DISSENT TO ORDER DENYING MOTION FOR RECONSIDERATION
(By: Ramil, J.)

Because I believe Casumpang's state court action involves not only the same factual inquiry, but also essentially the same legal theory that was rejected in Casumpang's Labor Management Reporting and Disclosure Act (LMRDA) claims, I believe we should reconsider our opinion in Casumpang v. ILWU, Local No. 142, No. 22726.

In determining the preemptive effect of the LMRDA, this court may look to preemption decisions premised on other federal labor statutes. See e.g. McCall v. Chesapeake & Ohio Railway Co., 844 F.2d 294, 299 (6th Cir. 1988) (noting that "[i]n determining the preemptive effect of the railway act, we look not only to other railway act cases but to preemption decisions premised on other federal labor statutes.").

In Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988), the United States Supreme Court considered whether an employee covered by a collective-bargaining agreement that provides a contractual remedy for discharge without just cause may enforce a state-law remedy for retaliatory discharge, or whether the state-law remedy is preempted by the Labor Management Relations Act (LMRA). The Court summarized "the principle of § 301 preemption," as follows:

> If the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted and federal labor-law principles -- necessarily uniform throughout the Nation -- must be employed to resolve the dispute.

Id. at 406. Applying this principle, the Court determined that

(1) neither of the elements of the state-law retaliatory discharge claim required the Court to interpret any term of a collective bargaining agreement, and (2) an employer's defense to a retaliatory discharge claim was a purely factual inquiry that likewise "does not turn on the meaning of any provision of a collective-bargaining agreement." Id. at 407. Accordingly, the court determined the state-law claim was not preempted by the LMRA because: "The state-law remedy in this case is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state law claim does not require construing the collective-bargaining agreement." Id.

Six years later, in Norris v. Hawaiian Airlines, Inc., 512 U.S. 246 (1994), the Court considered whether an aircraft mechanic who claimed he was wrongfully discharged could pursue available state-law remedies for wrongful discharge, or whether he could seek redress only through the Railway Labor Act's (RLA) arbitral mechanisms. The Court determined that Lingle provided an "appropriate framework for addressing pre-emption under the RLA" and adopted the Lingle standard to resolve claims of RLA pre-emption. Id. at 263. Accordingly, the Court looked to whether the mechanic's state-law wrongful-discharge claims were independent of the collective bargaining agreement. Id. at 266. The Court determined that "[t]he state tort claims [. . .] require only the purely factual inqury into any retaliatory motive of the employer." Id. at 266. Accordingly, under the

Lingle standard, Norris' state-law wrongful-discharge claims were not preempted.

Applying the Lingle standard to the instant case, Casumpang's state-law claim requires more than a "purely factual inquiry" into whether the Union's bylaws and constitution permit the withholding of Casumpang's vacation pay. Although he disclaims any challenge to the union election or his dismissal, the fact remains that whether Casumpang is entitled to vacation pay turns, first and foremost, upon whether he was wrongfully suspended. If Casumpang was wrongfully suspended, then the union was certainly not entitled to withhold his vacation pay.

The United States Supreme Court opinion Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen and Packers v. Crowley, 467 U.S. 526 (1984) provides little by way of support for the contention that Casumpang's state-law claim is not precluded by the LMRDA. Crowly presented the distinct issue of "whether Title I remedies are available to aggrieved union members while a union election is being conducted." Id. at 541. To make this determination, the Court looked to "the primary objectives that controlled congressional enactment of the LMRDA" for guidance. Id. at 453. Among them, the Court noted that "Congress clearly indicated its intent to consolidate challenges to union elections with the Secretary of Labor, and to have the Secretary supervise any new elections necessitated by the act." Id. Noting the importance of the Secretary's role, the Court reiterated that "Congress made suit

by the Secretary under Title IV the exclusive postelection remedy for challenges to an election . . . to centralize in a single proceeding such litigation as might be warranted with respect to a single election." Id. at 549 (citing Trbovich v. Mine Workers, 404 U.S. 528, 532 (1972).

The Court determined that "whether a Title I suit may properly be maintained by individual union members during the course of a union election depends upon the nature of the relief sought by the Title I claimants." Id. The Court concluded:

> Whether suits alleging violations of Title I of the LMRDA may properly be maintained during the course of a union election depends upon the appropriateness of the remedy required to eliminate the claimed statutory violation. If the remedy sought is invalidation of the election already being conducted with court supervision of a new election, then union members must utilize the remedies provided by Title IV. For less intrusive remedies sought during an election, however, a district court retains authority to order appropriate relief under Title I."

Id. at 550. By way of footnote, the Court added that "[t]he exclusivity provision of the [LMRDA] Title IV may not bar post-election relief for Title I claims or other actions that do not directly challenge the validity of an election already conducted." 467 U.S. at 541 n.16. The Court cited to Ross v. International Brotherhood of Electrical Workers, 513 F.2d 840 (9th Cir. 1975), and Amalgamated Clothing Workers Rank and File Committee v. Amalgamated Clothing Workers of America, Philadelphia, Joint Board, 473 F.2d 1303 (3rd Cir. 1973), neither of which are applicable to the instant case.[1]

[1] Ross is not controlling because the plaintiff in Ross won his election. At that time, his claims under the LMRDA were rendered moot. Id. at 841. In other words, Ross's LMRDA claims were never considered or rejected

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Presently, Casumpang seeks to bring a state-law claim for vacation pay. Casumpang has unsuccessfully sought this remedy through federal court action. In bringing this state claim, Casumpang, in effect, seeks to have a state court make a determination as to whether he is entitled to vacation pay. Because whether Casumpang is entitled to vacation pay necessarily turn upon whether he was rightfully or wrongfully suspended, I believe this claim is preempted by federal labor law.

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by a federal court. In this context, the Ninth Circuit Court of Appeals concluded that plaintiff's state-law tort claim was allowed to proceeded on its own. Id. at 843. Casumpang's LMRDA claims, on the other hand, were expressly rejected by federal district court. In Amalgamated Clothing, the Third Circuit Court of Appeals determined that appellant's LMRDA Title I claim was not precluded by the exclusive remedy provisions of the LMRDA where, although filed before a union election, it did not reach the appellate court until after the election had been conducted and appellant had won. 473 U.S. 1303.