivers to those shifting all costs to the public.⁷⁷⁹ Each plan was evaluated in light of emissions goals but also taking into account “wages/quality of life” for truck drivers.⁷⁸⁰ Proposals included requiring individual drivers to display an emblem indicating emission compliance; imposing an “impact fee at the gate” on dirty trucks; assigning

burn sulfur fuel within twenty miles of the port and dock with electrical power. PORT OF LONG BEACH & PORT OF L.A., SAN PEDRO BAY PORTS CLEAN AIR ACTION PLAN: TECHNICAL REPORT 6, 87 (2006), available at http://www.portoflosangeles.org/CAAP/CAAP_Tech_Report_Final.pdf.

771. Janet Wilson, *Diesel Trucks Target of Port Plan*, L.A. TIMES, Nov. 7, 2006, at B3.

772. PORT OF LONG BEACH & PORT OF L.A., *supra* note 770, at 4.

773. *Id.* at 57.

774. *Id.* at 59. The report also assumed that 500 trucks would be replaced through the China Shipping-created Gateway Cities program. *Id.*

775. *Id.* at 58.

776. *Id.* at 62–63.

777. *Id.* at 71.

778. *Id.* at 59. The report estimated that LNG trucks would cost \$188,500, while clean diesel trucks would cost \$129,500 to replace. Retrofitting was estimated at \$19,500 per truck. *Id.* at 60.

779. *Id.* at 67–70.

780. *Id.* at 68.

exclusive franchises to clean trucking companies “that can document that their drivers are paid a ‘prevailing wage’”; creating a joint powers authority that would buy trucks and hire drivers, thus competing with existing for-profit companies; and having the ports directly buy trucks and hire drivers, mandating that only city drivers would be allowed on port property.⁷⁸¹ The commissioners included a specific timeline for action because “we didn’t want it to be just a clean air plan that implied it was going to be put on a shelf somewhere.”⁷⁸² Thus, they asked port staff to develop “further program details” and an “implementation plan” for review and approval “by end of 1st quarter 2007.”⁷⁸³

On November 20, 2006, after a raucous, four-hour joint session of the harbor commissions,⁷⁸⁴ at which numerous residents and officials (including the mayor) testified, both ports approved CAAP by a unanimous vote.⁷⁸⁵ As if to further underline the importance of the trucking piece, the presidents of both ports read a statement into the record, which directed their “respective staffs to work expeditiously to bring forward a plan” to tackle the “dirty truck problem.”⁷⁸⁶ The “skeletal outline” of this program included “a 5-year, focused effort to replace or retrofit the entire fleet of over 16,000 trucks that regularly serve our Ports with trucks that at least meet the 2007 control standards and that are driven by people who at least earn the prevailing wage.”⁷⁸⁷ The directive made clear that the ports were to restrict noncompliant trucks from entry and that the fees necessary to fund the program “would be imposed on ‘shippers,’ and not on the drivers.”⁷⁸⁸ Furthermore, the ports were instructed to “invite private enterprise trucking companies to hire the drivers on terms that offer the proper incentives and conditions to achieve the Clean Air Action Plan goals while resulting in adequately paid drivers.”⁷⁸⁹ The goal of CAAP was to reduce diesel truck emissions by eighty percent.⁷⁹⁰

781. *Id.* at 68–70.

782. The deadlines were “so that the community would know that we were taking their concerns seriously but also so that our business contacts, our tenants and our customers would know and have certainty about what was going to be expected of them in terms of delivering cleaner air to the public.” Telephone Interview with Jerilyn López Mendoza, *supra* note 723.

783. PORT OF LONG BEACH & PORT OF L.A., *supra* note 770, at 73.

784. See *San Pedro Bay Ports Clean Air Action Plan Joint Board Meeting* (Nov. 20, 2006), http://lacity.granicus.com/MediaPlayer.php?view_id=14&clip_id=1211.

785. The mayor urged the port to “grow green, but grow indeed,” noting that port growth would support 1.9 million regional jobs. Janet Wilson, *Port Panels OK Plan to Cut Pollution*, L.A. TIMES, Nov. 21, 2006, at B3.

786. *Statements of the Presidents of the Los Angeles Board of Harbor Commissioners and the Long Beach Board of Harbor Commissioners*, in PORT OF L.A. & PORT OF LONG BEACH, *supra* note 770.

787. *Id.*

788. *Id.*

789. *Id.*

790. Louis Sahagun, *Port OKs ‘Green’ Cargo Fee*, L.A. TIMES, Dec. 18, 2007, at B1. As part of this effort, the port and SCAQMD funded the production of electric drayage trucks in conjunction with Balqon Corporation. See Press Release, Port of Los Angeles, Mayor Villaraigosa Drives First Heavy-Duty, Electric Port Drayage Truck off the Assembly Line at New Harbor City Factory (Feb. 24, 2009), http://www.portoflosangeles.org/newsroom/2009_releases/news_022409_etruck.asp.

Although the vote was hailed as a serious step toward addressing the “diesel death zone,” large questions remained about CAAP’s implementation and funding, despite pledges from the ports of \$200 million and the SCAQMD of \$48 million, as well as the passage of state Proposition 1B, which authorized \$20 billion in bond funding for transportation projects, \$1 billion of which was targeted to support air clean up.⁷⁹¹ The focus on trucks previewed—and was pushed forward by—the emergence of a new environmental-labor alliance that saw clean trucks as a way to achieve emission reductions, while advancing the Teamsters’ long-standing goal of unionizing port truckers. Evidence of this was on display at the final joint port meeting on CAAP, where truckers testified and parked outside in solidarity, while NRDC lawyer Melissa Lin Perrella made the sustainability argument that would define the clean trucks campaign: “The problem is that if you give a poor truck driver a clean truck, he needs to be able to afford maintaining it.”⁷⁹² Reducing pollution over the long term would require raising the standards of the truck drivers. The campaign for clean trucks was thus born.

IV. REFORMING THE PORTS: THE CAMPAIGN FOR CLEAN TRUCKS

A. *The Alliance: Forming the Coalition*

1. *Personnel*

How CAAP came to focus on clean trucks was in part a story of regulatory efficacy. In the complex jurisdictional framework for air regulation, drayage trucks that serviced the ports came to be viewed as within port control in a way that ocean going vessels and rail trains were not. Yet the move toward clean trucks was also a product of political opportunity and interest convergence. Opportunity was built upon the ports’ need to develop a sustainable growth plan for the future that accounted for environmental concerns. All stakeholders recognized the need for a sustainable emission control framework. The question was what it would look like. By highlighting the need to clean up 16,000 dirty diesel trucks, CAAP made a potential link between environmentalism and unionism—which the labor movement was eager to strengthen. Hence, cleaning up trucks was connected to the concept of transforming the structure of the drayage truck industry in a way that implicated drivers’ employment status. For organized labor, environmentalists brought the regulatory leverage and community activists brought the grassroots credibility. For environmental and community leaders, labor brought political heft and the ability to move local power.

There were both top-down and bottom-up processes at play. The top-down process was driven by Change to Win, which was in the midst of formulating its ports strategy, focused on the concession model, at the very moment the CAAP

791. Janet Wilson, *Trucks Targeted in Clean-Air Drive*, L.A. TIMES, Nov. 12, 2006, at B1.

792. *Id.*

process was moving toward its approval. The intersection between Change to Win's ports campaign and CAAP occurred by design, but the precise timing was somewhat fortuitous. The Blue-Green Alliance, a formal collaboration between labor and environmental groups, was founded as way to overcome historic antagonisms to develop policies that created good jobs and a healthy environment. Carl Pope, director of the Sierra Club, announced an initial agreement between the Sierra Club and the United Steel Workers union in June 2006.⁷⁹³ He then began meeting with other labor leaders to build out the alliance.

In July, Pope met with top officials at Change to Win to discuss potential collaborations. At that time, although Change to Win had begun to move forward with its five-port concession strategy, the ports team did not have a strong grasp of the local situation in Los Angeles. The Sierra Club, in contrast, had just completed a video about the China Shipping case—called “Terminal Impact”⁷⁹⁴—and, through the local chapter, was deeply engaged in ongoing efforts to stem port pollution. It was also around this time that news reports indicated that Dubai was trying to buy a terminal at the Port of Los Angeles, which raised security concerns.⁷⁹⁵ In discussing Change to Win's ports campaign, Pope, who was closely connected to local Sierra Club activists, mentioned the CAAP process. Change to Win's Nick Weiner, who was at the July meeting, remembered that Pope's mention of Los Angeles, although “just happenstance,” allowed the port's team to key in on Los Angeles as an auspicious site and to “connect the dots” between the concession model and the environmental piece.⁷⁹⁶ As Weiner recalled, “we discovered that, oh right, these are old polluting trucks and they contribute to the pollution in L.A. in particular. [The Pope meeting] kind of just happened . . . around the same time so that we were able to then further develop [the concession] theory.”⁷⁹⁷

From there, Weiner and his colleagues were assigned to “figure out L.A.,”⁷⁹⁸ a task they undertook with speed and intensity. Weiner and John Canham-Clyne immediately reached out to Maria Elena Durazo, head of the powerful Los Angeles County Federation of Labor, and Madeline Janis, director of the Los Angeles Alliance for a New Economy (LAANE), which was known for spearheading passage of Los Angeles's Living Wage Ordinance in 1997.⁷⁹⁹ LAANE's mission, creating a “new economy that works for everyone,” was advanced by “championing the role that local government can play in nudging either individual industries or the

793. Carl Pope, *A New Blue-Green Alliance Is Born*, HUFFINGTON POST (June 8, 2006, 4:53 PM), http://www.huffingtonpost.com/carl-pope/a-new-bluegreen-alliance-_b_22558.html.

794. The video was narrated by Diane Keaton. See Natural Res. Def. Council, *Terminal Impact*, YOUTUBE (Sept. 1 2006), <http://www.youtube.com/watch?v=qOUBj1ssjKs>.

795. Telephone Interview with Nick Weiner, *supra* note 480.

796. *Id.*

797. *Id.*

798. *Id.*

799. Telephone Interview with John Canham-Clyne, *supra* note 479.

broader regional economy.”⁸⁰⁰ With LAANE’s support, the campaign “took off,”⁸⁰¹ with the goal of passing a concession policy at the ports of Los Angeles and Long Beach. Although Change to Win launched its campaign nationwide, there was optimism about Los Angeles because “the politicians and politics lined up . . . [and] our ability to build a coalition lined up” because the “infrastructure was already there.”⁸⁰² For Canham-Clyne, the key factors leading to Los Angeles were the strength of the local labor movement, which had helped elect Mayor Villaraigosa and held him accountable; the “air quality crisis” and the work of environmental groups to address it; and the “very specific willingness of [the] drivers to fight.”⁸⁰³ It was on this basis that Change to Win focused its energy on Los Angeles.

The first order of business was to mobilize local infrastructure in support of the campaign. “Change to Win always felt strongly that . . . to be effective on the ground, you needed a lot of people who really knew the landscape.”⁸⁰⁴ Change to Win chose LAANE, known for its sophisticated campaign research and policy work, to house staff and be the focal point of the coalition building process. As Canham-Clyne recalled, “We did want to make sure that LAANE was involved . . . because they had demonstrated experience in bringing together community organizations and the labor movement in ways that actually functioned.”⁸⁰⁵ Change to Win thus made an initial funding grant to LAANE in order to support campaign hiring and administrative assistance.⁸⁰⁶ Hiring was overseen by Change to Win’s Weiner and Canham-Clyne, who sought to bring in personnel with skills necessary to move the port agenda. A key member of this team was Jon Zerolnick, who joined LAANE in 2006.⁸⁰⁷ A Yale undergraduate who pursued graduate labor studies at the University of Massachusetts, Zerolnick was a researcher with deep experience in corporate campaigns.⁸⁰⁸ During college, he worked in the dining halls as a member of HERE Local 35 (with which he went on strike). During graduate school, he interned with HERE Local 11 in Los Angeles. When HERE offered to hire him full-time, Zerolnick dropped out of graduate school and went to Las Vegas to work on a culinary workers campaign with Local 226.⁸⁰⁹ He then served as a researcher on a campaign to organize workers at the Venetian hotel. From there, Zerolnick went to Denver to join the AFL-CIO on a

800. Jon Zerolnick, *The Clean and Safe Ports Campaign: False Dichotomies and the Underground Economy Versus Coalition-Building and the Power of Local Government* 9 (unpublished manuscript) (on file with the UC Irvine Law Review).

801. Telephone Interview with Nick Weiner, *supra* note 480.

802. *Id.*

803. Telephone Interview with John Canham-Clyne, *supra* note 479.

804. *Id.*

805. *Id.*

806. Interview with Patricia Castellanos, Director of Clean and Safe Ports Project (Feb. 23, 2012).

807. Interview with Jon Zerolnick, Senior Research & Policy Analyst, L.A. Alliance for a New Economy (Feb. 23, 2012).

808. *Id.*

809. *Id.*

multi-union organizing campaign at the Denver International Airport and then came to Los Angeles in 2002 to staff the research department of the United Farmworkers union.⁸¹⁰ When the Change to Win split occurred, he consulted with unions for a while until he received a call from Canham-Clyne in 2006, inviting him to become part of the ports team at LAANE, to which Zerolnick was already attracted because of “the overlap of policy and . . . coalition building and organizing.”⁸¹¹

Zerolnick was soon joined by Patricia Castellanos, who was technically hired first after an interview with Canham-Clyne but took some time off and thus started just after Zerolnick.⁸¹² Castellanos brought a number of key experiences and skills as an organizer with the proven “ability to build coalitions.”⁸¹³ She had roots in the South Bay after working there on a number of electoral campaigns in the early 1990s, including the fight against the anti-immigrant initiative, Proposition 187.⁸¹⁴ She then spent nearly a decade at AGENDA, a South Los Angeles-based community organizing group and progressive think tank, where she worked on policy and education campaigns with environmental justice groups around the country.⁸¹⁵ Castellanos also brought connections to the mayor’s office. She had campaigned for Villaraigosa in 2005 and joined his staff once he was elected, working on goods movement policy under Larry Frank in the Neighborhood Services office, where she was “trying to build relationships for the mayor in that area.”⁸¹⁶ Like Zerolnick, Castellanos was affirmatively recruited. She had “heard rumblings” about the ports campaign when Canham-Clyne called to ask if she was interested.⁸¹⁷ Roxana Tynan from LAANE also reached out to encourage Castellanos, who joined the staff in August 2006 and spent the first few months applying for foundation grants to staff the project at “a high level.”⁸¹⁸ She succeeded in securing an initial grant from Hewlett Packard and gradually increased funding to support two organizers and three researchers at the height of the campaign.⁸¹⁹ Although they were both housed at LAANE, which was the campaign’s “glue,” Castellanos and Zerolnick worked with Weiner and Canham-Clyne in an “integrated” relationship in which they considered themselves “all staff together.”⁸²⁰

From the outset, the campaign’s mission was advancing the concession concept designed by Weiner and Canham-Clyne. In its basic form, the concept was to use the port’s legal authority as a market actor to require drayage trucking

810. *Id.*

811. *Id.*

812. Interview with Patricia Castellanos, *supra* note 806.

813. Telephone Interview with John Canham-Clyne, *supra* note 479.

814. Interview with Patricia Castellanos, *supra* note 806.

815. *Id.*

816. *Id.*

817. *Id.*

818. *Id.*

819. *Id.*

820. Telephone Interview with Nick Weiner, Nat’l Campaigns Organizer, Change to Win (Apr. 25, 2013).

companies to effectuate a double conversion: of their fleet to clean trucks and of their drivers to employees. The market-based rationale, which formed the legal hook upon which the plan rested, was that the double conversion was necessary to provide sustainable emission reductions which were, in turn, necessary to ensure stable port growth. Employee conversion was key to making the trucking companies internalize the long-term costs of clean fleet acquisition and maintenance. A short-term subsidy could incentivize the drivers to buy clean trucks. But to have those trucks maintained over time required that they be owned by the entities best able to bear that cost: the trucking companies themselves. When Weiner and Canham-Clyne reached out to LAANE, they had already fully “hatched this idea” in D.C.⁸²¹ Thus, at the point of initial coalition building, Zerolnick and Castellanos understood that the plan, though still incomplete, would adopt the “essence” of what had been developed by Change to Win, in conversation with LAANE and key environmental groups, and that it involved the “port creating a direct contractual relationship with trucking companies.”⁸²²

Weiner and Canham-Clyne advanced the concession model against the backdrop of careful legal analysis, which had been conducted by the Teamsters’ Mike Manley and Andrew Kahn of the Teamsters’ outside law firm Davis, Cowell & Bowe in San Francisco. The Teamsters retained Kahn because they needed California counsel and because Kahn and Richard McCracken, another partner at Davis, Cowell & Bowe, had been involved in the early conversations about port organizing—and were among the nation’s leading labor lawyers on strategic campaign work. The legal question to Manley and Kahn was: “politically if we could pull this off, would it withstand challenge?”⁸²³ Their analysis looked at the possibility of a lawsuit based on federal preemption and also researched potential actions by the Federal Maritime Commission under the Shipping Act. With respect to the commission, the lawyers concluded that the employee provision was not discriminatory and met the Shipping Act’s reasonableness test.⁸²⁴ On preemption, their conclusion was that “we should be okay. A port would have authority, as a market participant and as a matter of its proprietary rights, to restrict who could come onto its property.”⁸²⁵ The lawyers were sure that the American Trucking Associations (ATA) would sue the ports if the Clean Truck Program passed, but they believed that the ports would ultimately prevail. With Manley’s analysis of the program as a valid exercise of port authority, the campaign was given legal clearance. As Weiner recalled, “the attorneys thought we had a pretty good case in the Ninth Circuit” and the “likelihood was remote” that the Supreme Court would ultimately take the case.⁸²⁶

821. Telephone Interview with Nick Weiner, *supra* note 480.

822. Interview with Jon Zerolnick, *supra* note 807.

823. Telephone Interview with Michael Manley, *supra* note 460.

824. *Id.*

825. *Id.*

826. Telephone Interview with Nick Weiner, *supra* note 480.

2. *Partnerships*

The campaign's critical first steps involved bringing together a diverse range of partner groups with the expertise to shape policy and the power to move political decision makers. Key among these groups were labor, environmental and environmental justice organizations, public health advocates, and faith-based groups. For LAANE, the initial goal was to convince partner organizations that addressing environmental and community impacts meant transforming the port trucking industry in a way that achieved employee conversion.⁸²⁷

The campaign was built upon the political power of organized labor and thus solidifying local union alliances was a crucial starting point. Getting buy-in from the "blue" side of the blue-green alliance was important given historical tension between unions and environmentalists, particularly around the port where unions like the ILWU and Building and Trades Council viewed environmental roadblocks to port expansion as inconsistent with their members' economic interests. As the campaign got underway, LAANE met with local union leaders from ILWU Local 13 and Teamsters Local 848, both of which had been active on port trucking issues.⁸²⁸ Dave Arian from ILWU Local 13 and Miguel Lopez from Teamsters Local 848 were key leaders, who would come to play important roles in the CAAP implementation process. Lopez, as the Teamsters port division representative, was deeply involved in efforts to organize port truckers. In 2004, he led a petition to the Port of Los Angeles to make shippers and terminal operators pay a fuel surcharge to compensate drivers for increased diesel costs.⁸²⁹ The following year, he and ILWU Local 13 President Mark Mendoza organized a protest against the new Los Angeles and Long Beach PierPass system, which assessed a cargo fee during peak hours to permit ports to stay open four nights a week and Saturdays—forcing truckers to work extended shifts without more compensation.⁸³⁰ Yet despite this collaboration, there were tensions between the ILWU and Teamsters from the outset, reflecting longstanding interests. The Teamsters had nothing to lose in the campaign and everything to gain. With no port drivers under union contract, the Teamsters saw fixing the independent-contractor problem as a solution to one of the union's most intractable organizing dilemmas. For the ILWU, in contrast, the campaign posed serious risks to its already strong position at the ports since any reduction of port activity meant a potential threat to its membership. In line with

827. See, e.g., Colleen Callahan, Clean Trucks Program Case Study (unpublished manuscript) (on file with the UC Irvine Law Review).

828. See Press Release, Int'l Bhd. of Teamsters, Teamsters and ILWU Announce Port Legislation Strategy (Feb. 4, 2002), available at <http://teamster.org/content/teamsters-and-ilwu-announce-port-legislation-strategy> (noting that the unions were joining to support state bills to force terminal operators to pay fines for making truckers idle while waiting for cargo and to require trucks to be safety certified).

829. See *Teamsters Deny Any Role in Planning Work Shutdown for L.A. Port Drivers*, AM. SHIPPER, Apr. 28, 2004, available at <http://www.labornet.org/news/0504/lateamst.htm>.

830. See Scott Martindale, *Port Truckers Rally Against Off-Hours Plan*, DAILY BREEZE, July 25, 2005, available at <http://teamster.org/content/daily-breeze-port-truckers-rally-against-hours-plan>.

these divergent positions, the Teamsters locals (848 in Long Beach and 63 in East Los Angeles) signed on to the campaign—with Miguel Lopez eventually joining the campaign’s steering committee—while the ILWU declined.

To gain traction with the ports, the coalition had to send a “strong message . . . that you can’t expand unless you are going to clean up your pollution.”⁸³¹ The environmentalists brought the “legal muscle” to make good on this threat and thus were crucial allies in the overall plan.⁸³² Castellanos was the point person for outreach and took the first steps toward building and deepening relations with environmental partners. Some of this groundwork had already been laid by LAANE’s participation in an earlier campaign to negotiate a community benefits agreement with LAX, in which LAANE worked with environmental advocates—particularly Jerilyn López Mendoza of Environmental Defense—in crafting a half-billion dollar community benefits package that supported noise mitigation, school upgrades, and job programs for communities adjacent to the airport. As a result of that campaign, Castellanos recalled that “there was some foundation for our relationship with our environmental partners already established . . . [that we were able to] then use as a building block and go deeper.”⁸³³

Doing so meant linking into preexisting port advocacy networks and capitalizing on areas of interest convergence. NRDC, which played a crucial role shaping port development since the China Shipping case, was an essential partner—already sharing some common political and legal ground with organized labor. Earlier blue-green collaborations built trust: NRDC was involved in the LAX community benefits campaign, and had worked with the Teamsters on previous litigation to ban Mexican trucks from entering the United States.⁸³⁴ There were also overlapping legal interests at stake. As the clean trucks campaign was taking shape, NRDC was simultaneously advancing a theory of market participation that supported labor’s vision for the port concession model. In *Engine Manufacturing Association v. SCAQMD*, NRDC argued that the SCAQMD should be permitted to develop its own emission rules governing commercial fleet vehicles despite Clean Air Act preemption—“seriously pushing the courts” to recognize “local jurisdiction through the market participant exception.”⁸³⁵ In 2005, a district court recognized the exception under the Clean Air Act and that decision was affirmed by the Ninth Circuit two years later⁸³⁶—at the height of the clean trucks campaign.

It was against this backdrop that Castellanos initially reached out to Adrian Martinez, a staff attorney at NRDC, who had a deep background in environmental

831. Telephone Interview with Adrian Martinez, *supra* note 692.

832. Telephone Interview with Melissa Lin Perrella, Staff Att’y, Natural Res. Def. Council (Apr. 2, 2010).

833. Interview with Patricia Castellanos, *supra* note 806.

834. See *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752 (2004) (holding that neither NEPA nor Clean Air Act requires the Federal Motor Carrier Safety Administration to evaluate environmental impact of cross-border trucking).

835. Telephone Interview with Adrian Martinez, *supra* note 692.

836. *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031 (9th Cir. 2007).

justice issues.⁸³⁷ Martinez studied environmental science in college and received a full-tuition public interest law scholarship to attend the University of Colorado Law School, where he went to pursue environmental law.⁸³⁸ A second-year internship at NRDC turned into a postgraduate fellowship; when Gail Feuer left to become a superior court judge, Martinez took over her position in NRDC's clean air unit. Soon thereafter, he switched over to environmental justice, which was his passion.⁸³⁹ With experience on port trucking gained from his participation on Hahn's No Net Increase Taskforce, Martinez became the primary NRDC staff member on the coalition, charged with thinking about "how legally they could create a more accountable system."⁸⁴⁰

Martinez was joined by David Pettit, a former legal aid lawyer who came to NRDC in 2007 after a stint as a partner in a boutique litigation firm in Los Angeles. Pettit "came into [the job] thinking, in environmental justice terms, that an alliance of labor and environment, should it happen, would be extremely powerful."⁸⁴¹ Pettit's first meeting as an NRDC attorney was about CAAP. From there, he was "able to figure out fairly quickly that the interests all pointed in the same direction," which meant "shifting the costs and the economic burden of cleaning the trucks from the drivers to . . . the trucking companies."⁸⁴²

Melissa Lin Perrella was another NRDC lawyer involved in the ports campaign. An ethnic studies and social welfare major in college interested in the intersection of "public health, civil rights, and low-income issues," Perrella had gone to Georgetown Law School with a desire to pursue a public interest career, initially taking a job as an associate with a big law firm, Orrick, Herrington & Sutcliffe.⁸⁴³ She was there for five years before applying to work on environmental justice issues at NRDC, where she started in 2004.⁸⁴⁴

For the NRDC team, joining the coalition was a chance to build "effective power" to protect the community from harmful pollution.⁸⁴⁵ The alliance with organized labor helped them better understand how "the economics of the port drayage system . . . impact the environmental conditions."⁸⁴⁶ Although NRDC lawyers felt "strongly that the economics of the system need to be changed" they "didn't take a position on whether or not drivers should be unionized."⁸⁴⁷ Martinez became a member of the campaign steering committee, where his role was to put

837. Telephone Interview with Adrian Martinez, Staff Att'y, Natural Res. Def. Council (Apr. 2, 2010).

838. *Id.*

839. *Id.*

840. Telephone Interview with Adrian Martinez, *supra* note 692.

841. Telephone Interview with David Pettit, Senior Att'y, Urban Program, Natural Res. Def. Council (Apr. 5, 2010).

842. *Id.*

843. Telephone Interview with Melissa Lin Perrella, *supra* note 832.

844. *Id.*

845. Telephone Interview with Adrian Martinez, *supra* note 837.

846. Telephone Interview with Melissa Lin Perrella, *supra* note 832.

847. *Id.*

the legal issues “on the table” so that coalition members could understand the “legal constraints” before evaluating the policy issues.⁸⁴⁸ In participating in the coalition, NRDC lawyers represented NRDC’s own members, not the coalition, although Martinez would address legal issues that would “pop up.”⁸⁴⁹ In developing policy, NRDC lawyers would analyze issues from two perspectives: “[T]rying to do what’s best for the environment [and] broader coalition, but [also] mindful of: if this ends up in the courtroom, how is this policy going to play out before a judge?”⁸⁵⁰ Generally, other coalition groups did not have separate legal counsel and would rely on NRDC to help them understand the legal stakes.⁸⁵¹

To expand the coalition, LAANE also built relations with other environmental and environmental justice groups that had begun moving toward similar strategies to reduce port emissions. The idea of using port concessions to reshape trucking was also percolating up from below. Convergence between labor and environmentalists occurred through the portal of CAAP, which provided the “perfect opening” for the concession plan.⁸⁵² Thus, in Weiner’s terms, the creation of the Clean Truck Program occurred as strains of activism that had been running in parallel began to intersect.

[O]n the ground in the environmental movement and . . . separately with the Teamsters there was this clean truck concept . . . Everyone was kind of spinning around. We came up with a policy proposal that would unite the workers and the enviros. But there were folks on the ground who conceptually or intuitively were going there anyway . . . people had been close to that idea, but hadn’t quite nailed it . . . [T]here was a lot of work to do and a lot of meetings . . . for people to sort of get it. What’s the concept? How do we put meat on the bones? How do we get it implemented? That all had to be sort of worked through.⁸⁵³

To do that, Weiner and Canham-Clyne “had a bunch of meetings with people and got to know them, and build trust with them, and got them connected with the drivers and the organizers.”⁸⁵⁴ In connecting with environmental and community groups, Change to Win leaders sought to “deepen the community’s understanding of the economics by bringing the drivers into the conversation.”⁸⁵⁵

Connections to environmental partners were built through different networks and sought to be attentive to the tensions between mainstream environmentalism and the environmental justice movement. Environmental activism around the port

848. Telephone Interview with Adrian Martinez, *supra* note 692.

849. *Id.*

850. Telephone Interview with Melissa Lin Perrella, *supra* note 832.

851. *See* Telephone Interview with Elina Green-Nasser, Adm’r, UCLA Sch. of Pub. Health & Former Project Manager, Long Beach Alliance for Children with Asthma (Apr. 23, 2013) (Green changed her name to Green-Nasser after the campaign); Telephone Interview with Angelo Logan, *supra* note 414.

852. Interview with Jon Zerolnick, *supra* note 807.

853. Telephone Interview with Nick Weiner, *supra* note 480.

854. Telephone Interview with John Canham-Clyne, *supra* note 479.

855. *Id.*

itself had multiple sources. Tom Politeo, a computer programmer and software developer who was born and raised in San Pedro, was involved in early environmental activism in the harbor area.⁸⁵⁶ Like Jesse Marquez, founder of the Coalition for a Safe Environment in Wilmington, Politeo ran high school track and became sensitive to the impact of air quality on his athletic activity; also like Marquez, he was moved to activism after two explosions in the 1970s revealed the dangers of chemical and oil storage around the ports.⁸⁵⁷ In the face of projected port growth, Politeo and other San Pedro residents, including homeowner activist Noel Park, began regularly attending harbor commission meetings in the 1980s. After the MATES II study was released, residents discussed strategies to reduce air pollution.

Through their own analysis, the San Pedro activists also arrived at a concession model as a way to force trucking companies to have “consideration for the community where they are working.”⁸⁵⁸ In early 2000, Park presented the concession model to the harbor commission based on what the city, led by Council Member Cindy Miscikowski, had done at LAX to force concessionaires to meet codes of conduct.⁸⁵⁹ Politeo, a Sierra Club member along with Park, argued that truckers “should be paid by the clock and not by the can.”⁸⁶⁰ Thus, the concept of a concession model to address port trucking pollution was born of “multiple inventors.”⁸⁶¹ As Politeo recalled:

[T]hese trucks were starting to queue up in fairly long lines. The trucks would sit there in idle. All the time they’re idling, they’re inching forward, and they’re polluting. And they’re noisy. The truckers can choose to come to the Port anytime they want. But, if they want to move containers, they have to come when the containers are available to be moved. They end up lining up in these long lines, and sitting around for hours sometimes, three hours, four hours, before they get a can to move. They move the cans and they may end up moving the cans during rush hour. We’re looking at this, thinking in terms of the way their sources are being managed. The trucking companies and the shippers who control the terminals don’t see any of the costs associated with the truckers waiting in long lines. They don’t pay for the extra fuel because the truckers pay for that. They don’t pay them for sitting around for three hours because it’s the truckers’ time. We looked at this, and said, “This is an environment in which the people who have the decision making power don’t feel the effect of whether the decisions are smart or not.”⁸⁶²

In 2001, Politeo, Park, and a handful of other members of the Los Angeles-

856. Telephone Interview with Tom Politeo, Volunteer, Sierra Club Harbor Vision Task Force (Mar. 26, 2013).

857. *Id.*

858. *Id.*

859. *Id.*

860. *Id.*

861. *Id.*

862. *Id.*

Orange County chapter of the Sierra Club formed the Harbor Vision Task Force as a formal standing committee within the Sierra Club focused on the environmental impact of goods movement and how to grow the port “green.”⁸⁶³ The task force held its first meetings at the Long Beach Yacht Club (where one member happened to dock his yacht) and then moved to the San Pedro Public Library. The group was small but active, with a decidedly prolabor bent. There were “a couple of longshoremen” and two former Teamsters: Sharon Cotrell from Long Beach and Dr. John Miller, who had put himself through college in Tennessee by working on a truck loading dock.⁸⁶⁴ In 2002, Cotrell arranged a meeting with Gary Smith, head of the Teamsters local who was working on Long Beach port issues; the groups collaborated to help gain passage of Lowenthal’s anti-idling bill, which had little effect, but cemented a working partnership. The Sierra Club did not get involved in the China Shipping suit, because it “didn’t have the resources to make that happen,” and as a matter of triage decided “NRDC is doing that.”⁸⁶⁵ Organizationally, the Sierra Club did not support Hahn’s no-net-increase initiative, which Politeo believed was insufficient, although Park was active on that task force.⁸⁶⁶

After Villaraigosa’s election, his administration brought together stakeholders under the auspices of Green LA (funded by the Liberty Hill Foundation),⁸⁶⁷ which formed a Port Working Group with Politeo, Andrea Hricko from USC’s Keck School of Medicine, Candice Kim from the Coalition for Clean Air, and other environmental representatives.⁸⁶⁸ Politeo suggested reaching out to labor, a move that resulted in a series of “brainstorming” meetings in Wilmington attended by Miguel Lopez from the Teamsters local, and representatives from the ILWU and International Brotherhood of Electrical Workers.⁸⁶⁹

Environmental justice and public health advocates also became networked through these processes. Angelo Logan of East Yard Communities for Environmental Justice was a member of the Port Working Group, as was Jesse Marquez.⁸⁷⁰ Marquez recalled how he was part of the initial Harbor Vision Task Force convened by the Sierra Club in 2001.⁸⁷¹ In 2003, Marquez formed the Impact Project, along with Hricko, and produced a series of policy briefs on trade and transportation.⁸⁷² During this period, he also began to meet with Latino truckers who, in his view, “because of the history of Teamster racism wanted nothing to do

863. *Id.*

864. *Id.*

865. *Id.*

866. *Id.*

867. Telephone Interview with Candice Kim, Senior Campaign Assoc., Coal. for Clean Air (Apr. 26, 2013)

868. Telephone Interview with Tom Politeo, *supra* note 856. The group was coordinated by Martha Matsuoka, a Ph.D. candidate in urban policy at UCLA and now professor at Occidental College. Telephone Interview with Candice Kim, *supra* note 867.

869. Telephone Interview with Tom Politeo, *supra* note 856.

870. *Id.*; Telephone Interview with Jesse Marquez, *supra* note 406.

871. Telephone Interview with Jesse Marquez, *supra* note 406.

872. *Id.*

with the unions,” but were worried about port security projects implemented in the wake of 9/11.⁸⁷³

Colleen Callahan, manager of air quality policy for the American Lung Association of California, also became involved in the Port Working Group.⁸⁷⁴ Callahan was an urban and environmental policy major at Occidental College, where she studied under prominent progressive faculty Peter Dreier and Robert Gottlieb.⁸⁷⁵ After a stint at the Center for Food and Justice, in 2006 she joined the American Lung Association, where her charge was getting it “more involve[d] in the environmental health advocacy work locally.”⁸⁷⁶ As a member of the Green LA Port Working Group, Callahan linked up with other environmental activists and then with LAANE staff.⁸⁷⁷ Elina Green, who was project manager at the Long Beach Alliance for Children with Asthma (LBACA), recalled meeting Teamsters leader Miguel Lopez and LAANE’s Patricia Castellanos through advocacy on environmental mitigation in relation to a proposed intermodal rail yard for BNSF in West Long Beach called the Southern California International Gateway.⁸⁷⁸ Community groups, including LBACA, contested the EIR in that project beginning in 2006, and through that process forged crucial alliances with organized labor. From Green’s point of view, the rail yard fight

was actually how the Teamsters sort of started to see the community side of things and they recognized that, well, if they supported us in our ask for that rail yard, then there would be potential for support in their campaign and we started to see the issues from each other’s side.⁸⁷⁹

For Green, the power of the coalition derived from this assemblage of “crazy-strange bedfellows.”⁸⁸⁰

The connection between environmental and community groups, LAANE, and Change to Win occurred through these formal networks and outside of them. Politeo of the Sierra Club recalled being contacted by Weiner in 2006 asking for support in developing a concession plan. “I remember my thought was ‘Holy shit! They want to do our work for us.’ I’m delighted. I sent a slightly less effusive message back, saying that ‘Yes, we’re interested in these things and even more.’”⁸⁸¹

873. *Id.* Security concerns were fueled by news of foreign entrants into the terminal operations markets. In the winter of 2006, the company Dubai Ports World publicized its plan to purchase twenty-two U.S. port terminals. Although its plan did not include Los Angeles and Long Beach, it raised security concerns about the regulation of immigrant drivers—concerns that organizers tried to use to promote employee conversion. See Judith Lewis, *A Heavy Load*, L.A. WEEKLY, July 25, 2007, available at <http://www.laweekly.com/2007-07-26/news/a-heavy-load/>.

874. Telephone Interview with Colleen Callahan, Deputy Dir., UCLA Luskin Ctr. for Innovation & Former Manager of Air Quality Policy, Am. Lung Ass’n (Apr. 15, 2013).

875. *Id.*

876. *Id.*

877. *Id.*

878. Telephone Interview with Elina Green-Nasser, *supra* note 851.

879. *Id.*

880. *Id.*

881. Telephone Interview with Tom Politeo, *supra* note 856.

Politeo began meeting with Change to Win and LAANE staff. The opportunity, as he saw it, was to leverage the staff and political power that was lacking before. “So, here we’ve got Change to Win, the Teamsters, and LAANE, all interested in this. Okay, I’m not going to skip on this.”⁸⁸² Politeo recalls that his meetings with LAANE, Change to Win, and the Teamsters flowed seamlessly out of the Port Working Group. “[I]t’s almost as if Nick Weiner walked into the room and said at one of our other meetings, ‘I’m taking over. It’s my show now.’ Over some short period of time, those who acceded to that remained, and the rest left.”⁸⁸³ In short order, ILWU “sort of disappeared.”⁸⁸⁴ And other groups began to join, including Clergy and Laity United for Economic Justice (CLUE), an interdenominational faith-based group closely aligned with LAANE, which organized clergy in Long Beach, making arguments for reform that sounded in terms of justice and morality.⁸⁸⁵ In addition, the coalition added immigrant rights groups, the Coalition for Humane Immigrant Rights of Los Angeles and Hermandad Mexicana,⁸⁸⁶ as well as the San Pedro-based Harbor-Watts Economic Development Corporation, a community-based group created in 1997 that focused on neighborhood capacity building and economic revitalization.

In assembling this coalition, LAANE staff did the bulk of the outreach work. Because of her prior environmental justice organizing and South Bay campaign work, Castellanos was particularly sensitive to being inclusive: “I . . . did not want to be caught in the scenario where we were just working with the NRDCs and [Coalition for Clean Airs] of the world and not giving equal footing to like the East Yard Communities for Environmental Justice.”⁸⁸⁷ During July and August 2006, she and Zerolnick conducted a first round of meetings with a number of groups, including East Yard, the Coalition for a Safe Environment, and LBACA, in which they asked the groups to “download” what they knew about trucks and provide input on the potential campaign.⁸⁸⁸ “[W]e didn’t come into this campaign thinking there is nothing happening out there And so it was an opportunity for us to learn.”⁸⁸⁹ LAANE had already been in contact with some of the groups in connection with the CAAP process; others they met with for the first time.⁸⁹⁰ It was during the second round of meetings that LAANE staff sought to enlist groups to join the campaign. During these meetings, LAANE focused on presenting the main conceptual analysis, emphasizing that “the employment status of the drivers had to be addressed” and the ports had to have a direct relationship with the trucking

882. *Id.*

883. *Id.*

884. *Id.*

885. Telephone Interview with Jonathan Klein, Exec. Dir., Clergy & Laity United for Econ. Justice (May 8, 2013).

886. Port truckers had heavily participated in the 2006 May Day immigration demonstrations, angered by recent immigration raids.

887. Interview with Patricia Castellanos, *supra* note 806.

888. *Id.*

889. *Id.*

890. *Id.*

companies in order to create “accountability in the system.”⁸⁹¹ According to Zerolnick, the frame was less “Are you with us?” and more “Here’s our analysis. Does this make sense?”⁸⁹²

The general approach to coalition building was to emphasize the opportunity to create a “potential solution” that would be in the “mutual interest” of labor, community, and environmental groups—creating a platform for long-term benefits and progressive policy change.⁸⁹³ At outreach meetings, some groups wanted to discuss policy details, while others focused on the working relationship with organized labor.⁸⁹⁴ There was “some trepidation” among the environmental justice groups about working with a “humongous labor union.”⁸⁹⁵ Castellanos shared those concerns and promised to “figure it out together.”⁸⁹⁶ Although the meetings produced active engagement, Castellanos did not “remember much resistance.”⁸⁹⁷

Organizations went through different processes to consider whether to join the coalition. LAANE’s Castellanos and Zerolnick reached out to the American Lung Association’s Callahan to ask if the American Lung Association would join the emerging coalition.⁸⁹⁸ Callahan recalled having to raise the issue up to “some pretty high channels” within the national organization to get approval to join since there “were some concerns about whether it was necessary to support the concessionary model or whether just pushing for the most current EPA standards . . . was sufficient.”⁸⁹⁹ LBACA, itself a coalition of local residents and health organizations, had to get approval from the entire membership.⁹⁰⁰ East Yard’s Logan was one coalition member who was excited about the partnership but wanted details about how it was going to work. He recalled sitting on the CAAP stakeholder group when he was contacted by LAANE after “we had been trying to reach out to labor without success.”⁹⁰¹ Although enthusiastic about the partnership, “our group’s questions were: How’s this all going to work out? What are the power dynamics? What is the decision making structure? . . . [W]e wanted . . . a governance structure that was really democratic.”⁹⁰²

The mission statement for what would become the Coalition for Clean and Safe Ports sought to meet this democratic demand, while emphasizing the main goals of the campaign:

891. Interview with Jon Zerolnick, *supra* note 807.

892. *Id.*

893. Interview with Patricia Castellanos, *supra* note 806.

894. *Id.*

895. *Id.*

896. *Id.*

897. *Id.*

898. *Id.*

899. Telephone Interview with Colleen Callahan, *supra* note 874. Callahan stated that the American Lung Association senior managers wanted to make sure “the campaign was truly about . . . clean air and not just about . . . labor issues.” *Id.*

900. Telephone Interview with Elina Green-Nasser, *supra* note 851.

901. Telephone Interview with Angelo Logan, *supra* note 414.

902. *Id.*

Our objective is to improve the condition of the trucking industry and of truck drivers operating at the San Pedro Bay Ports and along associated goods movement corridors. We are guided by the need to reduce associated health impacts on workers and local communities by resolving shortcomings associated with current port trucking practices. In doing so, we will address port trucking's many challenges that face industry, community, government, labor and the environment.

To accomplish our objective, we will foster an appropriate role for trucking as part of goods movement planning and solutions. We will ensure trucks run cleanly, quietly, safely and efficiently with a stable, employee workforce that pays livable wages and offers drivers all the rights and benefits of an employee. We will make sure improvements adopted in the San Pedro Bay area help create systemic solutions that improve conditions overall and don't simply transfer problems to other areas, such as adjacent communities, our inland ports or other stops along the goods movement chain.

We will act on a timely basis as part of a democratic, broad-based coalition to promote public awareness of trucking problems and solutions and we will seek to influence policy makers to put decisive solutions into effect as rapidly as possible.⁹⁰³

3. *Policy*

The intense period of initial organizing saw the first instance of organizational coordination between members of the fledging coalition: the filing of written comments on the first public draft of CAAP. Released in July 2006, CAAP required its own EIR and thus both NRDC and LAANE filed comments.⁹⁰⁴ Although the CAAP draft identified clean trucks as an issue, it did not make the connection to employment status, providing the coalition with an opening. Zerolnick remembered the CAAP provisions on trucking to read like:

"We're not really sure how to do it. We'll come back to this." So we submitted public comment and said, "Well, actually we have some ideas for how to do this [A]nd the basic structural problems are independent-contractor status and the lack of a relationship between the port and this sector of the industry."⁹⁰⁵

Zerolnick drafted a comment letter and circulated it to all partners, who made editorial suggestions.⁹⁰⁶ He also worked closely with Manley and lawyers at NRDC, particularly Adrian Martínez, as he fine-tuned the proposal.⁹⁰⁷ The input was

903. Coal. for Clean & Safe Ports, Draft Mission Statement (unpublished document) (on file with the UC Irvine Law Review).

904. Telephone Interview with Adrian Martínez, *supra* note 692.

905. Interview with Jon Zerolnick, *supra* note 807.

906. *Id.*

907. *Id.*

focused on sharpening the link between industry accountability, employee status, and emission reduction. In Martinez's terms, the focus was on remedying

the Wild, Wild West situation where there really weren't effective standards and there was no accountability . . . [Workers] weren't getting paid much, they were on the hook for all the insurance and the costs of the equipment, so it was this natural marriage that if you're going to fix the problem, you need to fix the systemic problem which is the lack of accountability from these trucking companies.⁹⁰⁸

The final letter seamlessly integrated these arguments, referencing the research that Change to Win had done as a basis to propose a Clean Truck Program built on the concession approach.⁹⁰⁹ The letter, sent to the directors of both ports, was submitted on behalf of LAANE and its "coalition partners."⁹¹⁰ The comments were conceptual, focusing on the "real market forces operating on the Port truckers," as well as "the significant and persistent structural problems in the industry."⁹¹¹ The bulk of the comments were devoted to detailing the economics of the drayage market and its dysfunctions, while explicating the concession model of transforming the industry. The letter emphasized the twofold problem of independent-contractor drivers and lack of port control over trucking companies.⁹¹² It then proposed a "long-term solution" under which the ports would "jointly enter into a direct contractual relationship with responsible motor carriers to provide drayage services at both Ports, utilizing the same model employed by airports to provide food and other services to air travelers."⁹¹³ The comments contemplated a request for proposal process awarding port entry only to trucking companies that met

clear standards concerning capitalization requirements, revenues paid to the Ports, environmental standards for trucking equipment operating at the Ports, other environmental mitigation measures and benchmarks, employee status for drivers, employment preferences for the current workforce of owner-operators, and labor peace requirements to ensure that revenue streams to the Ports are uninterrupted.⁹¹⁴

Under this plan, the letter emphasized that the benefits would be clean trucks maintained over the long term, achieving emission reductions while also promoting security and greater accountability.⁹¹⁵ The letter was short on specific policy proposals, but long on analysis and prescription, powerfully laying out the essence

908. Telephone Interview with Adrian Martinez, *supra* note 692.

909. Interview with Jon Zerolnick, *supra* note 807.

910. Letter from LAANE et al. to Geraldine Knatz, Exec. Dir., Port of L.A. & Richard D. Steinke, Exec. Dir., Port of Long Beach (Aug. 28, 2006) (on file with author). The partners included at that point were Change to Win, CLUE, Coalition for Clean Air, Coalition for Humane Immigrant Rights of Los Angeles, Communities for a Better Environment, Harbor Watts Economic Development Corporation, the Teamsters, the Los Angeles County Federation of Labor, and NRDC.

911. *Id.* at 2.

912. *Id.* at 3–4.

913. *Id.* at 5–6.

914. *Id.* at 6.

915. *Id.* at 7.

of what would become the Clean Truck Program. Although the details were still unclear, the key move was linking clean trucks to employment status through a direct contract between the ports and the trucking companies.⁹¹⁶ CAAP thus provided the critical opportunity to unite disparate labor, environmental, and community interests around a coherent policy program to attack diesel truck emissions.

The last step was to officially convene the Coalition for Clean and Safe Ports. The launch was timed to happen right before the joint ports CAAP review meeting on November 20, 2006; in order to maximize publicity, the coalition staged a major press conference.⁹¹⁷ The coalition's first order of business was to mobilize for the November 20 meeting, which it did by organizing a "massive community driver turnout," which helped shape the electric environment leading to CAAP approval.⁹¹⁸

Although the coalition grew over the two-year fight for the program,⁹¹⁹ its initial composition reflected wide support that underscored the success of LAANE's outreach.⁹²⁰ In the end, the Coalition for Clean and Safe Ports was broad and deep: "We had community, we had faith-based groups, we had the environmental justice community, we had the environmental community, we had economic development groups . . . We had lawyers, we had scientists involved, we had economic experts, we had people on the ground."⁹²¹

In keeping with its commitment to inclusivity and democracy, while also acknowledging the need for clear and efficient decision making, the coalition structured a tripartite governance system. Policy decisions were ultimately to be decided by a supermajority vote of the coalition members.⁹²² To facilitate operations, members agreed to create a steering committee composed of a smaller group of representatives from key organizational partners: three labor, two environmental, two community, two immigrant/legal, and one to two research/academic.⁹²³ This committee—which "played to the coalition's strengths" by giving voice to the diverse groups involved⁹²⁴—was charged with agenda setting, providing strategic recommendations, and making day-to-day and urgent

916. Interview with Jon Zerolnick, *supra* note 807.

917. Interview with Patricia Castellanos, *supra* note 806; Interview with Jon Zerolnick, *supra* note 807.

918. Interview with Jon Zerolnick, *supra* note 807.

919. Interview with Patricia Castellanos, *supra* note 806 (noting that End Oil joined the coalition after the initial launch).

920. There were approximately thirty initial members in the coalition, which grew to around forty members. *See id.*

921. Telephone Interview with Adrian Martinez, *supra* note 837.

922. Coal. for Clean & Safe Ports, Structure & Decision-Making (unpublished document) (on file with the UC Irvine Law Review).

923. *Id.* The first steering committee, not yet at full strength, included Adrian Martinez of NRDC, Elina Green of LBACA, Louis Diaz from Teamsters Local 848, Nativo Lopez from Hermandad Mexicana, Rafael Pizarro of Coalition for Clean Air, a representative from Teamsters Local 63, and Tom Politeo from the Sierra Club.

924. Interview with Patricia Castellanos, *supra* note 806.

decisions.⁹²⁵ The steering committee was created in recognition of the fact that the groups were part of a “live campaign” that required some quick decisions, but also was designed to vet policy and strategy ideas in order to make recommendations for full coalition approval.⁹²⁶ As necessary, the coalition also agreed to set up working subcommittees to deal with various policy issues and give recommendations to the full coalition. These subcommittees were established to develop coalition policy with respect to specific community, environmental, and labor issues. LAANE staffed the subcommittees, but did not formally sit on them. Thus structured, the coalition was ready to take action.

B. *The Affirmative Phase: Mobilizing Local Law*

1. *The Outside Game: Developing the Program, Exerting Pressure*

With the coalition in place, LAANE’s effort shifted to rolling out the campaign to pass what would become the Clean Truck Program. The basic approach was twofold. First, the coalition would meet during an intense period to hammer out the details of the program—converting the model taken from Change to Win into a workable policy. Second, the coalition would engage decision makers and stakeholders to build support for the program. These elements—a clear policy draft and outside pressure—would then be used to move the policy through internal city and port channels.

At the outset of the campaign, both the Los Angeles and Long Beach ports were still aligned in the process, reflecting the ongoing energy around implementing CAAP. In early 2007, the ports established a stakeholder group comprised of representatives from the ports, air agencies, industry, environmental and labor groups, and academia.⁹²⁷ Several coalition members participated, including Angelo Logan from East Yard Communities for Environmental Justice, Melissa Lin Perrella from NRDC, Jesse Marquez from Coalition for a Safe Environment, Elina Green from LBACA, Candice Kim from the Coalition for Clean Air, Miguel Lopez from the Teamsters, and Patricia Castellanos from LAANE.⁹²⁸ The stakeholder group was created to provide input into the ports’ larger process of CAAP implementation, which included the development of a detailed Clean Truck Program.⁹²⁹

925. Steering committee decisions were by consensus; if no consensus could be achieved, decisions went to the full coalition. *See* Coal. for Clean & Safe Ports, Structure & Decision-Making, *supra* note 922.

926. Interview with Patricia Castellanos, *supra* note 806.

927. Port of Long Beach & Port of L.A., San Pedro Bay Ports Clean Air Action Plan Implementation Stakeholder Meeting [hereinafter San Pedro Bay Ports Clean Air Action Plan Implementation Stakeholder Meeting] (Powerpoint presentation) (on file with the UC Irvine Law Review).

928. *See* Port of L.A. & Port of Long Beach, San Pedro Bay Ports Clean Air Action Plan, CAAP Stakeholder Group Members (on file with the UC Irvine Law Review).

929. *See* San Pedro Bay Ports Clean Air Action Plan Implementation Stakeholder Meeting, *supra* note 927.

To inform that process—and ultimately shape what the final program would look like—the coalition moved quickly to build out the policy. Following on the heels of CAAP approval, which established the general framework for port truck regulation, “things really kicked into high gear.”⁹³⁰ In late 2006, the coalition set to work on filling in program details in order to shape the final rules. At the outset, the coalition had its basic “yardstick”: that any Clean Truck Program had to be “accountable, sustainable, and comprehensive,” which meant that it would rest upon fleet *and* employee conversion—thus avoiding a short-term solution converting the fleet to clean trucks through a one-time public subsidy that left the trucking companies without responsibility for long-term maintenance.⁹³¹ The question for the coalition members was “what are the standards going to be?”⁹³²

To answer this question, the coalition engaged in external and internal discussions. Externally, LAANE and Change to Win organizers met with port staff and key elected officials to present the general framework provided by Change to Win. From there, Zerolnick—working closely with the Teamsters’ Manley and NRDC’s Martinez—began to draft the policy. This was an iterative process that connected to the coalition’s internal discussions. Within the coalition, members broke into subcommittees charged with developing standards around labor, environmental, and community issues.⁹³³ To advance this process, the coalition initiated monthly standing meetings, with individual subcommittees engaged in intensive policy discussions that continued during the interim periods.⁹³⁴ Community partners responded to specific requests for evaluating provisions and came up with some of their own. For example, residents working with coalition member East Yard proposed to make trucking companies park trucks off neighborhood streets and adhere to specified truck routes that would minimize community disruption.⁹³⁵ Once vetted at the subcommittee level, provisions were passed onto the steering committee for incorporation into the working draft and then presented to the entire coalition for general approval. Although full coalition approval was technically by supermajority vote, Zerolnick recalled that decisions were all made by consensus.⁹³⁶ As the draft details evolved, LAANE and Change to Win organizers would meet again with city and port officials, getting their feedback and buy-in.⁹³⁷

What emerged from this process was a document that the coalition called a Request for Proposal (RFP) designed as a vehicle for implementing the concession

930. Telephone Interview with Melissa Lin Perrella, *supra* note 832.

931. Interview with Jon Zerolnick, *supra* note 807.

932. *Id.*

933. *Id.*

934. *Id.*

935. Telephone Interview with Angelo Logan, *supra* note 414.

936. Interview with Jon Zerolnick, *supra* note 807.

937. Interview with Patricia Castellanos, *supra* note 806.

model. The RFP was essentially a scoring system to rate potential concessionaires.⁹³⁸ Scores were based on responses to application questions designed to ensure that trucking companies met criteria necessary to effectuate the Clean Truck Program.⁹³⁹ The RFP model was chosen because the coalition assumed that for ease of administration the ports would limit entry to a handful of trucking concessionaires and the RFP provided a standard system to allow the ports to rank applicants.⁹⁴⁰ The RFP document was primarily drafted by Zerolnick, shaped by extensive discussions among coalition members, and contained items the coalition viewed as “a bottom line”—phasing out old trucks and employee conversion—and others that were on a “wish list.”⁹⁴¹

The RFP’s main purpose was to ensure “that the most responsible entities operate at the Port.”⁹⁴² Toward that end, the RFP designated responsible business, security, environmental, labor, community, and efficiency standards, though the overall plan hinged on converting old dirty trucks to new clean ones, while also converting the drivers to employees. The standards were to be implemented through the ports’ contract power: “[s]uccessful applicants will enter into a contract with the Port mandating a turnover of the entire truck fleet over five years.”⁹⁴³ Applicants were also required to “use only employee drivers (as opposed to independent contractors) to provide drayage services.”⁹⁴⁴ The RFP was structured so as to assign a baseline qualification to applicants meeting minimum criteria, while then giving extra points to applicants that could demonstrate good business practices and community relations—which were the “wish list” items.⁹⁴⁵ The minimum standards were framed to advance core elements of the Clean Truck Program. Applicants were asked: “Does the Applicant utilize only employee drivers to perform drayage services?” and were informed that they “must comply with the requirements of the Clear Bay Clean Air Action Plan (CAAP) regarding the reduction of pollution from diesel trucks.”⁹⁴⁶ Applicants also had to “provide an assurance of labor peace”⁹⁴⁷—an agreement that they would not disrupt unionization efforts in exchange for a commitment on the part of employees not to strike. The time frame for employee conversion was not specified, though applicants were told that they had five years to convert their entire fleets to EPA 2007 standards (by purchasing new trucks or through retrofit) with a minimum of

938. Coal. for Clean & Safe Ports, Request for Proposals: Port Drayage Service Contract, Executive Summary 5 (Apr. 2007) (unpublished document) (on file with the UC Irvine Law Review).

939. *Id.* at 5–6.

940. Interview with Jon Zerolnick, *supra* note 807.

941. *Id.*

942. Coal. for Clean & Safe Ports, Request for Proposals, *supra* note 938, at 2.

943. *Id.* at 3.

944. *Id.*

945. Interview with Jon Zerolnick, *supra* note 807.

946. Coal. for Clean & Safe Ports, Request for Proposals, *supra* note 938, at 10–11.

947. *Id.* at 4.

one-fifth of the fleet converted each year.⁹⁴⁸ Applicants were also asked “to make arrangements to provide off-street parking” for out-of-service trucks and to “work with the Port . . . to develop a plan to minimize the impact of HDVs on port-adjacent communities.”⁹⁴⁹ Concession fees were to be set at an initial level of \$5000 per truck in addition to a ten percent monthly revenue fee.⁹⁵⁰ In April 2007, the RFP was submitted to both harbor commissions, which said that they would take it “under advisement.”⁹⁵¹ Although it was not meant to be public, the RFP was leaked to the press.

On April 12, 2007, the ports jointly issued their own Proposed Clean Trucks Program, which gave the coalition most of what it wanted—adopting the concession model as its cornerstone—though in a very different format.⁹⁵² In what NRDC’s Perrella called “a huge, huge step forward in our quest for clean air,”⁹⁵³ the ports agreed to use their “tariff authority”—their power to pass port rules, called “tariffs”—to “only allow concessionaries operating ‘clean’ trucks to enter port terminals without having to pay a new Truck Impact Fee at the gate.”⁹⁵⁴ For the purposes of the program, a clean truck had to meet the so-called “CAAP standard,” which meant EPA 2007 compliant new trucks, retrofitted trucks for those model year 1994 and newer, and trucks replaced through the Gateway Cities program created under the China Shipping settlement.⁹⁵⁵ Older trucks would be progressively banned (with a 2012 target date), though could continue to enter if their companies—referred to as Licensed Motor Carriers, or LMCs—paid a Truck Impact Fee of thirty-four to fifty-four dollars per container.⁹⁵⁶ Proceeds from that fee and a twenty-six dollar cargo fee, along with other sources of public funding, would be used to subsidize truck replacement and retrofit. Concessionaires would also have to commit to “require employee drivers (after a transition period),”⁹⁵⁷ with the goal of achieving full employee conversion by January 1, 2012.⁹⁵⁸ Following the coalition model, the ports proposed to confer concessions after an RFP process in

948. *Id.* at 3. The RFP also stated that twenty-five percent of the converted fleet must be natural gas trucks.

949. *Id.* at 12–13.

950. *Id.* at 4.

951. Telephone Interview with Jon Zerolnick, Dir. of Clean & Safe Ports Project, L.A. Alliance for a New Economy (Feb. 20, 2013).

952. Janet Wilson & Ronald D. White, *2 Ports Aim to Slash Diesel Exhaust*, L.A. TIMES, Apr. 14, 2007, at B1.

953. *Id.*

954. PORT OF LONG BEACH & PORT OF L.A., PORTS OF LONG BEACH AND LOS ANGELES PROPOSED CLEAN TRUCKS PROGRAM 1 (2007) (on file with the UC Irvine Law Review).

955. *Id.* at 1–2.

956. *Id.* at 2.

957. PORT OF LONG BEACH & PORT OF L.A., PROPOSED CLEAN TRUCKS PROGRAM FACT SHEET (2007) (on file with the UC Irvine Law Review).

958. PORT OF LONG BEACH & PORT OF L.A., *supra* note 954, at 8.

which “applicants w[ould] be evaluated for financial strength and asset control.”⁹⁵⁹ The ports’ proposed plan did not go as far as the coalition’s in limiting entry to those companies that best met business practice standards. Nonetheless, from the coalition’s perspective, “it really did contain most of what we wanted.”⁹⁶⁰ Industry representatives viewed it through the opposite lens and immediately asserted the threat of litigation. As Curtis Whelan, executive director of the Intermodal Carriers Conference of the ATA, put it: “We are looking at it now from our lawyers’ point of view to see what we might do. I think we might challenge that. . . . By definition, these containers represent interstate commerce. It would impact interstate commerce in a dramatic way. Can a port authority do that?”⁹⁶¹

The coalition believed that the answer was “yes” and seized the opportunity to push forward. In response to the ports’ proposal, Zerolnick (again with input from lawyers Manley and Martinez) drafted another comment letter—this time submitted under the formal auspices of the Coalition for Clean and Safe Ports.⁹⁶² Unlike the first letter, which was conceptual, this one was “more concrete,” addressing specific policy details.⁹⁶³ The letter, while commending the ports for their “leadership” and “hard work,” sought to offer areas for the plan’s improvement.⁹⁶⁴ Although it addressed a variety of technical details, it emphasized the employee component, which was not explicated in detail in the ports’ draft. Specifically, it argued that—unlike the conversion to clean trucks—there should be no transition period for the conversion to employee drivers.⁹⁶⁵ To do otherwise, the letter suggested, would create potential unfairness for companies that complied earlier and would impose insurmountable administrative problems.⁹⁶⁶

It was the spring of 2007 and negotiations over the terms of the Clean Truck Program had begun in earnest. As the negotiations developed, they would focus on three crucial elements of the program: (1) the nature and timing of the ban on dirty trucks and the related phase-in of clean trucks; (2) the amount and structure of fees imposed on truck cargo, and the related amount of financial incentives allocated to fund clean truck conversion; and (3) the structure and content of the concession agreement, with particular emphasis on extent and timing of employee conversion.

959. Ports of Los Angeles and Long Beach, Clean Trucks Program: Program Elements for Stakeholder Discussion, CAAP HDV1 (Apr. 11, 2007) (Powerpoint presentation) (on file with the UC Irvine Law Review).

960. Interview with Jon Zerolnick, *supra* note 807.

961. Wilson & White, 2 *Ports Aim to Slash Diesel Exhaust*, *supra* note 952.

962. Interview with Jon Zerolnick, *supra* note 807.

963. *Id.*

964. Letter from Coal. for Clean & Safe Ports to Dr. Geraldine Knatz, Exec. Dir., Port of L.A. & Richard D. Steinke, Exec. Dir., Port of Long Beach, at 1 (May 10, 2007) (on file with the UC Irvine Law Review).

965. *Id.* at 2.

966. *Id.* The letter also reiterated its argument for imposing minimum business standards on LMCs, requiring labor peace agreements, mandating some alternative fuel trucks, and developing an off-street parking and community impact plan. *Id.* at 5–9.

To advance the coalition's positions on these issues, members sought to "debate it out in public," organizing around a series of port commission meetings to demonstrate that the coalition was "a force to be reckoned with."⁹⁶⁷ The Los Angeles and Long Beach harbor commissions held regular public meetings to discuss policy development, at which coalition members, community residents, and truck drivers turned out to press the argument that "we need to fix the trucking system."⁹⁶⁸ As NRDC's David Pettit described with wry humor, the coalition would turn these normally staid events into dramatic affairs by bringing hundreds of people "with torches and pitchforks."⁹⁶⁹ There were also special meetings devoted specifically to the Clean Truck Program, which were in Zerolnick's memory "even longer and even more contentious."⁹⁷⁰ In one, held in June 2007, 300 drivers turned out to support the program. Edgar Sanchez, a driver from Long Beach, pointed to coalition support as motivating him to speak out:

Before we didn't have the courage or the confidence to tell people how we feel out of fear we'd be fired or labeled as troublemakers Not anymore. We see the smoke pouring out of our trucks and we breathe it all day, every day But we also work long hours at minimum rates. We can be fired at any moment, like slaves without a voice.⁹⁷¹

A few months later, on October 12, the ports held a Joint Public Workshop on the Clean Truck Program—a six-hour meeting at which the ports took "tons of testimony" from various stakeholders,⁹⁷² including LAANE's Castellanos and NRDC's Perrella, as well as numerous truckers and community residents.⁹⁷³ As the Joint Public Workshop underscored, a primary function of the coalition was to turn out members at these meetings to testify in favor of the proposed program. These meetings were also often a focal point for circulating and responding to draft policies. Drafts would emanate from the ports and Zerolnick would work primarily with NRDC lawyers to craft a response; that draft would be circulated among coalition members for comments and then once finalized sent back to the ports for review. Meetings were opportunities for exchange and amplification. During this back-and-forth, coalition members would shape program language and clarify objectives. For instance, a LBACA community resident working with the coalition developed the idea to put placards on trucks indicating a number to call to report any emission and safety issues⁹⁷⁴—an idea that was eventually incorporated into the working plan.

967. Interview with Patricia Castellanos, *supra* note 806.

968. Interview with Jon Zerolnick, *supra* note 807.

969. Telephone Interview with David Pettit, *supra* note 841 (recalling statement by port general counsel Tom Russell).

970. Interview with Jon Zerolnick, *supra* note 807.

971. Louis Sahagun & Ronald D. White, *Port Drivers Steer Toward Clean-Truck Program*, L.A. TIMES, June 6, 2007, at B2.

972. Interview with Jon Zerolnick, *supra* note 807.

973. See Agenda of the Regular Meeting of the L.A. Bd. of Harbor Comm'rs (Oct. 12, 2007), http://lacity.granicus.com/MediaPlayer.php?view_id=14&clip_id=2191&meta_id=27885.

974. See Telephone Interview with Elina Green-Nasser, *supra* note 851.

During this period, coalition pressure was applied in open spaces and behind closed doors. The coalition staged a number of public actions, including a caravan of 100 big rigs down the 110 freeway to the Port of Long Beach.⁹⁷⁵ Coalition members also met privately with harbor commissioners, mayor's office staff, and council staff in both cities—though the approach increasingly diverged between Los Angeles and Long Beach. In Los Angeles, the coalition had allies in key elected politicians and harbor commissioners and thus the outreach was designed to give them the materials and arguments necessary to hold the line against industry lobbying. The big push was convincing “people to understand that the employee provision was an environmental provision.”⁹⁷⁶ This was true at the commission level and in the mayor's office, where there were some divisions among the mayor's staff about whether the program should just focus on the green elements or should also include the blue focus on employee drivers. As a result, the coalition had to “fend off repeated attempts by . . . forces within the mayor's office who wanted to jettison the labor components of the Clean Truck Program.”⁹⁷⁷ In Los Angeles, the coalition also had a powerful champion in Council Member Janice Hahn, with whom members met regularly to work out strategy and policy details.⁹⁷⁸ In Castellanos's view, Hahn “genuinely was supportive of workers and workers' issues. I think this was in her district and she cared about it.”⁹⁷⁹

In Long Beach, the approach was different given the perceived skepticism of recently elected Mayor Bob Foster to the employee conversion provision of the program. Foster, a Democrat who had headed Southern California Edison, won the Long Beach mayor's race in a run-off election in June 2006. He took office that next month, just as CAAP was moving toward approval and the battle for clean trucks was taking shape. Los Angeles Harbor Commissioner Jerilyn López Mendoza recalled having lunch with Foster early in his term to discuss the prospects for port coordination around CAAP. After the lunch, she called LAANE organizer William Smart to ask: “Have you guys talked to Bob Foster yet? . . . I don't think he's on board with an employee mandate . . . I think you all have some work to do.”⁹⁸⁰ Coalition members were deployed to increase the pressure on Foster—since unilateral action by Los Angeles could undermine the entire project by diverting cargo to Long Beach. Colleen Callahan of the American Lung Association would “bring health professionals” to meetings with Long Beach harbor commissioners and Mayor Foster, to whom she would emphasize “why the policy proposal would address health.”⁹⁸¹ Similarly, Elina Green of LBACA mobilized the group's community-based membership to share the challenges they experienced caring for

975. Tiffany Hsu & Rong-Gong Lin II, *Taking a Message to the Streets*, L.A. TIMES, June 28, 2007, at B1.

976. Telephone Interview with Candice Kim, *supra* note 867.

977. Telephone Interview with Nick Weiner, *supra* note 820.

978. Telephone Interview with Candice Kim, *supra* note 867.

979. Interview with Patricia Castellanos, *supra* note 806.

980. Telephone Interview with Jerilyn López Mendoza, *supra* note 723.

981. Telephone Interview with Colleen Callahan, *supra* note 874.

children with asthma and how the Clean Truck Program would promote better public health.⁹⁸² As LBACA members worked to “pull any strings” they had with Long Beach officials, they also faced local reprisal: Green recalled one meeting with Mayor Foster and a small group of coalition members in which the mayor was “literally yelling at us the entire meeting.”⁹⁸³

Coalition members played different roles in exerting outside pressure over the course of the two-year campaign. In private meetings and public hearings, LAANE and Change to Win made the case for industry restructuring, while NRDC emphasized the environmental benefits (and held out the implicit litigation threat). LAANE’s Castellanos, Change to Win’s Weiner and Canham-Clyne, and NRDC’s Martinez, Perrella, and Pettit met regularly with port staff, both mayors’ offices, and both city councils, though the emphasis was on the Long Beach council because of Janice Hahn’s support in Los Angeles.⁹⁸⁴ The goal of these meetings was to make the case for sustainability, while also demonstrating the power of the blue-green coalition. In this regard, Castellanos recalled the coalition’s first meeting with the Los Angeles mayor’s office and port staff: When NRDC showed up with the Teamsters, port director Geraldine Knatz was “a little confused” and there was a lot of “brow raising.”⁹⁸⁵ To complement these efforts, environmental justice organizers mobilized their base. Marquez and Logan would turn out community members to attend commission meetings and meet with elected officials.⁹⁸⁶ Other groups similarly engaged in turn out efforts, and everyone attended periodic public rallies.

Although all the groups played their roles, some also acknowledged that LAANE was in charge. While each coalition member spent considerable time and resources advancing the campaign, in the end, LAANE “had staff dedicated to this campaign” and was “really in the driver’s seat.”⁹⁸⁷ Some members expressed concerns about being tokenized but generally praised LAANE’s ability to “really listen” to coalition members and bring everyone on board.⁹⁸⁸ With the coalition thus united, members worked to hold officials accountable as they attempted to move the program through internal political channels.

982. Telephone Interview with Elina Green-Nasser, *supra* note 851.

983. *Id.*

984. Interview with Patricia Castellanos, *supra* note 806.

985. *Id.*

986. Telephone Interview with Angelo Logan, *supra* note 414; Telephone Interview with Jesse Marquez, *supra* note 406.

987. Telephone Interview with Colleen Callahan, *supra* note 874.

988. *Id.*; Telephone Interview with Elina Green-Nasser, *supra* note 851.

Figure 8: Coalition Rally at Port of Los Angeles⁹⁸⁹

2. *The Inside Game: Mobilizing Legal Expertise, Moving Policy*

In Los Angeles, as the campaign heated up in 2007, internal policy development proceeded along parallel, though deeply interconnected, paths. It started at the very top, with an effort to obtain a commitment by the Los Angeles mayor and port officials to support some version of the Clean Truck Program. It then went through three phases of policy development. First, city lawyers—in conversation with campaign lawyers—conducted a legal analysis to evaluate and ultimately sign off on the policy, focusing primarily on the risk of preemption. Second, the mayor's office staff managed industry resistance by contracting for an outside economic analysis of the program's costs and benefits that set the framework for the final policy drive. Third, in that final drive, port staff took the lead in thinking through policy details and resolving conflicting industry and coalition views, producing the version of the Clean Truck Program that would ultimately be approved. During this final phase, the Long Beach harbor commission broke ranks with Los Angeles and pursued an independent policy.

In November 2006, James Hoffa, president of the Teamsters, met with Los Angeles Mayor Antonio Villaraigosa to seek his support for the clean trucks

989. Photograph from Patricia Castellanos & Doug Bloch, *A Smart California Port Policy for the Green-Growth Future, Spearheaded by Progressives - Part II*, CALIFORNIA PROGRESS REPORT (May 28, 2008), <http://www.californiaprogressreport.com/site/smart-california-port-policy-green-growth-future-spearheaded-progressives-part-ii>.

campaign.⁹⁹⁰ The mayor agreed to the concept, which was then tracked for policy development at the port, where the mayor's new appointments to the harbor commission and port directorship—made to advance CAAP—would play a key role in the approval of the Clean Truck Program.⁹⁹¹

Inside the Los Angeles mayor's office, staff understood that a clean truck policy was a priority and worked to advance it. Staff knew about the LAANE campaign and Weiner met directly with some members of the mayor's office to present Change to Win's analysis of the drayage truck market and how the Clean Truck Program would affect it.⁹⁹² On the basis of this analysis and their own their own review, staff concluded that the drayage sector was "a perfectly competitive market with . . . a strong negative externality."⁹⁹³ As the outside pressure of the coalition—and industry opponents—scaled up, the mayor's staff faced multiple challenges. One was "to maintain the integrity of the internal policy making process . . . by keeping outside influence outside."⁹⁹⁴ Mayor staff member David Libatique, and later Sean Arian, provided a "buffer" against the coalition.⁹⁹⁵ While the mayor's staff continued meeting with coalition and industry representatives throughout the process, they attempted to minimize the degree to which there was any perception of unfairness in the negotiating process.

A key challenge was advancing the program in the face of increasingly intense industry opposition—and, partly as a consequence, some opposition within the mayor's office itself and at the port. To effectively engage that opposition—and to assess whether it was worth spending political capital to do so—the mayor's and port's staffs needed to be comfortable with the legal foundation for the program. In early 2007, the coalition's legal analysis was presented to the mayor's staff, who wanted assurance that it had been done.⁹⁹⁶ Once it became apparent the program was really moving forward, port lawyers began "leading the charge" to make sure they had their "ducks in line" on the legal issues.⁹⁹⁷ As a result, there were several meetings between port general counsel, city attorney Thomas Russell; other city attorney lawyers assigned to the port, particularly Joy Crose; the Teamsters' Mike Manley; and lawyers from NRDC. These meetings focused on solidifying the legal argument for the concession approach. Manley circulated versions of the memos he had drafted for the Teamsters to the city attorneys, came out to meet with them, and responded to questions and concerns.⁹⁹⁸ In these discussions—also attended by LAANE and Change to Win organizers—Manley viewed his role as "trying to

990. David Zahniser & Louis Sahagun, *Truckers' Status Is a Hitch in Port Plan*, L.A. TIMES, Mar. 6, 2008, at B1.

991. Telephone Interview with Sean Arian, President, Eos Consulting (Apr. 26, 2013).

992. Telephone Interview with Nick Weiner, *supra* note 820.

993. Telephone Interview with David Libatique, *supra* note 754.

994. *Id.*

995. *Id.*

996. Telephone Interview with Sean Arian, *supra* note 991.

997. *Id.*

998. Telephone Interview with Michael Manley, *supra* note 460.

convince [port lawyers] not to recommend to the port commission to reject” the program.⁹⁹⁹ Manley’s view when he talked to port counsel was “that the ATA is going to sue you,” but “if you’re sued you can win.”¹⁰⁰⁰ He argued for the program as a “unified whole”:

We had these allies and the thing about labor and environmental groups is we always accuse each other of ditching . . . for our own interests. . . . And so I was careful not to come across as if I were saying, “Well, this 2007 truck stuff doesn’t matter as long as they’re employees”¹⁰⁰¹

Labor and environmentalists converged around legal theory as well as political interests. NRDC was present at these meetings as the legal “hammer,” but also to help make the case for local authority.¹⁰⁰² NRDC and other environmental groups were independently “pushing using this market participant exception and at the same time, labor had been eyeing it as a potential approach to resolve several issues. And so it kind of came together where we were both saying” the same thing.¹⁰⁰³ NRDC, like the labor lawyers, understood the legal risk of the concession plan and believed that there was “a unified view of how strong the arguments were.”¹⁰⁰⁴

Ultimately, it was port counsel who had the last word on the legal analysis. Much of this work fell to city attorney Joy Crose, who was lead counsel to the Port of Los Angeles on the Clean Truck Program. Her role was to conduct a “legal review of the program” and prepare all “program implementing documents, including contracts, tariffs, ordinances and resolutions.”¹⁰⁰⁵ To do this, Crose worked with her counterpart in Long Beach, and also engaged outside counsel, Steven Rosenthal, chair of litigation in the Washington, D.C. office of Kaye Scholer. After interviewing a number of law firms toward the end of 2006, the city attorney’s office hired Rosenthal and his team to advise the port. Rosenthal had deep expertise on “the commerce clause, federal preemption, and federal statutes relating to the regulation of commerce,” gained in representing airports and ports over the course of his thirty-year career.¹⁰⁰⁶ Together with the city attorneys, Rosenthal advised the port on the legal issues related to enacting the Clean Truck Program. Reflecting on his general approach to city policy, Rosenthal noted that when it comes to reviewing “new, complex programs, you can identify risks” and can suggest “this is why we think this approach is a better idea” but always in a context in which the client understands that “there is no certainty.”¹⁰⁰⁷

999. *Id.*

1000. *Id.*

1001. *Id.*

1002. Telephone Interview with Nick Weiner, *supra* note 820.

1003. Telephone Interview with Adrian Martinez, *supra* note 692.

1004. Telephone Interview with David Pettit, *supra* note 841.

1005. Email from Joy Crose, Assistant Gen. Counsel, Office of the City Att’y, to Scott Cummings, Professor, UCLA School of Law (May 7, 2013) (on file with author).

1006. Telephone Interview with Steven S. Rosenthal, Partner, Complex Commercial Litig. Dep’t, Kaye Scholer (Dec. 16, 2013).

1007. *Id.*

The policy makers and their staff were not seeking certainty, just credible assessment. Weiner felt that the campaign's legal groundwork helped to get the port attorneys to "buy into our analysis," which was basically: "yeah, there's a risk. But it's good policy. . . . [W]e've got a good legal case."¹⁰⁰⁸ NRDC's Martinez described the value of the legal analysis in similar terms. He believed that the legal analysis empowered the city and port to take a stronger position on the bottom-line policy details: If the ATA was going to sue on whatever policy passed, he argued, it freed the port to develop the most effective policy on its own terms and then to "go to court with the best program we have."¹⁰⁰⁹

Similarly, the initial legal analysis provided a ready response to the industry's legal push-back that would occur during policy formulation. Martinez recalled that industry groups had "a lot of legal power, so whenever the port or somebody would propose something, they'd give this very long, threatening legal letter that said you can't do this, you can't do this, you can't do this, you can't do this and here's the legal reasons why." But the coalition had "lawyers on the other side . . . firing back comment letters: oh, but look at this case, look at this case, and making these similar sophisticated arguments on why you can do it. And I think that was the big difference."¹⁰¹⁰ For the mayor's office staff tasked with advancing the program, this legal analysis was critical as a predicate to moving forward: "the legal analysis that was provided by the attorneys basically told us if . . . we're going to have an effect on port trade . . . we would have to act as a market participant and the way we would do that would be through a concession-based model."¹⁰¹¹ The mayor's general counsel, Tom Saenz—who had joined Villaraigosa in 2005 after serving as director of litigation at the Mexican American Legal Defense and Education Fund—also reviewed the program and provided a legal opinion to his client.

The context of mayoral decision making was also shaped by politics. Mayor Villaraigosa's first major policy initiative—a controversial attempt to take over the Los Angeles Unified School District board through the enactment of a state law—was held unconstitutional by a superior court judge in late 2006, giving the mayor a stinging defeat.¹⁰¹² The mayor needed a policy win and a strong pro-environment position at the port promised to deliver political dividends, while also solving a critical regional problem. While Villaraigosa supported employee conversion, he understood its legal and political vulnerabilities—and could not risk a signature policy going down in the courts twice in a row.

The urgency of solving the trucks problem was underscored as both ports faced community resistance to several massive expansion projects, delayed by

1008. Telephone Interview with Nick Weiner, *supra* note 480.

1009. Telephone Interview with Adrian Martinez, *supra* note at 692.

1010. *Id.*

1011. Telephone Interview with David Libatique, *supra* note 754; *see also* Telephone Interview with Sean Arian, *supra* note 991 ("[W]e were very confident that we had strong legal justification for [the program] to pass.").

1012. Howard Blume & Joel Rubin, *Judge Tosses Out Mayor's Takeover of L.A. Schools*, L.A. TIMES, Dec. 22, 2006, at A1.

CAAP, which were unveiled to the public in mid-2007. These included replacing the Gerald Desmond Bridge to permit entry of larger container vessels; expanding and upgrading facilities in several terminals, including TraPac, China Shipping, and APL; creating new rail and road access; and building a new terminal for crude oil.¹⁰¹³ The pressure once again was on the ports to accommodate growing container volume and local officials were eager to solidify the ports' position given its vital regional economic role—by one account, responsible for over 250,000 jobs in Southern California and nearly \$7 billion in state and local taxes.¹⁰¹⁴ In light of this, Los Angeles Harbor Commission President David Freeman vowed: “We’re going to grow and we’re going to clean up this place or my head will be served up on a silver platter in Los Angeles Mayor Antonio Villaraigosa’s office.”¹⁰¹⁵ Some coalition members seemed ready to sharpen their knives. The Sierra Club’s Tom Politeo warned that the ports’ growth rate would outpace mitigation efforts, while LBACA’s Green put it more bluntly: “They say growing green means expanding terminals and putting more trucks on the road. What’s cleaner about that? It’s not logical.”¹⁰¹⁶ Both ports, for their part, seemed to recognize the fight ahead, with the Port of Long Beach director of planning stating that he expected that “every one of the environmental impact documents for these projects will be challenged and end up in court.”¹⁰¹⁷ The ports also sought to market to community members, attempting to “make the ports hip” through a “traveling educational exhibit” designed “to dazzle students with port facts”—at a price tag of one million dollars.¹⁰¹⁸

The ports simultaneously had to calibrate their response to increasing industry resistance to the Clean Truck Program, which focused on concerns about cost. After the ports released their joint proposal in April 2007, “the real fight began. Once that was public . . . industry came out strong and . . . the ports, the mayors, the electeds reacted to that.”¹⁰¹⁹ A report by the Los Angeles Economic Development Corporation in May warned that the cargo fee proposed to fund clean trucks might divert cargo to other ports.¹⁰²⁰ In June, agricultural exporters complained that the program could make U.S. agriculture “uncompetitive.”¹⁰²¹

The ports’ response was to conduct their own economic analysis of the proposed program, which was contracted to outside consultants at Economics & Politics, Inc. Completed in September 2007, the report (called the Husing Report

1013. Louis Sahagun, *Ports Complex Plans to Grow Bigger, Cleaner*, L.A. TIMES, May 28, 2007, at B1.

1014. *Id.*

1015. *Id.*

1016. *Id.*

1017. *Id.*

1018. *Id.*

1019. Interview with Patricia Castellanos, *supra* note 806.

1020. Ronald D. White, *Record Southland Imports Predicted*, L.A. TIMES, May 1, 2007, at C6.

1021. Ronald D. White, *Exporters Making Waves over Ports’ Clean-Air Plan*, L.A. TIMES, June 1, 2007, at C3.

after its main author, economist John Husing), rested on extensive interviews with industry actors, as well as a statistical analysis of a variety of economic data.¹⁰²² The report compared the cost of converting the estimated 16,800 trucks regularly serving the ports to clean trucks through the existing structure of independent-contractor drivers to the cost of a plan based on employee conversion. It concluded that the proposal to convert to employee-operated clean trucks would cost LMCs nearly \$150,000 per truck, which would include the cost of retrofitting or replacing the trucks and the cost of compensating the drivers—for a total cost of nearly \$2.5 billion for converting the entire fleet.¹⁰²³ This cost was calculated after factoring in port subsidies for fleet conversion, which were to be funded through truck fees and other public sources (including SCAQMD and Proposition 1B funds).¹⁰²⁴ The report focused on two costs associated with driver compensation. First, the report analyzed the impact of the federal government's new security program, which required anyone accessing foreign entry points, including ports, to obtain a Transportation Workers Identification Credential—a biometric ID card also known as a TWIC card.¹⁰²⁵ The federal regulations barred undocumented immigrants from obtaining a TWIC card and Husing estimated that this would reduce the supply of port trucking drivers by up to twenty-two percent, causing LMCs to raise their prices by up to twenty-five percent to cover the costs of luring new drivers.¹⁰²⁶ The second type of driver-related costs were the payroll and benefits cost increases associated with the conversion of drivers to employees.¹⁰²⁷ Combining these driver costs with the cost of clean truck conversion, the report estimated that LMCs would raise their prices by an average of eighty percent to offset the cost of implementing the Clean Truck Program.¹⁰²⁸ Although emphasizing that this would be a “relatively insignificant” increase in overall shipping costs, it was notable that the price increase under a fleet conversion plan that continued to use independent contractors was significantly lower (at less than fifty percent).¹⁰²⁹

Worried that the ports would primarily focus on costs, Jon Zerolnick and others at LAANE set out to “quantify the benefits of passing the program.”¹⁰³⁰ Zerolnick thus took the lead in authoring *The Road to Shared Prosperity*—released a month before the Husing Report—which projected “direct and indirect financial benefits of over \$4.2 billion” as a result of increased employee income and shifted taxes, as well as health care savings resulting from better community health and

1022. JOHN E. HUSING ET AL., SAN PEDRO BAY PORTS CLEAN AIR ACTION PLAN, ECONOMIC ANALYSIS: PROPOSED CLEAN TRUCK PROGRAM (2007), available at <http://www.cleanairactionplan.org/civica/filebank/blobload.asp?BlobID=2260>.

1023. *Id.* at iv–v.

1024. *Id.* at 6.

1025. *Id.* at iii.

1026. *Id.* at 39–41.

1027. *Id.* at 66–69.

1028. *Id.* at v.

1029. *Id.* at iv.

1030. Interview with Jon Zerolnick, *supra* note 807.

reduced taxpayer subsidies for driver health care.¹⁰³¹ When it was released, the Husing Report also made a nod toward the benefit side by acknowledging an SCAQMD estimate of a “cumulative economic benefit of \$4.7 to \$5.9 billion due to reductions in premature deaths, lost work time and medical problems.”¹⁰³² However, its overall conclusions about employee conversion were negative. The Husing Report suggested that shippers “will resist the LMC price increases due to their size” and “would delay such an increase as long as possible and explore other options.”¹⁰³³ For the LMCs themselves, the report warned that in the transition period, “there is the risk of the destruction of their firms and possibly bankruptcy. For those that survive, the question arises as to how they would recoup the accumulated loss created during the transition period.”¹⁰³⁴ Husing predicted that one-third of small LMCs would go out of business.¹⁰³⁵ The report did not engage the issue of long-term sustainability emphasized by the coalition.

Predictably, industry reaction focused on the Husing Report’s cost analysis, which strengthened opposition to employee conversion. The PMSA and National Industrial Transportation League—jointly representing Wal-Mart, Exxon, General Motors, and other major importers—formally asked the Federal Maritime Commission to intervene to stop the Clean Truck Program.¹⁰³⁶ Some trucking company owners threatened dire consequences. One family-run business owner said in response to the Husing Report: “Do the math. They want just a handful of companies to do business with . . . I am not interested in having 500 truck drivers as employees. If I have to remodel my business, I will probably walk away. I won’t want to go through it.”¹⁰³⁷ Industry groups pressed their position and ratcheted up the litigation threat. In a letter sent to both harbor commissions and mayors, a coalition of business groups urged that the ban on dirty trucks be scrapped in favor of emission standards, and warned that the proposal was “anti-competitive,” was outside the ports’ “legal authority under state law,” and thus “will result in litigation.”¹⁰³⁸ Against this backdrop, staff members within the Los Angeles mayor’s office and port were legitimately concerned and a key question became why employee conversion was essential to a program that purported to advance environmental goals. Even Los Angeles Harbor Commission President David Freeman, a staunch program supporter, appeared to equivocate: “We all, of course, want to get the truck program up and running . . . But quite frankly, when we do

1031. JON ZEROLNICK, *THE ROAD TO SHARED PROSPERITY: THE REGIONAL ECONOMIC BENEFITS OF THE SAN PEDRO BAY PORTS’ CLEAN TRUCKS PROGRAM 6–7* (2007), available at http://www.cleanandsafeports.org/fileadmin/files_editor/Road_to_Shared_Prosperty.pdf.

1032. HUSING ET AL., *supra* note 1022, at i.

1033. *Id.* at 74.

1034. *Id.* at 75.

1035. *Id.* at vi, 17 (predicting loss of 376 “mostly smaller LMCs” out of a total of 800 to 1200 LMCs overall).

1036. Ronald D. White, *Plan to Cut Port Air Pollution Assailed*, L.A. TIMES, Sept. 28, 2007, at C3.

1037. Ronald D. White & Janet Wilson, *Opposition Grows to Ports’ Clean-Air Plan*, L.A. TIMES, Sept. 29, 2007, at C1.

1038. Ronald D. White, *Changes Urged in Proposal for Ports*, L.A. TIMES, Oct. 10, 2007, at C2.

the economic analysis it raises some questions.”¹⁰³⁹ In response, coalition members expressed frustration that the ports were mishandling program implementation and had lost valuable momentum. As NRDC’s David Pettit put it: “The ports of Los Angeles and Long Beach get a failing grade for slipping behind in the implementation of their landmark Clean Air Action Plan.”¹⁰⁴⁰ It was fall 2007 and the program was at a crossroads.

The “turning point” was born out of tragedy,¹⁰⁴¹ when Los Angeles mayor’s staffer David Libatique was hit and seriously injured by a port drayage truck while walking out of a meeting at the TraPac Container Terminal. Although he would recover to full strength and eventually return, his temporary absence left a personnel gap at the Los Angeles mayor’s office. That gap was filled by Sean Arian, who was almost preternaturally well-suited for the task ahead. Arian was the product of “multiple generations of longshoremen in San Pedro”—someone who as a boy suffered asthma and thus understood the Clean Truck Program in “very personal” terms.¹⁰⁴² He also had a unique combination of skills. A Columbia-trained lawyer, Arian had spurned the practice of law for the high-powered world of management consulting at McKinsey & Company, which he joined after a Fulbright fellowship in Latin America (where he focused on access to justice) and a federal court clerkship.¹⁰⁴³ As a McKinsey analyst, Arian worked for Mayor Villaraigosa setting up a Project Management Unit to audit and track the mayor’s accomplishments. In early 2007, Arian left McKinsey and became the city’s director of economic development on the mayor’s Business Team. Once Libatique was injured, the port portfolio was given to Arian.

Arian entered a situation in which the foundation for a Clean Truck Program had been laid, but significant industry roadblocks remained. Arian took measure of the political context. He was told that the coalition had “done all the legal work,” and understood that the coalition had also set forth the “big picture” in a way that made clear “what the community thinks” and what the “political upside and downside were.”¹⁰⁴⁴ This gave the mayor “political space” to advance a policy that would be “truly ground breaking.”¹⁰⁴⁵ But the case for the link between the environmental benefits of the program and employee conversion had not been persuasively made and industry arguments against it were gaining traction after the Husing Report. Arian sought to more forcefully make the case that port pollution was a “systemic problem” of “market failure,” and thus not amenable to environmental regulation by itself.¹⁰⁴⁶ Although the Clean Truck Program was fundamentally about environmental remediation, to get there, Arian argued it was

1039. White & Wilson, *Opposition Grows to Ports’ Clean-Air Plan*, *supra* note 1037.

1040. *Id.*

1041. Telephone Interview with David Libatique, *supra* note 754.

1042. Telephone Interview with Sean Arian, *supra* note 991.

1043. *Id.*

1044. *Id.*

1045. *Id.*

1046. *Id.*

crucial to attack “the root cause of the problem as opposed to just trying to attack one of the externalities.”¹⁰⁴⁷ The issue was how to convince the ports to move toward what Libatique called an “asset-based market,” in which LMOs owned their trucks.¹⁰⁴⁸

Two decisions changed the program’s course—at least in Los Angeles. First, Arian and others within the Los Angeles mayor’s office recognized that for the program to succeed, staff at the port had to buy in. To achieve this, Arian—working closely with Castellanos and Weiner¹⁰⁴⁹—was able to convince the mayor to “put somebody high ranking” in charge of developing the program at the Los Angeles port.¹⁰⁵⁰

That person turned out to be John Holmes, who held what was arguably the second most important job in the port after the director: overseeing day-to-day operations as the port’s deputy executive director. Holmes had spent nearly thirty years in the Coast Guard, the last three of which directing operations in Southern California—making him a “known quantity” at the port.¹⁰⁵¹ In Holmes’s view, he was charged with designing the Clean Truck Program because figuring out how to get clean trucks in and out of the terminals was ultimately an “operational issue.”¹⁰⁵² When he was assigned to the program by Knatz in late 2007, the “two things” he knew were that the program was “going to have a rolling ban . . . to culminate in five years in having all the trucks . . . be EPA 2007 or newer” and there was going to be employee conversion.¹⁰⁵³ As Holmes recalled: “My role was to basically figure it all out.”¹⁰⁵⁴

On the campaign side, it was Weiner’s role to facilitate this process. Weiner’s goal was to help Holmes credibly advance the employee conversion piece as an integral part of the environmental program and not just a union project.¹⁰⁵⁵ In Weiner’s analysis, because port staff were on the front line of dealing with industry opposition, they were under the most pressure to respond to industry claims that “the sky is going to fall.”¹⁰⁵⁶ That front line pressure was a constant challenge for the campaign, since port staff would report industry concerns up the ladder, ultimately landing back at the mayor’s office, where the mayor’s staff would get “nervous and weak-kneed” and the coalition would have to “prop up our supporters” and “beat back all these claims.”¹⁰⁵⁷ As a result, the coalition believed it was crucial to have “someone at the staff level at the port . . . able to push back

1047. *Id.*

1048. Telephone Interview with David Libatique, *supra* note 754.

1049. Telephone Interview with Nick Weiner, *supra* note 820.

1050. Telephone Interview with Sean Arian, *supra* note 991.

1051. Telephone Interview with John Holmes, Deputy Exec. Dir., Port of L.A. (Apr. 29, 2013).

1052. *Id.*

1053. *Id.* The placard and parking programs were also in the version that Holmes received. *Id.*

1054. *Id.*

1055. *Id.*

1056. Telephone Interview with Nick Weiner, *supra* note 820.

1057. *Id.*

and move this agenda.”¹⁰⁵⁸ Weiner understood that the politics were fraught, since industry was “trying to tag the port as basically in bed” with the unions.¹⁰⁵⁹ Weiner also knew that Holmes was politically astute and appreciated the stakes: that he technically worked for the mayor, while having to deal with industry as the port’s primary constituency.¹⁰⁶⁰

Arian introduced Holmes to Weiner. As Weiner recalled, the pitch to Holmes was: “the mayor really wants this, so [Weiner] could help you understand why this makes sense and talk it through.”¹⁰⁶¹ Weiner recalled that Holmes’ initial posture was “skeptical”—asking “what does this have to do with the Clean Truck Program?”¹⁰⁶² To answer that question, Weiner initiated a series of “one-on-one discussions” with Holmes about the concession model and, specifically, the employee conversion piece. From Weiner’s vantage point, these discussions were fruitful as Holmes eventually became comfortable with the idea that “the employee requirement is really so that the companies will be responsible . . . to maintain the trucks and not these drivers.”¹⁰⁶³ Thus, Holmes accepted the main thrust of the coalition’s argument: that if the maintenance costs were not shifted onto the trucking companies, the maintenance could not be sustained over the long term since the drivers could not shoulder the expense.¹⁰⁶⁴ From there, Holmes began to work on the program details. Given concerns about cost, a key issue was determining the appropriate level of financial incentives, which trucking companies had advocated for as necessary to make the conversion “happen as soon as possible.”¹⁰⁶⁵ For the incentive piece, Holmes brought in the port’s director of finance. But they were working off the basis of the Husing Report, which did not provide a strong framework for advancing the entire clean truck package.

This led to the second crucial decision. After Holmes was on board, Arian received the mayor’s permission to bring in another consulting firm to reevaluate the economics of the Clean Truck Program. After reviewing the Husing Report, Arian believed that there was an insufficient “fact base” to convince stakeholders of the need for industry transformation and thus argued for what amounted to a more sophisticated cut at the economics done by “one of the top consulting firms.”¹⁰⁶⁶ Using his connections, Arian was able to bring in Boston Consulting Group (BCG) (his former firm’s chief rival), which agreed to send in its “A Team” on a pro bono basis to analyze the economic impact of converting to clean trucks. To justify this, Arian dissected the Husing Report in a way that conveyed to port staff that: “Your analysis didn’t go far enough to give us the information we need

1058. *Id.*

1059. *Id.*

1060. *Id.*

1061. *Id.*

1062. *Id.*

1063. *Id.*

1064. *Id.*

1065. Telephone Interview with John Holmes, *supra* note 1051.

1066. Telephone Interview with Sean Arian, *supra* note 991.

to evaluate our options.”¹⁰⁶⁷ From Weiner’s perspective, Arian was able to “basically rip apart” the analysis of John Husing, whose response was “You’re right, I can’t do that”—setting the stage for the entry of BCG.¹⁰⁶⁸ Arian viewed BCG as “potentially a huge risk” because its consultants’ reputational capital was based on telling “you what they think the right answer is regardless of whether that’s the answer you wanted to get from them,” and their analysis would become part of the public record.¹⁰⁶⁹ However, Arian firmly believed that “we needed to have a really strong fact base by a mutual third party respected organization.”¹⁰⁷⁰ Arian recalled that port counsel, Tom Russell, was the “very first person who hopped on board” with the BCG plan since for the market participation theory to work as a legal rationale for the program, there needed to be a strong evidentiary record of why the program made business sense.¹⁰⁷¹

Holmes also worked closely with BCG analysts. Holmes recalled that a “key factor” was BCG “working a month with us, locked in a room basically trying to figure out how this could work.”¹⁰⁷² Holmes’s view at this stage was that to get where the Los Angeles port wanted to be “required a sea change in the drayage trucking industry.”¹⁰⁷³ To do that, he saw the basic choice as regulating or incentivizing the industry—which was not going to go green “just to do the right thing.”¹⁰⁷⁴ Industry’s basic question was: “Are you going to pay me to do it or make me do it?”¹⁰⁷⁵ The answer was: some combination of both.

Toward that end, Holmes’s work with BCG was designed to promote trucking participation in the program and “get the numbers right.”¹⁰⁷⁶ BCG modeled industry responses to different program scenarios, in which the main elements were the amount of the cargo fee, the timing of the truck ban, the development of security structures, the nature of driver status (independent contractor or employee), and the amount of incentives (which varied by whether the new trucks would run on diesel or alternative fuel). The port wanted to encourage companies to buy Liquid Natural Gas (LNG) trucks, which were an average of \$50,000 more expensive than diesel trucks. One issue Holmes grappled with was how much the incentive had to be to persuade companies to buy LNG trucks. In addition, Holmes was focused on working out the details of the concession arrangement and its impact on the

1067. *Id.*

1068. Telephone Interview with Nick Weiner, *supra* note 820.

1069. Telephone Interview with Sean Arian, *supra* note 991. During the same time frame, the port also commissioned a study from Beacon Economics, which was funded by the Hewlett Foundation and released in February 2008, finding that the overall benefits of the program outweighed the costs. JON HAVEMAN & CHRISTOPHER THORNBERG, BEACON ECONS., CLEAN TRUCKS PROGRAM (2008), available at http://www.cleanandsafeports.org/fileadmin/files_editor/Beacon_CTP_Report.pdf.

1070. Telephone Interview with Sean Arian, *supra* note 991.

1071. *Id.*

1072. Telephone Interview with John Holmes, *supra* note 1051.

1073. Interview with John Holmes, *supra* note 148.

1074. *Id.*

1075. *Id.*

1076. *Id.*

community. In his view, the employee mandate was closely associated with the off-street parking provision, since employees would “slip seat”—transfer their trucks to different drivers from one shift to the next—which meant that there needed to be a place to park the trucks during the transfer period.¹⁰⁷⁷ Holmes was sensitive to complaints about traffic and saw the placard as an effort to respond to community concerns.¹⁰⁷⁸

Once the economic models were run, Holmes visited “the twenty-five biggest trucking companies in the country” to validate the results.¹⁰⁷⁹ In these meetings—which included major carriers like Schneider, Swift, and Knight, as well as shippers like Wal-Mart—Holmes would say: “We’re thinking of doing the program this way. What are we missing?” Through that process, Holmes and the consultants gained “a whole bunch of knowledge” about industry structure and equipment costs that were then factored back into the modeling analysis.¹⁰⁸⁰ Holmes recalled that his meetings with industry were not all adversarial. To the contrary, many representatives of major trucking companies expressed support for minimum standards in an industry they viewed as built on “caveman economics,” in which fly-by-night carriers forced a “race to the bottom.”¹⁰⁸¹ Yet although these firms supported many of the environmental elements of the program “and gave good feedback,” they uniformly did not agree with employee conversion.¹⁰⁸² Holmes also understood that even those companies that supported the general approach were likely to join an industry lawsuit against the program if it passed, simply because industry rejected port regulation on principle.¹⁰⁸³

As Holmes and BCG carried out their analysis, the commissioners were also working to iron out the policy details. Commissioner Mendoza recalled that her starting point was at odds with Freeman’s, who thought that the Los Angeles port should simply “mandate the purchase of 500 LNG trucks” and thus become the direct owner of a portion of the port trucking fleet.¹⁰⁸⁴ However, as the program developed around employee conversion within the mayor’s office, Freeman embraced the concept and fought for it like a “momma bear.”¹⁰⁸⁵ Together, Mendoza and Freeman took the lead in moving the entire program forward. Mendoza described her approach to dealing with the city attorneys assigned to the program:

[W]e didn’t ask them, we would tell them, “This is what we’re going to do. You guys have to figure out how to make it work.” And although we got a lot of push-back and a lot of “you know, we’ve never done that before,”

1077. *Id.*

1078. *Id.*

1079. Telephone Interview with John Holmes, *supra* note 1051.

1080. *Id.*

1081. Interview with John Holmes, *supra* note 148.

1082. Telephone Interview with John Holmes, *supra* note 1051.

1083. *Id.*

1084. Telephone Interview with Jerilyn López Mendoza, *supra* note 723.

1085. Telephone Interview with Sean Arian, *supra* note 991.

or “we have outside consultants who have done the analysis and they think that we don’t have a really good chance.” Our response was, “Okay, do we know for certain that this would not be successful in court? No. Well, if we don’t try, we won’t know.”¹⁰⁸⁶

Freeman saw his role as motivating the staff, which “required, shall we say, inspiration. And my role was to inspire them . . . by just telling them that if they didn’t get this stuff done, there was going to be hell to pay.”¹⁰⁸⁷ In Freeman’s view, “Holmes was the best staff person there in getting religion and helping to make it happen.”¹⁰⁸⁸ Policy issues brought up by port staff were hammered out, either in an ad hoc committee on environmental review staffed by Mendoza and Freeman, or in a closed session of the entire board. In the face of concerns that “truck companies would boycott” the port,¹⁰⁸⁹

David Freeman and John Holmes would get on a plane and go fly to Walmart in Bentonville, Arkansas, or they’d fly to the different trucking companies that were in Texas and Virginia and places like that, and they would sit down and talk to the business owners and say, “Look, we know this is uncomfortable, we know this is different, we know this is the first time you’ve been asked to do something like that but at the same time if we clean up, it will allow us to expand in a way that the community will not rise up and riot the way they have in the past. If you want to grow, if you want the port to grow, if you want your goods to get in and out faster, we also have to be as green as possible so that we can grow.”¹⁰⁹⁰

The information gained in these trips allowed Freeman to respond to staff concerns about costs. And Mendoza used her lawyering skills to respond to issues raised about the legality of employee conversion, asking: “Well, why aren’t we a market participant? . . . Why can’t we make that argument? What do we have to do to make that argument compelling?”¹⁰⁹¹ Freeman knew that “our furthest reach under the law was to require the truckers to have employees.”¹⁰⁹²

3. *The End Game: Passing the Clean Truck Program*

As BCG worked on its analysis, the Los Angeles and Long Beach ports initiated a sequential approach to program implementation. Based on a political calculus that it was best to lock in elements of the program in stages—ranging from least to most controversial—the ports began moving forward specific elements of the Clean Truck Program: from clean truck conversion, to industry incentives, to employee conversion. This order tracked the key elements of the program debated from the outset and set an agenda for phased implementation: first, the progressive

1086. Telephone Interview with Jerilyn López Mendoza, *supra* note 723.

1087. Telephone Interview with S. David Freeman, *supra* note 751.

1088. *Id.*

1089. *Id.*

1090. Telephone Interview with Jerilyn López Mendoza, *supra* note 723.

1091. *Id.*

1092. Telephone Interview with S. David Freeman, *supra* note 751.

ban on dirty trucks; second, the Clean Truck Fee; and third (and most controversially), the concession plan with employee conversion. In the first two steps, the ports of Los Angeles and Long Beach moved in synch, but in the third, they diverged. Throughout the process, industry pressure mounted to split off the environmental standards from the employee conversion piece—and to sever the environmentalists from organized labor in the coalition.

The first step was, in relative terms, the easiest. On November 1, 2007—as the BCG team was just getting under way—the Port of Los Angeles Board of Harbor Commissioners unanimously approved a progressive dirty truck ban.¹⁰⁹³ Following a strong staff recommendation,¹⁰⁹⁴ the board approved Order 6935 to phase in the ban over five years.¹⁰⁹⁵ The legal structure of the ban, drafted by city attorney Crose, highlighted the legal authority of the port, while the operational structure bore the imprint of Holmes’s expertise. Legally, the order amended port Tariff No. 4, which was originally adopted in 1989 to govern the rates and terms of terminal operations.¹⁰⁹⁶ As amended, Tariff No. 4 imposed a prohibition on the *terminal operators*—not the trucking companies or the truck drivers. Specifically, the ban stated that “no Terminal Operator shall permit access to any Terminal in the Port of Los Angeles” to nonconforming trucks.¹⁰⁹⁷ In the order’s findings section, the justification for the ban was made in market participant terms. There, the case was strongly asserted for the port as a proprietary entity with business interests in pollution reduction:

Independently, the failure of the Port to adequately address air pollution impacts, including diesel truck emissions, would threaten future Port growth both because of legal constraints under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act and the opposition of surrounding residents and communities to further expansion without an actual improvement in environmental conditions surrounding the ports.¹⁰⁹⁸

The findings focused on trucks as “a critical element in the efficient operations of the Port,” and concluded: “Reasonable environmental measures are simply good business practices.”¹⁰⁹⁹

On the operations side, the order established a new system for efficiently

1093. Louis Sahagun, *L.A. Panel OKs Plan to Cut Port Truck Soot*, L.A. TIMES, Nov. 2, 2007, at B1.

1094. Memorandum from Ralph G. Appy & Michael R. Christensen, Env’tl. Mgmt. Div., Permanent Order Amending Port of L.A. Tariff No. 4 (Oct. 29, 2007).

1095. L.A. Bd. of Harbor Comm’rs., Order 6935, Items 2010, 2015, 2020 (Nov. 1, 2007). The progressive ban operated by barring drayage trucks built before 1989 by October 1, 2008; barring unretrofitted trucks built before 2004 (and retrofitted trucks built before 1994) by January 1, 2010; and completely barring any trucks that did not meet 2007 model year standards by January 1, 2012. *Id.*

1096. L.A., Cal., Ordinance 165789 (Apr. 10, 1990) (adopting L.A. Bd. of Harbor Comm’rs, Order No. 5837 (July 12, 1989) (adopting Port of L.A. Tariff No. 4)).

1097. L.A. Bd. of Harbor Comm’rs, Order 6935, Items 2010, 2015, 2020.

1098. *Id.* ¶ 12.

1099. *Id.* ¶¶ 13, 14.

identifying clean trucks—requiring all trucks to install a Radio Frequency Identification Device by August 1, 2008. The device would contain a unique identification number that could be electronically read by terminal operators, which could cross-reference the number against records showing the vehicle model year and compliance with clean trucks standards.¹¹⁰⁰ The Long Beach Board of Harbor Commissioners unanimously approved an identical ban five days later,¹¹⁰¹ prompting Long Beach Mayor Foster at a joint news conference with Los Angeles Mayor Villaraigosa to tout the two cities' effort “to lead the world in pushing for cleaner air and healthier environment with our shared goal of having the cleanest ports in the world.”¹¹⁰²

With the dirty truck ban legally and logistically in place, the battle immediately turned to the issues of new truck financing and employee conversion. Upon passage of the Los Angeles ban, port director Knatz struck a stern negotiating posture, acknowledging the need for short-term program funding, but making clear “we can't subsidize it forever.”¹¹⁰³ With respect to employee conversion, trucking companies again emphasized the litigation threat. Cecilia Ibarra, assistant operations manager for Total Distribution Service of Wilmington was explicit—and articulated industry's particular hostility toward the employee piece. “We want clean air as much as anyone, but the board's actions may drive us into litigation. A concession program is a step toward unionization. I can already hear the ka-chink, ka-chink, ka-chink in union coffers.”¹¹⁰⁴ Despite this effort to isolate employee conversion from the program's environmental elements, coalition members continued to assert a unified front. LBACA's Green made the strong case: “I don't understand why the board decided to vote on just the clean-truck portion of the clean-air plan It's hard not to think that they were pandering to the environmental community by throwing us a bone, as though we would be happy with just a progressive ban.”¹¹⁰⁵ In an official statement released after the Long Beach ban was adopted, the coalition kept up the pressure to move forward: “Without reform, the Los Angeles and Long Beach ports remain unprepared to meet ever-increasing trade demands, and they will be unequipped to compete in today's rapidly changing economy.”¹¹⁰⁶

1100. *Id.* at Items 2000, 2005, 2025.

1101. Long Beach Bd. of Harbor Comm'rs, *Minutes of a Special Meeting*, PORT LONG BEACH, 20 (Nov. 5, 2007). At this meeting, during which the board approved the ordinance's first reading, the coalition turned out several drivers, who spoke, as did NRDC's Martinez, the Clean Air Coalition's Kim, and the American Lung Association's Callahan. *Id.* at 3–10. The Long Beach harbor commissioners approved the ordinance's “second and final reading” on November 12. Long Beach Bd. of Harbor Comm'rs, *Minutes*, PORT LONG BEACH, 9 (Nov. 12, 2007). The ordinance, as adopted, was No. HD-1997, which amended Long Beach Tariff No. 4 to include findings and policy language that were identical to Los Angeles Order 6935. Long Beach, Cal., Ordinance HD-1997 (Nov. 12, 2007) (amending Ordinance HD-1357, Tariff No. 4 (Dec. 27, 1983)). The Long Beach Clean Truck Program was drafted by City Attorney Robert Shannon.

1102. Louis Sahagun, *Long Beach Joins Port Ban on Old Trucks*, L.A. TIMES, Nov. 6, 2007, at B4.

1103. Sahagun, *L.A. Panel OKs Plan to Cut Port Truck Soot*, *supra* note 1093.

1104. *Id.*

1105. *Id.*

1106. Sahagun, *Long Beach Joins Port Ban on Old Trucks*, *supra* note 1102.

On the financing side, the issue from the outset had been at what price to set the Clean Truck Fee (a charge on containers carried by drayage trucks to be imposed on shippers) in order to create a fund for clean truck conversion. The ports' initial proposal contained a range—from thirty-four to fifty-four dollars per container—which set the bargaining zone. Industry sought to push the ports toward the lowest end of the range, while other stakeholders sought to keep up the pressure for the ports to act aggressively. In 2006, state Senator Lowenthal from Long Beach advanced a bill to impose a sixty-dollar fee on cargo loaded in forty-foot containers to fund emission reduction, but Governor Schwarzenegger vetoed it on the ground that it would hurt U.S. exports.¹¹⁰⁷ In 2007, Lowenthal reintroduced the bill, but agreed to withdraw it in September as the Clean Truck Program appeared to advance.¹¹⁰⁸ Other public funds were potentially available for truck conversion, but not at the levels anticipated.¹¹⁰⁹ The financial viability of truck conversion thus hinged on the cargo fee.

Long Beach made the first move, approving a cargo fee of thirty-five dollars per loaded twenty-foot container on December 17, 2007.¹¹¹⁰ The Clean Truck Fee would be “assessed on containerized merchandise entering or leaving the Ports by Drayage Truck,” to be paid by the “Beneficial Cargo Owner,” and collected by the terminal operator.¹¹¹¹ The fee was expected to raise \$1.6 billion for a Clean Truck Fund,¹¹¹² to be used by the port “exclusively for replacement and retrofit of Drayage Trucks serving the Ports of Los Angeles and Long Beach.”¹¹¹³ Still marching in lockstep, the Los Angeles harbor commissioners approved an identical fee four days later.¹¹¹⁴

Finally, the stage was set for the showdown over employee conversion. Both sides in the debate pushed hard. In Long Beach, Mayor Foster worked to isolate organized labor. As Weiner recalled, Foster “kept . . . wanting to meet with the environmental folks in our coalition without the labor folks . . . [asking:] ‘Why can’t

1107. Sahagun, *Port OKs ‘Green’ Cargo Fee*, *supra* note 790.

1108. *Id.* Lowenthal reintroduced the measure, which was again vetoed by Schwarzenegger in September 2008. Louis Sahagun & Ronald D. White, *Local Ports Initiate Antipollution Program*, L.A. TIMES, Oct. 2, 2008, at B2; Sahagun, *Port OKs ‘Green’ Cargo Fee*, *supra* note 790.

1109. Editorial, *Long Beach and L.A. Port Officials Should Vote for Container Fees That Will Lead to Cleaner Air*, L.A. TIMES, Dec. 17, 2007, at A18 (noting that a disproportionately small proportion of Proposition 1B funds had been allocated to Southern California).

1110. Sahagun, *Port OKs ‘Green’ Cargo Fee*, *supra* note 790. The Ordinance, No. HD-2005, was unanimously approved in its second and final reading (with one commissioner absent) on January 7, 2008. *See* Long Beach, Cal., Ordinance No. HD-2005 (Jan. 9, 2008); Long Beach Bd. of Harbor Comm’rs, *Minutes*, PORT LONG BEACH, 9 (Jan. 7, 2008).

1111. Long Beach Bd. of Harbor Comm’rs, Clean Truck Tariff Amendment and Fee, Item 1030 (Dec. 11, 2007), <http://www.polb.com/civica/filebank/blobdload.asp?BlobID=4708>.

1112. Sahagun, *Port OKs ‘Green’ Cargo Fee*, *supra* note 790.

1113. Long Beach Bd. of Harbor Comm’rs, Clean Truck Tariff Amendment and Fee, *supra* note 1111, at Item 1035.

1114. L.A. Bd. of Harbor Comm’rs Order No. 6943 (Dec. 20, 2007). This order also followed a strong staff endorsement. *See* Memorandum from Ralph G. Appy & Michael R. Christensen to L.A., Cal. Board of Harbor Commissioners (Dec. 20, 2007).

we just do this? Why do you need this employee thing?”¹¹¹⁵ Commissioner Freeman perceived Foster as set against employee conversion: “He just did not believe that we had the right to force these [trucking companies] to have employees.”¹¹¹⁶ And Foster was worried that “the Teamsters will take over” and undermine future environmental programs.¹¹¹⁷

The coalition kept up the pressure with a series of public demonstrations—against the backdrop of ongoing private negotiations. On the day that Long Beach approved its Clean Truck Fee, the coalition organized a rally of 150 truckers at the port entrance to stress the need for employee conversion. “We all support cleaner air, but none of us wants a loan or a grant to buy a new truck,” said driver Miguel Pineda. “If these plans become law, I won’t be able to put food on the family table.”¹¹¹⁸ He added that “a lot of truckers have stopped spending money on repairs because they aren’t sure they will still have jobs next year . . . It’s a terrible situation; we live like slaves in the 19th Century.”¹¹¹⁹ A month later, the *Los Angeles Times* ran a front-page story on “unsafe trucks” coming out of the ports, focusing on the plight of low-income independent contractors who could not afford to replace tires on their big rigs and frequented “llaneros” who would use hot blades to carve new grooves into seriously worn tires; the story highlighted other drivers engaged in desperate measures like “lashing bumpers to chassis with bungee cords and smearing mud over cracked parts to hide the problems from CHP officers.”¹¹²⁰

In the face of pending expansion plans—the *Los Angeles Times* noted that fifteen port projects had been held up since the China Shipping case in 2001—the coalition also pressed to underscore the legal stakes.¹¹²¹ NRDC’s Adrian Martinez and the Teamsters’ assistant director of ports, Ron Carver, sent a letter to the ports stating: “Unless we are assured that your plans include reasonable proposals for mitigating the environmental harm of your existing facility, let alone your proposed expansion, we cannot see how we could let the process continue without a challenge.”¹¹²² The message was clear—and industry reacted strenuously, with the vice-president of the TraPac Terminal calling it a “shakedown.”¹¹²³ Martinez observed that “things are getting nasty out there,” while Mayor Villaraigosa tried to give a positive spin: “In the interests of green growth, historic adversaries have become part of a very delicate coalition. It’s as though everyone is coming to this party holding hands but reluctant to get on the dance floor. But they will, eventually. They have to.”¹¹²⁴

1115. Telephone Interview with Nick Weiner, *supra* note 820.

1116. Telephone Interview with S. David Freeman, *supra* note 751.

1117. *Id.*

1118. Sahagun, *Port OKs ‘Green’ Cargo Fee*, *supra* note 790.

1119. Louis Sahagun, *Ports Turn Over a New, Green Leaf*, L.A. TIMES, Dec. 25, 2007, at A1.

1120. Louis Sahagun, *Unsafe Trucks Stream Out of L.A.’s Ports*, L.A. TIMES, Jan. 21, 2008, at A1.

1121. Sahagun, *Ports Turn Over a New, Green Leaf*, *supra* note 1119.

1122. *Id.*

1123. *Id.*

1124. *Id.*

Before that could happen, the coalition sought to make clear that the legal consequences of inaction would be further logjam. Markers were laid down at both ports. In Los Angeles, the proposed TraPac Terminal expansion was the legal flashpoint. On December 6, 2007, the Los Angeles Harbor Commission, in a statement of overriding considerations,¹¹²⁵ unanimously approved the EIR for a \$1.5 billion upgrade projected to create 6000 jobs and \$200 million annually in taxes.¹¹²⁶ Four individuals and sixteen groups—including the Coalition for Clean and Safe Ports, NRDC, the Coalition for Clean Air, the American Lung Association, Sierra Club, and LAANE—appealed the approval to the Los Angeles City Council on the ground that it did not adequately address the air pollution impact.¹¹²⁷ One of the individual appellants was Kathleen Woodfield, president of the San Pedro and Peninsula Homeowners Association, which had been a lead plaintiff in the China Shipping litigation.¹¹²⁸ As she recalled, the appellants were not represented by legal counsel: “NRDC was clear that they were not representing us.”¹¹²⁹ Yet NRDC did flex its own legal muscle, indicating its intent to file a CEQA lawsuit if the council appeal was unsuccessful.¹¹³⁰ In response, Council Member Hahn blocked the EIR from getting out of a key council committee and began negotiating with environmental and neighborhood groups.¹¹³¹

Two months later, in Long Beach, NRDC and the Coalition for a Safe Environment filed an intent-to-sue letter with the port, asserting an innovative legal theory: that the port was an entity subject to federal oversight as a hazardous waste site under the federal Resource Conservation and Recovery Act.¹¹³² NRDC’s Pettit claimed: “We want the court to take over the whole thing at once in order to enforce a new priority of public health over profit We think that will require court appointment of a port czar to force the port to use currently available technology to fix the problem.”¹¹³³ The letter requested that the port stop expansion projects until it could prove they would not “at any time increase the level of hazardous diesel particulates emanating from the port.”¹¹³⁴

1125. See ENVTL. MGMT. DIV., PORT OF L.A., DRAFT FINDINGS OF FACT AND STATEMENT OF OVERRIDING CONSIDERATIONS, BERTHS 136-147 [TRAPAC] CONTAINER TERMINAL PROJECT (2007).

1126. L.A. Bd. of Harbor Comm’rs, *Minutes of the Special Meeting of the Los Angeles Board of Harbor Commissioners*, PORT L.A. (Dec. 6, 2007).

1127. Letter from David Pettit et al. to Members of the Los Angeles City Council, Re: Appeal from Board of Harbor Commissioners Decision to Approve the Final EIR for TraPac Container Terminal (Dec. 14, 2007) (on file with author).

1128. Telephone Interview with Kathleen Woodfield, Member, Sierra Club (May 14, 2013). Woodfield was also a member of the Port Community Advisory Committee. *Id.*

1129. *Id.*

1130. See *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, No. CV 08-4920 CAS (RZs), 2010 WL 3386436, at *8 (C.D. Cal. Aug. 26, 2010).

1131. David Zahniser & Louis Sahagun, *Harbor Reaches Pollution Accord*, L.A. TIMES, Apr. 3, 2008, at B1.

1132. Louis Sahagun, *Long Beach Port Faces Suit Threat*, L.A. TIMES, Feb. 7, 2008, at B3.

1133. *Id.*

1134. *Id.*

If the NRDC letter was meant to put pressure on the Port of Long Beach as the clock ticked down toward a resolution on employee conversion, it did not have that effect. To the contrary, on February 16, 2008, the Port of Long Beach officially broke ranks with its Los Angeles counterpart, announcing a meeting to approve the final element of its Clean Truck Program—a concession plan—without the employee conversion piece.¹¹³⁵ “Their announcement caught us all by surprise,” said LAANE’s Castellanos.¹¹³⁶ In its concession plan, trucks would be granted a “right of access to port property” in exchange for LMCs entering into contracts that ensured compliance with existing laws (including the preexisting elements of the Clean Truck Program), as well as “local truck route and parking restrictions.”¹¹³⁷ The ordinance also modified the Clean Truck Fee for cargo moved on trucks not purchased with port subsidies, waiving the fee for containers transported on alternative fuel trucks and halving it for clean diesel trucks.¹¹³⁸

Released on the cusp of a three-day weekend, the plan was slated for vote the following Tuesday, February 19, by the Long Beach Harbor Commission. Despite the short turnaround, the coalition mobilized to attend the six-hour hearing, with public comments given by several residents, drivers, and coalition members—including Zerolnick, Martinez, Politeo, Kim, Logan, Green, and Callahan.¹¹³⁹ Nonetheless, board approval was unanimous,¹¹⁴⁰ and port officials touted their program as a “victory for clean air”¹¹⁴¹—one that cleaved apart the environmental and labor elements.¹¹⁴² Mayor Foster’s chief of staff, responding to the mayor’s break with Los Angeles, said: “It doesn’t scare us that there is a difference of opinion What scares us is not acting to clean the air as quickly as possible. If their board is not ready to go yet, fine Ours is.”¹¹⁴³ NRDC, unsurprisingly, disagreed in its letter to the board: “Perhaps the most glaring flaw in the port’s program is the lack of its key partner and neighbor, the Port of Los Angeles. If Los

1135. Louis Sahagun, *Officials of Area Ports Split Over Truck Issue*, L.A. TIMES, Feb. 19, 2008, at B1.

1136. *Id.*

1137. Long Beach, Cal., Ordinance No. HD-2011, ¶ 14 (Mar. 17, 2008).

1138. *Id.* at Item 1030.

1139. Long Beach Bd. of Harbor Comm’rs, *Minutes*, PORT LONG BEACH, 5–6 (Feb. 19, 2008).

1140. A second and final reading of the ordinance was approved on March 17, 2008, with two commissioners (Topsy-Elvord and Walter) absent. Long Beach Bd. of Harbor Comm’rs, *Minutes*, PORT LONG BEACH, 6–7 (Mar. 17, 2008). The board authorized the port director to execute the concession agreements on June 2. Long Beach Bd. of Harbor Comm’rs, *Minutes*, PORT LONG BEACH, 10 (June 2, 2008).

1141. Louis Sahagun, *Public Health, Labor Groups Decry Harbor Panel’s Air Plan*, L.A. TIMES, Feb. 20, 2008, at B4.

1142. The port’s concession agreement stated that a concessionaire “shall give a hiring preference to drivers with a history of providing drayage services to the port,” but did not require conversion. Long Beach Bd. of Harbor Comm’rs, Port of Long Beach Concession Agreement § III(e). Like the Los Angeles program that would follow, the Long Beach agreement required compliance with truck routes and parking restrictions, a maintenance plan, and placards, though it reduced the concession fee to \$250 per concessionaire. *Id.* §§ III(f), (g), (m) & 2.1.1.

1143. Sahagun, *Officials of Area Ports Split Over Truck Issue*, *supra* note 1135.

Angeles decides to go in a different direction in its clean-trucks program, the result would be chaos at the ports.”¹¹⁴⁴

All eyes therefore turned back to Los Angeles. Industry opponents of employee conversion sought to cast it as a union ploy. NRDC’s Martinez perceived that opponents were “freaked out” by the unified front maintained by NRDC and the Teamsters and recalled a lot of “fearmongering.”¹¹⁴⁵ The *Los Angeles Times*, in reporting on the ongoing battle, emphasized the unionization angle: “Critics of the employee provision of the clean truck program . . . are concerned that it could be used by the Teamsters as a springboard to launch unionization efforts at ports nationwide.”¹¹⁴⁶ It also noted that that Change to Win had donated \$500,000 to Mayor Villaraigosa’s local telephone tax initiative, Proposition S, insinuating that the unions expected a quid pro quo.¹¹⁴⁷ A month later, an editorial began: “Pollution, death and economic stagnation. These catastrophes are being brought to you by the Natural Resources Defense Council and the International Brotherhood of Teamsters.”¹¹⁴⁸ It argued that the clean trucks deal was being jeopardized over a “dispute that has nothing to do with pollution and everything to do with an unholy alliance between environmentalists and organized labor.”¹¹⁴⁹ Noting that Long Beach had already passed its plan without employee conversion and that Los Angeles seemed on the verge of doing the opposite, the editorial board suggested that the Clean Truck Program of both ports would be tied up for years in litigation—in Long Beach by NRDC and in Los Angeles by the ATA.¹¹⁵⁰ The editorial argued that it did not have to be so, since “[u]nder a lease-to-own program, a nonprofit or other organization could buy new trucks and lease them to the truckers, charging low fees that would be subsidized by the ports.”¹¹⁵¹

Coalition members fought back. Coalition for Clean Air director Martin Schlageter responded to the *Los Angeles Times* in the editorial pages that he was “baffled at your editorial placing the blame for delay on advocates of clean air,” noting that it was an NRDC lawsuit that produced CAAP in the first instance and that the Long Beach plan suffered from the “glaring weakness” of failing to influence driver working conditions, which was a concern “for environmentalists and labor advocates alike.”¹¹⁵² Coalition members also sought to make fun of the

1144. Sahagun, *Public Health, Labor Groups Decry Harbor Panel’s Air Plan*, *supra* note 1141. The coalition appealed the board’s decision to the city council to no avail. NRDC then filed a Freedom of Information Act suit to get all documents relevant to the Clean Truck Program. “We just wanted to find out what was going on because they just kept on making these bizarre decisions behind closed doors, with no public process.” Telephone Interview with Adrian Martinez, *supra* note 837.

1145. Telephone Interview with Adrian Martinez, *supra* note 837.

1146. Sahagun, *Officials of Area Ports Split Over Truck Issue*, *supra* note 1135.

1147. *Id.*

1148. Editorial, *A Storm in Every Port*, L.A. TIMES, Feb. 24, 2008, at M2.

1149. *Id.*

1150. *Id.*

1151. *Id.*

1152. Martin Schlageter, Letter to the Editor, *Delays in Cleaning Up the Ports*, L.A. TIMES, Mar. 1, 2008, at A20.

argument that there must be “something wrong” in a collaboration between labor and environmentalists, with Pettit and his colleagues donning T-shirts with “The Unholy Alliance” printed on them.¹¹⁵³ In retrospect, Pettit thought “we, NRDC—did a poor job of messaging what [the program] had to do with clean air. And I think we came off poorly . . . in all the media attention.”¹¹⁵⁴ Yet in a sign that political support was holding firm, the Los Angeles City Council formally adopted the board of harbor commissioners’ progressive ban and Clean Truck Fee at the end of February.¹¹⁵⁵

By March 2008, on the brink of the Los Angeles port’s final decision on employee conversion, the political back-and-forth reached a fever pitch. The coalition had taken out five full-page color advertisements in the *Long Beach Press-Telegram* denouncing Mayor Foster, while Los Angeles City Council Member Hahn was privately urging him to reconsider.¹¹⁵⁶ For their part, the Teamsters were seeking to use their political clout to block state funding for Long Beach to complete renovation of the Gerald Desmond Bridge.¹¹⁵⁷ LAANE sent Foster a public records request seeking all his communications with industry representatives.¹¹⁵⁸ Yet Foster remained defiant: “So the end result is, if this happens to be the only office I ever hold and the only term I ever serve, I’m comfortable with that.”¹¹⁵⁹ Industry groups also struck a strident tone in advance of the Los Angeles decision. Curtis Whalen, executive director of the ATA, stated that Villaraigosa’s “biggest problem is he has good intentions, but they are not legal.”¹¹⁶⁰

It was at the height of this debate, on March 7, 2008, that BCG released its long-awaited report—which had been delayed in the wake of the Long Beach decision. At its heart was an analysis of the economics of employee conversion—the sole remaining piece of the Los Angeles Clean Truck Program. In clinical terms, far removed from the supercharged rhetoric of campaign adversaries, the report evaluated three program options: the first would permit the continued operation of independent contractors and give them a share of the incentive financing to acquire clean trucks; the second would also permit continued operation of independent contractors, but limit financing to LMOs; and the third would require LMOs to make what it called an “employee commitment.”¹¹⁶¹ The report’s key move—and what made it different than the Husing Report—was that it compared short-term (one to five year) and long-term (more than five year) outcomes in relation to stated

1153. Telephone Interview with Nick Weiner, *supra* note 820.

1154. Telephone Interview with David Pettit, *supra* note 841.

1155. L.A., Cal., Ordinance 179707 (Feb. 27, 2008) (adopting L.A. Bd. of Harbor Comm’rs, Order No. 6935 (Nov. 1, 2007) (progressive truck ban)); L.A., Cal., Ordinance 179708 (Feb. 27, 2008) (adopting L.A. Bd. of Harbor Comm’rs Order No. 6943 (Dec. 20, 2007) (clean truck fee)).

1156. Zahniser & Sahagun, *Truckers’ Status Is a Hitch in Port Plan*, *supra* note 990.

1157. *Id.*

1158. *Id.*

1159. *Id.*

1160. *Id.*

1161. THE BOS. CONSULTING GRP., SAN PEDRO BAY PORTS CLEAN TRUCK PROGRAM: CTP OPTIONS ANALYSIS 6 (2008).

environmental, port operations, and safety and security goals.¹¹⁶² The report's bottom line was that the employee model provided "the best path to long term sustainability" although it posed some "near term risks."¹¹⁶³ Specifically, the report concluded that the employee model would "maximize the likelihood of creating a market in which the reciprocal obligations between the Port (granting a commission) and LMCs (providing drayage services) create a sustainable reliable supply of truckers attracted to stable and relatively well paying jobs in an operationally efficient and orderly drayage market."¹¹⁶⁴ It went on to recommend that a "100% employee driver requirement, phased in over five years" was the best option: "transparent, aligning incentives and easiest to administer."¹¹⁶⁵ Financing support for clean truck conversion was set at eighty percent for new diesel trucks and up to eighty percent for LNG trucks, with \$5000 given to scrap pre-1989 trucks.¹¹⁶⁶

The report was not all rosy. It predicted that under the "employee commitment" scenario, there would be more cargo diversion—approximately three percent—than under the other options, but that this cost would likely be outweighed by overall benefits.¹¹⁶⁷ The "key risk" was that shippers would divert cargo over and above this three percent threshold based on factors other than increased price,¹¹⁶⁸ such as fear of "future disruption or instability."¹¹⁶⁹ This risk would be exacerbated, the report stated, if the Port of Los Angeles and the Port of Long Beach adopted different programs¹¹⁷⁰—which, of course, had already happened, though the report seemed to hold out hope that there was still a possibility that Long Beach might reverse course. In reporting on the plan, the *Los Angeles Times* highlighted the cargo risk, beginning its article by emphasizing its conclusion "that 'substantial diversions' of the Los Angeles port's business probably would shift to the neighboring port of Long Beach or to other harbors."¹¹⁷¹

Despite these market concerns, the BCG report ultimately did the work it was designed to do. At the staff level, the cost analysis permitted Holmes and other port managers to solidify the employee conversion piece and calculate the precise level of financing. On March 12, 2008, a staff report authored by Holmes and deputy director of finance Molly Campbell recommended approval of the concession and incentive plans analyzed in the BCG report.¹¹⁷² At the board level, Arian recalled

1162. *Id.*

1163. *Id.* at 10.

1164. *Id.* at 9.

1165. *Id.*

1166. *Id.* at 68.

1167. *Id.* at 70, 79.

1168. *Id.* at 74.

1169. *Id.* at 9.

1170. *Id.* at 74.

1171. Ronald D. White & Louis Sahagun, *Risk Seen in Port Plan*, L.A. TIMES, Mar. 8, 2008, at C1.

1172. Memorandum from John Holmes, Deputy Exec. Dir. of Operations & Molly Campbell, Deputy Exec. Dir. of Fin. & Admin., to the Bd. of Harbor Comm'rs (Mar. 12, 2008).

that the report was the “key study” that persuaded skeptical commissioners to move toward approval.¹¹⁷³

On the day the Los Angeles board was set to meet on the concession plan, the *Los Angeles Times* took one last opportunity to hammer home the litigation threat. In an editorial titled “Harbor No Illusions: L.A.’s Plan to Clean Up Port Pollution Is Sure to Wind Up in Court,” the editorial board argued that “[i]n the real world of lawsuits and endless court proceedings, [the truck plan] would stall progress on cleaning the air indefinitely.”¹¹⁷⁴ Yet at this stage in the game, the early legal work on the port’s authority to pass the program seemed to fortify city staff. As Libatique recalled, staff did not shy away from the concession model: Because of “the amount of work and time we put into the legal underpinnings of the program . . . I think there was a level of confidence here that we had a strong legal case.”¹¹⁷⁵ If litigation came—which it would—the city was prepared to defend its program then, rather than back off it now. The program that the board did adopt on March 20, 2008, contained the signature element of what the coalition had spent almost two years working toward: the concession plan.¹¹⁷⁶ Resisting industry pressure, the board in Order 6956 (again drafted by Crose) further amended Tariff No. 4 to “require parties who access Port land and terminals for purposes of providing drayage services to the Port of Los Angeles to have a Concession Agreement” with the port.¹¹⁷⁷ Following the same format used in the earlier order banning dirty trucks, the amendment placed enforcement responsibility on the terminal operators, stating that “no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession.”¹¹⁷⁸ Terminal operators that violated the order were subject to criminal sanction under the tariff’s general penalties provision, which made any violation of the tariff a misdemeanor punishable by a fine of up to \$500 and imprisonment of up to six months.¹¹⁷⁹

The order set forth the legal justification for the concession plan. Expressing concern about the “environmental, operational, and safety and security objectives of the Port” (language adapted from the BCG report), the findings emphasized the goal of encouraging “evolution of the Port drayage market towards an asset-based market in which Licensed Motor Carriers that hold the motor carrier concessions also own the truck assets used to perform under the concession.”¹¹⁸⁰ After noting that the port “currently has no business relationship with the thousands of trucks,

1173. Telephone Interview with Sean Arian, *supra* note 991.

1174. Editorial, *Harbor No Illusions*, L.A. TIMES, Mar. 20, 2008, at A20.

1175. Telephone Interview with David Libatique, *supra* note 754.

1176. The presentation of the concession plan provided at the meeting drew heavily on the BCG findings. See *The Port of Los Angeles Clean Truck Program: Program Overview & Benefits*, PORT L.A., http://www.portoflosangeles.org/ctp/CTP_O&B.pdf (last visited Apr. 2, 2014).

1177. L.A. Bd. of Harbor Comm’rs, Order No. 6956 ¶ 3 (Mar. 20, 2008).

1178. L.A. Bd. of Harbor Comm’rs, Port of L.A., Tariff No. 4, Item No. 2040 (Mar. 20, 2008).

1179. *Id.* Item No. 220(b).

1180. L.A. Bd. of Harbor Comm’rs, Order No. 6956 ¶¶ 16, 19.

drivers or licensed motor carriers” hauling cargo, the order mandated a concession program “that specifies conditions that must be met in order to provide drayage services” at the port.¹¹⁸¹ It stated that a drayage company “must enter into” an agreement, which would last for a term of five years, “in order to access” the port.¹¹⁸² Although the order itself did not explicitly discuss employee conversion, a separate transmittal by staff (circulated to the full board) proposed a “non-exhaustive list of the main Concession requirements,” which included that LMCs “[t]ransition to 100% employee drivers for Port of Los Angeles drayage in five years, according to a schedule specified by the port.”¹¹⁸³ The list also included the concessionaire’s commitment to create an “off street parking plan”; to affix “placards on all Concession controlled trucks referring to a 1-800 phone number to report concerns regarding truck emissions, safety and operations”; and to pay a concession fee of “\$2500 plus an annual fee of \$100 per truck.”¹¹⁸⁴ The order also modified the Clean Truck Fee—exempting cargo transported by concessionaires who used 2007-compliant alternative fuel trucks (even if purchased with port subsidies) and any who purchased clean diesel trucks without port subsidies¹¹⁸⁵—while deferring collection of the Clean Truck Fee from June 1 to October 1, 2008.¹¹⁸⁶

In what appeared as a recognition of the legal vulnerability of at least some elements of the concession plan, a severability provision was also added. It stated:

If any provision of Port of Los Angeles Tariff No. 4 shall be determined by court or agency of competent jurisdiction to be unenforceable, unlawful or subject to an order of temporary or permanent injunction from enforcement, such determination shall only apply to the specific provision and the remainder of the provisions . . . shall continue in full force and effect.¹¹⁸⁷

The purpose of the provision was to reduce legal and political risk to the overall Clean Truck Program. Legally, the severability provision would permit a court to excise some provisions, while keeping intact the broader plan. Commissioner Freeman recalled “the meeting in the mayor’s office where we decided, well, we want a severability clause . . . so that if we lose that one, it doesn’t contaminate the rest of the case. And we all went ahead with that.”¹¹⁸⁸ For the mayor, there were also political implications. Severability maximized the possibility of sustaining some aspects of the Clean Truck Program—and thus being able to declare political victory while also addressing an important policy concern. Perhaps

1181. *Id.* ¶¶ 21, 23.

1182. *Id.* ¶ 24.

1183. Transmittal 1, Port of Los Angeles Drayage Truck Concession Requirements ¶ (b).

1184. *Id.* ¶¶ (f), (m), (o).

1185. L.A. Bd. of Harbor Comm’rs, Order No. 6956, ¶ 26.

1186. *Id.* ¶ 25. The order also made a technical change to the definition of cargo owner that affected application of the fee. *Id.* ¶ 28.

1187. L.A. Bd. of Harbor Comm’rs, Port of L.A., Tariff No. 4, Item No. 2095 (Mar. 20, 2008).

1188. Telephone Interview with S. David Freeman, *supra* note 751.

most crucially, if the employee provision was ultimately struck down, progress could still be made toward greening the port and organized labor would be no worse off than if the effort had not been made at all.

In connection with the board order, a separate resolution drafted by Crose and approved by the board laid out the market participation rationale for the concession plan, while also adding in the core financial incentives. The resolution noted that the objective of the plan was to “create and sustain an efficient, reliable supply of drayage services to the port,” which “as land owner of the Harbor District land and assets has the right and the obligation to manage and control the access to its land by tenants and invitees to ensure that operations thereon maintain safety and security of Port operations on a sustainable basis.”¹¹⁸⁹ The resolution went on to stress that the “air quality, port security, and safety goals” of the plan were “more likely to be achieved and sustained over the long term” through concessions. It also pointed to the “[s]erious and long-standing problems” produced by “inadequate maintenance” and “unsafe, negligent or reckless driving of trucks” at the port, and asserted that the concession model was the “most efficient,” “greenest,” “safest,” “most community friendly,” “most responsive and flexible,” and “easiest model to administer.”¹¹⁹⁰ In addition, the resolution—following the staff report and BCG analysis—authorized a Truck Funding Program, to “provide funding of up to 80% of the value” of clean trucks (in the form of either a lease-to-own agreement or up-front grant to purchase or retrofit) “in order to make the transition . . . more affordable.”¹¹⁹¹ Other incentives included a Truck Procurement Assistance Program to “provide volume discounted pricing” to concessionaires and a Scrap Truck Buyback Program providing \$5000 to owners of pre-1989 trucks who turned them in.¹¹⁹² With that, the centerpiece of the Clean Truck Program was approved. The following day, the ATA’s Whalen called it a “scheme to unionize port drivers” and vowed that: “We’re going to go after Los Angeles with everything we’ve got so their plan goes to hell in a handbasket. We will win and we will win handily.”¹¹⁹³

Yet a few steps still remained. The Los Angeles port wanted resolution of the dispute over the TraPac expansion—which had served as the coalition’s final “bargaining chip.”¹¹⁹⁴ As homeowner activist Kathleen Woodfield recalled, the port “wanted to move forward with the TraPac project. For as long as it was appealed it was in limbo.”¹¹⁹⁵ To move this along, Woodfield, Martinez, and other coalition members met with Council Member Hahn, Mayor Villaraigosa, port director Knatz, and Commissioner Freeman to hammer out a deal.¹¹⁹⁶ Working closely with Hahn—whose support coalition members thought was “strong and pretty much

1189. L.A. Bd. of Harbor Comm’rs, Resolution 6522, at 1 (Mar. 20, 2008).

1190. *Id.* ¶¶ a–o.

1191. *Id.* at 7.

1192. *Id.*

1193. Louis Sahagun, *Port Shifts Plan’s Cost to Shippers*, L.A. TIMES, Mar. 21, 2008, at B5.

1194. Telephone Interview with Tom Politeo, *supra* note 856.

1195. Telephone Interview with Kathleen Woodfield, *supra* note 1128.

1196. *Id.*

unequivocal”¹¹⁹⁷—the coalition negotiated a settlement in early April.¹¹⁹⁸ Under its terms—negotiated primarily by Martinez and port general counsel Tom Russell¹¹⁹⁹—the port agreed to create a Mitigation Trust Fund with an immediate \$12 million contribution towards community improvements and an air filtration system for local schools.¹²⁰⁰ The agreement also provided—as a means of avoiding future litigation—that more funds would be contributed for mitigation in conjunction with future expansion projects at the port:¹²⁰¹ \$1.50 for each additional cruise ship passenger and \$2 for each additional container.¹²⁰² The funds were to go to a nonprofit group, the Harbor Community Benefit Foundation, created for the purposes of disbursing the money.¹²⁰³ The agreement also committed the port to continue working to support the Clean Truck Program.¹²⁰⁴ It was the first EIR approved at the port since China Shipping, and Commissioner Freeman touted the agreement as a model for pending expansion plans. “The entire environmental community is giving its blessing to Mayor Villaraigosa’s green growth program We will work together on all future [projects] and not resort to litigation.”¹²⁰⁵ The NRDC’s Pettit, though pleased with the outcome, did not go quite that far, emphasizing that: “The agreement does not give up our right to sue on any project other than TraPac.”¹²⁰⁶

The accord did, however, clear the way for the concession agreement itself to be approved. The draft agreement, circulated in early May, spelled out the mechanics of “driver hiring” in detail, setting forth a phased implementation in which a concessionaire “shall be granted a transition period . . . by which to transition its Concession drivers to 100% Employee Concession drivers by no later than December 31, 2013.”¹²⁰⁷ Under the transition plan, twenty percent of drivers had to be converted by the end of 2009, sixty-six percent by the end of 2010, eighty-five percent by the end of 2011, and one hundred percent by the end of 2013.¹²⁰⁸ The agreement also required concessionaires to “submit for approval . . . an off-

1197. Telephone Interview with Tom Politeo, *supra* note 856.

1198. See Press Release, Port of Los Angeles, Mayor Villaraigosa, Councilwoman Hahn Announce Historic Agreement that Will Allow TraPac Terminal Renovations to Go Forward at Port of L.A. (Apr. 3, 2008); see also Zahniser & Sahagun, *Harbor Reaches Pollution Accord*, *supra* note 1131.

1199. Telephone Interview with Kathleen Woodfield, *supra* note 1128. Woodfield also noted the contributions of Serena Lin, a lawyer at Public Counsel Law Center. *Id.*

1200. L.A. Harbor Dep’t Agreement 09-2764, Memorandum of Understanding 4 (Apr. 2, 2008) (on file with the UC Irvine Law Review); see also Zahniser & Sahagun, *Harbor Reaches Pollution Accord*, *supra* note 1131.

1201. See L.A. Harbor Dep’t Agreement 09-2764, *supra* note 1200, at 4.

1202. *Id.*

1203. *Id.* at 3; see also L.A. Bd. of Harbor Comm’rs, *Minutes of a Special Meeting*, PORT L.A., 15–16 (Oct. 26, 2010) (approving creation of nonprofit organization to administer the Mitigation Trust Fund).

1204. See L.A. Harbor Dep’t Agreement 09-2764, *supra* note 1200, at 2–3.

1205. Zahniser & Sahagun, *Harbor Reaches Pollution Accord*, *supra* note 1131.

1206. *Id.*

1207. L.A. Bd. of Harbor Comm’rs, Drayage Services Concession Agreement for Access to the Port of Los Angeles ¶ III(d) (on file with the UC Irvine Law Review).

1208. *Id.*

In the end, after nearly two years of struggle, the coalition had won a program in Los Angeles that included the twin goals of fleet and employee conversion. Both were achieved through a legal structure that linked the port's contractual and police powers: trucking companies were required to sign concession agreements to enter the port and terminal operators were required to bar entry to any trucking companies that did not comply with port rules—or incur criminal sanctions. The program was to be financed primarily through the imposition of cargo fees, which would shift the costs of clean truck acquisition to shippers, while providing incentives for trucking companies to upgrade their fleets. Looking at the final program as a whole, there were some details with which the coalition could quibble. At the outset, the coalition had set its sights on full conversion to alternative fuel trucks, a higher fee, and immediate employee conversion.¹²¹⁴ What it got was partial alternative fuel conversion, a lower fee with significant exceptions, and a five-year phase in for employee conversion. However, these were minor sacrifices to achieve the ultimate program, which closely tracked the outlines proposed in the coalition's RFP a year earlier.

C. *The Defensive Phase: Responding to Federal Law*

The ink was barely dry on the Clean Truck Program when legal challenges to it commenced. From the outset, this had been anticipated by the coalition as part of the overall process of enacting and defending the law. As LAANE's Jon Zerolnick described, from the beginning, it “was always a part of the timeline” that the “ATA sues here.”¹²¹⁵ Teamsters counsel Mike Manley's early legal opinions had predicted lawsuits on preemption and maritime law grounds—precisely what ended up occurring. The campaign, premised on enacting local law, now turned to defending that law against efforts to negate it on federal grounds.

1. *Private Litigation I: The Injunctive Phase*

As it had long threatened, the ATA was first to the federal courthouse.¹²¹⁶ On July 28, 2008, the ATA filed a complaint in federal district court in Los Angeles for declaratory judgment and injunctive relief.¹²¹⁷ The lawsuit took aim at the concession plans of both the Los Angeles and Long Beach ports, arguing that they were preempted by the FAAA's prohibition against municipalities enacting “a law, regulation, or other provision having the force and effect of law related to a price,

1214. Telephone Interview with Nick Weiner, *supra* note 820.

1215. Telephone Interview with Jon Zerolnick, *supra* note 951.

1216. Ronald D. White & Louis Sahagun, *National Trucking Group to Sue Ports Over Cleanup Plan*, L.A. TIMES, July 26, 2008, at B9.

1217. Complaint for Declaratory Judgment and Injunctive Relief, Am. Trucking Ass'ns, Inc. v. City of L.A., 577 F. Supp. 2d 1110 (C.D. Cal. 2008) (No. CV 08-04920 CAS (C1x)) (filed July 28, 2008). The ATA was represented by its in-house counsel, Robert Digges; outside counsel law firm Constantine Cannon LLP, appearing pro hac vice; and local counsel Christopher C. McNatt, Jr. of Scopelitis, Garvin, Light, Hanson & Feary, LLP, in Pasadena. *Id.*

route, or service of any motor carrier.”¹²¹⁸ The complaint further alleged that both plans violated the Commerce Clause by imposing “invasive regulatory requirements on virtually all aspects of the business of a federal motor carrier, including truck maintenance, on-street and off-street parking, employee wages, employee benefits, hiring practices, truck signage, recordkeeping, auditing, frequency of service to the Ports, and even upon sale or transfer of the motor carrier’s business.”¹²¹⁹ Although challenging both ports, the complaint used the fact that Long Beach had broken ranks on employee conversion to buttress its Commerce Clause argument: “The Port of Los Angeles *prohibits* motor carriers’ use of more than 10,000 independent owner-operators of trucks on *their side* of the city line that bisects the San Pedro Bay port complex, while the Port of Long Beach *permits* such subcontracting on *its side* of the line—a text-book case . . . for federal preemption to prevent [the] patchwork of service-determining laws, rules, and regulations from disrupting the motor carriage of property in interstate commerce.”¹²²⁰

The ATA complaint also sought to distinguish the environmental provisions of the Clean Truck Programs from what it called “extraneous, burdensome regulations regarding wages, benefits, truck ownership, preferences for certain types of trucks, and frequency of service to ports, which have no material environmental impact.”¹²²¹ Making clear that it did “*not* challenge the Ports’ truck engine-retirement programs”¹²²²—that is, the progressive ban on dirty trucks—the ATA set its sights specifically on the operational provisions of the concession plans. As the ATA’s CEO put it, “the litigation is not aimed and should not interfere with the ports’ clean air efforts. We are challenging only the intrusive and unnecessary regulatory structure being created under the concession plans.”¹²²³

That the ATA was especially concerned about employee conversion was revealed in its prayer for relief, in which it first sought to enjoin both plans in their entirety (Count I) and then *separately* sought to enjoin just that portion of the Los Angeles plan that precluded “independent owner-operators” from port entry (Count II).¹²²⁴ The ATA was thus giving the court a choice: Even if it did not think the concession plans as a whole were preempted, the court could decide to simply enjoin the employee conversion piece. Overall, the ATA’s complaint deftly carved lines: distinguishing Long Beach from Los Angeles, and within Los Angeles isolating the employee conversion piece from the other concession provisions. Two days later, the ATA moved for a preliminary injunction to bar implementation of

1218. 49 U.S.C. § 14501(c)(1) (2012).

1219. Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 1217, ¶ 2.

1220. *Id.* ¶ 3.

1221. *Id.* ¶ 4.

1222. *Id.*

1223. Louis Sahagun, *Truck Group Sues Ports*, L.A. TIMES, July 29, 2008, at B4.

1224. Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 1217, ¶¶ 37–47 (Count I), ¶¶ 48–54 (Count II). Count III argued that both plans were preempted by the Commerce Clause. *Id.* ¶¶ 55–66.

the concession plans.¹²²⁵ Speaking later about the injunction, the ATA's Whalen sounded what would be the industry group's talking points: "Let's be clear: We are not against clean trucks . . . We are objecting to concession plans that are going to squeeze out a lot of existing motor carriers and thousands of independent owner-operators."¹²²⁶ From the coalition's point of view, this argument rang hollow. As NRDC's Martinez recalled, the ATA was "trying to just throw monkey wrenches after monkey wrenches" to stop the plans, while all the time insisting it was "supportive of clean air."¹²²⁷

Confronted with a new effort to split the environmental and labor elements of the program, and facing the prospect of the cities' legal interests diverging from their own, the coalition—not formally party to the suit—had to decide how to respond. Playing to its legal strength, and emphasizing the connection between the environmental and labor pieces of the Los Angeles program, the coalition turned again to its environmental partners. On July 31, the NRDC, Sierra Club, and Coalition for Clean Air moved to intervene in the case, arguing that its members had "significantly protectable interests" that would not be adequately represented by the defendant ports, which "as public proprietary entities, . . . must balance resource constraints and the interests of various constituencies—some of which (such as those of Plaintiff) are at odds with the proposed intervenors' interest—and have often taken positions on port-related policy and regulatory matters contrary to" the intervenors.¹²²⁸ The court agreed and the intervenors proceeded to make their case in support of the concession plans.

In their brief opposing the ATA's preliminary injunction motion, NRDC's Pettit, Perrella, and Martinez sought to lay out the environmental case for market participation, devoting the first part of their brief to explicating why the plans were "necessary to protect public health."¹²²⁹ In addition to reviewing the evidence of air pollution and public health impacts, the intervenors' brief stressed how all elements of the concession plans, including employee conversion (not mentioned by name) were "intertwined and . . . all necessary to achieve the Ports' clean air goals."¹²³⁰ NRDC's Perrella recalled that although it was "very clear that we were in favor of L.A.'s program," NRDC intervened to protect both the Los Angeles and Long Beach plans since "the heart of [the] ATA's argument really attacked the

1225. Notice of Motion and Motion for Preliminary Injunction on Counts I and II of Plaintiff's Complaint, *Am. Trucking Ass'ns, Inc.*, 577 F. Supp. 2d 1110 (No. CV 08-04920 CAS (CTx)) (filed July 30, 2008).

1226. Louis Sahagun & Ronald D. White, *Truckers and Ports Head to Court*, L.A. TIMES, Sept. 8, 2008, at B3.

1227. Telephone Interview with Adrian Martinez, *supra* note 837.

1228. Notice of Motion and Motion to Intervene of Natural Res. Def. Council, Sierra Club and Coal. for Clean Air at 1-2, *Am. Trucking Ass'ns, Inc.*, 577 F. Supp. 2d 1110 (No. CV 08-04920 CAS (CTx)) (filed July 31, 2008).

1229. Opposition of Proposed Defendant-Intervenors Natural Res. Def. Council, Sierra Club and Coal. for Clean Air to Plaintiff's Motion for Preliminary Injunction at 3, *Am. Trucking Ass'ns, Inc.*, 577 F. Supp. 2d 1110 (No. CV 08-04920 CAS (CTx)) (filed Aug. 20, 2008).

1230. *Id.* at 5.

fundamentals of both programs. And so we felt like it was important to protect” them.¹²³¹ As Martinez put it, “Part of your goal is to defend the whole damn thing, so ultimately we think the ports have rights to do this.”¹²³² In the litigation, NRDC represented its own interests, which meant that the organization’s lawyers “work[ed] together to figure out the best approach.”¹²³³ In also representing the Sierra Club and Coalition for Clean Air, NRDC’s retainer identified one person within each organization that served as the representative for client relations purposes, keeping NRDC out of the other client organizations’ internal deliberations.¹²³⁴

Throughout the litigation, NRDC worked with counsel for the Port of Los Angeles, with whom it had a much closer relation than with counsel for Long Beach—based on the Los Angeles city attorneys’ supportive posture during the policy phase.¹²³⁵ NRDC lawyers had a “joint defense agreement” with the Port of Los Angeles lawyers,¹²³⁶ with whom they would discuss “who would take what approach to what issue,”¹²³⁷ and exchange drafts.¹²³⁸ Although the city defendants were definitely in the lead, NRDC did not “shy away from . . . being parties in the case.”¹²³⁹ Toward that end, NRDC sought to make arguments that built upon its comparative advantage as environmental experts. In this vein, NRDC pressed the argument that the ports needed to implement the concession plans to avoid potential environmental liability. As the “troublemakers” that initiated port litigation in the first instance, NRDC could make that case “more forcefully” than the city defendants, particularly since the ports were not going to concede that they had ongoing environmental legal risk.¹²⁴⁰ In addition, NRDC was well-positioned to make the strong case for showing how the employee driver piece “benefits the environment.”¹²⁴¹ Particularly to the extent that the ATA was seeking to paint the Los Angeles plan as a sop to unions, having NRDC make the labor argument was a way to keep the entire plan within an environmental frame. During the lawsuit, Teamsters counsel Manley recalled that the plan was for him to “recede as much as possible to the background,” although he believed that the ATA representatives were “going to paint it as a Teamster case anyway—which they did.”¹²⁴² Manley participated “indirectly” by providing his analyses of the market participant doctrine

1231. Telephone Interview with Melissa Lin Perrella, *supra* note 832.

1232. Telephone Interview with Adrian Martinez, *supra* note 837.

1233. *Id.*

1234. *Id.*

1235. Telephone Interview with David Pettit, *supra* note 841.

1236. Telephone Interview with Melissa Lin Perrella, *supra* note 832.

1237. Telephone Interview with David Pettit, *supra* note 841.

1238. Telephone Interview with Melissa Lin Perrella, Staff Att’y, Natural Res. Def. Council (Apr. 23, 2013).

1239. Telephone Interview with Melissa Lin Perrella, *supra* note 832.

1240. *Id.* Indeed, Rosenthal suggested that although the city was “aligned” with NRDC in the litigation, they had “differing interests,” noting that “NRDC certainly supported what we were doing, but NRDC sues the port as well.” Telephone Interview with Steven S. Rosenthal, *supra* note 1006.

1241. Telephone Interview with Melissa Lin Perrella, *supra* note 1238.

1242. Telephone Interview with Michael Manley, *supra* note 460.

to NRDC lawyers, to whom he told: “here’s the argument, here’s why it supports us.”¹²⁴³

Asserting a unified front in the preliminary injunction phase, both ports filed a joint opposition that strongly asserted local authority for their respective concession plans—though with a different emphasis than the environmental intervenors’ brief. On the Los Angeles side, outside counsel Steven Rosenthal was the defendants’ lead attorney, supported by his colleagues at Kaye Scholer, who worked closely with city attorneys Tom Russell, Joy Crose, and Simon Kahn. Long Beach was similarly represented by its city attorneys and outside counsel from two law firms.¹²⁴⁴

In their opposition, the ports made three arguments against preemption. First, they asserted that the ports had sovereign control over the tideland areas under the state Tidelands Trust Act.¹²⁴⁵ Second, they argued that the programs fell squarely within the market participant exception to federal preemption as the product of “a proprietary action of the Ports in their capacity as commercial enterprises and landlords.”¹²⁴⁶ Here, the ports emphasized the market dimensions of the concession plans:

The CTP is a product of the Ports’ recognition that in order to grow and to continue to compete successfully in that market, they need to address major environmental and security issues. The concession programs reflect the Ports’ efforts to secure trucking services—services critical to their commercial operation—in a way that will further those objectives. Hence those programs fall squarely within the market participant doctrine.¹²⁴⁷

In making this argument, the ports relied heavily on the *Engine Manufacturers* case, litigated by NRDC, applying the market participant exception to the Clean Air Act in upholding SCAQMD rules setting emission standards for vehicles acquired by the state.¹²⁴⁸ Based on that case, the ports emphasized that they were acting as a market participant in the “efficient procurement” of trucking services and that the plans’ “narrow scope” defeated an inference that their “primary goal was to encourage a general policy rather than address a specific proprietary problem.”¹²⁴⁹ As a third ground of opposition, the ports argued that the concessions fell within a statutory exception to FAAA preemption, which stated that the act “shall not

1243. Telephone Interview with Michael Manley, Staff Att’y, Int’l Bhd. of Teamsters (Mar. 29, 2013).

1244. The outside counsel was Paul L. Gale from Ross, Dixon & Bell, LLP, and C. Jonathan Benner and Mark E. Nagle, appearing pro hac vice, from Troutman Sanders, LLP. *See* Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction, *Am. Trucking Ass’n, Inc.*, 577 F. Supp. 2d 1110 (No. CV 08–04920 CAS (CTx)) (filed Aug. 20, 2008).

1245. *Id.* at 11.

1246. *Id.* at 17.

1247. *Id.* at 22.

1248. *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031 (9th Cir. 2007).

1249. Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction, *supra* note 1244, at 26–29.

restrict the safety regulatory authority of a State with respect to motor vehicles.”¹²⁵⁰ Specifically, the ports claimed that the plans were designed to enhance port security and eliminate unsafe trucks¹²⁵¹—drawing on arguments that were laid out in the findings sections of the Clean Truck Program legislation. To buttress this argument, the ports submitted an affidavit from John Holmes averring that the Los Angeles program was, in addition to addressing environmental harms, “designed to address other problems that result from the truck activities at the Ports—safety and security.”¹²⁵²

Weighing these arguments was District Court Judge Christina Snyder, who had been appointed in 1997 by President Clinton after serving as a partner in a Los Angeles law firm.¹²⁵³ In the early part of her career, Judge Snyder was a founder of Public Counsel Law Center, one of Los Angeles’s largest legal services organizations, serving on its board and as its president.¹²⁵⁴ Her first opinion was an early victory for the ports. In an order dated September 9, 2008, she denied the ATA’s motion for a preliminary injunction.¹²⁵⁵ Yet the scope of the order highlighted the challenges that the ports would face ahead. First, the court held that the concession plans likely regulated the “price, route, or service” of trucking companies and thus fell within the scope of FAAA preemption.¹²⁵⁶ The issue was therefore whether an exception to preemption would save the plans. Of the ports’ three arguments for an exception, Judge Snyder only agreed with one: that “the defendants have shown that there is a significant probability that the concession agreements fall under the safety exception to the FAAA, and that they may therefore be saved from preemption.”¹²⁵⁷

Although acknowledging that there “does not appear to be any case law addressing the question of whether security concerns analogous to the concerns identified by the Ports fall within the safety exception,” Judge Snyder ruled that it was likely they did even though the concessions were not passed for the “exclusive

1250. 49 U.S.C. § 14501(c)(2)(A) (2012).

1251. Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction, *supra* note 1244, at 38.

1252. Declaration of John M. Holmes in Support of Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction at 4, *Am. Trucking Ass’n, Inc. v. City of L.A.*, 577 F. Supp. 2d 1110 (C.D. Cal. 2008) (No. CV 08–04920 CAS (CTx)) (filed Aug. 20, 2008). Affidavits of other port officials, including Los Angeles executive director Geraldine Knatz and Long Beach executive director Richard Steinke, were also submitted to support the defendants’ broader market participant arguments. Declaration of Dr. Geraldine Knatz in Support of Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction, *Am. Trucking Ass’n, Inc.*, 577 F. Supp. 2d 1110 (No. CV 08–04920 CAS (CTx)) (filed Aug. 20, 2008); Declaration of Richard Steinke in Support of Defendants’ Opposition, *Am. Trucking Ass’n, Inc.*, 577 F. Supp. 2d 1110 (No. CV 08–04920 CAS (CTx)) (filed Aug. 20, 2008).

1253. Susan Gordon, *Beverly Hills Bar Association Honors the Honorable Christina A. Snyder and Top Trial Attorney Marshall B. Goldman*, WESTSIDETODAY.COM (Feb. 6, 2013), <http://www.westsidetoday.com/s7-8972/beverly-hills-bar-association.html>.

1254. *Id.*

1255. Order Denying Plaintiff’s Motion for Preliminary Injunction at 26, *Am. Trucking Ass’n, Inc.*, 577 F. Supp. 2d 1110 (No. CV 08–04920 CAS (CTx)) (filed Sept. 9, 2008).

1256. *Am. Trucking Ass’n, Inc.*, 577 F. Supp. 2d at 1117.

1257. *Id.* at 1125.

purpose of promoting safety.”¹²⁵⁸ However, the court rejected the state tidelands argument, noting that it was “not convinced that the fact that the Ports rest on sovereign tidelands renders them immune from preemption under the FAAA.”¹²⁵⁹ Perhaps more alarmingly for the ports, the court ruled against application of the market participant exception on the grounds that the programs were not about “efficient procurement” but rather were “akin to a licensing scheme,” and they were not sufficiently narrow in scope to qualify as meeting a “specific proprietary problem.”¹²⁶⁰ Because it lost the motion, the ATA appealed.¹²⁶¹ While both ports separately filed answers to the ATA’s complaint, the case would now move—for the first time—to the Ninth Circuit.

As it did, the coalition continued its organizing and media work outside of court to make the case for employee conversion. Part of this strategy involved criticizing Long Beach’s program. Speaking for a coalition of civil rights and consumer groups, NAACP President Julian Bond compared Long Beach drivers, who were being forced to take on debt to finance low-emission trucks, to sharecroppers in the Deep South, warning of a wave of “foreclosures on wheels.”¹²⁶² Under the Long Beach plan, the Mercedes-Benz/Daimler Truck Finance Company was administering a lease-to-own program in which drivers would be given loans to purchase new clean trucks worth over \$100,000.¹²⁶³ However, as the coalition stated in a report delivered to Daimler headquarters, even with port incentives many drivers would not be able to meet the payments and would thus be subject to Daimler’s aggressive collections department.¹²⁶⁴ While the coalition urged Long Beach to adopt the Los Angeles employee conversion approach, some workers were confused, with one quoted as stating: “A lot of truckers have no idea what’s going on with all these different plans and protests, so they are just going with the flow.”¹²⁶⁵ Yet the protests continued, with sixty truckers—some chanting “Clean trucks, yes! Bankruptcy, no!”—gathering to condemn the opening of Long Beach’s Clean Trucks Center, charged with administering the financial incentive component of the Long Beach program.¹²⁶⁶

Concerns that trucking companies would boycott the Los Angeles program when it officially began on October 1, 2008, were allayed when two large national firms—Swift and Knight—agreed to participate in exchange for financial

1258. *Id.* at 1124–25.

1259. *Id.* at 1118.

1260. *Id.* at 1121–23.

1261. Preliminary Injunction Appeal, *Am. Trucking Ass’n, Inc.*, 577 F. Supp. 2d 1110 (No. CV 08–04920 CAS (CTx)) (filed Sept. 10, 2008).

1262. CONSUMER FED’N OF CAL. ET AL., FORECLOSURE ON WHEELS: LONG BEACH’S TRUCK PROGRAM PUTS DRIVERS AT HIGH RISK FOR DEFAULT, LAANE (2008), available at <http://laane.org/downloads/B568P314C.pdf>. The coalition included the NAACP, Consumer Federation of California, the League of United Latin American Citizens, and LAANE.

1263. *Id.* at 2.

1264. *Id.*

1265. Louis Sahagun, *Long Beach Port’s Truck Loans Criticized*, L.A. TIMES, Aug. 20, 2008, at B3.

1266. Louis Sahagun, *Truckers Blast Long Beach Loan Program*, L.A. TIMES, Aug. 23, 2008, at B4.

incentives.¹²⁶⁷ This was followed by an announcement that 120 carriers—many members of the ATA—had applied to service the port under program criteria.¹²⁶⁸ With the Great Recession taking its economic toll, some viewed both ports' Clean Truck Programs as coming at the most inauspicious economic time as container traffic had dropped sharply from the previous year.¹²⁶⁹ However, the recession also made clean truck conversion more attractive for many trucking companies.¹²⁷⁰ As diesel prices soared in 2008 and hundreds of companies failed, converting to cleaner technology with port subsidies made economic sense.¹²⁷¹ When the Los Angeles and Long Beach programs were formally initiated on October 1, both mayors hailed them as a success: with ninety-five percent of trucks entering the ports meeting program standards, only 2000 had to be turned away.¹²⁷² Coalition member Martin Schlageter praised the programs' arrival: "Powerful institutional forces representing billions of dollars had for years urged that the ports not do anything. But the mayors and the ports stood firm."¹²⁷³

It was against this backdrop that the ATA's appeal of Judge Snyder's September 2008 denial of injunctive relief took place. On appeal, the industry group—represented by the same lawyers as below—contested the lower court's interpretation of the preliminary injunction standard and its ruling that the FAAA's "safety exception" likely protected the concession plans from federal preemption.¹²⁷⁴ The ports countered these arguments and also reasserted their own claims for local authority under the market participant exception.¹²⁷⁵ As they had in the court below, the environmental intervenors reiterated the public health benefits of the plans, defended the lower court's application of the safety exception, and then reasserted the case for market participation.¹²⁷⁶ The appeal attracted wider attention: the U.S. government (Department of Transportation, Federal Motor Carrier Safety Administration, and Department of Justice) filed an amicus brief in support of the ATA,¹²⁷⁷ as did the National Industrial Transportation League¹²⁷⁸

1267. Ronald D. White & Louis Sahagun, *2 Big Haulers Accept L.A. Port's Clean-Truck Criteria*, L.A. TIMES, Aug. 22, 2008, at C2.

1268. Ronald D. White, *Truckers on Board with Clean-Air Plans*, L.A. TIMES, Sept. 6, 2008, at C1.

1269. Sahagun & White, *Local Ports Initiate Antipollution Program*, *supra* note 1108 (noting a 9.9% decrease in Long Beach and 4.6% decrease in Los Angeles).

1270. Francisco Vara-Orta, *Clean Air Program Revs Up Truck Sales*, L.A. BUSINESS J., May 25, 2009.

1271. Ronald D. White, *Truckers Unload Fuel Costs*, L.A. TIMES, Apr. 10, 2012, at A1.

1272. Sahagun & White, *Local Ports Initiate Antipollution Program*, *supra* note 1108.

1273. *Id.*

1274. Brief of Appellant Am. Trucking Ass'ns, Inc. at 15, *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009) (No. 08-56503) (filed Oct. 8, 2008).

1275. Opening Brief for Appellees, *Am. Trucking Ass'ns, Inc.*, 559 F.3d 1046 (No. 08-56503) (filed Nov. 26, 2008).

1276. Intervenor-Appellees' Brief at 3–4, *Am. Trucking Ass'ns, Inc.*, 559 F.3d 1046 (No. 08-56503) (filed Nov. 5, 2008).

1277. Brief for the U.S. as Amicus Curiae in Support of Reversal, *Am. Trucking Ass'ns, Inc.*, 559 F.3d 1046 (No. 08-56503) (filed Oct. 21, 2008).

1278. Brief of Amicus Curiae the Nat'l Indus. Transp. League in Support of Appellant Am. Trucking Ass'ns, Inc., *Am. Trucking Ass'ns, Inc.*, 559 F.3d 1046 (No. 08-56503) (filed Oct. 20, 2008).

and National Association of Waterfront Employers,¹²⁷⁹ all arguing against the lower court's application of the safety exception. The California attorney general came in on the side of the ports.¹²⁸⁰

The stage was thus set for a ruling by a three-judge panel of the Ninth Circuit. Although they differed in ideological orientation—Robert Beezer and Ferdinand Fernandez were conservatives appointed by Ronald Reagan, while Richard Paez was a liberal former legal aid lawyer appointed by Clinton—they spoke with a unanimous voice. In an order issued on March 20, 2009, the panel reversed the district court's denial of injunctive relief.¹²⁸¹ The court's key move was to distinguish among the various provisions of the concession plans, holding that “the district court legally erred in not examining the specific provisions of the Concession agreements, and it is likely that many of those provisions are preempted.”¹²⁸² The panel's analysis rejected the ports' claims with devastating thoroughness.

Although it agreed with the district court on the preliminary injunction standard and its application to the tidelands and market participant arguments,¹²⁸³ the panel disagreed on the safety exception. Noting that “the mere fact that one part of a regulation or group of regulations might come within an exception to preemption does not mean that all other parts of that regulation or group are also excepted,”¹²⁸⁴ the court proceeded to highlight the non-safety rationales for the plans, including “an extensive attempt to reshape and control the economics of the drayage industry” and to “ameliorate . . . adverse economic effects.”¹²⁸⁵

The court then turned to analyzing the plans' individual provisions. Homing in on the employee conversion piece in the Los Angeles plan, the court used the

1279. Brief of Amicus Curiae Nat'l Ass'n of Waterfront Employers in Support of Appellant Am. Trucking Ass'ns, *Am. Trucking Ass'ns, Inc.*, 559 F.3d 1046 (No. 08-56503) (filed June 30, 2009).

1280. Brief of the Attorney Gen. of the State of Cal. as Amicus Curiae in Support of Appellees the City of L.A., *Am. Trucking Ass'ns, Inc.*, 559 F.3d 1046 (No. 08-56503) (filed Dec. 18, 2008). At the same time, CARB was finalizing its own emission rules to phase out old, dirty diesel trucks by requiring all diesel trucks to meet 2010 standards by the year 2023. Margot Roosevelt, *Community Groups, State Battle Pollution*, L.A. TIMES, Dec. 11, 2008, at B1. This was viewed by the coalition as a backstop, requiring trucks to move away from diesel irrespective of the outcome of the ATA litigation. See Telephone Interview with Melissa Lin Perrella, *supra* note 1238. The *Los Angeles Times* editorial board praised the CARB plan, but also used it to take another jab at the Los Angeles port's employee conversion program: “The port needs a separate truck plan because it has a separate mechanism for funding cleaner vehicles, but it would be better off imitating state regulators and focusing on cleaning the air, not trying to reinvent the steering wheel.” Editorial, *A New Day for Diesel*, L.A. TIMES, Dec. 12, 2008, at A32. Industry groups challenged the CARB standard and NRDC intervened to support it. Telephone Interview with Melissa Lin Perrella, *supra* note 1238. The standard was approved in 2008, though it still has not been fully implemented. Tony Barboza, *Date for Cleaner Trucks Delayed*, L.A. TIMES, Apr. 26, 2014, at AA1 (stating that CARB agreed to postpone compliance deadline for “small fleets, lightly used trucks and those operating in rural areas”). The Port of Los Angeles subsequently amended Tariff No. 4 to be consistent with the CARB standards. L.A. Bd. of Harbor Comm'rs, Order No. 09-7031 (Dec. 8, 2009).

1281. *Am. Trucking Ass'ns, Inc.*, 559 F.3d at 1060.

1282. *Id.* at 1057.

1283. *Id.* at 1053.

1284. *Id.* at 1055.

1285. *Id.*

very findings the port had included in the ordinance to support market participant status to undercut the safety exception argument, asserting that “the record demonstrates that the Ports’ primary concern was increasing efficiency and regulating the drayage market.”¹²⁸⁶ On that basis, the court held that “as we see it, the independent contractor phase-out provision is one highly likely to be shown to be preempted.”¹²⁸⁷ The court expressed similar skepticism about provisions in both plans that required job posting, hiring preferences for experienced drivers, and financial disclosure, as well as Los Angeles’s off-street parking ban and Long Beach’s driver health insurance requirement.¹²⁸⁸ Moving through the preliminary injunction test, the court went on to suggest that a company faced with a concession plan would suffer irreparable harm by being put to a “Hobson’s choice”: if it refused to sign, its port drayage business likely would “evaporate” with the result for a small carrier probably “fatal,” while if it did sign, a company would “incur large costs,” which would “disrupt and change the whole nature of its business.”¹²⁸⁹ Noting that the public interest in deregulation further supported issuing a preliminary injunction, the court stopped just short of complete reversal, stating that in light of the severability provision: “we are not prepared to hold that every provision must be preempted.”¹²⁹⁰ Accordingly, the appellate court remanded the case back to the district court for “further consideration of the specific terms of each agreement and for the issuance of an appropriate preliminary injunction.”¹²⁹¹

Smelling blood, the ATA renewed its motion for preliminary injunction against both ports’ plans on the ground of FAAA preemption.¹²⁹² It was at this stage that the Los Angeles and Long Beach ports once again parted ways, each filing separate oppositions. In its brief, the Los Angeles port decided to play defense, conceding the provisions the Ninth Circuit had explicitly addressed (employee conversion, off-street parking, job posting and driver hiring requirements, and financial capability), while arguing against preemption on safety grounds for those that remained.¹²⁹³ There was a tension in this position given that it conceded the severability of a plan that the port had long argued constituted an indivisible scheme to redress port pollution. Yet the terms of the Ninth Circuit opinion seemed to require this tactical position to salvage any part of the plan. Long Beach was more

1286. *Id.* at 1056.

1287. *Id.*

1288. *Id.* at 1056–57.

1289. *Id.* at 1057–58.

1290. *Id.* at 1059–60.

1291. *Id.* at 1060.

1292. Notice of Plaintiff’s Motion on Remand for Entry of a Preliminary Injunction on Counts I and II of Complaint, *Am. Trucking Ass’ns, Inc. v. City of L.A.*, No. CV 08-4920 CAS (CTx), 2009 WL 1160212 (C.D. Cal. Apr. 28, 2009) (filed Apr. 3, 2009).

1293. Los Angeles Defendants’ Opposition to ATA’s Motion on Remand for a Preliminary Injunction at 6–11, *Am. Trucking Ass’ns, Inc.*, No. CV 08-4920 CAS (CTx), 2009 WL 1160212 (filed Apr. 13, 2009). The remaining provisions included those requiring concessionaires to prepare maintenance plans, ensure driver enrollment in TWIC, guarantee compliance with federal, state, and local laws (including other provisions of the Clean Truck Program), and post placards.

aggressive, arguing that none of its plan's provisions, including those singled-out by the Ninth Circuit, were preempted either because they simply duplicated already existing law or were related to port safety.¹²⁹⁴ The ATA responded that duplicative provisions should be removed from the plans and because the preempted provisions were *not* severable, the plans "should be enjoined in their entirety."¹²⁹⁵ The *Los Angeles Times* editors, anticipating the district court decision, weighed in against the Los Angeles program, asking Mayor Villaraigosa "and his union backers" to just "[l]et it go."¹²⁹⁶

On April 28, 2009, the district court ruled for the second time on the ATA's motion for preliminary injunction, issuing a split decision.¹²⁹⁷ Taking a provision-by-provision approach, the court preliminarily enjoined key elements of the ports' plans—including Los Angeles's employee conversion provision, as well as both ports' provisions on hiring preferences, financial capability, and parking and route restrictions¹²⁹⁸—while letting stand other provisions the court held to be related to port safety.¹²⁹⁹ Rejecting the ATA's claim that the plans should rise or fall as unified agreements, the court held that the preempted provisions were severable and that the safety provisions could be effectively implemented on their own.¹³⁰⁰ NRDC released a statement criticizing the ruling: "Without the employee program, port cleanup goals could be severely delayed because most independent owner-operators cannot afford to maintain and repair their trucks."¹³⁰¹

The ATA once again took appeal, disputing the district court's decision not to preempt the provisions deemed safety related.¹³⁰² By the time the Ninth Circuit

1294. Long Beach Defendants' Memorandum in Opposition to Plaintiff's Motion on Remand for Preliminary Injunction at 2–3, *Am. Trucking Ass'ns, Inc.*, No. CV 08-4920 CAS (CTx), 2009 WL 1160212 (filed Apr. 13, 2009). Long Beach also argued that its plan should be examined in the first instance by the Secretary of Transportation, which had statutory authority to determine whether its plan could be enforced. *Id.* at 7.

1295. Reply of ATA in Support of Motion on Remand for Preliminary Injunction at 22–23, *Am. Trucking Ass'ns, Inc.*, No. CV 08-4920 CAS (CTx), 2009 WL 1160212 (filed Apr. 17, 2009).

1296. Editorial, *Let's Get Truckin'*, L.A. TIMES, Apr. 24, 2009, at A32. As he had in the past, the Coalition for Clean Air's Martin Schlageter responded to the *Times*: "Without a systemic fix, today's new trucks will be tomorrow's broken-down trucks." Martin Schlageter, *The Road We're On*, L.A. TIMES, Apr. 28, 2009, at A22 (letter to editor).

1297. *Am. Trucking Ass'ns, Inc.*, No. CV 08-4920 CAS (CTx), 2009 WL 1160212.

1298. *Id.* at *20–21. The court also enjoined Long Beach's driver health insurance provision, and both ports' truck tariffs and concession fees. *Id.* However, in a subsequent ruling, responding to a motion by the ATA to modify the April 28 order so that it would not have to post bond, the court reinstated the Port of Los Angeles's concession fee. *Am. Trucking Ass'ns, Inc. v. City of L.A.*, No. CV 08-4920 CAS (CTx), 2009 WL 2412578, at *2–3 (C.D. Cal. Aug. 4, 2009).

1299. *Am. Trucking Ass'ns, Inc.*, No. CV 08-4920 CAS (CTx), 2009 WL 1160212, at *11–18. In total, the court let stand nine provisions requiring concessionaires to: (1) be LMCs; (2) use permitted trucks; (3) ensure driver compliance; (4) prepare a maintenance plan; (5) ensure driver enrollment in TWIC; (6) ensure that trucks have compliance tags; (7) ensure compliance with security laws; (8) post placards; and (9) keep records not related to safety. *Id.* at *21.

1300. *Id.* at *19–20.

1301. Ronald D. White, *Judge Restricts Ports' Truck Plan*, L.A. TIMES, Apr. 30, 2009, at B2.

1302. Brief of Appellant *Am. Trucking Ass'ns* at 13–16, *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 596 F.3d 602 (9th Cir. 2010) (No. 09-55749) (filed June 11, 2009).

decided the case, however, Long Beach was no longer part of it. With the appeal pending, the Port of Long Beach decided to strike a deal with the ATA, in which the port would permit truck access under a new “Registration and Agreement” to supersede the concession plan.¹³⁰³ The new agreement stripped away provisions deemed unrelated to clean truck conversion—including those dealing with parking, truck routes, and financial capability.¹³⁰⁴ Under the final agreement, concessionaires would certify truck compliance with basic registration, identification, safety, and security standards, while also certifying compliance with the environmental provisions of the Clean Truck Program.¹³⁰⁵ On the basis of that settlement, the court dismissed the Long Beach defendants on October 20, 2009.¹³⁰⁶ While Long Beach port director Richard Steinke affirmed his port’s commitment to going green, Los Angeles director Geraldine Knatz asked, “Who will pay for the next fleet of clean trucks when today’s new trucks will need to be replaced?”¹³⁰⁷

Left to fend for itself, the Port of Los Angeles confronted an invigorated adversary. In court, the ATA sought to compel the disclosure of internal port documents reflecting staff deliberations over the concession agreement, to which the ATA claimed to be entitled in order to rebut port assertions that the agreement was motivated by safety concerns.¹³⁰⁸ Although the ATA would ultimately lose this argument on privilege grounds,¹³⁰⁹ it suggested the extent to which the ATA was

1303. Stipulation of Settlement and Joint Motion for Voluntary Dismissal with Prejudice between Plaintiff ATA and Long Beach Defendants, Exhibit A, Motor Carrier Registration and Agreement at 1–2, *Am. Trucking Ass’ns, Inc. v. City of L.A.*, No. CV 08-4920 CAS (CTx) (filed Oct. 19, 2009). The settlement was approved by the board after a closed session meeting, with Commissioner Cordero voting against. Long Beach Bd. of Harbor Comm’rs, *Minutes of a Special Meeting*, PORT LONG BEACH 1 (Oct. 19, 2009).

1304. Ronald D. White, *Port Settles Truckers Lawsuit*, L.A. TIMES, Oct. 21, 2009, at B4.

1305. Exhibit A, Motor Carrier Registration and Agreement, *supra* note 1303, at 2–4. The settlement also required the port to amend provisions of its Clean Truck Program to be consistent with the settlement terms, which it did after a full hearing at which Pettit, Zerolnick, Schlageter, and other coalition members spoke out against the changes. Long Beach Bd. of Harbor Comm’rs, *Minutes*, PORT LONG BEACH 9–11 (Nov. 16, 2009).

1306. Order of Voluntary Dismissal with Prejudice of Long Beach Defendants, *Am. Trucking Ass’ns, Inc.*, No. CV 08-4920 CAS (CTx) (filed Oct. 20, 2009). NRDC and other environmental groups challenged this settlement on CEQA grounds, arguing that it “substantially weakened the environmental benefits of the Port’s Clean Truck Program” and that the port violated CEQA by failing to conduct an appropriate environmental review. *NRDC, Inc. v. City of Long Beach*, No. CV 10-826 CAS (PJWx), 2011 WL 2790261, at *1–2 (C.D. Cal. July 14, 2011). The district court agreed, ordering an initial environmental study in July 2011. *Id.* at *5. The city conducted a study and issued a negative declaration, stating that the proposed project could not have a significant effect on the environment. THOMAS JOHNSON ENVIRONMENTAL CONSULTANT LLC, PORT OF LONG BEACH ATA LITIGATION SETTLEMENT AGREEMENT: INITIAL STUDY (2011), available at <http://www.polb.com/civica/filebank/blobload.asp?BlobID=9236>.

1307. Ronald D. White, *Ports Split on Union Stance*, L.A. TIMES, Nov. 28, 2009, at B1.

1308. Joint Stipulation Regarding Plaintiff’s Motion to Compel Production of Documents Withheld Due to the Deliberate Process Privilege at 1–3, *Am. Trucking Ass’ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436 (filed Oct. 19, 2009).

1309. Order Re: Plaintiff’s Motion for Review of the Order of the Magistrate Judge Declining to Require Production of Documents Withheld due to the Deliberative Process Privilege at 13, *Am. Trucking Ass’ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436 (filed Dec. 21, 2009).

willing to go to win. Out of court, ATA allies sought to take a page from the coalition's book, organizing drivers in opposition to the Los Angeles program. In November 2009, the National Port Drivers Association, claiming to represent independent-contractor drivers, staged a protest in which 400 truckers drove up the 710 freeway to Los Angeles City Hall, criticizing the fact that clean truck funding had not been given to independent-contractor drivers.¹³¹⁰ Around the same time, the Long Beach port began a marketing campaign to promote its program to community residents, featuring the president of ILWU Local 11, George Lujan, stating that his "union supports the Port of Long Beach Clean Trucks Program."¹³¹¹

On appeal, the Port of Los Angeles lost a little more ground in front of a different three-judge panel of the Ninth Circuit.¹³¹² On February 24, 2010, the panel agreed with the district court's decision to enjoin the provisions it did but also decided to enjoin one more—the placard provision, which the court found to be specifically outlawed by a separate section of the FAAA to which the safety exception did not apply.¹³¹³ The Ninth Circuit opinion contained a slight bit of good news for the Los Angeles port: holding that the port could exclude motor carriers that did not comply with the concession agreement and permitting implementation of the non-preempted provisions.¹³¹⁴ However, the overall picture for Los Angeles looked grim. With Long Beach out of the case and the core features of its concession plan subject to a preliminary injunction, the Port of Los Angeles appeared to face long odds heading into trial,¹³¹⁵ which was set for April 2010.

The dramatic turnaround—from the district court's initial support of the concession plan prior to its official launch date in the fall of 2008 to its preliminary injunction in the spring of 2009—affected the rollout of the Clean Truck Program. Although scheduled to begin on October 1, 2008, it was widely assumed that the port would not strictly enforce the concession plan until April 2009 as it worked out technical issues and permitted trucking companies to purchase new trucks and begin the phase-in of employee conversion.¹³¹⁶ Despite the ATA lawsuit filed in July 2008, program implementation proceeded apace. As Jon Zerolnick recalled, at first, "nothing changed."¹³¹⁷ Trucking companies drew upon port and state funding

1310. Seema Mehta, *Truckers Protest New Rules*, L.A. TIMES, Nov. 14, 2009, at A3.

1311. Bill Mongelluzzo, *ILWU Backs Long Beach Clean Trucks Program*, J. OF COM. (Jan. 7, 2010, 4:04 PM), http://www.joc.com/maritime-news/ilwu-backs-long-beach-clean-trucks-program_20100107.html.

1312. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 596 F.3d 602, 606 (9th Cir. 2010). This time, the panel consisted of a staunch liberal, Harry Pregerson, appointed by President Jimmy Carter; Ronald M. Gould, a conservative appointed by President Bill Clinton in a deal to break a nominations impasse; and Myron H. Bright, a senior Eighth Circuit Judge (appointed by President Lyndon Johnson) sitting by designation.

1313. *Id.*

1314. *Id.* at 606–07.

1315. On February 25, 2010, the district court denied both ATA and Port of Los Angeles's cross motions for summary judgment, clearing the way for trial. Civil Minutes – General, *Am. Trucking Ass'ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436 (proceedings in chambers on Feb. 25, 2010).

1316. Telephone Interview with Jon Zerolnick, *supra* note 951.

1317. *Id.*

to begin converting their fleets, while some, like Southern Counties Express and Swift, took initial steps to convert their drivers to employees.¹³¹⁸ By early 2009, the coalition was supporting Teamsters organizing at companies that had moved to employee drivers.¹³¹⁹ The preliminary injunction ruling in April 2009 changed everything. With the threat of port sanction lifted, companies promptly moved back to independent-contractor drivers. Zerolnick described his impression of the industry's position this way: "Now once it's clear that I don't have to do this stuff and in fact by doing this stuff I'm putting myself at a pretty serious competitive disadvantage, then why the hell am I going to keep doing this?"¹³²⁰

As trucking companies kept or moved back to independent-contractor drivers, they also shifted to them the new costs associated with purchasing clean trucks. The ban on old, dirty trucks—the second phase of which was set to go into effect on January 1, 2010—forced drivers to purchase or lease new and expensive low-emission vehicles. Although the port offered subsidies, some drivers could not take advantage of them to buy their own trucks because they could not qualify for loans to pay off the balance—or simply could not afford to pay off the loans, even with port incentives.¹³²¹ As one driver ominously predicted: "The first of the year will probably be the end of my family."¹³²²

Even for those who could acquire their own trucks, the total burden of the loan payments, higher maintenance and insurance costs, and higher registration fees placed new burdens on drivers who struggled before the program was implemented—and who faced even more intense challenges as the recession reduced work opportunities. In this context, trucking companies were cutting contract rates, putting the drivers in even more economic peril. The *Los Angeles Times* profiled one driver who sold his old truck and joined a company that still hired some employee drivers: "We're like slaves. We've lost our freedom."¹³²³ Those drivers who stayed independent owners appeared to have no more autonomy. Trucking companies that had directly purchased clean trucks made drivers lease them back, deducting insurance and maintenance costs from their pay.¹³²⁴ The *Los Angeles Times* reported that these new trucks cost fifty percent more to operate on top of lease payments of \$1000 per month.¹³²⁵ "Things were bad enough when we owned our trucks, but I would say the situation is desperate now," one driver concluded.¹³²⁶ Another, with twenty years of trucking experience, reported that his

1318. *Id.*

1319. *Id.*

1320. *Id.*

1321. Patrick J. McDonnell, *Truckers Caught in a Tight Spot*, L.A. TIMES, Nov. 27, 2009, at A18. Critics charged that most port incentives went to fund big trucking companies (Swift Transportation received \$12 million for 591 clean trucks, while Knight Transportation got \$4.4 million for 172 trucks), although the port stated that \$200 million went to small firms. *Id.*

1322. *Id.*

1323. *Id.*

1324. Patrick J. McDonnell, *Truckers Assail 'Green' Cost*, L.A. TIMES, Dec. 7, 2010, at A1.

1325. *Id.*

1326. *Id.*

take-home pay was seven dollars an hour—less than the minimum wage. His assessment was harsh: “This program has been a great deception to us We no longer have hope to be in the middle class. We are all poor now.”¹³²⁷

2. *Public Litigation: Federal Agency Intervention*

In the midst of the program rollout—and before the ATA trial—another legal altercation over the Clean Truck Program would be resolved. On the heels of Judge Snyder’s first preliminary injunction denial in 2008, a second front opened in the litigation battle—this one initiated by the Federal Maritime Commission (FMC) exercising its jurisdiction to approve cooperative agreements of ports.¹³²⁸ On the verge of passing the CAAP program back in 2006, the ports asked for FMC approval of their plan to “promote cooperation, openness and joint action through means of discussion, development of consensus and agreement” in order to “decrease port-related air pollution emissions.”¹³²⁹ In August 2008, after passage of the Clean Truck Programs, the ports filed an amendment further detailing their agreement to “discuss, exchange information, cooperate and, to the extent each Port in its sole discretion deems appropriate, coordinate the adoption and implementation of programs to reduce truck emissions and improve Port safety and security (Clean Truck Programs).”¹³³⁰

Responding to this amendment, on September 12, the five-member FMC (staffed with a majority of members appointed by President George W. Bush) issued a nine-page Request for Additional Information to determine the competitive impact of the coordinated programs—sparking a strong dissent by Commissioner Joseph Brennan, who argued that the commission was “making a monumental mistake in delaying, yet again, the overall environmental plan of the ports.”¹³³¹ From the coalition’s point of view, the FMC action was the result of industry representatives going to Washington, D.C. to pressure “a more favorable agency” to create problems for the ports in the wake of the industry’s initial district court loss.¹³³² After an exchange of documentation with the ports, the FMC formally

1327. *Id.* Similar reports came out of Long Beach. See Kristopher Hanson, *Straining Under the Load*, LONG BEACH PRESS-TELEGRAM, Aug. 23, 2009, available at http://www.cleanandsafeports.org/fileadmin/files_editor/LBPTTruckDriverFacesHardRoad_082309.doc.pdf (quoting one driver as saying: “Between payments for the new truck, insurance, fuel, taxes and the lack of work, I’m barely making it”).

1328. See 46 U.S.C. §§ 40301(b), 40302, 40304, 40307 (2012).

1329. FED. MAR. COMM’N, LOS ANGELES AND LONG BEACH PORT INFRASTRUCTURE AND ENVIRONMENTAL PROGRAMS COOPERATIVE WORKING AGREEMENT, FEDERAL MARITIME COMMISSION, AGREEMENT NO. 2011170, at 1 (original effective date Aug. 10, 2006).

1330. FED. MAR. COMM’N, LOS ANGELES AND LONG BEACH PORT INFRASTRUCTURE AND ENVIRONMENTAL PROGRAMS COOPERATIVE WORKING AGREEMENT, FEDERAL MARITIME COMMISSION, AMENDED AND RESTATED AGREEMENT NO. 2011170-001, at 3 (filed Aug. 1, 2008).

1331. Ronald D. White & Louis Sahagun, *Ports’ Truck Plan May Be Delayed*, L.A. TIMES, Sept. 13, 2008, at B3.

1332. Telephone Interview with Adrian Martinez, *supra* note 837.

voted to seek the “surgical removal of substantially anticompetitive elements of the agreement, such as the employee mandate.”¹³³³

On October 31, 2008, three months after the initial ATA lawsuit was filed—and in the waning days of the Bush administration—the FMC filed a complaint in the D.C. district court to enjoin both ports’ Clean Truck Programs pursuant to section 6(h) of the Shipping Act of 1984,¹³³⁴ which authorized the FMC to bring a civil action if an “agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost.”¹³³⁵ The complaint, though framed broadly, homed in on the Los Angeles employee driver provision, challenging as “substantially anticompetitive” any program “to discuss, agree or implement a concession plan or plans . . . that requires, directly or indirectly, the use of only employee drivers to perform truck drayage service” or that “prohibits, directly or indirectly, the use of independent owner-operator drivers.”¹³³⁶ In elaborating its legal claim, the complaint stated that

the Commission determined that the CTP-induced changes to the drayage market and corresponding reduction in competition caused by the requirements to use employee-drivers exclusively . . . will give rise to substantial transportation cost increases, beyond what is necessary to generate the public health and environmental benefits asserted by the Ports.¹³³⁷

The case moved quickly—and came to an abrupt resolution after President Barack Obama, who wrote a letter in support of the Clean Truck Program as a candidate,¹³³⁸ took office in early 2009.¹³³⁹ On November 17, 2008, the FMC moved for a preliminary injunction against that portion of the Clean Truck Program that “(1) requires the use of employee-drivers by LMC concessionaires; or (2) establishes truck purchasing incentives, subsidies and clean truck fee exemptions that disadvantage Independent Owner Operators” at the ports.¹³⁴⁰ Because this motion

1333. Ronald D. White, *Agency Objects to Clean Truck Program*, L.A. TIMES, Oct. 30, 2008, at C1.

1334. Complaint for an Injunction Pursuant to Section 6(h) of the Shipping Act of 1984 46 U.S.C. § 41307, *Fed. Mar. Comm’n v. City of L.A.*, 607 F. Supp. 2d 192 (D.D.C. 2009) (No. 08-1895 (RJJ)) (filed Oct. 31, 2008).

1335. 46 U.S.C. § 41307(b)(1) (2012).

1336. Complaint for an Injunction Pursuant to Section 6(h) of the Shipping Act of 1984 46 U.S.C. § 41307, *supra* note 1334, at 27–28.

1337. *Id.* at 10.

1338. Kristopher Hanson, *Obama and Clinton Push for Truckers’ Rights at Port*, LONG BEACH PRESS-TELEGRAM, Jan. 12, 2008, at A7.

1339. See Press Release, Coal. for Clean & Safe Ports, Federal Maritime Commission’s Move to Drop Lawsuit Against Clean Trucks Program Signals President Obama’s Support to Protect Port Drivers, Public Health (June 16, 2009), available at <http://cleanandsafeports.org/resources-for-the-media/press-releases/federal-maritime-commission%E2%80%99s-move-to-drop-lawsuit-against-clean-trucks-program-signals-president-obama%E2%80%99s-support-to-protect-port-drivers-public-health/>.

1340. Plaintiff’s Motion for Preliminary Injunction at 1, *Fed. Mar. Comm’n*, 607 F. Supp. 2d 192 (No. 08-1895 (RJJ)) (filed Nov. 17, 2008).

was the first time since the enactment of section 6(h) that the FMC had sought a preliminary injunction, there was no precedent for the standard to be applied. In its pleadings, the FMC argued for a less onerous rule than that typically applied in preliminary injunction cases, urging the court to adopt a “more flexible” standard based on section 6(h)’s test for *permanent* injunctions in which the court would only consider whether the FMC had a substantial likelihood of success on the merits.¹³⁴¹ The FMC argued that it was likely to succeed based on an “extensive economic impact study” performed by its chief economist showing that the “the net cost impact of the explicit POLA employee mandate, as presently confined to that port alone, likely will range between \$3.0 billion and \$4.6 billion through 2025—without offsetting benefits.”¹³⁴²

Both ports—Los Angeles still represented by Kaye Scholer’s Rosenthal and Long Beach by outside counsel from Troutman Sanders—vigorously disputed both the characterization of the doctrinal test for preliminary injunction and the assessment of the FMC’s likelihood of success.¹³⁴³ In a ruling on April 15, 2009, the district court for the District of Columbia, in an opinion by President George W. Bush appointee Richard Leon, squarely sided with the ports.¹³⁴⁴ Calling the FMC’s interpretation of the preliminary injunction standard a “stretch,” the court ruled that the FMC could not meet it anyway.¹³⁴⁵ Although the commission had shown a potential increase in transportation costs, it had not demonstrated that the increase was the product of reduced competition—both because any trucking cost increase seemed to result from compliance with the programs’ terms (rather than market concentration) and because Long Beach’s rejection of employee conversion showed that the ports were “actually *in competition*.”¹³⁴⁶

1341. Memorandum in Support of Plaintiff’s Motion for Preliminary Injunction – Expedited Hearing Requested – Pursuant to Local Rule LCvR 65.1(d) at 19–20, *Fed. Mar. Comm’n*, 607 F. Supp. 2d 192 (No. 08-1895 (RJL)) (filed Nov. 17, 2008).

1342. *Id.* at 29.

1343. On December 22, 2008, both ports moved to dismiss the complaint. Memorandum in Support of the Los Angeles Defendants’ Motion to Dismiss, *Fed. Mar. Comm’n*, 607 F. Supp. 2d 192 (No. 08-1895 (RJL)) (filed Dec. 22, 2008); Memorandum in Support of Long Beach Defendants’ Motion to Dismiss, *Fed. Mar. Comm’n*, 607 F. Supp. 2d 192 (No. 08-1895 (RJL)) (filed Dec. 22, 2008). In January 2009, the FMC filed an opposition to the motion to dismiss, Plaintiff’s Reply to Motions to Dismiss of Defendants Los Angeles and Long Beach, *Fed. Mar. Comm’n*, 607 F. Supp. 2d 192 (No. 08-1895 (RJL)) (filed Jan. 15, 2009), and the ports filed reply briefs, Los Angeles Defendants’ Reply Memorandum in Support of Their Motion to Dismiss, *Fed. Mar. Comm’n*, 607 F. Supp. 2d 192 (No. 08-1895 (RJL)) (filed Jan. 29, 2009); Long Beach Defendants’ Reply to Plaintiff’s Opposition to Motions to Dismiss, *Fed. Mar. Comm’n*, 607 F. Supp. 2d 192 (No. 08-1895 (RJL)) (filed Jan. 29, 2009). The FMC filed an amended complaint adding further allegations of coordinated activity by port staff. First Amended Complaint for an Injunction Pursuant to Section 6(h) of the Shipping Act of 1984 46 U.S.C. §41307, *Fed. Mar. Comm’n*, 607 F. Supp. 2d 192 (No. 08-1895 (RJL)) (filed Feb. 11, 2009).

1344. Carol J. Williams, *Court Refuses to Halt Clean-Truck Program*, L.A. TIMES, Apr. 16, 2009, at A10.

1345. *Fed. Mar. Comm’n*, 607 F. Supp. 2d at 197–204.

1346. *Id.* at 200–01. The court also held that the FMC had not shown irreparable harm and that the balance of equities and the public interest weighed in favor of upholding the programs. *Id.* at 202–04.

The FMC swiftly retreated—perhaps motivated more by political change than legal defeat. In early June 2009, President Obama appointed Commissioner Brennan—the lone dissenter from the initial lawsuit—as acting FMC chair.¹³⁴⁷ One week later, the commission moved to dismiss the proceeding (and the court’s April preliminary injunction ruling), arguing that a number of “events resolve the issues underpinning the Plaintiff Commission’s decision to bring this action and render unnecessary an injunction by this Court.”¹³⁴⁸ One basis that the FMC raised in moving to dismiss its lawsuit was the fact that the district court in the ATA suit had by then already enjoined the employee conversion provision of Los Angeles’s concession plan—thus mooted the FMC challenge.¹³⁴⁹ Another factor motivating the FMC’s dismissal was the Great Recession, which had significantly reduced cargo shipments and imposed financial hardships on both ports as they sought to implement their truck conversion programs.¹³⁵⁰ When it was initially filed, the FMC action had blocked the ports’ power to collect the fees they had planned to use to fund clean truck purchases, contributing to a shortage of promised incentive financing.¹³⁵¹ After the district court rejected the FMC’s preliminary injunction motion, the Port of Long Beach sought to bring its incentive program in line with the more generous program instituted in Los Angeles. Toward that end, on April 20, 2009, the Long Beach harbor commission harmonized its clean truck incentives with those of Los Angeles.¹³⁵² In its motion to dismiss, the FMC argued that this harmonization mooted the case to the extent that it had “sought to enjoin the disparities between the Ports.”¹³⁵³ The court agreed and the action was formally dismissed the following month.¹³⁵⁴

1347. Plaintiff’s Motion to Dismiss Proceeding and for Vacatur of the Court’s April 15, 2009 Order and Memorandum Opinion at 2, *Fed. Mar. Comm’n*, 607 F. Supp. 2d 192 (No. 08-1895 (RJL)) (filed June 16, 2009).

1348. *Id.* at 1–2.

1349. *Id.*

1350. *Id.* at 7.

1351. See Ronald D. White, *Port’s Clean-Rig Program Is Running on Empty*, L.A. TIMES, Jan. 27, 2009, at C1. Despite this glitch, the Clean Truck Programs had succeeded in adding 3000 new clean diesel trucks to the port fleet within the first five months of its implementation. Ronald D. White, *Cleanup at Ports Starts to Pay Off*, L.A. TIMES, Feb. 23, 2009, at C1. One year after the programs’ launch, port officials “said they expect to reduce truck emissions at both ports by 80% by the end of 2010—a year ahead of schedule.” Phil Willon, *Diesel Emissions Are Down Dramatically at Port Complex*, L.A. TIMES, Oct. 2, 2009, at A11. The trucks were touted as improving driver comfort and safety, though some independent contractors complained about the prospect of being barred from the Port of Los Angeles. See Ronald D. White, *Reaping Benefits of Clean Trucking*, L.A. TIMES, Apr. 6, 2009, at B1.

1352. Plaintiff’s Motion to Dismiss Proceeding and for Vacatur of the Court’s April 15, 2009 Order and Memorandum Opinion, *supra* note 1347, at 7.

1353. *Id.*

1354. Stipulation of Voluntary Dismissal, *Fed. Mar. Comm’n*, 607 F. Supp. 2d 192 (No. 08-1895 (RJL)) (filed July 24, 2009). In a startling turnaround, less than one year later, the FMC issued its inaugural “Chairman Earth Day Award” to the Port of Los Angeles for its Clean Truck Program. Press Release, Coal. for Clean & Safe Ports, National “Blue-Green” Coalition Applauds Key Obama Appointee’s Inaugural Earth Day Award to LA Clean Truck Program (Apr. 21, 2010), available at <http://cleanandsafeports.org/resources-for-the-media/press-releases/national-blue-green-coalition-applauds-key-obama-appointees-inaugural-earth-day-award-to-la-clean-truck-program/>. In another

3. *Private Litigation II: The Merits Phase*

The dismissal of the FMC suit in the summer of 2009, at the moment the ATA was taking its appeal from Judge Snyder's second preliminary injunction ruling, raised the stakes of the ATA lawsuit, which was now the only legal barrier to the Los Angeles port's Clean Truck Program. As the case moved toward trial, following the 2010 Ninth Circuit ruling that preliminarily enjoined the employee driver provision (as well as the provisions on hiring preferences, financial capability, off-street parking and truck routes, and placards), each side focused on strengthening their arguments. While this effort concentrated on crafting legal briefs and assembling evidence, the coalition also sought to reinforce its arguments for clean trucks in the public domain. Seeking to shore up the economic case in favor of the vulnerable employee provision, LAANE issued a report on the cusp of trial demonstrating that "the combined costs for clean truck leases and vehicle maintenance are out of reach for individual port drivers" thus undermining the "heart of the environmental policy."¹³⁵⁵ Timed to correspond with the parties' final briefings, the stage was set for trial.

The trial briefs laid out the now-familiar pattern of disagreement. The ATA argued FAAA preemption of the Los Angeles concession plan; contended that although it did not have to show each provision was unrelated to safety, it could; and then argued against market participation and in favor of finding that the plan unduly burdened interstate commerce.¹³⁵⁶ Narrowing its focus for trial, the ATA only challenged five key provisions of the Los Angeles concession plan related to: (1) employee conversion, (2) off-street parking, (3) maintenance, (4) placards, and (5) financial capability.¹³⁵⁷ Reprising a back-up argument first made at the preliminary injunction hearing, which had gained increasing court attention throughout the case, the ATA also sought to apply the Supreme Court's decision in *Castle v. Hayes Freight Lines*, which held that states were prohibited under the Motor Carrier Act from interfering with a carrier's right to operate in interstate commerce.¹³⁵⁸ Although the district court had earlier rejected this argument on the ground that the Motor Carrier Act was passed forty years before the FAAA—whose

twist, President Obama appointed then Long Beach Harbor Commissioner Mario Cordero to chair the FMC in 2013. *Chairman Mario Cordero*, FEDERAL MARITIME COMMISSION, http://www.fmc.gov/bureaus_offices/commissioner_mario_cordero.aspx (last visited April 1, 2014).

1355. SEJAL PATEL, FROM CLEAN TO CLUNKER: THE ECONOMICS OF EMISSIONS CONTROL 5 (2010), available at http://www.cleanandsafeports.org/fileadmin/files_editor/FromCleantoClunker.pdf.

1356. Plaintiff's L.R. 16-10 Trial Brief at i, *Am. Trucking Ass'ns, Inc. v. City of L.A.*, No. 08-4920 CAS (RZx), 2010 WL 3386436 (C.D. Cal. Aug. 26, 2010) (filed Apr. 13, 2010). That the commerce argument was relegated to a subsidiary position did not surprise NRDC's Martinez, who reflected that the freight industry "lawyers will scream commerce clause violations to the top of their lungs during the advocacy or administrative stage, . . . [b]ut ultimately I haven't found them to want to litigate it because . . . there's fear of bad precedent . . . [since] I don't think their case is that strong." Telephone Interview with Adrian Martinez, *supra* note 837.

1357. *Am. Trucking Ass'ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436, at *2-3.

1358. *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 63-64 (1954).

safety exception permitted states to suspend carrier service—the Ninth Circuit had cryptically stated that “this issue is not finally resolved and may be reconsidered in further proceedings for a permanent injunction.”¹³⁵⁹ The ATA used this opening to argue that *Castle* stood for the proposition that only the federal government could determine a carrier’s safety fitness and thus the port could not enforce the safety provisions of its concession agreement by barring truck access.¹³⁶⁰

For its part, the Port of Los Angeles took a slightly different approach than in the preliminary injunction phase. First, the port contended that the concession plan’s individual provisions did not have the “force and effect of law related to a price, route, or service” and therefore were not preempted by FAAA section 14501(c) at all. The port then argued that—assuming preemption did apply—the provisions fell within the market participant exception and also were permitted under the FAAA’s safety exception.¹³⁶¹ This order reflected the port’s sense that the safety exception was a relatively weaker argument, but one that it “was kind of stuck with” after the district court upheld several provisions on that basis.¹³⁶² Sending a similar message, the port devoted only a page to the ATA’s commerce clause argument and relegated the *Castle* claim to a footnote.¹³⁶³ Not feeling as constrained by the lower court ruling, the NRDC’s position at trial emphasized the validity of the concession plan under the market participant exception.¹³⁶⁴

The trial lasted seven days. The ATA’s chief counsel, Robert Digges, appeared on behalf of the plaintiffs, alongside outside counsel Christopher McNatt, Jr. from Scopelitis, Garvin, Light, Hanson & Feary. On the Los Angeles side, city attorneys Tom Russell and Simon Kahn appeared with outside counsel from Kaye Scholer (Steven Rosenthal and his team). NRDC lawyers Melissa Lin Perrella and David Pettit appeared on behalf of the environmental intervenors. At trial, port counsel and NRDC each made opening statements, emphasizing distinct themes that foreshadowed counsels’ division of labor throughout the remaining litigation. Port counsel Rosenthal sought to lay out the case that the Clean Truck Program was adopted to “address specific proprietary concerns at the port.”¹³⁶⁵ He suggested that the evidence would show the need for the port as an “enormous commercial enterprise” to address environmental and community impacts that had “brought significant expansion and improvement at the port to a screeching halt.”¹³⁶⁶ He also stressed the port’s need to respond to security risks in laying out the case for

1359. *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 596 F.3d 602, 607 (9th Cir. 2010).

1360. Plaintiffs’ L.R. 16-10 Trial Brief, *supra* note 1356, at 25.

1361. Defendants’ Trial Brief (L.R. 16-10) at 1, *Am. Trucking Ass’ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436 (filed Apr. 13, 2010).

1362. Telephone Interview with David Pettit, *supra* note 841.

1363. Defendants’ Trial Brief (L.R. 16-10), *supra* note 1361, at 22–23 n.10, 24–25.

1364. Telephone Interview with David Pettit, *supra* note 841.

1365. Transcript of Defendant The City of Los Angeles’ Opening Statement at 35, *Am. Trucking Ass’ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436.

1366. *Id.* at 28, 33.

application of the safety exception.¹³⁶⁷ For the environmental intervenors, NRDC's Perrella focused on "[w]hether the remediation of port-generated air pollution by the Clean Truck Program and specifically by the concession agreement is protected under the market participant doctrine."¹³⁶⁸ As she made clear, the intervenors' case would stress the public health impacts of port pollution and tie them directly to the independent-contractor status of the drivers.¹³⁶⁹

During trial, Rosenthal and his team presented evidence to show how the Clean Truck Program responded to proprietary concerns. Rosenthal questioned key port decision makers: Executive Director Geraldine Knatz, who discussed program details;¹³⁷⁰ Commissioner David Freeman, who emphasized that the program was designed to facilitate port expansion;¹³⁷¹ and Deputy Executive Director of Operations John Holmes, who discussed how the program was intended "to provide a level of accountability, but also to insure the program was sustainable and that it met the environmental and security goals of the port."¹³⁷² Rosenthal's colleagues elicited testimony from witnesses highlighting how the program responded to local port traffic problems and transportation security concerns.¹³⁷³ Perrella took the lead in questioning Dr. Elaine Chang, who outlined the case for port-induced air pollution and the need for the Clean Truck Program to address it,¹³⁷⁴ and Long Beach resident Bernice Banares, who testified about her own asthma and safety concerns raised by port trucks.¹³⁷⁵ NRDC's role was to "get into the record what the public health and environmental problem is and then to draw out facts related to how the port sought to address those problems and how addressing those problems was really intertwined with its pursuing its commercial interests."¹³⁷⁶

With the evidence thus tendered, the parties waited for Judge Snyder to rule, which she did on August 26, 2010, in a decision that gave a sweeping victory to the port. In the court's detailed Findings of Fact and Conclusions of Law, Judge Snyder

1367. *Id.* at 30, 41.

1368. Transcript of Intervenor National Resource Defense Council's Opening Statement at 49, *Am. Trucking Ass'ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436.

1369. *Id.* at 52–53.

1370. Transcript of Testimony of Defendant's Witness, Dr. Geraldine Knatz, *Am. Trucking Ass'ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436.

1371. Transcript of Testimony of Defendant's Witness, Simon David Freeman, *Am. Trucking Ass'ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436.

1372. Transcript of Testimony of Defendant's Witness, John Merrill Holmes at 84, *Am. Trucking Ass'ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436.

1373. Transcript of Testimony of Defendant's Expert Witness, Jeffrey Walter Brown, *Am. Trucking Ass'ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436; Transcript of Testimony of Defendant's Expert Witness, James Evan Hall, *Am. Trucking Ass'ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436; Transcript of Testimony of Defendant's Witness, Bruce Charles Wargo, *Am. Trucking Ass'ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436.

1374. Transcript of Testimony of Defendant's Expert Witness, Dr. Elaine Chang, *Am. Trucking Ass'ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436.

1375. Transcript of Testimony of Intervenor's Witness, Bernice Banares, *Am. Trucking Ass'ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436.

1376. Telephone Interview with Melissa Lin Perrella, *supra* note 1238.

2014]

PREEMPTIVE STRIKE

1115

ruled that none of the provisions challenged by the ATA were preempted—contradicting the Ninth Circuit’s assessment during the preliminary injunction phase. The trial court’s decision—with an eye on the ATA’s inevitable appeal—set forth alternative grounds for different provisions. With respect to the maintenance, placard, and financial capability provisions, the court ruled that there was insufficient evidence that they would affect truck prices, routes, or services and were thus not preempted under section 14501(c);¹³⁷⁷ alternatively, the court concluded that even if these provisions were preempted, the maintenance and placard provisions fell within the safety exception (though the financial capacity provision, enacted to ensure “the Port will not lose its investment in truck grants,” did not).¹³⁷⁸ With respect to the employee driver and off-street parking provisions, the court held both preempted and neither within the safety exception.¹³⁷⁹

However, here the court moved to a different rationale: market participation. Rejecting the ATA’s narrow definition of proprietary action, the court stated that “where restrictions are placed on services essential to the functioning of a government-run commercial enterprise, the market participant exception applies to non-procurement decisions.”¹³⁸⁰ The court then ruled that the entire concession agreement was “essentially proprietary”¹³⁸¹—and thus not preempted—because it was passed “in response to litigation and the threat to POLA’s continued economic viability by community groups . . . as a ‘business necessity,’ in order to eliminate obstacles to its growth.”¹³⁸² Wanting to cover all its bases, the court also found each individual provision to fall within the market participant exception. Focusing on employee conversion, the court agreed with the port that it was “designed to transfer the financial burden of administration and record-keeping onto the trucking companies,” which was “clearly an economically motivated action, and one that a private company with substantial market power—such as the oligopoly power of the Port—would take when possible in pursuit of maximizing profit.”¹³⁸³ The court further found that the off-street parking and placard provisions were “designed specifically to generate goodwill among local residents and to minimize exposure to litigation from them,” while the financial capability and maintenance provisions were “aimed to ensure that the trucking companies had the resources to sustain the Port’s investment in cleaner trucks.”¹³⁸⁴ Finally rejecting the ATA’s *Castle* and dormant commerce clause claims,¹³⁸⁵ the court resoundingly validated the port’s

1377. *Am. Trucking Ass’ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436, at *20.

1378. *Id.* at *22–23.

1379. *Id.* at *19–22.

1380. *Id.* at *26.

1381. *Id.*

1382. *Id.* at *27.

1383. *Id.* at *28.

1384. *Id.* at *29.

1385. *Id.* at *29–32. In reaching this conclusion, the court dismissed the port’s tideland trust power claim. *Id.* at *23.

Clean Truck Program and the legal strategy that produced it—at least for the moment.

That moment passed quickly. In September 2010, the ATA appealed—and back up the ladder the case went. In doing so, the ATA requested that the court stay the implementation of the Clean Truck Program pending the appeal.¹³⁸⁶ Judge Snyder agreed to temporarily enjoin the employee provision, which she held was likely to produce irreparable harm to plaintiffs that was not outweighed by other equities, while permitting implementation of the rest of the concession plan.¹³⁸⁷ By this point, the issues dividing the parties were fully crystalized and their briefs reflected well-worn arguments for and against preemption.¹³⁸⁸ However, to underscore the stakes, a number of new amici weighed in on the side of the ATA's appeal: the Intermodal Association of North America, asserting the negative impact of the concession plan on the intermodal industry;¹³⁸⁹ the National Right to Work Legal Defense Foundation, which argued that the concessions forced independent-contractor drivers to sacrifice their right to work as such;¹³⁹⁰ the Owner Operator Independent Drivers Association, which argued that the concession plan was not responsive to the issues facing non-short-haul drivers;¹³⁹¹ and the Center for Constitutional Jurisprudence, which argued that market participant status could only be exercised through procurement.¹³⁹²

The judges assigned to the appellate panel hearing the case were Betty Fletcher, an iconic liberal appointed by President Carter as only the second woman judge in the Ninth Circuit; Randy Smith, a strong conservative from Idaho appointed by President George W. Bush; and Rudi Brewster, a senior district court judge from San Diego who had been appointed by President Reagan. In a two-to-one decision, with Smith in dissent, the panel upheld the bulk of the concession

1386. Memorandum of Points & Authorities On Motion To Stay Final Judgment Pending Appeal, *Am. Trucking Ass'ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436 (filed Sept. 24, 2010).

1387. Civil Minutes – General on Plaintiff's Motion for Injunction Pending Appeal at 8, *Am. Trucking Ass'ns, Inc.*, No. 08-4920 CAS (RZx), 2010 WL 3386436 (proceedings in chambers Oct. 25, 2010).

1388. Compare Brief of Appellant Am. Trucking Ass'ns, Inc., *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 660 F.3d 384 (9th Cir. 2011) (No. 10-56465) (filed Dec. 28, 2010), with Brief for Appellees, *Am. Trucking Ass'ns, Inc.*, 660 F.3d 384 (No. 10-56465) (filed Jan. 31, 2011) and Brief for Intervenor-Appellees, *Am. Trucking Ass'ns, Inc.*, 660 F.3d 384 (No. 10-56465) (filed Jan. 31, 2011).

1389. Intermodal Ass'n of North America, Inc. to Participate as *Amicus Curiae*, *Am. Trucking Ass'ns, Inc.*, 660 F.3d 384 (No. 10-56465) (filed Jan. 4, 2011).

1390. Motion for Leave to File Amicus Brief in Support of Appellant by Raymond Porras, et al., *Am. Trucking Ass'ns, Inc.*, 660 F.3d 384 (No. 10-56465) (filed Jan. 4, 2011).

1391. Brief of the Owner-Operator Indep. Drivers Ass'n, Inc., as *Amicus Curiae* in Support of Appellant Am. Trucking Ass'ns, Inc., for Reversal of District Court's Findings of Fact and Conclusions of Law, *Am. Trucking Ass'ns, Inc.*, 660 F.3d 384 (No. 10-56465) (filed Jan. 4, 2011).

1392. Brief Amicus Curiae of Ctr. for Constitutional Jurisprudence & Harbor Trucking Ass'n in Support of Plaintiff-Appellant at 9, *Am. Trucking Ass'ns, Inc.*, 660 F.3d 384 (No. 10-56465) (filed Jan. 4, 2011). The California Attorney General again supported the port. See Amicus Curiae Brief of the State of California, ex rel. Attorney General Kamala Harris in Support of Appellees and Affirmance, *Am. Trucking Ass'ns, Inc.*, 660 F.3d 384 (No. 10-56465) (filed Feb. 17, 2011).

plan—but dealt the decisive blow to employee conversion.¹³⁹³ Taking an expansive view of market participation, the court held that “when an independent State entity manages access to its facilities, and imposes conditions similar to those that would be imposed by a private landlord in the State’s position, the State may claim the market participant doctrine.”¹³⁹⁴ Here, because the “Port has a financial interest in ensuring that drayage services are provided in a manner that is safe, reliable, and consistent with the Port’s overall goals for facilities management,” the court concluded that “the Port acted in its proprietary capacity as a market participant when it decided to enter into concession agreements.”¹³⁹⁵ However, the court stopped short “of holding that every provision in the concession agreement” was therefore valid, instead opting to “examine whether the provisions at issue further the State’s interests as a facilities manager, or whether the provisions seek to affect conduct unrelated to those interests.”¹³⁹⁶ The court also made clear that the safety exception was available for appropriate provisions, despite the ATA’s reading of *Castle* to the contrary.¹³⁹⁷

Turning to the specific provisions at issue, the court upheld four on diverse grounds: it concluded that the financial capability provision did not affect rates, routes, or services and thus was not preempted; it found the maintenance provision to fall within the safety exception; and it upheld the off-street parking and placard provisions as proprietary acts of the port as a market participant.¹³⁹⁸ Yet the court could find nothing to save employee conversion, which it concluded sought “to impact third party behavior unrelated to the performance of the concessionaire’s obligations to the Port.”¹³⁹⁹ Recognizing the port’s interest in providing higher wages to attract drivers lost to the Transportation Workers Identification Credential program, the court nonetheless concluded that the port could not achieve market stability “by unilaterally inserting itself into the contractual relationship between motor carriers and drivers.”¹⁴⁰⁰ Further recognizing the port’s interest in protecting its investment in clean trucks, the court concluded that the concession agreements swept too broadly by binding all LMCs, “not merely those who drive Port-subsidized trucks.”¹⁴⁰¹ Finally, acknowledging the port’s interest in “streamlined administration” over a smaller number of LMCs, the court found it “insufficient to outweigh the Port’s avowed desire to impact wages not subsidized by the State.”¹⁴⁰²

1393. *Am. Trucking Ass’ns, Inc.*, 660 F.3d 384 (filed Sept. 26, 2011). Dissenting, Judge Smith would have held the entire plan to be preempted, that market participant status did not apply because the relevant market was trucking services (in which the port did not participate), and that the safety exception was precluded by *Castle*. *Id.* at 410–15 (Smith, J., dissenting).

1394. *Id.* at 401.

1395. *Id.* at 401–02.

1396. *Id.* at 402.

1397. *Id.* at 402–03.

1398. *Id.* at 403–09.

1399. *Id.* at 408.

1400. *Id.*

1401. *Id.*

1402. *Id.*

With this, employee conversion—the lynchpin of a monumental campaign and innovative local policy—was held to be “tantamount to regulation” and thus preempted.¹⁴⁰³

It was September 2011, five years after the campaign for clean trucks had begun, and the piece that had held the labor-environmental alliance together was gone. LAANE’s Patricia Castellanos, responding to the decision, stated that it would “have devastating consequences for working families and port communities plagued by dirty air and dead-end jobs.”¹⁴⁰⁴ The port’s (and coalition’s) early calculation that it could win at the Ninth Circuit level—made with full knowledge of the uncertainty—turned out to be wrong as to employee conversion. The editorial board of the *Los Angeles Times*, on the eve of the Ninth Circuit decision, had expressed hope that it would “end the city’s misguided attempt to team up with the Teamsters.”¹⁴⁰⁵ And, indeed, the port decided not to appeal the ruling—though not for the reasons suggested by the *Times*. On the negative side of the ledger, the Ninth Circuit ruling sent an undeniable signal: unable to persuade one of the circuit’s most liberal judges, Betty Fletcher, it seemed fruitless—even reckless—to press the case for employee conversion in front of the conservative majority on the Supreme Court. On the positive side, it also was possible for the port and coalition to count the Ninth Circuit ruling as a win and walk away. As NRDC’s Pettit saw it, the Ninth Circuit ruling endorsed the idea that a port “can have a concession plan and can put conditions on trucks . . . even [those] in interstate commerce.”¹⁴⁰⁶ With the basic foundation of the concession concept thus left “intact,”¹⁴⁰⁷ NRDC lawyers “viewed what we got from the Ninth Circuit as a victory.”¹⁴⁰⁸ As it turned out, so did the ATA.

4. *Private Litigation III: The Supreme Court Phase*

Refusing to settle for the victory over employee drivers, the ATA again set its sights on gutting the concession plan, this time by appealing to the Supreme Court.¹⁴⁰⁹ NRDC saw the appeal as a statement by the ATA that “state and local government should not be able to place . . . really any requirements on motor carriers, so it was: ‘If we can show that you can’t even do this placard provision, then that means that you can’t do anything.’”¹⁴¹⁰ In pressing this case, the ATA retained new counsel for the appeal: Supreme Court specialist Roy Englert, an

1403. *Id.*

1404. Louis Sahagun, *Panel Throws Out Part of Port’s Clean Truck Program*, L.A. TIMES, Sept. 27, 2011, at AA3.

1405. Editorial, *Truckin’ Toward a Cleaner Port*, L.A. TIMES, Sept. 28, 2011, at A12.

1406. Telephone Interview with David Pettit, *supra* note 841.

1407. Telephone Interview with Adrian Martinez, *supra* note 837.

1408. Telephone Interview with Adrian Martinez, Staff Att’y, Natural Res. Def. Council (March 29, 2013).

1409. Petition for a Writ of Certiorari, *Am. Trucking Ass’ns, Inc. v. City of L.A.*, 133 S. Ct. 2096 (2013) (No. 11-798) (filed Dec. 22, 2011).

1410. Telephone Interview with Melissa Lin Perrella, *supra* note 1238.

assistant solicitor general under President Reagan who had started his own appellate firm in 2001 and boasted a nearly perfect record in front of the Court. NRDC's Perrella noticed the difference, recalling that the ATA's Supreme Court counsel was "phenomenal," framing the briefs in a way "that was just really compelling."¹⁴¹¹

In its petition for certiorari, the ATA asked the Court to resolve what it characterized as three significant circuit splits: one over the application of the market participant exception to preemption, a second over the scope of FAAA preemption, and a third over the vitality of *Castle*. With respect to market participation, the ATA argued that the Ninth Circuit created a conflict by saving the port's concession plans from preemption based on its status as a property owner when it did not "actually participate in the market" for drayage trucking and when the plan's restrictions were "unrelated to the efficient procurement of services."¹⁴¹² The ATA further asserted that the Ninth Circuit read the FAAA "rates, routes, or services" preemption too narrowly and that *Castle* still barred a state from "enforcing its laws through even a partial suspension of the motor carrier's ability to operate in interstate commerce."¹⁴¹³

In response, the port sought to minimize the legal stakes, arguing that the Ninth Circuit's decision was in fact congruent with those of other circuits on market participation and thus no circuit split existed. Furthermore, the port suggested that the other issues presented were not substantial enough to warrant Court review: specifically, the Ninth Circuit's single ruling that the FAAA did not preempt the financial capability provision and its narrow application of the safety exception to the maintenance provision were too minor to justify granting cert.¹⁴¹⁴ For their part, the environmental intervenors emphasized that the Ninth Circuit's decision on market participation was based on the trial court's extensive factual findings on the port's health and community impacts, which the ATA did not challenge on appeal.¹⁴¹⁵ They also continued to emphasize the business benefits of the port going green, which NRDC as an environmental organization believed it was better positioned to do.¹⁴¹⁶ In March 2012, the Supreme Court invited the U.S. Solicitor

1411. *Id.*

1412. Petition for a Writ of Certiorari, *supra* note 1409, at 2. In their amicus briefs, the Chamber of Commerce and National Industrial Transportation League, Center for Constitutional Jurisprudence and Harbor Trucking Association, and Airlines for America (the airline trade group) all sided with the ATA to limit the market participant exception. *See* Brief for the Chamber of Commerce of the United States of America & Nat'l Indus. Transp. League as *Amici Curiae* in Support of Petitioner, *Am. Trucking Ass'n, Inc.*, 133 S. Ct. 2096 (No. 11-798) (filed Jan. 23, 2012); Motion for Leave to File and Brief *Amicus Curiae* of Ctr. of Constitutional Jurisprudence & Harbor Trucking Ass'n in Support of Petitioner, *Am. Trucking Ass'n, Inc.*, 133 S. Ct. 2096 (No. 11-798) (filed Jan. 23, 2012); Brief of *Amicus Curiae* Airlines for America in Support of Petitioner, *Am. Trucking Ass'n, Inc.*, 133 S. Ct. 2096 (No. 11-798) (filed Jan. 23, 2012).

1413. Petition for a Writ of Certiorari, *supra* note 1409, at 25–26.

1414. City of L.A. Brief in Opposition at 9–38, *Am. Trucking Ass'n, Inc.*, 133 S. Ct. 2096 (No. 11-798) (filed Feb. 21, 2012).

1415. NRDC Brief in Opposition at 5–14, *Am. Trucking Ass'n, Inc.*, 133 S. Ct. 2096 (No. 11-798) (filed Feb. 21, 2012).

1416. Telephone Interview with Adrian Martinez, *supra* note 1408.

General to express its views on the matter, which it did, coming in on the side of the ATA.¹⁴¹⁷ In the U.S. brief, Solicitor General Donald Verrilli argued for an expansive concept of preemption, rejecting the idea that a port should be able to impose special rules, claiming instead that the port was “akin to a public managed transportation infrastructure” and thus should not be able to impose restrictions that were inconsistent with other ports.¹⁴¹⁸ However, the solicitor general also threw a line to the port by recommending that the Court not grant certiorari based on the limited significance of the Los Angeles case.¹⁴¹⁹

If supporters of the Clean Truck Program were surprised when the Ninth Circuit struck down the employee driver provision, they were shocked when the Court agreed to consider the ATA’s market participant and *Castle* claims: setting up review of the concession plan’s placard and off-street parking provisions.¹⁴²⁰ NRDC’s Perrella described her response:

Surprised? . . . It completely devastated us . . . I don’t think I’ve had that really horrible feeling in my stomach . . . the way I did when I found out the Supreme Court had decided to take the case . . . [H]ere we go again with a wacky environmental case in the Ninth Circuit before a bunch of conservative judges . . . probably not the best forum for us.¹⁴²¹

The Court decision to take the case signaled an interest in perhaps curtailing the market participant doctrine at the core of the Ninth Circuit’s decision. Accordingly, the port adjusted its market participant argument in its merits brief. Parrying the ATA’s claim that the port did not participate directly in the drayage market, the port emphasized its right as a property owner to enter into agreements affecting access to its land. In summarizing its core position, the port asserted that “absent a statement of clear congressional intent to the contrary, the courts should presume that proprietary state conduct dealing with the management of state-owned property is within the market-participant doctrine.”¹⁴²² Because the port as property owner had a clear “commercial motivation” in the contested provisions—promoting truck safety and improving community relations—they fell within the scope of the market participation doctrine.¹⁴²³ NRDC shaped its merits brief in response to the city’s draft, emphasizing the commercial benefits of the port’s

1417. Brief for the United States as *Amicus Curiae* Supporting Reversal, *Am. Trucking Ass’ns, Inc.*, 133 S. Ct. 2096 (No. 11-798) (filed Feb. 22, 2013).

1418. David G. Savage, *High Court to Hear Case on Port’s Clean Truck Program*, L.A. TIMES, Jan. 12, 2013, at B2.

1419. Brief for the United States as *Amicus Curiae* Supporting Reversal, *supra* note 1417, at 6.

1420. The ATA technically did not seek review of the Ninth Circuit holding that the truck maintenance provision fell under the safety exception; it did ask for review of the financial capacity provision, but the Court refused to grant it. *Am. Trucking Ass’ns, Inc.*, 133 S. Ct. at 2102 n.3.

1421. Telephone Interview with Melissa Lin Perrella, *supra* note 1238.

1422. Brief for the City of L.A. Respondents at 15, *Am. Trucking Ass’ns, Inc.*, 133 S. Ct. 2096 (No. 11-798) (filed Mar. 18, 2013).

1423. *Id.* at 29–30.

“green growth” strategy.¹⁴²⁴ In making the market participant argument, NRDC drew upon its now-deep well of experience and also exchanged views with port counsel and the Teamsters’ Mike Manley.¹⁴²⁵ In preparing for oral argument, Perrella helped organize two moot courts, one at the University of California, Irvine School of Law, and another at Public Citizen in Washington, D.C., where she persuaded former Solicitor General Seth Waxman to be on the panel.¹⁴²⁶

At oral argument, it was immediately clear that the port’s position would be greeted with skepticism. Almost as soon as port counsel Rosenthal began his opening statement, Justice Scalia pounced: “What exception do you appeal to? There are a number of exceptions there.”¹⁴²⁷ Barely letting him finish a sentence, Scalia insisted that Rosenthal was asking for “an exception for private contract operations as opposed to public matters,” adding that “[t]here are exceptions to the preemption [sic] and that is not one of them.”¹⁴²⁸ For Perrella, this was “difficult” because their argument hinged on the Court recognizing, as a first step, that there was in fact a market participant exception to the FAAA and she “felt like at least a few of the justices couldn’t even get past step one.”¹⁴²⁹ Contending with Justice Scalia and Chief Justice Roberts about whether the concessions were enforced through the port’s criminal sanctions, Rosenthal focused on whether the provisions carried the “force and effect of law” under the FAAA.¹⁴³⁰ This took the conversation away from market participation, meandering through an analysis of *Castle* and then back to questions of concession enforcement¹⁴³¹—in this way, previewing the grounds for the Court’s ultimate resolution.

If the supporters of the Clean Truck Program were bracing for a sweeping curtailment of the market participant exception, what they got on June 13, 2013—in a unanimous decision by Justice Kagan—was a narrow, technical reading of FAAA section 14501(c)(1)’s operative language, preempting a state “law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier.”¹⁴³² Stating that the parties agreed that the provisions at issue related to a motor carrier’s price, route, or service, Kagan’s decision focused on the “force and effect of law” language. While the Court acknowledged that the FAAA’s terms exempted “contract-based participation in a market,”¹⁴³³ it concluded that the placard and off-street parking provisions, though contained in a

1424. Brief for Respondents Natural Res. Def. Council, et al. at 10, *Am. Trucking Ass’n, Inc.*, 133 S. Ct. 2096 (No. 11-798) (filed Mar. 18, 2013).

1425. Telephone Interview with Michael Manley, *supra* note 1243.

1426. Telephone Interview with Melissa Lin Perrella, *supra* note 1238. Perrella also recalled circulating information on the Supreme Court case on a ports listserv, responding to listserv questions, and explaining the case to coalition members. *Id.*

1427. Transcript of Oral Argument at 30, *Am. Trucking Ass’n, Inc.*, 133 S. Ct. 2096.

1428. *Id.* at 31.

1429. Telephone Interview with Melissa Lin Perrella, *supra* note 1238.

1430. Transcript of Oral Argument, *supra* note 1427, at 39.

1431. *Id.* at 44–51.

1432. *Am. Trucking Ass’n, Inc.*, 133 S. Ct. at 2102.

1433. *Id.*

contract, were “part and parcel of a governmental program wielding coercive power over private parties, backed by the threat of criminal punishment.”¹⁴³⁴ Specifically, because the objectives of the agreement were accomplished “by amending the Port’s tariff” to impose legal liability on terminal operators—a violation of which was subject to criminal sanction—it did not stand alone as contract, but rather was part of a comprehensive regulatory scheme backed by “the hammer of criminal law.”¹⁴³⁵ Although the Court acknowledged that the “line between regulatory and proprietary conduct has soft edges,” this case was “nowhere near” it since “the threat of criminal sanctions” showed the government acting “*qua* government, performing its prototypical regulatory role.”¹⁴³⁶ In the Court’s view, the fact that the port may have passed the Clean Truck Program to “turn a profit” was irrelevant to the question of whether it had acted with the “force and effect of law.”¹⁴³⁷ What mattered was not intent, but rather the means used, which here involved enforcement of the placard and off-street parking provisions through “a coercive mechanism, available to no private party”—thus bringing them within the FAAA’s preemptive scope.¹⁴³⁸ With this characterization of the concession provisions and reading of the statute, the Court sidestepped deep analysis of the scope of market participation.

The court then punted on the ATA’s *Castle* claim. The ATA argued that *Castle* prevented the port from enforcing the remaining concession provisions on financial capacity and truck maintenance, which operated to deny noncompliant trucks port access; this denial, the ATA claimed, infringed a power reserved by statute to the federal government.¹⁴³⁹ However, the Court read *Castle* to only prevent a state actor from punishing “an interstate motor carrier for prior violations of trucking regulations,” rather than “taking off the road a vehicle that is contemporaneously out of compliance.”¹⁴⁴⁰ Because the port had not yet begun to enforce the provisions, the Court concluded that it was not clear whether enforcement would be for past violations of the agreement—which would possibly be barred by *Castle*—or for ongoing violations—which the Court noted that even the ATA agreed would be permissible.¹⁴⁴¹ Because “the kind of enforcement ATA fears, and believes inconsistent with *Castle*, might never come to pass at all,” the Court—threading a very fine needle—decided simply not to decide.¹⁴⁴²

1434. *Id.* at 2103.

1435. *Id.*

1436. *Id.*

1437. *Id.* at 2104.

1438. *Id.*

1439. *Id.*

1440. *Id.* at 2105.

1441. *Id.*

1442. *Id.* In a concurrence, Justice Thomas, while agreeing entirely with the opinion, noted an issue that the port failed to raise but, in his view, should have: that the FAAA’s application to intrastate trucking was quite likely unconstitutional under the Commerce Clause and thus the FAAA itself would lack preemptive force. *Id.* at 2106 (Thomas, J., concurring). “Although respondents waived any

In the end, although the port lost, it did manage to limit the doctrinal damage. The Court noted that the port had occasionally framed the question as whether “a freestanding ‘market-participant exception’ limits § 14501(c)(1)’s express terms.”¹⁴⁴³ However, mirroring the shift to the “force and effect of law” discussion in oral argument, the opinion’s text did not mention the market participation doctrine by name, though it asserted that “contract-based participation in a market” was not preempted by the FAAA.¹⁴⁴⁴ In that sense, the port—along with the environmental and labor groups that had urged it on—dodged a doctrinal bullet.

Yet that was cold comfort to the city staff and coalition personnel who had struggled so mightily to win passage of the Los Angeles Clean Truck Program. Reflecting on the litigation loss, the port’s John Holmes—one of the key architects of the concession plan—saw a contradiction at the heart of the legal outcome. Although the port remained legally liable for environmental compliance, he read the Court’s analysis as depriving the port of full legal power to achieve it. The result, in his view, was that the port had “accountability without authority.”¹⁴⁴⁵

For the coalition, the Court’s opinion officially laid to rest the boldest aspirations of the Clean Truck Program. Built upon interconnected labor, community, and environmental claims for redress, what remained of the program—clean truck conversion and port financing to achieve it—spoke most directly to the environmental concerns. Although community residents would benefit from clean trucks, their other issues—off-street parking and placards to enable reporting of bad drivers—had been legally excised from the concession plan. And one of organized labor’s preeminent goals—changing truck drivers from independent contractors to employees—once tantalizingly close, was again a distant dream. Litigation, which had been such a powerful tool in bringing together the coalition, had been used by its adversary to tear its accomplishment apart.

D. *The Aftermath: Maneuvering Around Preemption*

The ATA litigation reinforced the outlines of the difficult legal box that the labor movement was in. Although federal labor law did not generally serve the movement’s strategic interests—at least when it came to port trucking—federal transportation law was held to preempt local efforts to change the balance of power. The environmental movement, on the other hand, was able to wield strong federal and state law to carve out space for local action. In this regard, the ATA’s own strategic behavior helped the environmental cause by foregoing a challenge to the truck ban in favor of focusing its arguments on the concession plan and, specifically, employee conversion. This was both a tactical and economic choice. Supporting the ports’ green initiative demonstrated industry social responsibility and sharpened the

argument that Congress lacks authority to regulate the placards and parking arrangements of drayage trucks using the port, I doubt that Congress has such authority.” *Id.*

1443. *Id.* at 2102 n.4 (majority opinion).

1444. *Id.* at 2102.

1445. Interview with John Holmes, *supra* note 148.

union critique. And facing the reality of increasing fuel costs and the promise of a local subsidy, it made economic sense to convert the port fleet.¹⁴⁴⁶ From the industry's point of view, employee conversion was a dead-weight loss to be fought tooth and nail.

As a result of the litigation, environmentalists could claim short-term victory in reducing emissions, but at the cost of long-term uncertainty about maintenance and the effect on truckers, who continued as independent contractors—only now with the added burden of having to acquire and maintain costly new clean trucks.¹⁴⁴⁷ In the face of federal preemption, the coalition pursued two strategies to maneuver around it. One centered on amending the FAAA to explicitly permit the Clean Truck Program—with employee conversion. The other sought to promote conversion and unionization through a company-by-company approach that combined misclassification litigation and direct driver organizing. Both, again, focused on changing the drivers' independent-contractor status to enable labor action.

1. *A Legislative Window—Closed*

By the time the Supreme Court finally resolved the ultimate fate of the concession plan, the coalition had long since turned to “Plan B.”¹⁴⁴⁸ After the Ninth Circuit's first preliminary injunction ruling in March 2009—in which it opined that the employee conversion provision was “one highly likely to be shown to be preempted”¹⁴⁴⁹—the coalition made a strategic decision not to wait idly by for the court process to wend its way toward resolution. As the district court issued its preliminary injunction against key elements of the concession plan a month later, the coalition had already set in motion a legislative campaign to moot the litigation. As Change to Win's Nick Weiner put it after the district court ruling: “We need to talk to our friends in Congress and see what our options are We've come this far, and we are not going to give up because there are crummy laws.”¹⁴⁵⁰

The campaign's first move was to the federal government, where it mobilized

1446. Ronald D. White, *Cleaner Port Air, but How?*, L.A. TIMES, Jan. 9, 2010, at B1 (noting that the Los Angeles port had given out \$44 million in incentives); David Zanhiser, *Trucking Group to Appeal Port Ruling*, L.A. TIMES, Aug. 28, 2010 at AA3 (stating that harbor department had given out \$57 million to subsidize vehicles).

1447. The Clean Truck Program did not mandate that truck drivers purchase and maintain their own trucks. To the contrary, it directed terminal operators to bar noncompliant dirty trucks, while stating that trucking companies “shall be responsible for vehicle condition and safety and shall ensure that the maintenance of all Permitted Trucks . . . is conducted in accordance with manufacturer's instructions.” L.A. Bd. of Harbor Comm'rs, *Drayage Services Concession Agreement for Access to the Port of Los Angeles*, *supra* note 1207, ¶ III(g). However, the program did not preclude trucking companies from passing on the purchase and maintenance costs to drivers and, as a matter of practice, that is what the companies did. *See* McDonnell, *Truckers Assail 'Green' Cost*, *supra* note 1324.

1448. Telephone Interview with Melissa Lin Perrella, *supra* note 832.

1449. *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1056 (9th Cir. 2009).

1450. Louis Sahagun & Ronald D. White, *Groups to Ask Congress for Help on Port*, L.A. TIMES, Apr. 15, 2009, at A12.

to amend the FAAA preemption rule to explicitly permit the Clean Truck Program—employee conversion and all. Jon Zerolnick remembered the coalition’s calculation in mid-2009 this way: “So we thought, okay, we’re pretty sure that we’re going to win the court case. But maybe we’re not. Maybe we’re wrong. We don’t think so. But, you know, if the F-quad-A—the Federal Aviation Administration Authorization Act of 1994—does preempt what we’re doing, well, then let’s just clarify the F-quad-A.”¹⁴⁵¹

The legislative campaign started with promise. In mid-2009, President Barack Obama had recently taken office and the Democrats controlled both houses of Congress—with a filibuster-proof majority in the Senate. The political stars were thus aligned and, while the focus was on health care reform, the coalition sought to capitalize on the opportunity.

A key early step was drafting language to modify the FAAA to carve out an exception for the Los Angeles program. To advance that piece, the Los Angeles city attorneys, with input from NRDC and Teamsters counsel, generated an early draft.¹⁴⁵² The draft modified section 14501(c) of the FAAA, which prohibited state or local laws “related to a price, route, or service of any motor carrier,” to make clear that preemption “does not apply to the authority of a State, or a political subdivision of a State or other municipal authority of a State, to condition entry to Port Facilities for the purpose of . . . improving the environmental, safety, security or congestion conditions of Port facilities or in nearby areas.”¹⁴⁵³ With that tentative language in hand, the port and coalition sought to build political support to move the policy forward. They would need to secure sponsors in both houses and to persuade the relevant committees—the Committee on Transportation and Infrastructure in the House, and the Committee on Commerce, Science, and Transportation in the Senate—to take up the bill.

In a display of its seriousness, in May 2009, the Port of Los Angeles paid \$150,000 to hire former House Majority Leader Richard Gephardt’s high-powered political consulting firm, the Gephardt Group, to lobby Congress on behalf of the amendment.¹⁴⁵⁴ To support this effort, the coalition, spearheaded by LAANE, reached out to Southern California congress members to educate them about the lawsuit and the proposed legislative fix, and to gain their support and potential cosponsorship.¹⁴⁵⁵ To make the coalition’s case, LAANE put together a comprehensive Briefing Book entitled, “Clearing the Roadblocks: A Map to Green and Grow a Key American Industry to Create 85,000 Middle-Class Jobs at Our Nation’s Ports,” which included an analysis of the “positive impacts” of the Los

1451. Telephone Interview with Jon Zerolnick, *supra* note 951.

1452. Telephone Interview with Melissa Lin Perrella, *supra* note 832.

1453. Coal. for Clean & Safe Ports, Background on the Port of Los Angeles Clean Trucks Program (July 15, 2009) (on file with the UC Irvine Law Review).

1454. Art Marroquin, *Port Panel Extends Lobbying Contract*, PASADENA STAR-NEWS (Jan. 20, 2010), <http://www.pasadenastarnews.com/20100121/port-panel-extends-lobbying-contract>.

1455. Telephone Interview with Jon Zerolnick, *supra* note 951.

Angeles port's Clean Truck Program, an overview of the ATA's litigation, key reports from the campaign (including the BCG report), press clippings, statements of support from prominent elected officials, and a list of organizational partners.¹⁴⁵⁶ The coalition also assembled a two-page background paper, proclaiming that the "trucking industry, under the leadership of the American Trucking Association . . . is attacking" the Clean Truck Program.¹⁴⁵⁷ This effort bore fruit. On November 4, 2009, twenty-four members of the California congressional delegation wrote to James Oberstar (D-Minnesota), chair of the House Committee on Transportation and Infrastructure, to urge him to "consider making changes to the FAAAA so that California ports can successfully implement and enforce needed truck management programs."¹⁴⁵⁸

Supporters of the amendment also made their case in the media. On the first anniversary of the Los Angeles Clean Truck Program, Mayor Villaraigosa touted its accomplishments and urged "lawmakers in Washington to update federal law and allow a first-of-its-kind emissions reduction initiative like the Clean Truck Program to flourish."¹⁴⁵⁹ Port director Geraldine Knatz sounded a similar note,¹⁴⁶⁰ while other port city politicians lent their support.¹⁴⁶¹ New York City Mayor Michael Bloomberg threw his weight behind the campaign: "Today, I'm calling on Congress to support legislation that will empower ports to implement the L.A. Clean Truck Program, an innovative initiative that will create good, green jobs and improve the quality of the air that New Yorkers breathe."¹⁴⁶² In what came as no surprise, the nation's biggest trade associations were not persuaded: "We strongly oppose the efforts of the port to support changing long-standing federal law . . . to include a provision within the Clean Truck Plan that has nothing to do with reducing truck emissions."¹⁴⁶³

For such a small change to an esoteric law, supporters assembled a powerful coalition to make its case on Capitol Hill. It included familiar players from the Los

1456. LAANE, Briefing Book, *Clearing the Roadblocks: A Map to Green and Grow a Key American Industry to Create 85,000 Middle-Class Jobs at Our Nation's Ports* (on file with the UC Irvine Law Review).

1457. Coal. for Clean & Safe Ports, *Background on the Port of Los Angeles Clean Trucks Program*, *supra* note 1453.

1458. Letter from Zoe Lofgren et al., Representatives from the State of California, United States House of Representatives, to James L. Oberstar, Chairman of the Transportation and Infrastructure Committee, United States House of Representatives (Nov. 4, 2009) (on file with the UC Irvine Law Review).

1459. Antonio Villaraigosa, *Clean Trucks: One Year Later*, HUFFINGTON POST GREEN (Dec. 1, 2009, 5:12 AM), http://www.huffingtonpost.com/antonio-villaraigosa/clean-trucks-one-year-lat_b_307158.html.

1460. Geraldine Knatz, *Port Clean-Truck Program Is Goal Worth Fighting For*, L.A. DAILY NEWS (Dec. 8, 2009, 9:00 PM), <http://www.dailynews.com/opinion/20091209/geraldine-knatzport-clean-truck-program-is-goal-worth-fighting-for>.

1461. White, *Port Settles Truckers Lawsuit*, *supra* note 1304.

1462. *Id.*

1463. Ronald D. White, *L.A. Port Urged to Stop Lobbying Over Clean Truck Program*, L.A. TIMES, Aug. 26, 2009, at B2.

Angeles campaign—including Change to Win, CLUE, East Yard Communities for Environmental Justice, LBACA, LAANE, and NRDC—as well as other powerful supporters (the national Blue-Green Alliance, the Steel Workers union, UNITE HERE, and Sierra Club) and community partners from around the country. Thus united, the coalition coordinated congressional visits in late 2009 and early 2010. Change to Win’s Weiner helped bring in truck drivers from Los Angeles and coordinated a lobbying day on which Mayor Villaraigosa, consultant Gephardt, and Teamsters president Hoffa met with key lawmakers.¹⁴⁶⁴ Jonathan Klein, director of CLUE, recalled making the faith case for the amendment, arguing “how unfair” the current law was “in the struggle for working people.”¹⁴⁶⁵ After delays negotiating support due to ILWU resistance, the coalition eventually won crucial backers, including House Speaker Nancy Pelosi and Secretary of Labor Hilda Solis, and—in a key advance—persuaded Democratic Congressman Jerrold Nadler from New York to sponsor the House version of the bill. Nadler was a “good progressive guy,” who had worked on port issues in New York and New Jersey and had strong ties to the Teamsters.¹⁴⁶⁶

As this push was underway, the politics began to unravel. The first thread came loose in January 2010, when Republican Scott Brown, in a surprise victory, won the Massachusetts Senate seat vacated by the passing of liberal stalwart Ted Kennedy. Deprived of its filibuster-proof majority in the Senate, the amendment’s supporters nonetheless fought on. Their strategy was to attach the amendment to a must-pass transportation reauthorization bill that could be carried in both houses on a Democratic majority.¹⁴⁶⁷ The enactment of Obama’s health care reform law in March 2010 fueled Tea Party resentment and drew predictions of a Republican House majority after the November midterm elections.

With Nadler’s support in place, there was a vigorous campaign to pass the amendment before the midterms. In a letter dated April 22, 2010, the coalition—now with over 100 organizations representing labor, environmental, and community groups from port cities around the country—again urged Oberstar’s transportation committee to take up the amendment. After detailing the state of the litigation and challenging the ATA’s “erroneous claims, not the least of which is that they really support the environmental goals of Los Angeles’ Clean Truck Program,” the letter promoted a concession model to “ensure trucks are adequately maintained,” “eliminate bad actors,” and “prevent fraud.”¹⁴⁶⁸ It concluded: “We can have both high trade volume and clean, safe communities, but only if ports are able to implement programs that give them the tools to address and solve the pollution

1464. Telephone Interview with Nick Weiner, *supra* note 820.

1465. Telephone Interview with Jonathan Klein, *supra* note 885.

1466. Telephone Interview with Nick Weiner, *supra* note 820.

1467. *Id.*

1468. Letter from LAANE et al. to James B. Oberstar, Chairman of the Transportation and Infrastructure Committee, United States House of Representatives, and John Mica, Ranking Member of the Transportation and Infrastructure Committee, United States House of Representatives (Apr. 22, 2010) (on file with author).

problem in the ports, including enforcing compliance by bad actors.”¹⁴⁶⁹ The House Committee on Transportation and Infrastructure agreed to move forward, and on May 5, 2010, held a hearing on port trucking conditions,¹⁴⁷⁰ at which NRDC’s Perrella spoke on the status of the litigation.¹⁴⁷¹ The draft amendment then was circulated to lawyers in the Department of Transportation, who were charged with FAAA enforcement (and who opposed the Port of Los Angeles in the ATA litigation). With their “wordsmithing,” the draft went back to Nadler and the coalition, which signed off.¹⁴⁷² With a final “big push,” the coalition gained commitments from key cosponsors—Democratic members of the California delegation, plus progressive allies from Maryland, Virginia, Wisconsin, Florida, New Jersey, New York, and Massachusetts—and the bill was ready.

On July 29, 2010, Nadler introduced the Clean Ports Act in the House as H.R. 5967.¹⁴⁷³ The bill—in language that echoed the coalition’s early draft—proposed to revise FAAA section 14501(c)(2)(A) to declare that federal preemption of local laws related to “a price, route, or service of any motor carrier” would *not* apply to

the authority of a State, political subdivision of a State, or political authority of 2 or more States to adopt requirements for motor carriers and commercial motor vehicles providing services at port facilities that are reasonably related to the reduction of environmental pollution, traffic congestion, the improvement of highway safety, or the efficient utilization of port facilities¹⁴⁷⁴

The campaign effort now turned to getting sufficient votes to pass—which meant more congressional lobbying—in a harrowingly narrow time frame. To do this, the coalition circulated the results of a survey of driver conditions one year after the ATA litigation, which emphasized that “[m]any port drivers, in order to compensate for new clean truck expenses, are working significantly longer hours, earning less, and feel considerably less optimistic about the future.”¹⁴⁷⁵ Noting that “trucking companies have seized greater control over drivers’ work and the trucks they operate through drastic changes in methods of compensation,”¹⁴⁷⁶ the coalition feverishly worked to gain support for an omnibus transportation bill. But with Republican electoral chances looking good as the midterm elections drew nearer,

1469. *Id.*

1470. *Assessing the Implementation and Impacts of the Clean Truck Programs at the Port of Los Angeles and the Port of Long Beach: Hearing Before the Comm. on Transp. & Infrastructure*, 111th Cong. 2 (2010).

1471. Telephone Interview with Jon Zerolnick, *supra* note 951.

1472. Telephone Interview with Nick Weiner, *supra* note 820.

1473. Clean Ports Act of 2010, H.R. 5967, 111th Cong. (2010); *see also* Darren Goode, *E2 Morning Round-up: Green Groups Highlight Oil Accidents, Spill Response Debate Heats Up, Nadler Floats ‘Clean Ports’ Bill and Oil Spill Threatens Lake Michigan*, THE HILL (July 29, 2010, 11:22 AM), <http://thehill.com/blogs/e2-wire/111569-e2-morning-round-up-green-groups-highlight-oil-accidents-spill-response-debate-heats-up-nadler-floats-clean-ports-bill-and-oil-spill-threatens-lake-michigan>.

1474. H.R. 5967.

1475. COAL. FOR CLEAN & SAFE PORTS, LONGER HOURS, LOWER WAGES & LITTLE HOPE 1 (on file with the UC Irvine Law Review).

1476. *Id.*

House Democrats were reluctant to make a strong push for a labor-backed bill, which was therefore delayed until after November. “And that’s when it all fell apart.”¹⁴⁷⁷

Although launched with great hope, the bill died an untimely death—undone by the catastrophic midterm election loss in November 2010 that negated the Democrats’ majority in the House. Deprived of the ability to pass legislation along party lines in either chamber of Congress, Democrats could not persuade any member of the newly energized and more conservative Republican caucus to cross the aisle in support of a union legislative priority. Although the coalition went through the motions, the legislative point was effectively moot. On February 9, 2011, with fifty-nine cosponsors, Nadler’s House bill was reintroduced as H.R. 572, with the operative language virtually unchanged.¹⁴⁷⁸ Putting on a brave face, Nadler proclaimed that the Los Angeles model for clean trucks should be promoted, emphasizing evidence showing that most port truckers earned too little to afford new rigs.¹⁴⁷⁹ The coalition once again revived its legislative outreach. In its electronic briefing packet, the coalition presented “media coverage, reports, and other materials” to “show why local governments need action from Washington to reduce emissions, create green jobs, improve public health, and help responsible businesses grow and compete as part of our national economic recovery strategy.”¹⁴⁸⁰ In a one-page overview, the coalition reiterated its argument that the ATA appeal was “preventing key portions of LA’s Clean Truck Program from being enforced, threatening job-creating expansion and infrastructure projects from moving forward.”¹⁴⁸¹ The coalition thus urged passage of H.R. 572, which “will empower, but not mandate, local ports to adopt requirements for motor carriers and vehicles that are reasonably related to the reduction of environmental pollution, traffic congestion, improving highway safety, or for the efficient utilization of port facilities.”¹⁴⁸²

Yet it would not be. By late 2011, the coalition had secured a Senate sponsor, newly elected New York Senator Kirsten Gillibrand, who introduced an identical

1477. Telephone Interview with Nick Weiner, *supra* note 820.

1478. Clean Ports Act of 2011, H.R. 572, 112th Cong. (2011). The new legislation added three words to the last clause of proposed section 14501(c)(2)(A) so that it now exempted local or state laws related to environmental, traffic, or operational concerns so long as “adoption or enforcement of such requirements” did not conflict with other federal laws. *Id.*

1479. Kristopher Hanson, *Congress Considers Law Allowing Other Ports to Mimic Clean Trucks Program*, LONG BEACH PRESS-TELEGRAM (Dec. 19, 2011, 9:00 PM), <http://www.presstelegram.com/technology/20111220/congress-considers-law-allowing-other-ports-to-mimic-clean-trucks-program>.

1480. *Support the Clean Ports Act of 2011*, COAL. FOR CLEAN & SAFE PORTS (Dec. 7, 2011), <http://cleanandsafeports.org/wp-content/uploads/2012/01/Clean-Ports-Act-eBriefing-Kit-12-7-11.pdf>.

1481. *The Clean Ports Act of 2011 (H.R. 572)*, COAL. FOR CLEAN & SAFE PORTS (May 2011), http://www.cleanandsafeports.org/wp-content/uploads/2011/05/Clean-Ports-Act-of-2011_House1-pager.pdf.

1482. *Id.*

bill, S. 2011, on December 16.¹⁴⁸³ The Senate bill was referred to the Committee on Commerce, Science, and Transportation, where it died stillborn.

In a last-ditch legislative effort, the coalition turned to the California state legislature in the wake of the federal midterm congressional election defeat. On February 18, 2011, with the cosponsorship of staunch labor ally and Assembly Speaker John Perez (representing parts of east and south Los Angeles), and Labor and Employment Committee Chair Sandre Swanson (from Oakland), the coalition helped to introduce the Truck Driver Employment and Public Safety Act, labeled as A.B. 950. The bill sought to amend the California Labor Code “for purposes of all of the provisions of state law that govern employment,” to declare that “a drayage truck operator is an employee of the entity or person who arranges for or engages the services of the operator.”¹⁴⁸⁴ As drafted, the bill would have effectuated by state legislative mandate what the coalition had failed to achieve through the port concession plan. However, industry push-back was swift and decisive. Although the bill was read into the Labor and Employment Committee record, and subsequently received a full hearing in May 2011,¹⁴⁸⁵ it was ordered to the inactive file in June after Perez met with representatives of the California Trucking Association.¹⁴⁸⁶ In arguing against the bill, the industry group claimed it would harm the state’s transportation industry and raised the problem of conflicting state and federal standards for employee status.¹⁴⁸⁷ In addition, the California Trucking Association pointed to the 2008 investigation of drayage trucking companies by state Attorney General Jerry Brown—who found five small companies misclassifying truckers at the Los Angeles and Long Beach ports—as evidence that misclassification was not a significant problem.¹⁴⁸⁸ The irony of this claim could not have been lost on coalition advocates, who knew that the five prosecuted companies represented a lower bound, not an upper limit on violators as the industry suggested. Indeed, as the campaign moved into its final phase, advocates had already begun to challenge trucker misclassification as a systemic problem—intent to prove the industry wrong and salvage the effort to reform port trucking.

2. *Law and Organizing—A Renewed Challenge*

a. *Misclassification Litigation*

The second post-injunction path pursued by the coalition was to combine

1483. Clean Ports Act of 2011, S. 2011, 112th Cong. (2011). Gillibrand had five cosponsors: Senators Barbara Boxer (CA), Sherrod Brown (OH), Al Franken (MN), Robert Menendez (NJ), and Charles Schumer (NY).

1484. Assemb. B. 950, 2011–2012 Leg., Reg. Sess. (Cal. 2011).

1485. Assembly Third Reading, Assemb. B. 950 (Feb. 18, 2011); Assemb. Comm. on Lab. and Employment, Hearing on Assemb. B. 950 (May 4, 2011).

1486. *California Bill Seeking to Ban Independent Truck Operators Shelved*, PAC. MAR. ONLINE (June 7, 2011, 11:45 AM), <http://www.pmmnonlinenews.com/2011/06/california-bill-seeking-to-ban.html>.

1487. *Id.*

1488. *Id.*

affirmative litigation with organizing in an effort to move some of the vast number of contractor-based companies to an employee model,¹⁴⁸⁹ while simultaneously attempting to organize the handful of employee-based companies that already existed. The strategy was to build misclassification lawsuits against companies that wrongfully classified drivers as contractors—thus exerting pressure on the companies to accept employees, while also winning benefits for the misclassified drivers. At the same time, the Teamsters would launch union organizing campaigns at companies that, for their own reasons, already hired drivers as employees.

Advocates had long believed that many drayage truck drivers were illegally labeled independent contractors by companies that nonetheless exercised employer-like control. Challenges to misclassification had its roots in the early 1990s campaign by the Waterfront Rail Truckers Union and the *Albillo v. Intermodal Container Services* class action at the end of that decade.¹⁴⁹⁰ Yet by the late 2000s, the context had changed in ways that refocused attention on the potential to make the misclassification case. The difference was twofold. First, particularly after the congressional midterm elections undercut the effort to amend the FAAA, the coalition was prepared to invest significant resources to promote a systematic enforcement campaign¹⁴⁹¹—something that had been lacking in previous enforcement efforts. And second, there were political allies in influential positions within relevant federal and state agencies that might be able to contribute additional enforcement resources.

The path was not easy. In an industry of hundreds of small companies, misclassification litigation was necessarily a piecemeal approach. Moreover, the legal argument for misclassification was not straightforward. The test for whether a worker was a statutory employee hinged on the degree of employer control: a murky legal test that looked at the “economic realities” of the working relationship, such as whether the worker was engaged in a distinct business, supplied the materials, provided a special skill, worked without supervision, set the work schedule, and was paid by the job.¹⁴⁹² Failing to properly classify an employee as such was not an independent legal violation, but rather a predicate to showing an employer violation of other laws—for example, illegally deducting business expenses (like lease payments) from driver paychecks, or failing to pay minimum wage, keep appropriate records, or provide workers compensation and unemployment insurance. For private lawyers, bringing misclassification suits therefore depended on the extent to which the legal violation would generate sufficient legal fees. Cases for back pay involving small numbers of low-paid workers did not always provide fees large

1489. A 2007 report found that only nine percent of Los Angeles and Long Beach port truck drivers worked as employees. See GREENBERG QUINLAN ROSNER RESEARCH, DEMOGRAPHIC OVERVIEW OF TRUCK DRIVERS AT THE PORTS OF LOS ANGELES AND LONG BEACH 3 (2007), available at http://www.cleanandsafeports.org/fileadmin/files_editor/GQRRdriverworkforcepoll.pdf.

1490. See *supra* Section III.B.

1491. Telephone Interview with Jon Zerolnick, *supra* note 951.

1492. See *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999); *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 769 P.2d 399, 403–05 (Cal. 1989).

enough to entice private lawyers to make the investment. Even successful cases could not force companies to hire employees—and often had the effect of simply making companies more stringent about following the independent-contractor rules.

It was against this backdrop that the coalition simultaneously pursued public and private enforcement options. The public option avoided the private attorney's fees problem by shifting the cost of litigation to government agencies responsible for enforcing employment law: the Department of Labor (DOL) at the federal level and the Department of Labor Standards Enforcement (DLSE) at the state level. Both agencies were empowered to investigate and bring enforcement actions against violators of minimum wage and overtime laws—and had the resources and staff to conduct large-scale operations. The key was persuading decision makers to exercise their power.

In 2009, the Obama DOL launched a misclassification initiative to investigate the problem in various industries. At the state level, in February 2008, during the height of the campaign for clean trucks, California Attorney General Jerry Brown appointed a task force to investigate port trucking misclassification, which “uncovered numerous state labor law violations committed by several trucking companies operating at the ports.”¹⁴⁹³ As a result, Brown filed lawsuits,¹⁴⁹⁴ which alleged that port trucking firms had illegally avoided paying employment taxes and workers' compensation benefits, and also gained an unfair business advantage over companies that followed the law.¹⁴⁹⁵ Brown won judgments against five small companies,¹⁴⁹⁶ though all went out of business.¹⁴⁹⁷ Another suit against Pac Anchor Transportation elicited a strong response,¹⁴⁹⁸ with the company criticizing the attorney general for seeking “political gain” by currying favor with the Teamsters to win their support in his planned 2010 run for governor.¹⁴⁹⁹ Pac Anchor fought the suit and won a superior court decision in 2009, which held that the state's unfair

1493. Press Release, California Attorney General, Attorney General Brown Sues Three Trucking Companies in Ongoing Worker Abuse Crackdown at Los Angeles and Long Beach Ports (Oct. 27, 2008), available at <https://oag.ca.gov/news/press-releases/attorney-general-brown-sues-three-trucking-companies-ongoing-worker-abuse>.

1494. These companies included Pacifica Trucks, Guasimal Trucking, Jose Maria Lira Trucking, Esmundo Lira Trucking, and Noel and Emma Moreno Trucking. Press Release, California Attorney General, Brown Wins Fifth Suit Against Port Trucking Companies that Violated Workers' Rights, (Feb. 4, 2010), available at <http://oag.ca.gov/news/press-releases/brown-wins-fifth-suit-against-port-trucking-companies-violated-workers-rights>.

1495. Cal. Bus. & Prof. Code §§ 17200–17210 authorizes injunctive relief and civil restitution against anyone engaged in “unfair competition,” defined broadly as “any unlawful, unfair or fraudulent business act or practice.”

1496. Press Release, California Attorney General, *supra* note 1494.

1497. Telephone Interview with Michael Manley, *supra* note 1243.

1498. See Complaint for Restitution, Penalties and Injunctive Relief, State v. Pac Anchor Transp., Inc., No. BC397600 (Sept. 4, 2008), available at http://oag.ca.gov/system/files/attachments/press_releases/n1606_complaint_pac_anchor.pdf.

1499. *Truckers Claim Brown's Frivolous Lawsuit Designed to Curry Political Favor*, LEGAL NEWSLINE (Nov. 25, 2008, 11:44 PM), <http://legalnewsline.com/news/217658-truckers-claim-browns-frivolous-lawsuit-designed-to-curry-political-favor>.

business practices claim was preempted by the FAAA. The case was reversed on appeal, but that opinion was superseded as the case went up to the California Supreme Court—where LAANE, represented by Davis, Cowell & Bowe’s Andy Kahn, filed an amicus brief in support of the state’s position.¹⁵⁰⁰

As it did, the coalition sought to mobilize additional public enforcement pressure at the state and federal levels. When Brown was elected governor of California in November 2010, he appointed Julie Su to head the DLSE. Su was a prominent workers’ rights lawyer, who directed the litigation department at the Asian Pacific American Legal Center in Los Angeles, where she had worked since joining the group as a Skadden Fellow in 1994.¹⁵⁰¹ Su had gained recognition for her groundbreaking advocacy on behalf of Thai workers enslaved by garment contractors in El Monte, California—a case in which she had pressed for garment manufacturer and retailer liability for contract worker abuse under the “economic realities” test.¹⁵⁰² She thus came to the job in early 2011 as a natural coalition ally with directly relevant experience litigating employment cases in industries defined by contracting.

Coalition members moved to reach out to Su to make the case that the DLSE should devote resources to target misclassification in port trucking. In doing so, they were equipped with multiple pieces of evidence. In December 2010, Rebecca Smith at the National Employment Law Project (NELP)—along with Professor David Bensman of Rutgers School of Management and Labor Relations, and Paul Marvy of Change to Win—released *The Big Rig*, a carefully documented report on port trucking finding that “the typical port truck driver is misclassified as an independent contractor” since drivers were subject to “strict behavioral controls,” “financially dependent,” and “tightly tied” to particular trucking companies.¹⁵⁰³ News reports highlighted the plight of truck drivers, with one article in the Spanish-language daily, *La Opinión*, quoting a driver lamenting: “We are at the mercy of God.”¹⁵⁰⁴ Other research linked misclassification to the concept of “wage theft,” with UCLA researchers finding that nearly one-third of Los Angeles workers in a typical week were deprived of the minimum wage.¹⁵⁰⁵ The UCLA report urged a “move toward proactive, ‘investigation-driven’ enforcement in low-wage industries, rather than simply reacting to complaints.”¹⁵⁰⁶ Making the link between wage theft

1500. See *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 125 Cal. Rptr. 3d 709, 716 (Cal. Ct. App. 2011), review granted by 329 P.3d 154 (Cal. 2011). The case was set for argument on May 28, 2014.

1501. Marc Lifsher, *Her Job: Putting a Stop to Wage Theft*, L.A. TIMES, May 22, 2013, at B1.

1502. See *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1459–61 (C.D. Cal. 1996).

1503. SMITH ET AL., *supra* note 231, at 6.

1504. Isaías Alvarado, ‘We Are at the Mercy of God,’ LA OPINIÓN, Dec. 8, 2010, available at http://cleanandsafeports.org/fileadmin/pdf/La_Opinion_december_article_Eng.pdf.

1505. RUTH MILKMAN ET AL., WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES 2 (2010) (finding that 30% of L.A. workers were paid less than minimum wage in the week preceding the survey, while 21.3% were not paid overtime).

1506. *Id.* at 56.

and the government budget, the Obama administration in 2010 estimated that stopping misclassification could generate \$7 billion in tax revenue.¹⁵⁰⁷

To help develop the case for proactive enforcement—thus advancing what was now “Plan C” since the federal legislative strategy had collapsed—LAANE hired Sanjukta Paul as legal coordinator in early 2011.¹⁵⁰⁸ Paul had worked at civil rights litigation boutique Hadsell & Stormer and then opened her own solo civil rights and employment firm. On the verge of taking a hiatus from practice, she heard from a colleague that LAANE was looking for a lawyer on a short-term contract to help address misclassification in port trucking.¹⁵⁰⁹ Attracted to being “part of a larger movement,” Paul took the job, which involved advancing the coalition’s top-down effort to promote agency enforcement while also developing a bottom-up strategy to link individual enforcement to driver organizing.¹⁵¹⁰ She quickly set about “getting up to speed on the legal issues,” which involved drafting memos to Change to Win’s Weiner to “inform the top-down enforcement approach against the industry.”¹⁵¹¹ Toward that end, Paul developed legal theories to strengthen the case for agency enforcement and looked into types of available damages.¹⁵¹²

Paul shared her memos with state regulators, while coalition members, led by LAANE’s Castellanos, met with the DLSE’s Su in mid-2011. The Teamsters’ Mike Manley and port division director Chuck Mack also joined in some of the meetings. As Manley recalled, the thrust of these discussions was: “Here’s the evidence. Here’s what we found. This is a misclassification . . . You’re losing a whole lot of money by not going after these people.”¹⁵¹³ This last argument was echoed by CLUE’s Jonathan Klein, who recalled attending some meetings and arguing that misclassifying companies “cheat[ed] the government” by depriving it of tax revenue collected on properly paid wages.¹⁵¹⁴ Manley described the overall goal of the agency meetings as “trying to move them to really do something other than just sit with us . . . and say, ‘Oh, my gosh, it’s awful.’”¹⁵¹⁵

This same approach was taken at the federal DOL, where Weiner coordinated meetings in 2011 to urge Secretary Hilda Solis and top enforcement officials to undertake parallel federal action. Manley attended some of these sessions, as did NELP’s Smith, who discussed *The Big Rig* findings.¹⁵¹⁶ Both the DLSE and DOL

1507. James Rufus Koren, *Truckers Want Break on Audits*, L.A. BUS. J., Oct. 1, 2012, available at <http://cleanandsafeports.org/los-angeles-business-journal-truckers-want-break-on-audits/>.

1508. Telephone Interview with Sanjukta Paul, Legal Coordinator, L.A. Alliance for a New Economy (May 9, 2013).

1509. *Id.* Initial funding came from the Public Welfare Foundation. *Id.*

1510. *Id.*

1511. *Id.*

1512. *Id.*

1513. Telephone Interview with Michael Manley, *supra* note 1243.

1514. Telephone Interview with Jonathan Klein, *supra* note 885.

1515. Telephone Interview with Michael Manley, *supra* note 1243.

1516. Telephone Interview with Nick Weiner, *supra* note 820.

made commitments to ramp up investigations. The wheels of government bureaucracy, however, moved slowly—and industry resistance was strong.

To reinforce the significance of the misclassification drive—and turn up the political pressure—Teamsters president James Hoffa visited the Los Angeles port in December 2011, just after the Ninth Circuit had issued its final ruling in the ATA case invalidating employee conversion. There to meet with striking workers at Toll Group, Inc., his general message to port drivers was that the Teamsters were still in the fight despite the unexpected setback: “We didn’t think we were going to lose We have to go a different way now.”¹⁵¹⁷ Industry representatives pushed back hard. Robert Millman, a lawyer from Littler Mendleson representing trucking companies, was dismissive of the misclassification campaign: “The short story is nothing (like this) has worked This is nothing new. The question is: Are they going to be able to come up with some new game plan?”¹⁵¹⁸

Part of the new game plan focused on leases between companies that had converted under the Clean Truck Program and drivers with whom the companies contracted.¹⁵¹⁹ The lease arrangements between a company and driver in many cases precluded the driver from working for other firms, thus suggesting a degree of control tantamount to an employer-employee relationship.¹⁵²⁰ Companies deducted loan payments from driver paychecks—a practice that was illegal under state law if the drivers were, in fact, employees. Paul’s legal research suggested that the “documentary evidence” of these deductions in paychecks could provide the “monetary hammer” for private lawsuits seeking damages.¹⁵²¹ Paul also suggested that a new state law sponsored by the Teamsters, the California Willful Misclassification Law (S.B. 459)¹⁵²²—passed in October 2011—provided additional legal leverage. An outgrowth of the legislative effort that had stalled around the more robust A.B. 950, which would have simply declared all port drivers employees, S.B. 459 made misclassification an independent state law violation, subjecting employers to substantial financial penalties.¹⁵²³ In a memo to the coalition, Paul concluded that “the Willful Misclassification Law represents a bold and important advance in the fight against employers’ misuse of the ‘independent contractor’ form to deny employees their basic legal rights.”¹⁵²⁴ In his Los Angeles visit, Hoffa

1517. James Rufus Koren, *Port Access Still Drives Teamsters*, L.A. BUS. J., Dec. 12, 2011, available at http://cleanandsafeports.org/wp-content/uploads/2011/12/LA_Biz_12.12.11.pdf.

1518. *Id.*

1519. Howard Fine, *Leasing Could Be Roadblock for Trucking Companies*, L.A. BUS. J., Oct. 24, 2011, available at http://cleanandsafeports.org/wp-content/uploads/2012/01/LA_Biz_TruckLeasing10.24.11.pdf.

1520. Howard Fine, *Contracting May Squeeze Employers*, L.A. BUS. J., Oct. 24, 2011, available at http://cleanandsafeports.org/wp-content/uploads/2012/01/LA_Biz_Contracting10.24.11.pdf.

1521. Telephone Interview with Sanjukta Paul, *supra* note 1508.

1522. CAL. LAB. CODE §§ 226.8 & 2753 (Deering 2013).

1523. The act imposed penalties of up to \$15,000 for individual violations and \$25,000 for violations that showed a “pattern or practice” of misclassification. *Id.* § 226.8 (b) & (c).

1524. Sanjukta Paul, Synopsis of the California Willful Misclassification Law 3 (unpublished manuscript) (on file with the UC Irvine Law Review).

stressed the systematic nature of misclassification, stating that drivers did not have the power to set their own rates or choose where to haul cargo, and also emphasized the tax loss to the government that resulted.¹⁵²⁵ The industry response was sharp, with companies complaining that they were being penalized for following the clean truck rule. “It doesn’t seem fair. We are following a government mandate and now we have that mandate being used against us,” said Vic La Rose, president of Total Transportation Systems, Inc.¹⁵²⁶

The second element of the coalition’s misclassification strategy sought to complement public enforcement with private litigation—and to coordinate the private litigation with driver organizing efforts. This strategy had its roots in two high-profile state court class actions filed by plaintiff-side attorneys at the Law Offices of Ellyn Moscovitz, which targeted labor abuse, but not misclassification, of port drivers. The first, in November 2009, alleged that after the rollout of the Clean Truck Program in 2008, Total Transportation Services, Inc. committed numerous employment violations by failing to pay minimum wage and overtime, provide meal and rest breaks, and reimburse expenses.¹⁵²⁷ The second suit was brought in June 2010 against Sun Pacific Transportation and Pacific Green Trucking, alleging similar violations.¹⁵²⁸ As truckers’ attorney Adam Luetto put it: “Port drivers consistently claim that they are forced to drive long hours without breaks and required to perform work they never get paid for These drivers, unsurprisingly, are simply tired of working for free and we are working hard to hold their employers responsible for such unlawful employment practices.”¹⁵²⁹ The Teamsters coordinated with the lawyers to provide evidence of violations.¹⁵³⁰ Both of these cases settled.

On the heels of these suits, individual drivers began to file their own wage claims with the DLSE, challenging their misclassification as independent contractors. Acting on their own, four Long Beach drivers filed claims against Seacon Logix, which resulted in a January 2012 DLSE ruling ordering the company

1525. Koren, *Port Access Still Drives Teamsters*, *supra* note 1517.

1526. *Id.*

1527. See Fiona Smith, *Truckers Claim ‘Wage Theft,’* L.A. DAILY J., Nov. 6, 2009; see also Class Action Complaint, *Montoya v. Total Transp. Servs., Inc.*, No. BC 425121 (Cal. Super. Ct. Nov. 3, 2009).

1528. Press Release, Coal. for Clean & Safe Ports, *Class Action Wage-and-Hour Suit Filed Against Sun Pacific Trucking, Inc., and Pacific Green Trucking, Inc. on Behalf of Southern CA Port Drivers* (June 30, 2010), available at <http://cleanandsafeports.org/resources-for-the-media/press-releases/class-action-wage-and-hour-suit-filed-against-sun-pacific-trucking-inc-and-pacific-green-trucking-inc-on-behalf-of-southern-ca-port-drivers-latest-suit-cites-labor-violations-including-failure/>. Attorney Scot D. Bernstein was co-counsel on the Sun Pacific class action suit.

1529. *Another Case Against Port Trucking Firm Underscores Widespread Industry Abuse, Disregard of Labor Laws, Teamsters Charge*, PR NEWSWIRE (June 30, 2010), <http://www.prnewswire.com/news-releases/another-case-against-port-trucking-firm-underscores-widespread-industry-abuse-disregard-of-labor-laws-teamsters-charge-97502984.html>.

1530. *Id.*

to pay over \$100,000 in back wages and penalties.¹⁵³¹ Seacon retaliated by suing the workers for breach of contract under their lease terms.¹⁵³² David Gurley, the DLSE attorney assigned to the ports, knew of the coalition's misclassification effort and reached out to Paul to help the workers, which she did (along with private employment lawyer Stephen Glick) by assisting them in filing retaliation actions—forcing Seacon to drop the lease claims.¹⁵³³ The Seacon Logix case was prosecuted on appeal by Labor Commissioner Su and upheld by the superior court.¹⁵³⁴ In commenting on the victory, Su stated:

In this case, drivers had signed agreements labeling them independent contractors but the Court saw the truth behind the label This case highlights the critical need for labor law enforcement, particularly where misclassification cheats hardworking men and women like these port truck drivers out of the full pay to which they were entitled This is wage theft and we will do everything in our power to stop it.¹⁵³⁵

The DLSE's involvement refocused attention on the push for greater public enforcement. In February 2012, the DOL and DLSE signed a memorandum of understanding outlining their partnership to reduce misclassification.¹⁵³⁶ In spring, the DLSE sent out subpoenas to several trucking companies and initiated investigations; the DOL launched a similar enforcement effort, resulting in approximately fifty investigations in total.¹⁵³⁷ Some companies noted that the subpoenas did not list specific violations, but only mentioned potential problems.¹⁵³⁸ Industry decried the investigations, with a California Trucking Association representative stating: "We have a problem when companies are harassed or targeted unjustifiably simply because they use independent

1531. Order of the Labor Commissioner, *Garcia v. Seacon Logix, Inc.*, Order, No. 05-52821-LT (Cal. Labor Comm'r Jan. 10, 2012); Order of the Labor Commissioner, *Urbina v. Seacon Logix, Inc.*, Order, No. 05-53002-LT (Cal. Labor Comm'r Jan. 10, 2012).

1532. Telephone Interview with Sanjukta Paul, Clinical Fellow, UCLA School of Law (Jan. 23, 2014).

1533. *Id.*

1534. Tom Gilroy, *Shipping Company Drivers Are Employees, Not Contractors, California Court Decides*, BLOOMBERG LAW (Mar. 4, 2013).

1535. Press Release, Dept. of Indus. Relations, California Labor Commissioner Prevails in Misclassification Case Against Port Trucking Company (Mar. 1, 2013), available at <http://www.dir.ca.gov/DIRNews/2013/IR2013-11.html>.

1536. Press Release, U.S. Dept. of Labor, US Labor Department, California Sign Agreement to Reduce Misclassification of Employees as Independent Contractors (Feb. 9, 2012), available at <http://www.dol.gov/opa/media/press/whd/WHD20120257.htm>.

1537. Koren, *Truckers Want Break on Audits*, *supra* note 1507. The DOL investigations resulted in some misclassification findings and orders of back pay. *See, e.g.*, Wage & Hour Div. Investigation Findings Letter, Container Connection of S. Cal., Inc., Case No. 1634525 (Jan. 22, 2013) (on file with the UC Irvine Law Review) (finding that two workers were owed one day of back pay for \$211.52 and \$26.17 respectively). In August 2012, the DOL brought suit against Shippers Transport Express on behalf of Oakland port truckers. *See* Complaint for Violations of the Fair Labor Standards Act, *Solis v. Shippers Transp. Express, Inc.*, No. 12-4249 (N.D. Cal. Aug. 13, 2012).

1538. Koren, *Truckers Want Break on Audits*, *supra* note 1507.

contractors.”¹⁵³⁹ In response, industry lawyers conducted trainings—styled “Teamster and worker misclassification update”—instructing trucking companies on how to avoid running afoul of misclassification rules. One such update recommended that companies “DO NOT Use a Driver Handbook that looks like an employee manual,” or require a driver to “[w]ear company logo,” “[p]aint the truck a particular color,” or “[d]isplay a company ID card.”¹⁵⁴⁰ Industry representatives tried to characterize the misclassification effort as another Teamsters ploy, with the executive director of the Harbor Trucking Association pointing to a “smoking gun” letter from Hoffa to Governor Brown in April 2012, in which Hoffa stated he was “glad to know that California, in collaboration with the U.S. Department of Labor, is seeking to end this practice.”¹⁵⁴¹ In October, ten trucking companies (calling themselves the Clean Truck Coalition) escalated the fight, filing suit against Su. In the complaint, the companies sought a declaration that their “pooling agreement” to share clean trucks and lease them to independent contractors, because it was authorized by federal law, precluded Su from pursuing state enforcement actions against them; the companies also requested an injunction against further misclassification investigations.¹⁵⁴² Responding to critics, Su insisted that the trucking industry was not being singled out and placed the blame squarely on the companies:

I think too often that entities have kept everything the same about their operation, but they once had employees and converted them to contractors to cut cost. It’s bad for employees, it’s bad for the competitors, and it cheats the public out of millions of dollars a year because they’re not paying taxes . . . I reject the notion that we should blame hardworking people for the abuse they might suffer from the people who break the law . . . That’s not the way our legal system is structured; that’s not the way our labor laws work.¹⁵⁴³

Yet the blame game continued, with industry groups insisting that they were being unfairly targeted and ratcheting up the political pressure to tamp down the investigations. In cases to recover expenses deducted from driver pay, companies complained that drivers could end up over-compensated, since their contract pay was as high as \$60,000 (though deductions could bring their take-home pay down below the minimum wage). The DLSE was politically vulnerable to charges that it

1539. *Id.*

1540. Cameron W. Roberts & Sean Brew, Roberts & Kehagiaras LLP, Understanding the Clean Truck Litigation Part VI, at 1, 30–31 (Nov. 13, 2013), available at <http://www.htc.org/downloads/RES111413HTC%20Clean%20Truck%202013%20-%20FINAL%20Presentation-rz.pdf>.

1541. Bill Mongelluzzo, *Feds Take on Drayage Misclassification*, J. COM., July 16, 2012, available at <http://www.teamsters492.org/docs/Feds%20Take%20on%20Drayage%20Misclassification.pdf>.

1542. Complaint for Declaratory and Injunctive Judgment at 12–13, *Clean Truck Coal., LLC v. Su*, No. 12-08949 (Oct. 17, 2012). The coalition included Green Fleet Systems, LLC, Pacific 9 Transportation, Inc., Southern Counties Express, Inc., and Total Transportation Services, Inc., among others. *Id.* at 3.

1543. Joseph Lapin, *Notes from the Underground Economy: Are Companies at the Port of Long Beach Cheating Truckers Out of Their Rightful Wages?*, OC WEEKLY, Jan. 10, 2013.

was investing enforcement resources helping drivers not viewed as sympathetic low-wage workers. To buttress DLSE efforts, Paul drafted legal memos arguing for enforcement efforts against large trucking companies, like Harbor Express, Inc., which would not be based on illegal expense deductions. Nonetheless, government enforcement stalled.

The coalition thus changed tack, trying to generate more bottom-up energy among workers to file wage claims, which they hoped would both put greater pressure on the DLSE to process claims coming from workers on the front lines and promote the organizing of misclassified workers. For this, the coalition turned to Paul to help “figure out” what to do.¹⁵⁴⁴ In response, Paul planned an eight-week legal rights clinic, coordinated with state and federal enforcement agencies, beginning in September 2012. To prepare these clinics, Paul reached out to partners in the labor movement, as well as government agency officials, for whom she provided an analysis of legal violations in the port trucking industry.¹⁵⁴⁵ In August, Change to Win organizers passed out leaflets to stopped trucks inviting them to attend an initial meeting to be held at the Teamsters Local 848 office in Long Beach.¹⁵⁴⁶ At the meeting were representatives from DLSE, DOL, and the California Division of Occupational Safety and Health (Cal/OSHA), as well as labor lawyers and Teamsters organizers—all of whom provided information and encouraged the truckers to pursue their rights.¹⁵⁴⁷ At this meeting, Paul facilitated a know-your-rights training for workers and organizers¹⁵⁴⁸—explaining what facts to look for in support of misclassification.¹⁵⁴⁹ From there, Paul instituted a regular legal clinic, open two nights per week, which helped drivers identify employment violations, provided counseling on legal options, assisted in the preparation of administrative claims, calculated wages owed, and made connections to private attorneys.

Through this process, roughly fifteen cases were filed.¹⁵⁵⁰ Although Paul did not represent the drivers directly, once they filed claims, she helped calculate damages, coordinated with DLSE attorneys, and used her private bar connections to help find plaintiff-side lawyers to represent the drivers in the ensuing proceedings.¹⁵⁵¹ Paul also provided private attorneys with supporting legal analysis

1544. Telephone Interview with Sanjukta Paul, *supra* note 1508.

1545. Telephone Interview with Sanjukta Paul, *supra* note 1532.

1546. Telephone Interview with Sanjukta Paul, *supra* note 1508; *see also* Joseph Lapin, *Local Coalition Tries to Organize Misclassified Workers*, LONG BEACH POST, Aug. 24, 2012.

1547. Telephone Interview with Sanjukta Paul, *supra* note 1508. Paul was joined by Carlos Bowker, Deputy Labor Commissioner at the DLSE; Abel Gervacio, an investigator with the DOL; Victor Narro, Project Director at the UCLA Labor Center; Peter Riley, Regional Manager of Cal/OSHA Region 3; Rebecca Smith, attorney at the National Employment Law Project; and Michael Manley from the Teamsters.

1548. *See, e.g.*, Teamsters Local 848, Know Your Rights Workshop, Sept. 14, 2012 (on file with author) (asking: “What is employee misclassification and what can you do to end it at the ports?”).

1549. Telephone Interview with Sanjukta Paul, *supra* note 1508.

1550. Telephone Interview with Sanjukta Paul, *supra* note 1532.

1551. *Id.*

and developed creative theories for company liability. The number of these “first-generation” cases was deliberately limited to those with strong legal claims in order to create good precedent for high-volume filings later.¹⁵⁵² In February 2013, as she was preparing to leave LAANE, Paul joined the Wage Justice Center in a class action lawsuit against QTS, Inc., seeking over \$5 million in damages for violations including unpaid minimum wages, willful misclassification, unlawful pay deductions, and unfair competition.¹⁵⁵³ In May, two drivers sued Wilmington-based Harbor Express on behalf of a broader class of drivers for misclassification. Describing the suit, Brian Kabateck, one of the plaintiffs’ lawyers, stated: “It looks like a traditional employment, but they slap the title of independent contractors on them.”¹⁵⁵⁴ Then, in June and July, forty-seven drivers filed DLSE claims against Pacific 9 alleging more than \$6 million in damages.¹⁵⁵⁵ In addition, coalition organizers supported en masse trucker filings with the DLSE starting in the spring of 2013.¹⁵⁵⁶ The message from the coalition was: “We’re going to continue to be here and be a problem.”¹⁵⁵⁷

An updated version of *The Big Rig* research—released by NELP, Change to Win, and LAANE in 2014—suggested the scope of the misclassification effort. Looking at cases since January 2011, it reported that “[s]ome 400 port drivers have filed labor law complaints” with the DLSE, resulting in “19 decisions finding that drivers are employees” and assessing “more than a million dollars in wages, unlawful deductions, and penalties on behalf of 19 drivers against five companies: Green Fleet Systems, Seacon Logix, Western Freight Carrier, Total Transportation Services, and Mayor Logistics.”¹⁵⁵⁸ In addition, based largely on coalition efforts to place driver cases with private lawyers, the report noted that there were nine pending private lawsuits against trucking companies for violations related to driver misclassification (eight of which, including Harbor Express, were class actions).¹⁵⁵⁹

1552. *Id.*

1553. Class Action Complaint at 17, *Talavera, Jr. v. QTS, Inc.*, No. BC501571 (Cal. Super. Ct. Feb. 22, 2013). In litigation that is ongoing, defendants have sought to prevent class members from participating in the suit by seeking to enforce releases drivers were required to sign as a condition of continuing to work for defendants. Plaintiffs’ Notice for Motion and Motion for Declaratory Relief and Curative Notice at 1, *Talavera, Jr.*, No. BC501571.

1554. Ricardo Lopez, *Truck Drivers Sue for Overtime*, L.A. TIMES, May 15, 2013 at B2.

1555. Paula Winciki, *Port Truck Drivers Owed Millions in Wages*, CITY WATCH (Sept. 13, 2013), <http://www.citywatchla.com/in-case-you-missed-it-hidden/5708-port-truck-drivers-owed-millions-in-wages> (last visited Feb. 15, 2014).

1556. Telephone Interview with Sanjukta Paul, *supra* note 1532.

1557. Telephone Interview with Michael Manley, *supra* note 1243.

1558. REBECCA SMITH ET AL., *THE BIG RIG OVERHAUL: RESTORING MIDDLE-CLASS JOBS AT AMERICA’S PORTS THROUGH LABOR LAW ENFORCEMENT* 14 (2014); *see also* Dan Weikel, *Labor Group Claims Port Trucking Companies Treat Drivers Unfairly*, L.A. TIMES (Feb. 19, 2014, 3:56 PM), <http://www.latimes.com/local/lanow/la-me-ln-port-trucker-conditions-20140219-story.html>.

1559. SMITH ET AL., *supra* note 1558, at 20–22; *see also* Ricardo Lopez, *Port Truckers Load Up on Labor Suits*, L.A. TIMES, July 5, 2014, at B1.

b. Union Organizing

Misclassification litigation was always understood as a means to an end—a way to pressure companies to accept employees and, perhaps, even a union. As such, it was meant to complement the final element of the coalition’s plan: organizing drivers toward the goal of winning union contracts. Unionization of port truckers, of course, was the prize that drove Teamsters involvement in the clean trucks campaign. And in the immediate wake of the Clean Truck Program’s passage in Los Angeles, the Teamsters initiated union organizing campaigns at the companies that had converted to employee drivers. In early 2009, the union protested driver terminations at Swift and Southern Counties Express, claiming employees had been fired in retaliation for union organizing and filing unlawful labor practice (ULP) claims with the National Labor Relations Board.¹⁵⁶⁰ However, when the district court in the ATA litigation preliminarily enjoined employee conversion in April 2009, these companies shifted back to an independent-contractor format and the union campaigns fizzled. As a result, the Teamsters were forced to refocus organizing on the handful of employee-based companies that—for idiosyncratic reasons—remained.

Of the hundreds of trucking companies that serviced the Port of Los Angeles, only a few had employee drivers. Pursuing unionization at them posed obvious risks. Employee drivers could lose their jobs, the Teamsters could lose the campaigns, and the companies could decide to do what all the other companies already did—contract out their driving. Yet there were also significant benefits. In the wake of the stymied clean trucks campaign, a victory was badly needed to show drivers that the Teamsters—and the broader coalition—could deliver tangible benefits. In addition, a unionized company could be held out as a successful model for others to follow—proving that employee-based drayage trucking could be economically viable. As CLUE director Jonathan Klein put it: “We needed to have a win. And we knew that it was important for all of the port truck drivers to see us win . . . to make people aware that this effort is brought to you by Teamsters.”¹⁵⁶¹ The union, with coalition support, thus sought to “build some density,”¹⁵⁶² however modest, in the port drayage sector, with the hope of creating a foundation for further growth.

To advance the union strategy, Teamsters Local 848 took the lead, with a “big investment from Change to Win” and the Teamsters’ national office.¹⁵⁶³ The Teamsters Organizing Department assigned organizer Jason Gateley, who had organized Coca-Cola workers in Las Vegas, to run the campaign. The union’s crucial first decision was selecting an initial target, which had to be a firm against which the union could exert maximum pressure without risking its withdrawal from the port market or conversion to contractors. The campaign thus chose Toll Group,

1560. Evelyn Larrubia, *Union Protests Truckers’ Firings*, L.A. TIMES, Mar. 3, 2009, at B1.

1561. Telephone Interview with Jonathan Klein, *supra* note 885.

1562. *Id.*

1563. Telephone Interview with Nick Weiner, *supra* note 820.

Inc., an \$8.8 billion Australia-based logistics company whose main U.S. activity was importing retail goods and shipping them to warehouses and retail outlets throughout the country. In Los Angeles, Toll employed seventy-five local port drivers. The key leverage against Toll was that the company was heavily unionized in Australia, where the Transport Workers Union represented 12,000 Toll workers, thus forming a powerful block that could pressure management to support the U.S. workers.¹⁵⁶⁴

To organize Toll drivers, the Teamsters ran a “traditional corporate campaign” that sought to gain union certification through an NLRB-sponsored election.¹⁵⁶⁵ After several months of Teamsters organizing, drivers at Toll filed an NLRB petition for a union election in January 2012.¹⁵⁶⁶ When a female driver was fired in February for stopping at McDonald’s, the organizing campaign kicked into high gear. Local Teamsters organizers, alongside their Australian union counterparts, protested in front of Toll’s Los Angeles office in March,¹⁵⁶⁷ while Teamsters president Hoffa and Los Angeles Mayor Villaraigosa made strong statements in support of the workers at the Los Angeles Good Jobs, Green Jobs Regional Conference a few weeks later.¹⁵⁶⁸ The coalition lent organizing support, with clergy, community members, and environmental activists standing by workers during protests.¹⁵⁶⁹ CLUE’s Klein joined a delegation to Toll’s Los Angeles office to protest driver terminations, asking management to “rehire these people” and emphasizing the “injustice of firing them.”¹⁵⁷⁰ Another rally featured speeches by Janice Hahn and Congressman Eric Tate (who was also a principal officer at Teamsters Local 848). Against this backdrop, Teamsters counsel Mike Manley did NLRB-related legal work, filing ULPs in response to employee firings and, when Toll refused to agree to a bargaining unit limited to drivers, successfully litigating that issue at the NLRB.¹⁵⁷¹

On April 11, 2012, in a historic vote, Toll drivers voted 46-15 in favor of

1564. See Press Release, Grim Truth at Toll Group, America’s Port Truckers Deliver a Resounding Yes Winning Union Recognition as Teamsters in Historic Vote (Apr. 11, 2012), available at <http://grimtruthattollgroup.com/files/2012/04/041112-TollDriverVictory9pm.pdf>; *Jobs Can’t Be Good or Green If They’re Not Union!*, COAL. FOR CLEAN & SAFE PORTS (Mar. 20, 2012), <http://cleanandsafeports.org/blog/2012/03/20/jobs-cant-be-good-or-green-if-theyre-not-union/>.

1565. Telephone Interview with Nick Weiner, *supra* note 820; Telephone Interview with Michael Manley, *supra* note 1243.

1566. James Rufus Koren, *Toll Group Drivers File with NLRB*, L.A. BUS. J., (Jan. 27, 2012), <http://labusinessjournal.com/news/2012/jan/27/toll-group-drivers-file-nlr>.

1567. *Toll Group in Dispute with Los Angeles Truck Drivers*, THE AUSTRALIAN BUS. REV. (Mar. 10, 2012, 3:00 PM), <http://www.theaustralian.com.au/business/toll-group-in-dispute-with-los-angeles-truck-drivers/story-e6frg8zx-1226295773360>.

1568. *Jobs Can’t Be Good or Green If They’re Not Union!*, *supra* note 1564. Teamsters officials also initiated a federal investigation into Toll driver misclassification at the New York and New Jersey ports. See U.S. Dep’t of Labor, Compliance Action Report, Toll Global Forwarding, No. 2012-332-05936 (Mar. 1, 2012), available at <http://grimtruthattollgroup.com/files/2012/07/TollNJ.pdf>.

1569. Telephone Interview with Jon Zerolnick, *supra* note 951.

1570. Telephone Interview with Jonathan Klein, *supra* note 885.

1571. Telephone Interview with Michael Manley, *supra* note 1243.

representation by Teamsters Local 848.¹⁵⁷² As Weiner recalled, it was “the first Teamster contract in L.A. in 30 years . . . Big deal!”¹⁵⁷³ Sounding a call to action, one driver cast the vote in these terms: “Our victory means we are finally getting closer to the American Dream. If we can win, I know other port truck drivers across the U.S. can unite just like we did.”¹⁵⁷⁴ The contract, unanimously ratified on December 30, 2012,¹⁵⁷⁵ gave drivers a nearly six dollar per hour pay raise with additional increases over the life of the contract (to take effect on January 1, 2013); made all Toll drivers part of the company’s retirement plan and guaranteed company pension contributions of one dollar per hour in the contract’s first two years; reduced driver payments for health insurance; provided paid vacation; and prohibited Toll from subcontracting out driving services.¹⁵⁷⁶ Highlighting the hope that the Toll contract would be only the first, the coalition announced that to “encourage a more level playing field and wide-scale unionization, the contract provides drivers the ability to re-negotiate for higher wages when a simple majority of the Southern California market is organized.”¹⁵⁷⁷ In exchange for accepting the union, Toll received some benefits: the Teamsters agreed not to make Toll follow the more stringent national Master Freight Agreement and also sought to promote Toll as a model worthy of additional business.¹⁵⁷⁸

With the Toll victory in hand, the Teamsters pursued other companies with employees—Green Fleet (mostly employee drivers) and American Logistics (all employee drivers)—while also moving more boldly against one company with only independent-contractor drivers (Pac 9 Transportation). Although there were common patterns and coordinated actions (in November 2013, for instance, drivers from all three companies went on a day-and-a-half strike protesting labor practices),¹⁵⁷⁹ organizing proceeded differently across employee and nonemployee firms.

1572. Press Release, Grim Truth at Toll Group, *supra* note 1564; Laura Clawson, *Truck Drivers Win Union Representation at Toll Group*, DAILY KOS (Apr. 12, 2012, 8:19 AM), www.dailykos.com/story/2012/04/12/1082732/-Truck-drivers-win-union-representation-at-Toll-Group.

1573. Telephone Interview with Nick Weiner, *supra* note 820.

1574. Press Release, Grim Truth at Toll Group, *supra* note 1564.

1575. *Toll Drivers Unanimously Ratify First Time Contract*, TEAMSTERS LOCAL 848, <http://www.teamsters848.org/toll-drivers-unanimously-ratify-first-time-contract/> (last visited Feb. 16, 2014).

1576. *The Road to the Middle Class: Teamster Contract with Toll Group Fuels Port Driver Hope*, COAL. FOR CLEAN & SAFE PORTS, http://toll.cleanandsafeports.org/files/2013/01/TollContract_Highlights.pdf.

1577. *Id.*

1578. Telephone Interview with Michael Manley, *supra* note 1243.

1579. *Port of L.A. Truck Drivers Stage 36-Hour Strike*, L.A. TIMES, Nov. 18, 2013, available at <http://articles.latimes.com/2013/nov/18/local/la-me-ln-port-truck-drivers-strike-20131118>. In July 2014, drivers conducted a job action against Total Transportation Services, Inc., Green Fleet Systems, and Pacific 9 Transportation, walking off the job in protest of what they claimed to be their wrongful classification as independent contractors. Andrew Khouri, *Five-Day Trucker Strike at Los Angeles and Long Beach Ports Ends*, L.A. TIMES (July 12, 2014), <http://www.latimes.com/business/la-fi-port-trucker-strike-20140712-story.html>. Some drivers from Total Transportation Services were fired. In November 2014, workers fired from Green Fleet Systems were reinstated as employees after a district

Organizing at employee-based firms followed the Toll template, in which Teamsters Local 848 initiated organizing, picketed company offices, and filed ULPs against driver terminations.¹⁵⁸⁰ Beginning in 2013, drivers at Carson-based Green Fleet, which had a majority of employee drivers, conducted weekly picketing to protest the company's labor practices. In August 2013, approximately thirty of the company's ninety drivers went on strike, claiming that supervisors hired union busters and asked employees to sign an antiunion petition.¹⁵⁸¹ The Teamsters then filed an NLRB complaint protesting the company's actions.

At Pac 9—a company with no employee drivers—organizers took a different approach that sought to coordinate misclassification litigation with union organizing. There, organizers supported workers filing misclassification suits with the DLSE,¹⁵⁸² attempting to use litigation as leverage to advance subsequent unionization: if the suits resulted in drivers being reclassified as employees, the Teamsters could run an NLRB campaign; if not, the threat of damages could potentially be used to bargain for employee conversion and employer neutrality vis-à-vis subsequent union organizing. More recently, the Teamsters have sought to directly organize truckers at nonemployee firms by using unfair labor practice strikes—in which drivers walk off the job to protest improper misclassification as independent contractors—to pressure those firms to hire the drivers as employees. Because a handful of companies account for a large share of port drayage services, a few successful campaigns at the biggest companies could reshape the labor market. Yet, while longtime supporter Janice Hahn urged activists to “keep on trucking,”¹⁵⁸³ organizing so far has not yielded another union contract, underscoring the ongoing challenge of unionization in the absence of systematic employee conversion—a goal once so close, but now still so far.

Looking back at the monumental nearly decade-long clean trucks campaign, what stands out is the enormous energy, commitment, and ingenuity of the activists, lawyers, policy makers, and community members involved in the epic struggle against the related problems of pollution and poverty at the ports. In the end, the campaign accomplished an enormously impressive transformation: changing port law to produce a “green fleet.” Struggles remain. As the ports have cut back on their commitment to community engagement,¹⁵⁸⁴ they have pursued new expansion

court ruling that they had been misclassified as independent contractors. *Two Fired Port Truck Drivers Return to Work in Landmark Case*, CAPITAL & MAIN, <http://www.laane.org/capitalandmain/two-fired-port-truck-drivers-return-to-work-in-landmark-case/> (Nov. 7, 2014).

1580. *Two Fired Port Truck Drivers Return to Work in Landmark Case*, *supra* note 1579.

1581. Ricardo Lopez, *Truckers Strike, Push to Unionize*, L.A. TIMES, Aug. 27, 2013, at B1.

1582. Email from Jon Zerolnick, Research Dir., L.A. Alliance for a New Economy, to Scott Cummings, Professor, UCLA School of Law (Jan. 10, 2014) (on file with author).

1583. See Janice Hahn, Op-Ed., *To Keep on Trucking*, L.A. TIMES, Nov. 25, 2013, at A11.

1584. James Preston Allen, *What's Wrong with Ending PCAC?*, CITY WATCH, May. 21, 2013, available at <http://citywatchla.com/archive/5110-what-s-wrong-with-ending-pcac-why-the-port-has-taken-a-wrong-turn> (noting that the Harbor Commission voted to dissolve the Port Community Advisory Committee on May 2); see also Telephone Interview with Kathleen Woodfield, *supra* note 1128

projects that threaten further community and environmental impacts.¹⁵⁸⁵ Fights over rail pollution and the proposed intermodal yard in Long Beach have provoked new legal action.¹⁵⁸⁶ And Long Beach has continued to gain ground in the competition for cargo against its more labor-friendly Los Angeles counterpart.¹⁵⁸⁷ But much has been achieved. In the wake of the Clean Truck Programs, diesel emissions from trucks decreased by ninety percent at both ports,¹⁵⁸⁸ making the San Pedro port complex one of the cleanest in the world. This success has sustained momentum for reducing diesel emissions,¹⁵⁸⁹ and advancing new green initiatives at the ports.¹⁵⁹⁰ Although key personnel at the Port of Los Angeles have resigned, there are ongoing efforts to revise and thus revive elements of the concession plan that were struck down by the Supreme Court.¹⁵⁹¹

Yet these efforts do not contain a solution to the fundamental driver contracting problem that sparked the monumental campaign in the first instance. Despite the labor movement's enormous investment on their behalf, port truckers continue to bear the cost of port growth—which now includes the added cost of clean truck conversion. The Teamsters' effort to unionize Toll and extend its reach to companies like Green Fleet shows that the fight is not over and instead has entered another phase of its long history.¹⁵⁹² In this sense, the Green Fleet campaign

(stating that the committee was dissolved after the port kept adding industry representatives who failed to come, causing the committee to consistently not have a quorum).

1585. *Port of Los Angeles Announces Plans to Spend \$400 Million on Projects*, DAILY BREEZE (June 5, 2013, 9:00 PM), <http://www.dailybreeze.com/general-news/20130606/port-of-los-angeles-announces-plans-to-spend-400-million-on-projects> (listing expenditures to electrify terminals, create a more fuel efficient rail yard, and create a new waterfront promenade).

1586. See Louis Sahagun, *Railroads Sued Over Soot*, L.A. TIMES, Oct. 21, 2011, at AA5; Dan Weikel, *Rail Yard Near L.A. Harbor Won't Cut Pollution, Foes Say*, L.A. TIMES, Oct. 22, 2012, at AA1; Dan Weikel, *Rail Yard Near Port Is Approved*, L.A. TIMES, Mar. 8, 2013, at AA1.

1587. Ryan Faughnder, *L.A. Port Numbers Fall, Long Beach's Rise*, L.A. BUS. J., May 15, 2013 (stating that the number of containers through Los Angeles was down 9.5%, and up 13% in Long Beach, although Los Angeles still had more units overall (640,330 to 519,464)).

1588. See Port of Long Beach, *Clean Trucks*, <http://www.polb.com/environment/cleantrucks/default.asp>; The Port of Los Angeles, *Air Quality Report Card, 2005–2011*, http://www.portoflosangeles.org/pdf/2011_Air_Quality_Report_Card.pdf.

1589. Neela Banerjee, *New Air Pollution Standards Aim to Reduce Soot Particles*, L.A. TIMES, Dec. 15, 2012, at A15 (describing the Obama administration's new air emission standards seeking reduction of soot from coal-fired power plants and diesel vehicles).

1590. Rong-Gong Lin, *Wilmington Celebrates Portside Park's Opening*, L.A. TIMES, June 5, 2011, at A33 (noting creation of \$55 million Wilmington Waterfront Park after 10 years of planning); Mai-Duc & Nelson, *Turning Freeway to Park?*, *supra* note 152 (describing plan to rip out part of Terminal Island Freeway and convert to green space); Matt Stevens, *Work Is Flashing Forward*, L.A. TIMES, Oct. 8, 2011, at AA3 (noting that the Angels Gate lighthouse was repainted with funding from the China Shipping settlement).

1591. Holmes and Knatz resigned in 2013. David Zahniser & Dan Weikel, *Executive Who Runs L.A. Port Will Retire*, L.A. TIMES, Oct. 4, 2013, at AA1. Before he did, Holmes indicated that the port was working on an iPhone app to replace the placard struck down by the Supreme Court and was considering eliminating criminal sanctions for tariff violations. Interview with John Holmes, *supra* note 148.

1592. Steve Lopez, *Truck Drivers at Port of L.A. Want a Fair Shake*, L.A. TIMES, May 18, 2014, at A1.

is thus an aptly named coda—and perhaps a new beginning—to the ongoing struggle to transform port trucking.

V. ANALYSIS

The clean trucks campaign reveals how sophisticated planning and political contingency converge to create moments in which social movements may deploy well-designed plans to challenge the status quo. In these moments, law plays a crucial role: framing the problem, shaping the solution, and providing the tools with which the struggle plays out. In Los Angeles (and to a lesser extent in Long Beach), a coalition of labor, environmental, and community groups—held together by a collective commitment to advancing the interests of low-wage workers—took on some of the most powerful economic actors in the global economy. And they won—for a moment, they won big, and even in the end, they won something substantial. That the change was cut back by court decisions does not negate the achievement. But it does invite reflection on how the campaign arrived at the point it did—bereft of structural labor policy reform, but still tenaciously in pursuit of innovative efforts to link misclassification litigation to driver organizing.

This part steps back from the case to offer three frames of analysis. First, it situates the campaign within the broader context of the labor movement's investment in local legal strategies, which have influenced local regulation, but also have been shaped by the political and legal levers that city policy making affords. This part then explores how labor's turn to localism shaped the nature of the ports campaign and what it was able to achieve, offering reflections at a relatively low level of theoretical generality and letting the campaign largely speak for itself. It suggests how the local scale of engagement influenced the form the campaign took—coalition building to achieve industry restructuring as a predicate for organizing—and how that form affected the lawyering role. Finally, this part concludes by reflecting on the outcome of the campaign and what lessons it holds for local labor lawmaking.

A. Context

Law's place in the labor movement has long been contested.¹⁵⁹³ The struggle has played out in relation to distinct—albeit closely related—geographical spaces. The first can be thought of as the geography of legal mobilization, where the issue is which lawmaking forum at which level of government is the appropriate target of advocacy to advance labor goals.¹⁵⁹⁴ Within this frame, activists engage in political

1593. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004); see also Katherine Stone & Scott Cummings, *Labor Activism in Local Politics: From CBAs to 'CBAs,'* in *THE IDEA OF LABOUR LAW 273* (Guy Davidov & Brian Langille eds., 2011).

1594. Michael W. McCann, *How Does Law Matter for Social Movements?*, in *HOW DOES LAW MATTER?* 76 (Bryant G. Garth and Austin Sarat ed., 1998); see also Richard Abel, *Speaking Law to Power:*

calculation about the appropriate scale of intervention (local, state, federal, international): they map power relations (which institutional targets can be most effectively influenced?) and evaluate the risks and rewards of different locational strategies (what is the scope of change afforded by a given target and how much can it be protected against countermobilization and backlash?).¹⁵⁹⁵ This is also the frame within which activists consider relative institutional competencies: should mobilization proceed through courts, legislatures, agencies, or elsewhere? The second space within which the role of law has been contested may be thought of as the geography of legal regulation. Where should law apply? Should it regulate the workplace directly, mandating that employers accord employees specific rights, both as mandatory minimum protections and as bases upon which workers can bargain collectively? Or should it apply to a particular industry or trade? Should it create uniform national standards or instead facilitate local experimentation? Because of the nature of American federalism—and specifically the scope of preemption—the geographies of mobilization and regulation are linked, which is to say that where law is deployed as a matter of legal mobilization affects where it is applied as a matter of legal regulation. Federal regulation may be used to directly reshape the nature of labor relations, while local regulation often must impact labor relations indirectly. Thus, as a strategic matter, the choice of where to mobilize affects the regulatory scope of what may be achieved.

Accounts of the labor movement over the past fifty years have offered a geographical story, located in the framework of American federalism, for the movement's decline¹⁵⁹⁶—and, in some places, its resurgence.¹⁵⁹⁷ Tracing the narrative of other twentieth-century progressive social movements, the story emphasizes the shifting terrain of labor's legal mobilization. It begins with the move by unions and their political supporters in the early twentieth century to seek national legislation to protect collective bargaining rights from local employer practices that thwarted early unionization drives and were not redressed by courts (or, in the case of injunctions targeting boycott activity, were actually effectuated through courts).¹⁵⁹⁸ It charts the apogee of this project in New Deal-era legislation codifying the collective bargaining system,¹⁵⁹⁹ judicial validation of that

Occasions for Cause Lawyering, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 69 (Austin Sarat & Stuart Scheingold eds., 1998).

1595. Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994); see also Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151 (2009).

1596. See Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767 (2001).

1597. See Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375 (2007); see also WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY (Ruth Milkman et al. eds., 2010).

1598. NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR (2002).

1599. Norris-LaGuardia Act of 1932, ch. 90, 47 Stat. 70 (codified 29 U.S.C. §§ 101–115 (2012)); National Labor Relations (Wagner) Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

framework,¹⁶⁰⁰ and the subsequent rise of private sector unionization that it ushered in.¹⁶⁰¹ This narrative then locates the forces of decline at the national level, attributing decline to eroding federal support for, and sometimes outright federal hostility to, the very legal framework that the movement had fought so hard to achieve.¹⁶⁰² Here, the story is the familiar one of reactionary legislative amendments,¹⁶⁰³ damaging judicial interpretations,¹⁶⁰⁴ and industry capture of administrative processes—all contributing to the steep decrease of private sector unionism.¹⁶⁰⁵ In response to federal political stalemate and judicial hostility, activists turned away from the federal system of collective bargaining and toward other possibilities—and here is where local political systems enter as potential spaces of alternative mobilization. Local activism had, to some degree, always been a part of labor struggles. The labor movement throughout this period also battled at the state level for public sector union rights. And movement challengers had their own local strategy, which succeeded in spreading right-to-work laws throughout the South and much of the Midwest. But mobilization to advance labor reform at the municipal level—conceiving of the city as a place where laws could be enacted to address labor conditions—did not emerge as a prominent strategy until the 1990s.¹⁶⁰⁶

This story connects accounts of the labor movement to insights from social movement and local government scholarship that have been under-examined, but which offer a useful frame for thinking about the spatial dimension of labor activism and its effectiveness. Law and social movement scholarship has focused attention on how movement actors shape strategy in response to political opportunity and the availability of resources,¹⁶⁰⁷ and have emphasized the channeling effect of the extant legal regime on movement activism.¹⁶⁰⁸ This scholarship thus provides a framework to help understand the mechanisms by which unions and community-based allies in other fields (like environmental justice and immigrant's rights) have

1600. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

1601. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1534 (2002).

1602. See Catherine Fisk, *Law and the Evolving Shape of Labor: Narratives of Expansion and Retrenchment*, LAW, CULTURE, & HUMAN. (Aug. 1, 2012), <http://lch.sagepub.com/content/early/2012/07/31/1743872112451016>.

1603. Taft-Hartley Act of 1947, ch. 120, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C. (2012)); Landrum-Griffin Act of 1959, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C. (2012)).

1604. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (validating the use of permanent replacements for striking workers).

1605. See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2008).

1606. See Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 483 (2009).

1607. The classics are: DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970* (2d ed. 1982), and John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOC. 1212 (1977).

1608. William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001).

made investments in local strategies in particular urban sites—Los Angeles,¹⁶⁰⁹ Chicago,¹⁶¹⁰ and New York¹⁶¹¹ prominent among them—as places where legal mobilization could have an impact on unionization specifically and inequality more broadly. From a social movement perspective, there are several dynamics at work: national unions allocating resources to local campaigns in the face of federal political blockage; local unions experimenting with new strategies to advance organizing outside of the federal labor law system; distinct civil society organizations developing around issues of local concern (e.g., immigrant rights in Los Angeles) that find common cause and points of strategic intersection with labor counterparts;¹⁶¹² coalitions being formed to advance discrete legal projects but also to build local power more generally; and the turn to local legal levers to augment worker power and potentially change employer behavior.

The other part of this story, emphasized by local government and urban studies scholars, is the changing role of the city as a space for certain types of political and regulatory interventions targeting economic inequality. The important point is that it is not just that labor has gone local in response to federal stagnation, but that this has happened—and, crucially, has been enabled by—the parallel transformation of the city itself, marked by new approaches to economic development responding to the enervating, and inequality-reinforcing, patterns of postwar white flight, suburbanization, and deindustrialization.¹⁶¹³ Although these trends have not played out the same across all urban areas, and there is considerable variation among cities in terms of the causes and scope of change, there have been underlying “boom and bust” patterns,¹⁶¹⁴ which have reshaped development policy and empowered new political actors over time. As postwar cities struggled with a declining tax base and depopulation, many responded with job-creation strategies built on attracting business through tax cuts and other subsidies; the aggressive use of redevelopment policies that facilitated the acquisition and development of property in “blighted” neighborhoods, typically communities of color; the leveraging of federal urban and antipoverty funds to support public-private partnerships; and the outsourcing of city functions to reduce costs and provide incentives for local companies to stay put. In cities where these policies were used, critics charged that the distribution of benefits was unequal, creating counterpressures for greater accountability and equity in development programs.

1609. Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927 (2007).

1610. See Virginia Parks & Dorian Warren, *The Politics and Practice of Economic Justice: Community Benefits as a Tactic of the New Accountable Development Movement*, 17 J. COMMUNITY PRAC. 88 (2009).

1611. Ashar, *supra* note 1; Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999 (2007).

1612. See Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282 (2013); Stephen Lee, *Screening for Solidarity*, 80 U. CHI. L. REV. 225 (2013).

1613. See FROM CHICAGO TO L.A.: MAKING SENSE OF URBAN THEORY (Michael J. Dear ed., 2002); DAVID HARVEY, SOCIAL JUSTICE AND THE CITY (rev. ed. 2009); EDWARD W. SOJA, SEEKING SPATIAL JUSTICE (2010).

1614. Schragger, *supra* note 1606.

Community-based organizations were often in the forefront of this accountability movement, but frequently lacked the political clout to significantly redirect city policy. But the strong economic growth of the 1990s created a new environment for political change, with rapid private development in previously disinvested neighborhoods generating community opposition—but also creating opportunities to rethink how development policy could create good jobs and mixed-income neighborhoods. In this environment, organized labor, in the midst of its own evolution, emerged as a key player in the struggle to build a more progressive city.¹⁶¹⁵

This frame recasts labor's move to the local arena in ways that raise important questions. Commentators have often looked at local efforts as targeted instances of leverage—that is, of using the tools available to promote specific labor goals. Yet local activism occurs within, and contributes to, a broader set of efforts that coalesce around (contested) visions of changing the city itself. Placing local labor activism in the context of a broader project of city transformation reframes labor campaigns as not simply about reconstituting labor law outside the federal sphere by leveraging local opportunities, but also about reimagining the city as a dynamic space for progressive regulation to redress inequality in its multiple forms. From this perspective, local campaigns are more than ad hoc uses of local government power to indirectly regulate work and instead operate as part of broader efforts to challenge inequality within cities—efforts that move beyond the regulation of work to address housing, environmental justice, immigrant rights, health, and other issues.

Situating the ports campaign in this context invites analysis at two levels. First, it focuses attention on how the local scale of intervention shaped campaign development: how the coalition came to define the legal problem, how resources were mobilized to address it, how local policy reform unfolded, and how lawyers were involved. It then invites reflection on how these same local factors affected campaign outcomes and what lessons can be drawn for social movements mobilizing to challenge the conditions of low-wage work.

B. Campaign

How did law shape the initiation and evolution of the ports campaign? This section explains why labor activists and lawyers focused on the ports as a target, how they developed an alliance with environmentalists, and what influenced decisions about legal objectives (locally mandated concession agreements governing truck entry at the ports) and legal strategies to achieve it.

1. Scale

Law was fundamental to the construction of the ports as an environmental and labor problem and hence was also fundamental to framing a solution. Free trade transformed the ports from engines of regional growth to conduits of globalization,

1615. Richard C. Schragger, *Is a Progressive City Possible? Reviving Urban Liberalism for the Twenty-First Century*, 7 HARV. L. & POL'Y REV. 231 (2013).

2014]

PREEMPTIVE STRIKE

1151

imposing negative externalities on surrounding communities in the form of pollution and incompatible development. Deregulation facilitated the explosion of trade by reducing the cost of transport, while also producing the specific problem of fragmentation in the drayage trucking industry and the shift toward independent-contractor drivers. The independent-contractor relation was the key legal barrier to unionization, since independent contractors were not exempt from antitrust law and thus were legally proscribed from organizing. Weak federal labor law therefore interacted with federal deregulation and antitrust law to put truckers in a difficult legal box: unable to organize to improve their dismal working conditions. These working conditions, in turn, interacted with port expansion to produce pollution: as the scale of drayage trucking increased to keep up with cargo growth, truck drivers could not afford to maintain and upgrade their trucks, thus contributing to massive port-generated air pollution. Local government promoted port expansion as an engine of job creation, but did not have the political will or legal tools to directly regulate the environmental and labor externalities.

As the case study suggests, framing the solution to these interlocking problems required identifying the political space and power to change the underlying structural legal problem. Different stakeholders approached the problem from distinct points of view. For organized labor, beginning immediately after deregulation undercut unionization in the nationwide trucking industry, finding a way to restructure the industry on a foundation of employee drivers was the central political and legal issue. The Teamsters, in particular, devoted significant resources to identifying possible solutions, which included supporting recognition strikes and advancing state legislation to permit independent-contractor organizing. But none of these early efforts gained any political traction. Port trucking was identified as a target not because of its size (it was a relatively small proportion of the overall trucking industry), but because of its strategic importance in evolving plans to organize the logistics supply change—with the ports viewed as a key “choke point” to exert organizing pressure. Local port policy making to transform drayage labor relations was conceived as a way to leverage city contracting power to change driver status. This idea had roots in labor campaigns to promote living wage ordinances and attach labor-friendly requirements to city concession and development agreements. These efforts depended on the availability of market participation as a space for local labor-enhancing regulation outside the scope of federal preemption. Thus, the political and legal calculus converged around a local political strategy to use the ports’ contracting power to require employee conversion.

In this sense, the city was both a target and a tool of legal reform. The ports were targeted by Change to Win as a strategic possibility precisely because they were city entities—proprietary departments within city government and thus subject to mobilization to change city policy. This was an important lever—and one used by both ports to pass landmark Clean Truck Programs requiring all trucking companies to enter into concession agreements. At the Los Angeles port, it was through these concessions that trucking companies would be made to comply with operational

standards like off-street parking and placard posting, while also converting to employee drivers. Failure to comply on the part of trucking companies would subject them to contract penalties—up to and including contract termination and port disbarment. This system hinged on enforcement by terminal operators, which were prohibited from admitting noncompliant trucks on the threat of port-imposed criminal sanctions.

2. *Opportunity*

To advance the campaign, activists identified targets and developed strategy through extensive research and careful planning. They targeted the ports as a sticky industry tied to the regional economy, thought of ways that working conditions could be raised, connected labor to other issues in order to build coalitions, and developed legal, political, and educational strategies to achieve their goals. Yet achieving local policy reform required more than a well-designed plan; it also depended on political support and mobilized resources. In addition, it required framing the campaign in terms calculated to maximize its potential for success.

The campaign's most ambitious and controversial aim was to fix the legal problem at the heart of the dysfunctional drayage trucking industry: the independent-contractor status of drivers. This goal was core to the labor-movement stakeholders, but ancillary to the environmental movement—at least in the period leading up to the campaign. Although environmental and community activists made the connection between port trucking and environmental degradation, they focused on using the tools they had (particularly litigation) to promote environmental compliance. These activists had to be persuaded to adopt the blue-green goal of fusing fleet conversion with employee conversion; that negotiation was successful in bringing together coalition members with different, though overlapping, interests.

With respect to campaign development, the legal framing of the concession plan as a “win-win” for labor and environmental groups was the key basis for coalition building. Environmentalists brought the litigation power, labor the policy-making power, and each group benefitted from a Clean Truck Program that committed trucking companies to a double conversion: of their fleet (from dirty to clean) and of their drivers (from independent contractors to employees). Framing the Clean Truck Program as a legal solution to the twin problems of environmental pollution and low-wage work at the ports helped to mobilize significant resources for the campaign—without which stakeholders remained in a more defensive position. These resources were mobilized at a moment of political opportunity. That opportunity was itself partly a function of those resources in that the political alignment that produced a Villaraigosa mayoralty in 2006 was based on the power of the Los Angeles labor movement. But while labor power was necessary to move the Clean Truck Program forward, it was not sufficient.

The campaign thus offered a moment of labor and environmental interest convergence. Labor saw the environmentalists as bringing legal power and political

2014]

PREEMPTIVE STRIKE

1153

appeal. NRDC had been successful in halting port expansion, which fed into the development of Los Angeles Mayor James Hahn's "no net increase" plan and Mayor Villaraigosa's Clean Air Action Plan (CAAP). Framing the campaign as primarily about the environment was a key strategic move that provided political and legal benefits: minimizing the salience of unionization, while also emphasizing the threat of litigation if the campaign failed. Early on, activists decided that clean trucks were necessary to reduce emissions and promote port growth. The employee piece of the Clean Truck Program was framed as a way to strengthen the green growth project, not to permit an independent mechanism for unionization, although the program stressed the importance of job quality for drivers. NRDC lawyers emphasized that they did not have a position on unionization, though they supported better conditions for drivers, and during both the campaign and litigation, they played the role of linking clean trucks to employee conversion.

For their part, environmentalists appreciated the local power of the labor movement to move policy and were eager for an alliance that would alleviate tensions over development—which labor unions often promoted for the job benefits, while environmentalists opposed on pollution grounds. Although NRDC lawyers could threaten additional slowdowns, which gave them significant power, their environmental litigation could not ultimately stop growth. They needed proactive policy reform that would guide future port development toward green goals. CAAP promised that and, along with structures like the Port Community Advisory Committee and No Net Increase Task Force, provided critical institutional frameworks connecting activists and putting pressure on local political officials to come up with genuine political reform. But the details of CAAP were vague. Folding in employee conversion created the opportunity for more significant policy change and brought an investment by organized labor. Labor's investment provided the basis for the campaign's launch, which was already underway as part of a national strategy organized by Change to Win. There were significant local organizations working on the issue of port trucking, but none had the staff and political connections to sustain a decisive policy campaign. Change to Win's entry into the local scene and collaboration with LAANE changed that. Change to Win provided money and staff to craft a concession model, design a campaign, and staff its implementation. LAANE became the organizational hub for the campaign, supported by Change to Win funding and expertise, but also able to draw upon a store of internal expertise built upon two decades of successful local policy reform.

Ultimately, however, the interests of the blue-green alliance were not completely aligned. Environmentalists could claim victory with a program that banned dirty trucks and promoted the acquisition of new clean vehicles, while labor needed employee conversion to win. The linked package of reforms—the dirty truck ban, financial incentives for clean truck conversion, and a concession plan with employee conversion—constituted a finely wrought political compromise that deftly advanced all stakeholder interests. However, because it was severable, and because industry countermobilization specifically sought to "divide and conquer"

by not challenging the environmental piece of the program, that compromise could be (and ultimately was) undone.

3. *Strategy*

Political and legal strategy to advance a Clean Truck Program was both planned and fortuitous. Planning came in terms of the groundwork laid for employee conversion. But the opportunity to advance the policy came through litigation. The opportunity was created by sustained community push-back against port expansion, which was funneled into and given additional power by law—in the form of the NRDC’s China Shipping lawsuit against the Port of Los Angeles. Community opposition, channeled into the secession movement, extracted political concessions from local politicians: James Hahn’s election as Los Angeles mayor, accompanied by his sister Janice’s election to city council, were built in part on promises to community groups to mitigate the port’s impact. These promises were laid bare by the Los Angeles port’s pursuit of China Shipping, which provoked a legal reaction showing how community and environmental groups could impose real costs on port development. It was this combination of legal and political pressure that induced Mayor Hahn to commit to “no net increase,” which although unsuccessful, laid the groundwork for Mayor Villaraigosa’s CAAP. It was CAAP that provided the environmental portal through which the Clean Truck Program was translated from concept designed by the Teamsters and Change to Win to real policy reform that advanced the green port project.

Thus, strategy was shaped by the interplay between labor, environmental, and local government law. Weak federal labor law interacted with antitrust and deregulation to limit labor’s power. However, port expansion ran afoul of relatively stronger federal and state environmental law, which ultimately offered a tool to slow port growth in the face of expensive and time-consuming litigation. Armed with the leverage of environmental litigation, the coalition sought to pass local port law to facilitate the twin goals of environmental and labor remediation. To do so, it attempted to nest the Clean Truck Program within the framework of local government law so as to take advantage of the city’s contracting power, while avoiding the negative preemptive effect of a deregulatory federal law: the FAAA.

To achieve this end, the campaign combined an outside game of protest and external pressure with an inside game focused on alliance formation and lobbying within government policy-making arenas. The clean trucks campaign was enabled by local political pressure in favor of greening the ports, pushed forward by community and environmental groups. In Los Angeles, this pressure locked Mayor Villaraigosa into a process of genuine port reform, which he strategically advanced through his appointments to the harbor commission and his selection of the port’s executive director. With these personnel in place, a legal framework, CAAP, was created to advance green growth through coordinated action at both ports, but without specific attention to implementing employee conversion. This piece was folded in by Change to Win after CAAP was already underway. It began in Los

2014]

PREEMPTIVE STRIKE

1155

Angeles with a high level contact by Teamsters president Hoffa and a commitment by Mayor Villaraigosa to support the campaign. It then proceeded through a series of negotiations between industry, labor, environmental, and community stakeholders. Inside pressure on local decision makers was brought to bear by the unions; outside pressure was exerted by community groups as well as ongoing legal challenges by NRDC, most notably around the TraPac expansion. This created the conditions for policy success, which the mayor's staff advanced through key decisions: placing the Los Angeles port's John Holmes in charge of policy development and commissioning the Boston Consulting Group analysis of concession plan options.

4. *Lawyering*

The local nature of the campaign also influenced the role of lawyers connected to it. Preemption shaped how movement lawyers thought of the possibilities for regulatory reform at the local level—and how those understandings were translated into policy reform. Movement lawyers from labor and environmental groups mobilized law in the administrative and legislative process to support readings of legal doctrine in a context of jurisprudential uncertainty and they sought to craft policy to minimize the risk of preemption.

Within this context, legal analysis played a crucial facilitative role. In the campaign, an important aspect of legal advocacy occurred far from the glare of court in the more mundane—but no less critical—process of administrative review through meetings with elected officials, city attorneys, and port staff. In this process, officials ultimately had to sign off on legislation that they were confident passed relevant legal standards. Elected officials cared both as a matter of principle and because they did not want to be on the hook for provoking, and potentially losing, expensive litigation when strong arguments did not support their positions.

Although movement actors and policy makers understood that a litigation challenge to the Clean Truck Program would ensue, legal opinions by the Teamsters' Mike Manley and analysis by NRDC were important to providing policy makers with some degree of confidence in the outcome. These analyses were supplemented and reinforced by legal opinions from city attorneys and outside port counsel. The legal opinions were necessarily predictions and thus ultimately uncertain. However, under conditions of uncertainty, plausible legal arguments supporting the program helped move policy making forward. In Los Angeles, the coalition and port attorneys' preemption analysis contributed to the harbor commission's and city council's support for the program. These local officials were, of course, predisposed to be supportive (because of coalition outreach and lobbying), but the opinions provided legitimate legal grounds. In addition, the presence of Teamsters and NRDC lawyers in the policy review process meant that the city attorneys were accountable to a wider audience for their legal analysis. As a result of input by a range of movement and city lawyers throughout the policy development phase, the legal foundation for the program was carefully scrutinized and crafted to minimize

the risk of FAAA preemption, which was well known. That it only partially succeeded underscored the uncertainty built into this type of prospective legal analysis.

C. *Outcome*

The Los Angeles Clean Truck Program was the culmination of two years of impressive organizing by the Coalition for Clean and Safe Ports. Under the program, the environmental movement would achieve one of its long-standing goals—“greening” the port—while the Teamsters could pursue unionization of the newly converted employees. It was a win-win designed to address the structural economic problem contributing to port pollution: low-paid independent contractors did not have the resources to maintain and upgrade their trucks to current environmental standards. In the coalition’s terms, the port was thus where old, dirty diesel trucks “went to die.” The Clean Truck Program would take maintenance out of the drivers’ hands, making the companies internalize the costs, thus creating a sustainable foundation for clean trucking over time. It was a compelling concept, brilliantly executed.

But it was not meant to be. Despite the impressive local policy win, the program was quickly swept into court, subject to a lawsuit by the ATA on FAAA preemption grounds. The case bounced back and forth between the district and appellate courts in the Ninth Circuit. Los Angeles’s employee conversion provision was preliminarily enjoined, but after trial held to be a valid exercise of local government power under the market participant exception to the preemption doctrine. The Ninth Circuit disagreed and reversed the trial court on that point. The case went to the Supreme Court on other grounds and, in a unanimous decision, the court struck down two additional minor provisions of the Los Angeles port’s Clean Truck Program. However, by this point, the dream of employee conversion and possible unionization on a mass scale had already all but died. The city did not contest the invalidation of the employee conversion provision on appeal to the Supreme Court, so that chapter had already been closed. The one silver lining of the Court’s decision was that it did not erode the underlying doctrinal basis for local government efforts to intervene in labor issues through the market participant exception to federal preemption.

But that was likely cold comfort to the activists who had worked so hard to get the Clean Truck Program passed in the first instance. It was also a blow to the Los Angeles port, which viewed itself as caught in a bind: accountable for pollution and other negative externalities, but without complete authority to redress them. Port Deputy Executive Director John Holmes’s reading of the Court’s decision suggested that the port’s connection to interstate commerce and thus to the federal system meant that much of its activity, though having massive local impacts, was outside the ambit of local control. The litigation outcome was also another blow to port truckers, who found themselves additionally burdened: obliged to acquire and maintain new, more expensive low-emission trucks, yet still in the degraded

economic position of independent contractors. This outcome focuses attention on the tradeoffs of local labor lawmaking. What accounts for the outcome in the clean trucks campaign and what lessons can be learned?

1. *Constraint*

With the decline of federal labor law after mid-century, the labor movement was cast in the position of having to use alternative legal regimes as leverage to advance labor rights. The ports campaign was an instance in which the Teamsters, lacking legal power because of independent-contractor rules, sought to leverage the power that NRDC litigation created to change the union's structural bargaining position—using environmental law as a springboard to surmount the legal barrier to organizing posed by truckers' independent-contractor status.

That leverage came in the form of the China Shipping litigation brought by NRDC, which changed the power dynamic of port growth. Whereas for nearly 100 years the ports could expand into adjacent communities with meager legal resistance, federal and state laws requiring environmental review permitted environmental groups to demand greater accountability in port expansion plans. NEPA and CEQA, in this regard, were imperfect instruments—allowing groups to delay but not to stop port development—but ones that nonetheless provided leverage in the competitive context of intermodal logistics.

In the ports campaign, environmental litigation had the power to force environmental reform in a context in which two factors were present: the polluting industry was fixed in place based on massive up-front infrastructure investment, and there was intense inter-regional competition for the industry's service. Because the ports were geographically sticky, but could potentially lose business to other regional competitors, delay and uncertainty were potent bargaining chips. Since litigation could impede port expansion plans and shippers could potentially reroute cargo to other West Coast ports (or even through the Panama Canal), the ports had a strong incentive to mitigate uncertainty to maintain profitability. This incentive gave NRDC negotiating power through lawsuits to enforce environmental compliance. Such lawsuits were limited in important respects: environmental review could mandate good environmental process, not good environmental outcomes. It could require that local agencies fully consider negative impacts and take steps to mitigate them; but ultimately project-based environmental harms could not be stopped through environmental review. However, review could impose costly delays if agencies had to redo environmental reports. In addition, because environmental review of port development ultimately had to be approved by city council, it provided a means for exerting political influence in that body.

Labor sought to mobilize its local political influence to address the independent-contractor problem. For the campaign, employee status was firmly connected to the idea of environmental sustainability: without employee drivers, a short-term incentive program might produce clean truck conversion, but over time drivers would be unable to maintain truck quality, thus necessitating another round

of public funding. That argument proved compelling as a way of advancing the Clean Truck Program through political channels. Yet, partly because of the industry's litigation tactics, the linkage of environmental and labor goals did not prevail in court. The ATA declined to challenge the dirty truck ban and made the industry's legal and public relations case on the ground that the concession plan was, at bottom, a concession to the power of organized labor.

In the end, the Ninth Circuit also viewed the employee conversion plan as too tenuously connected to environmental mitigation, instead characterizing employee conversion as an attempt to "impact third party behavior unrelated to the performance of the concessionaire's obligations to the Port"¹⁶¹⁶—in other words, an attempt to change trucking company labor practices to enable unionization. The court thus did not buy the argument that employee conversion was about environmental sustainability first and unionization second (if at all). As a result of industry litigation strategy and court analysis, the environmental components of the Los Angeles Clean Truck Program were left standing, while the labor and community provisions were gutted (though the power of the port to create a concession plan was upheld).

This outcome correlated to *ex ante* legal strength: because environmental law was the most potent weapon in thwarting port growth, mitigating environmental concerns was ultimately viewed as most central to the ports' role as market actors. Conversely, requiring employee conversion (and thereby strengthening labor law) was not seen as market participation, despite the arguments connecting conversion to long-term environmental sustainability. In this way, labor lawmaking was doubly disadvantaged by its relationship to federalism: the weakness of the NLRA regime pushed labor law down to the local level, where that same weakness made it too insignificant to count toward legitimate city market participation.

From this perspective, the campaign outcome was a product of the deeply uneven playing field on which organized labor sought to advance. The campaign itself spotlighted the high threshold barrier to effective local labor activism in low-wage sectors defined by contracting: specifically, the legal predicate for unionization—employee status—must be in place before local-government-based legal strategies to facilitate it can work. In industries in which statutory employees already exist, local governments may bargain with employers for labor neutrality in exchange for public benefits in order to facilitate union organizing without running afoul of labor preemption.¹⁶¹⁷ However, the clean trucks campaign underscores the challenge of even getting to this step in low-wage industries characterized by pervasive independent contracting and thus outside the purview of labor law. In such industries, where baseline employment conditions are not established, federal preemption on *nonlabor law* grounds (i.e., deregulatory transportation rules) may

1616. *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 660 F.3d 384, 408 (9th Cir. 2011).

1617. *See* Sachs, *supra* note 4.

preclude local legal reforms to create employment relationships (and thus get to the locally mediated bargaining process in the first instance).

As a result, the structure of low-wage industries defined by independent contracting creates a formidable double barrier to labor organizing since unions must *first* overcome the legal challenge of transforming the employment status of workers in the industry in order to even create the *possibility* for collective action—which still has to be fought for and won. Because this weak starting position is a product of federal law—and organized labor is too politically disfavored to change that law outright—the labor movement must anchor reform efforts in receptive local government law processes. But doing so may subject labor efforts to the risk of non-labor-law preemption—underscoring the movement’s deeply disadvantaged position in pursuing unionization. Thus, as the clean trucks campaign shows, it is *both* the weakness of labor law *and* the strength of nonlabor law (antitrust and deregulation) that may converge to erect substantial challenges to organizing industries—like port trucking—in which workers are assigned the label of “owner-operators” but live a reality indistinguishable from that of low-wage employees. In such industries, even if (against the odds) campaigns manage to succeed, they do so merely by restoring workers back to the baseline of being *organizable*—aligning their legal label with their lived reality—and thus removing extant legal barriers that now preclude even the possibility of demanding better conditions.

2. *Countermobilization*

For the trucking industry, conditions at the outset of the campaign were the mirror image of those confronted by labor—and thus placed industry in a favorable starting position. The legal playing field that disadvantaged labor mobilization empowered industry countermobilization. Just as the structure of local government law and its relation to preemption placed limits on coalition efforts to reform port trucking, it facilitated industry resistance and, ultimately, industry success in overturning the Los Angeles concession plan mandating employee conversion. Industry began from a position of strength—seeking to protect the legal and economic status quo against change. Its strategy from the outset was to defend against structural market reform and thus keep labor in the posture of litigating individual misclassification suits, which the industry could defend in a war of attrition.

Politically and legally, industry sought to sow division where the coalition had attempted to build unity. When industry could not stop the Clean Truck Program in Los Angeles, it ramped up lobbying pressure on Long Beach and succeeded in defeating employee conversion there. The Los Angeles-Long Beach split paid political and legal dividends. Politically, it heightened inter-union division, further undercutting the support of already unionized longshoremen by increasing the risk that the Los Angeles program would divert cargo to neighboring Long Beach. The split also eroded the support of Los Angeles officials who confronted the prospect of lost economic benefit to the city and the real chance of political failure. This put

pressure on Mayor Villaraigosa to create an escape hatch, agreeing to a severability provision in the Clean Truck Program that would allow him to claim an environmental victory if employee conversion ultimately failed in court. In the end, it was precisely the employee provision's severability that allowed the ATA to focus its attack on employee conversion while professing support for green growth. As this suggests, the split between the two ports also produced legal benefits for the ATA: sharpening the legal focus on employee conversion (and its connection to unionization), facilitating the ultimate legal settlement with Long Beach (thus allowing the ATA to direct its full resources to defeating the Los Angeles plan), and adding weight to the ATA's preemption claim (by revealing the danger of inconsistent port regulation).

In similar fashion, industry also sought to weaken the ties binding labor and environmental allies—using litigation to promote the breach it could not achieve during the policy campaign. This divide-and-conquer strategy was enabled by the industry's favorable legal starting point. Labor and environmental partners had to overcome substantial legal uncertainty weighing against their core argument that local government had authority to enact joint clean truck and employee conversion as a coherent—and intrinsically connected—market participation strategy. Recognizing this vulnerability, industry pushed against the weakest part of the coalition's argument: that employee conversion was central to the port's proprietary interests. And industry pit the coalition partners' ultimate interests against each other. Although the labor and environmental movements stood firm in their commitment to the entire Los Angeles Clean Truck Program, they ultimately had distinct aims: environmentalists wanted emission reductions while organized labor sought unionization. The industry plan was to drive a wedge by effectively conceding on emissions in order to thwart unionization. This plan was advanced through the industry's litigation decision not to challenge the dirty truck ban and its public relations strategy repeatedly linking the concession plan to the Teamsters. Although NRDC lawyers valiantly defended the environmental-labor linkage, they could not convince the courts to agree on the intrinsic connection between employee conversion and long-term environmental sustainability. In the end, while NRDC litigation brought the coalition together, ATA litigation succeeded in dividing the coalition's achievement apart.

3. *Adaptation*

Litigation setback did not end the clean trucks campaign, but rather caused it to adapt and retool. As in any campaign for social change, the coalition had a range of goals and fallback positions, as well as linkages to related campaigns to which resources could be redeployed (and lessons applied). In the immediate context of the clean trucks campaign, failure to achieve the highest order goal (passage and validation of a Clean Truck Program with employee conversion at both ports) channeled resources into backup goals: ensuring enforcement of the clean truck

mandate while continuing the fight to convert truckers to employee drivers, even if in more piecemeal fashion.

At each stage of the campaign, the coalition planned for and (when necessary) pivoted to pursue alternatives to its primary goal of implementing the full Clean Truck Program. Thus, after the Ninth Circuit's unfavorable March 2009 preliminary injunction decision, the coalition swiftly adapted its strategy—deploying Plan B (and then C). Plan B focused on passing federal legislation explicitly exempting the Clean Truck Program from the FAAA—a move that failed when the Democrats lost control of Congress in 2010. The campaign was then forced back to its default position (Plan C): facilitating misclassification lawsuits, brought by governmental and private lawyers, to impose costs on companies that wrongfully denied drivers employee status, while simultaneously organizing to unionize trucking firms (like Toll) that already recognized their drivers as employees. The goal of the (currently ongoing) misclassification campaign is to expand the number of companies that hire employee drivers, and then to increase union density company-by-company. This is, of course, where the campaign started—and where industry would prefer to be—but the aggressive nature of the Plan C litigation phase, buttressed by government agency support, shows that the coalition is not willing to give up without a fight to expose the pervasive nature of trucker misclassification and abuse.

As this misclassification fight has persisted, the coalition strategy that fell short at the ports has been redesigned to advance a parallel (and ongoing) campaign to organize city waste haulers—in which the hard lessons of port failure have been used to strengthen the legal grounds for securing victory in a distinct sector of the local trucking industry. Because the broader labor movement goal is increased union density, failure to achieve one of the movement's biggest prizes—unionization of port trucking as the supply chain “choke point”—has nonetheless produced important learning that continues to inform ongoing policy cycles in which labor movement actors are repeat political players. LAANE is currently leading a campaign to require private sanitation companies servicing Los Angeles businesses and some residential properties to obtain city-issued franchises for waste hauling to and from eleven designated city zones. Titled “Don't Waste L.A.,” the campaign brings together the same environmental and labor alliance that sought to green the ports, now around the mutual goals of converting the waste fleet of over 1000 trucks to clean emission technology, while improving conditions for waste drivers and promoting recycling to achieve the city's “zero waste” goal.¹⁶¹⁸

However, this time around, the coalition—drawing upon its port experience—has designed the policy so as to avoid the litigation that undercut the Clean Truck Program. Instead of granting concessions to all companies that agree to employee conversion (among other requirements), the waste hauling plan awards an exclusive

1618. Don't Waste LA Facts and Impacts, http://www.dontwastela.com/wp-content/uploads/2014/08/DWLA_FactsandImpacts.pdf; *see also* Sabrina Bornstein, Don't Waste L.A.: A Path to Green Jobs, Clean Air and Recycling for All (Jan. 2011), http://www.dontwastela.com/wp-content/uploads/2013/06/DWLA_Report_Finalweb1.pdf.

franchise for trucking companies selected through a competitive bidding process (one franchise per zone), in which bids are judged based on a range of good business practices that include using clean trucks, following efficient routing, promoting recycling and organic waste diversion, and implementing strong driver work standards. In so doing, the plan operates outside the scope of FAAA preemption (not regulating motor carriers in the transportation of property) and also fits squarely within the heart of market participation (dealing with the efficient procurement of city services). The waste hauler plan passed the Los Angeles City Council in April 2014 and the city bureau of sanitation is currently soliciting bids from trucking companies for the exclusive franchises.¹⁶¹⁹ This new achievement suggests that the labor movement's investment in the port campaign—though itself disappointing—was not wasted.

4. *Accountability*

Although, in the end, organized labor may not have been left worse off by the loss of employee conversion, port truck drivers were: saddled with the costs of clean trucks without the benefits of employee status. The failure of the concession plan in court thus raises the question of how to evaluate the coalition's ex ante judgment about the legal viability of the Clean Truck Program. The problem, from the coalition's perspective, was how to evaluate campaign risk and reward in relation to the ambiguous and contested boundaries of preemption. The key legal prediction centered on the risk of litigation failure—specifically, the risk that the program in general and the employee conversion piece in particular would be struck down. Movement lawyers believed that a legal challenge to the entire plan was inevitable, but that the ports would win a FAAA challenge at the Ninth Circuit and that the Supreme Court would not grant certiorari. This prediction turned out to be wrong: only the concession plan was challenged, the Ninth Circuit struck down the critical employee conversion provision, and the Supreme Court decided to consider (and reject) remaining concession provisions.

This outcome highlights the limits of predictive judgments in legal opinions, which are ultimately affected by so many factors that even a careful prospective legal opinion can ultimately miss the mark. The dynamics of crafting legal opinions may shape their content and accuracy. Legal opinions generated by movement lawyers may be influenced by lawyers' bias in favor of their reform position. However, in policy campaigns, movement-side legal analysis must be accepted by lawyers on the inside of the political decision-making process. In Los Angeles, the coalition's preemption analysis in support of the Clean Truck Program was also vetted by inside and outside port counsel, as well as the mayor's general counsel—which

1619. Emily Alpert Reyes, *L.A. Council Overhauls Trash Collection for Business, Big Apartments*, L.A. TIMES (Apr. 1, 2014, 12:15 PM), <http://www.latimes.com/local/lanow/la-me-ln-trash-franchise-overhaul-20140401-story.html#ixzz2xgQePq3n>; *L.A. Opens Bidding for Firms to Serve New Trash Collection Zones*, L.A. TIMES (June 11, 2014, 1:56 PM), <http://www.latimes.com/local/lanow/la-me-ln-trash-collection-overhaul-20140611-story.html>.

2014]

PREEMPTIVE STRIKE

1163

enhanced opportunity for independent review. All converged around the same ultimate conclusion: that the Clean Truck Program was a legally defensible exercise of local government power under the market participant exception to preemption. All of the legal reviews acknowledged the risk of litigation failure, but ultimately concluded that it was a risk worth taking. From the point of view of port counsel (both inside counsel at the city attorney's office and outside counsel at Kaye Scholer), one might understand legal support of the Clean Truck Program in terms of presenting the client with the strongest defense of its proposed course of action: when port lawyers conducted their legal review of the Clean Truck Program, the political decision to move it forward had already been made, and therefore port lawyers viewed their job as advancing the wishes of their client, the harbor commission. (The mayor's general counsel played a similar role relative to his client.) The fact that coalition and government lawyers all understood that the ATA would sue the ports *no matter what their programs required* strengthened political resolve (at least in Los Angeles) to press for the most ambitious set of policy changes.

Legal review was also connected to an assessment of political risk. For the Los Angeles mayor, the political upside of the Clean Truck Program was transformative policy that made two important constituencies happy. On the other hand, losing the entire program in court would be another catastrophic political failure (following the mayor's defeated bid to take over the school district). The mayor sought to hedge this downside risk by pursuing severability in the Clean Truck Program. This meant that in the event employee conversion was struck down, the environmental provisions could survive—allowing the mayor to claim a major environmental win, while leaving the Teamsters (though not necessarily the truckers) no worse than where they started.

The mayor's choice put the coalition in the position of having to make its own political calculus about severability and how it might impact one of the key constituencies it was attempting to help: port truckers. With severability in place, there was a small, but nontrivial, risk that if clean truck conversion passed without employee conversion, drivers could be left worse off: remaining independent contractors forced to bear the cost of acquiring and maintaining more expensive clean trucks. In a context in which the prize was so big (industry transformation with the possibility of organizing the entire logistics supply chain) and the legal analysis suggested that the risk of losing was so small, coalition leaders decided to pursue the policy in the face of risk. From the record, it is not clear whether the truck drivers involved in the campaign—who were a subset of the roughly 16,000 serving the ports—understood the precise nature of the risk, though it is reasonable to believe that those who were active would have agreed with the coalition's analysis and thus supported the policy despite the risk of losing on employee conversion.

Yet, even with activist driver support of the plan, the accountability problem in the clean trucks campaign was a thorny one. The activist drivers were only a fraction of the total port trucker population and could not claim representative status (and, indeed, there were challenger groups, like the National Port Drivers

Association, which claimed to represent thousands of owner-operators who wanted to maintain that status). Without organizing and polling all drivers, coalition leaders had to rely on the support of those drivers most committed to the clean truck project.

Moreover, the nature of the coalition itself—while strengthening its claims to broad stakeholder representation—complicated its members' representative roles. The coalition was made up of a range of groups, but environmentalists and organized labor were acknowledged to be the most powerful. Environmentalists were committed to emission reduction and were not in a position of direct accountability to the drivers. Although the Teamsters' constituency, broadly defined, included port truck drivers, the drivers were not union members—only potential ones. The Teamsters and their allies at Change to Win thus had to consider the impact of a successful Clean Truck Program not just on port truckers, but the union movement more generally. And this was a judgment ultimately made by labor movement leaders, *not* the movement lawyers, who were in a more conventional position of general counsel to the unions—thus shifting the crucial representational choices to the client level. In the end, those movement leaders decided that the campaign was strategically important enough (with significant potential benefits to a much wider universe of workers), and the downside limited enough, that it was worth the risk—that to change the equation for organized labor in the United States, it was necessary to seize the once-in-a-generation chance to go big at the ports. Had the gamble paid off, labor's representation of port truckers would have been put to the test in the unionization drive that would have ensued. As it stands, the campaign's outcome highlights the importance of incorporating the voices of vulnerable constituency members with the most to lose in movement decision making—and the challenge of ever neatly resolving conflicting movement interests in complex and high-stakes campaigns for transformative social change.

CONCLUSION

The clean trucks campaign at the Los Angeles and Long Beach ports is a monumental story of the power, and tradeoffs, of labor lawmaking at the local level—as well as an example of how such local lawmaking is framed, and ultimately constrained, by federal preemption. This study of the campaign has showed how the legal regime of port governance imposed negative local impacts on low-income communities and low-wage workers, while also creating the possibility for a strategic alliance to advance labor and environmental change. This alliance, formed by deliberate design and unforeseen opportunity, executed sophisticated inside and outside games to achieve major policy reform in Los Angeles: the Clean Truck Program converting port trucks to clean vehicles and port truckers to employees. However, because the federal legal regime disadvantaged labor's local bid to change the independent-contractor-based system of port trucking, the program was vulnerable to industry opposition and court revision that not only eroded the policy victory but also imposed new economic hardships on the constituency (port

2014]

PREEMPTIVE STRIKE

1165

truckers) the policy was designed to help. In this case, one of Los Angeles's most ambitious and potentially transformative campaigns to restructure port trucking was undercut by industry litigation that split the policy interests of a formidable blue-green alliance, validating the program's environmental provisions (clean trucks), while negating the labor ones (employee drivers). As a result, while the ports are now on track to achieve green growth, it is still on the backs of their most vulnerable workers.

