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**March 30, 2009**

**INTERNATIONAL LONGSHORE AND WAREHOUSE UNION'S  
COMMENTS FOR IMPROVING  
THE TWIC PROGRAM AND PORT SECURITY**

The following provides the comments of the International Longshore and Warehouse Union on changes needed to the TWIC program and SAFE Ports Act and comments on the bill proposed by Representative Loretta Sanchez for the Border Enforcement and Technology Act of 2009.

**A. THE TWIC PROGRAM IS PREVENTING LONGSHOREMEN/MARINE  
CLERKS, WHO POSE NO THREAT TO NATIONAL SECURITY, FROM  
EARNING A LIVING.**

**1. The Law Must Require Adequate Staffing of the TWIC Program at All Levels.**

We applaud Rep. Sanchez for including adequate staffing for TWIC enrollment and administration offices in her bill. As we are presently seeing, inadequate TSA staffing has created undue delay and backlog of TWIC enrollment, unfairly depriving American Longshore workers of livelihoods. Sufficient TSA staffing is needed not only to clean up the backlogs and end the delays of ongoing mass TWIC enrollments. It is also necessary to adequately manage the TWIC program, including quickly replacing lost, damaged and destroyed cards as well as timely addressing reported changes in an individual's criminal record.

**a. The Need to End the Current Delays and Backlogs for Enrollment.**

Presently, the TSA adjudication offices that process initial TWIC applications and TWIC appeals and waivers are overwhelmed and their review processes are severely backlogged. American Longshore workers are facing four-to-six-month wait times in order to get a TWIC card. Those entitled to waivers are waiting as long as eight to nine months. Such long wait

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times are a far cry from the thirty-day timeline for initial determinations and sixty-day timeline for waivers and appeals provided for in the program rules and regulations.<sup>1</sup>

We cannot overstate the severity of the impact that these delays are having on our members. Now that TWIC compliance is mandatory in all West Coast ports except the Ports of Los Angeles /Long Beach, many of our members are being prevented from doing their jobs and earning a living. Experienced longshoremen and marine clerks, who have served the port for decades and pose no risk to national security, are being denied their livelihoods and struggling to find ways to support their families as they wait for the administrative processes to move forward. TSA must be required to add additional staff and work overtime to clear this backlog as rapidly as possible and return these men and women to work.

The following are just a few examples, among many others, of ILWU members who have been prevented from working due to administrative delays in the processing of their TWIC applications:

- Steven Richards is a longshoreman in the Port of Seattle. He applied for a TWIC on October 25, 2008, more than four months before the February 28, 2009 deadline for compliance in his port. Despite his early application, Mr. Richards did not receive any response for months. Finally in January, Mr. Richards contacted TSA to find out the status of his application and was told that his application was still being processed. In mid-February, he was informed for the first time that he had to provide a birth certificate because he had been born overseas. No doubt TSA had learned that Mr. Richards was born on the U.S. army base in Bremerhaven, Germany to a military family. Apparently, TSA is requiring children born to overseas U.S. military personnel to prove their national identity and go to the trouble to obtain the proper paperwork that TSA itself can more readily get from the military. Mr. Richards has ordered his birth certificate, but it will take about six to eight weeks for delivery. Once he receives it, he will have to submit it to TSA for further review. Mr. Richards is a United States citizen and has no criminal convictions on his record. However, simply because he had the “bad fortune” of being born on a U.S. military base, his application has been delayed for over five months and he has been prevented from working since February 28, 2009. At this point Mr. Richards does not know when he will be allowed to return to work. In the meantime, he is rapidly depleting his savings as he tries to support his family without his regular means of income from longshore work.

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<sup>1</sup> 49 C.F.R. §§ 1515.5(b)(6), 1515.7(d). We understand that TSA reports having shorter wait times; but these agency reports are inconsistent with the experiences of many of our members.

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- ILWU member Jim Green, a longshoreman from the San Francisco Bay area, applied for a TWIC on December 19, 2008, more than two months before the February 28, 2009 deadline for compliance. TSA, or its contractor Lockheed Martin, lost his application, so Mr. Green had to apply again on February 11, 2009. On March 8, he was notified that TSA was unable to read his fingerprints. He went in a third time to give fingerprints and was told that he needed to start the application process all over again. Beginning February 28, Mr. Green was prevented from going to work because he didn't have a TWIC. As a result, he lost his steady job and will have to find sporadic work through the longshore dispatch hall.
- Another registered longshoreman in the San Francisco Bay Area applied for a TWIC on December 17, 2008. He had previously been convicted of a marijuana-related offense, but the court ordered that his conviction be expunged. He has been a hard-working longshoreman for 18 years and has no other convictions. When he contacted TSA in January to find out the status of his application, he was told that TSA was denying him a TWIC due to his conviction. It then took TSA until approximately March 10 to issue a written notice and formalize the denial so that he could seek a waiver or appeal. As a result of the delay, this member, whose name we withhold to protect his privacy, has only recently been able to apply for a waiver, more than three months after he first filed his TWIC application. In the meantime, since February 28, 2009, he has been prevented from working and does not know if or when he will be able to return to work. He is struggling to try to support his family and risks home foreclosure if he is unable to return to work soon.

This is not the treatment that these hard-working men and women deserve and we urge Congress and the Secretary of Homeland Security to take immediate action to address the severe hardships that they face.

## **b. The Need for Adequate Resources for Ongoing TWIC Administration.**

TSA must also have adequate staffing and resources to properly administer the TWIC program on an ongoing basis. People being who they are, TSA must adequately budget for the need to replace lost, stolen, and damaged cards on a continuous basis. Delays and backlogs for replacement cards will not only deprive the cardholders of needed income, but also unduly disrupt the operations of the ports and the flow of commerce. In addition, since all TWIC cards

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must be renewed each five years, the agency must be properly funded and staffed to administer these cycles of mass renewals.<sup>2</sup>

## **c. The Consequences of Inadequate TWIC Resources**

Inadequate TSA staffing and TWIC resources do far more harm beyond depriving American workers of employment and disrupting American ports and commerce. Programs such as TWIC can work only with the full confidence in support of its participants. First impressions and experiences typically determine long-term attitudes toward such government programs. The delays and backlogs being suffered by port workers and port operators are creating strong, negative opinions against TWIC that may well prevail for years. Continued TSA understaffing and underfunding will only work to undermine the integrity of the TWIC program.

### **2. The Law Must Make Explicit that Workers Can Be Escorted.**

The ILWU urges Congress and the Department of Homeland Security to clarify the provisions regarding escorting and make explicit that all workers, including longshoremen/marine clerks, may work escorted. Currently, the Maritime Transportation Security Act provides that in order for an individual to have access to secure areas of a marine terminal facility, he or she must have a transportation security card or be accompanied by another individual who holds such a card.<sup>3</sup> The regulations and United States Coast Guard's official guidance (NVIC) on the implementation of the TWIC program set forth provisions for how individuals without TWICs may be accompanied or "escorted" by a TWIC-holder and the ratio of non-TWIC-holders to escorts.<sup>4</sup> These escorting provisions reasonably and flexibly permit workers without TWICs to perform their work in general proximity to workers with TWICs.

The TWIC Regulations and NVIC also have special provisions for newly-hired employees, who can work without an escort for up to sixty (60) days while their TWIC applications are being processed, as long as they pass a named-based check in Coast Guard's database and make up no more than 25% of the workforce.<sup>5</sup> All ILWU represented longshoremen/marine clerks underwent this same name-based background check in 2006 and

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<sup>2</sup> 49 C.F.R. § 1572.23(a) (TWIC expires after five years).

<sup>3</sup> 46 U.S.C. § 70105(a).

<sup>4</sup> 33 C.F.R. § 101.105 (defining "Escorting") and § 101.515; *Enclosure (3) to Navigation and Vessel Inspection Circular (NVIC) No. 03-07 re "Guidance for the Implementation of the Transportation Worker Identification Credential (TWIC) Program in the Maritime Sector"* at pages 3, 10, 12 (Jul. 2, 2007).

<sup>5</sup> 33 C.F.R. § 105.257; *Enclosure (3) to NVIC* at pages 18-20. Specifically, new hires can work unescorted for thirty (30) days and the Captain of the Port can extend the time period for an additional thirty (30) days. *Id.*

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all passed.<sup>6</sup> So under the current regulations, incumbent American port workers, who have passed the Coast Guard's name-based security check, should be allowed to work under escort pending the processing and delivery of their TWIC card. Unfortunately, such is not the case in many port facilities.

**a. Longshoremen/marine clerks are being singled-out for harsher treatment.**

Longshoremen/marine clerks on the West Coast, most having worked in the industry for many years and already passed the name-based background check in 2006, are denied access to their jobs unless they have actually received their TWIC card. While port practices are inconsistent, many waterfront facilities are not allowing longshoremen/marine clerks to work with an escort. Even those whose TWIC applications have been approved, and so simply await manufacture and delivery of the card, are being denied access and escort by many port operators, apparently with the support of TSA and the Coast Guard.

It is unjust and un-American to administer the TWIC program in a way that denies port employees, whose applications have already been approved, access to their jobs because inadequate government staffing and funding prevent timely delivery of their TWIC card. It is irrational and inexcusable to deprive such American workers the simple courtesy of escort at work while the government gets it together to manufacture and deliver the TWIC card. Denial of escort to American longshoremen becomes grossly offensive and unconscionable when so many others, including truck drivers and ship's crews, mostly foreign nationals, regularly receive escorting privileges.

While the practices are not uniform from one facility to the next, most facilities permit escorted access to virtually every other type of worker at the port except ILWU represented longshoremen and marine clerks. The following are some examples:

- Truckers without TWICs are permitted to enter facilities with an escort. Indeed, at the Port of Portland, guards lead truck drivers into the facility and through the container yard before even checking to see whether they have TWICs. Twenty to thirty trucks at a time are routinely lined up inside the facility waiting to be checked for TWICs.
- A new industry of private escort service companies is being created, selling services to trucking companies and others for a fee. Individuals working for an

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<sup>6</sup> Fed. Reg. Vol. 71, No. 82 at 25067 (April 28, 2006).

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escort company, with no connection to the Port or Terminal Operator, are escorting truck drivers without TWICs. Two such companies in San Diego are Pegasus Security Service and Terminalift, LLC.

- The Port of Tacoma has established a \$230.00 fee to escort truck drivers.
- Rail crews are escorted and not required to have TWICs, though they move trains with sometimes a hundred or more cargo containers directly into port facilities. At some facilities, train crews without TWICs do not have any escort at all. At other facilities, the only “escorting” of rail crews and trains is conducted by video camera linked to a monitor at a remote location.
- Vessel crews without TWICs are permitted to dock, disembark and enter facilities, escorted by the vessel’s agent.
- Maintenance crews, providing regular and routine repairs on facility equipment in secure areas, are not required to have TWICs. They are permitted to work either under escort or, in at least several instances in the Port of San Diego, without any escort at all.
- Workers on long-term projects at the ports are permitted regular access even if they don’t have TWICs. For example in the Port of Tacoma, construction workers without TWICs engaged in a two to three-month, full-time project to build a crane are permitted to work inside the facility everyday escorted by their foreman. Similarly, in the Port of Seattle, a crew dismantling a container crane has no TWICs; they are “escorted” by the facility operator. In reality this means that the operator employee leads the workers through the facility to the crane and then leaves them to do their work unwatched.

Meanwhile, American longshoremen and marine clerks who make-up the regular port workforce and have been vetted through the Coast Guard’s name-based security screen, are being prevented from working altogether if they do not have TWICs in their possession. By best count, there are several hundred ILWU-represented longshoremen and marine clerks who, at this writing, are being denied work. On any given day, a longshoreman/marine clerk may lose his/her TWIC, have it stolen, or simply misplace it temporarily. By the current policies, that person is simply unemployed until the bureaucracy can or will intervene or the card is found.

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## **b. ILWU longshoremen are not a security risk.**

This discriminatory treatment of longshoremen/clerks is both unfair and nonsensical. At the Coast Guard's direction, the entire ILWU workforce was checked against the terrorist watch list in 2006.<sup>7</sup> Not a single ILWU worker was found to be a threat or even suspected of posing a threat to national security.

It is longshoremen/clerks who typically have long-term, established relationships with the port and the surrounding community. Most longshoremen/marine clerks live and raise their families near the port. There is no evidence that longshoremen/marine clerks pose a greater security risk to marine terminal facilities or vessels than other, more sporadic workers and cannot be safely escorted as other workers are. Indeed, the nature of longshore work is uniquely suited to escorting because longshoremen typically work in gangs and in close proximity to others.

Likewise, there is no evidence that incumbent longshoremen and clerks, many of whom have worked in the industry for decades, pose a greater risk to national security than newly hired port employees who by NVIC No. 03-07 can work without escort for up to sixty (60) days while they wait for their TWIC applications to be processed.

We strongly urge that the TWIC program be amended to expressly permit longshoremen and marine clerks to be escorted in keeping with the principles outlined in NVIC No. 03-07. Such an approach is entirely consistent with the current practice for other workers, poses no significant risk to port security, and ensures that our members will not be unfairly denied the ability to earn a living.

## **3. *TSA Should Be Required to Conduct a More Efficient and Accurate Review Before Denying an Individual a TWIC Based on Information in the FBI Database.***

We urge the addition of provisions requiring TSA to conduct a more efficient and accurate review before issuing an initial notice of denial. Based on the incomplete information in the FBI's criminal records database, TSA is routinely initially denying TWICs to workers who actually meet the requirements for obtaining one. The consequences of this over-denial are severe, particularly now that TWIC compliance is mandatory in most West Coast ports. Our members are being stigmatized and denied the ability to work and support their families.

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<sup>7</sup> Fed. Reg. Vol. 71, No. 82 at 25067 (April 28, 2006) (requiring the ILWU to provide the Coast Guard with identifying information, including Social Security Numbers and alien identification numbers for all longshoremen to permit TSA to "analyze ... whether or not an employee or longshoreman poses or is suspected of posing a security threat warranting denial of access to the port facility" and stating that anyone meeting those criteria will be denied access).

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TSA's own statistics make clear that the agency is erroneously denying TWICs to far too many workers. As of March 15, 2009, 19,293 workers nationwide had appealed TSA denials of TWIC.<sup>8</sup> So far, 17,134 of these appeals have been granted.<sup>9</sup> (TSA does not publish statistics on the number of appeals pending.) While we applaud the Department of Homeland Security and Congress for including an appeal process in the governing law and regulations, these numbers show that the current screening process is deeply flawed. And there is no way to identify how many workers have been erroneously denied a TWIC and did not know or did not understand that they could appeal the decision.

To help prevent this over-denial, TSA's review must be more efficient.

- a. Before issuing an initial denial letter, TSA should be required to determine that an arrest resulted in a conviction for a disqualifying offense.**

When an individual's FBI rap sheet includes an arrest for a disqualifying offense without any explanation of its final disposition, even if the arrest is years old, TSA assumes that the matter is still pending. On that basis, TSA issues notice to the applicant stating that he or she must provide proof of the final disposition or be denied a TWIC. This procedure has a serious detrimental impact on workers by denying them employment pending resolution of the problem.

The FBI's database routinely lacks information regarding the final disposition of an arrest. The Attorney General's 2006 Report on Criminal Background Checks found that the FBI's database was "missing final disposition information for approximately 50% of its records."<sup>10</sup> Many of the workers whose records fall into this 50% gap, including ILWU members, were never convicted of a disqualifying offense at all or were convicted outside of the relevant time period. Many others were not even charged with a disqualifying offense or charged with any crime. Yet they are sent an initial denial letter, required to clear their names in order to keep their jobs and prevented from working while they compile the information and wait for TSA to review it. TSA must be required to investigate the final disposition of an arrest in its first review before presuming that the matter is still open and issuing an initial notice of denial.

- b. TSA should be required to confirm that a crime at issue is a felony before issuing an initial denial letter.**

Although only felony convictions are disqualifying offenses for purposes of TWIC, FBI rap sheets do not necessarily indicate whether the offense for which an individual was convicted

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<sup>8</sup> Dep't of Homeland Security, *TWIC Dashboard* at 1 (March 19, 2009).

<sup>9</sup> *Id.*

<sup>10</sup> *The Attorney General's Report on Criminal History Background Checks*, at page 3 (2006).

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is a felony or a misdemeanor. TSA assumes that all offenses are felonies unless otherwise indicated and issues initial denial letters without investigation. This often erroneous assumption, based on incomplete information, forces workers to appeal and lose work while they gather the required materials to prove to TSA that they were not convicted of a disqualifying felony. Where the rap sheet is silent as to whether the conviction is for a felony or misdemeanor, TSA should be required to verify that the crime is a felony before issuing an initial denial letter and effectively depriving the worker of his or her means of livelihood based on incomplete data.

### **c. TSA should be required to confirm an applicant's release date.**

FBI rap sheets may contain information about the initial sentence imposed following a conviction, but routinely lack information about the sentence actually served. Thus, an individual may be eligible for a TWIC because he or she was released from incarceration for a disqualifying offense more than five years ago, even if the sentence imposed would have extended into the five-year period. Rather than verify the applicant's actual release date, TSA assumes that an individual served the entire sentence imposed where the rap sheet does not indicate otherwise. TSA makes this assumption even when the applicant has attested on his or her TWIC application that he or she served a shorter sentence. These individuals are nonetheless issued initial denial letters and forced out of work while they appeal the erroneous denial. TSA should be required to investigate the actual release date where the rap sheet is silent and the applicant has attested that he or she was released from incarceration more than five years ago.

None of these changes would place an undue burden on TSA. In the case of federal gun checks required by the Brady Act, the FBI tracks down 65% of the missing dispositions within three days rather than simply denying the license based on old arrest information.<sup>11</sup> Surely where workers' livelihoods are at stake, TSA should be required to do as much and more.

### **4. TSA Must Develop Effective and Efficient Ways to Collect Biometric Data from Individuals Who Cannot Provide Fingerprints.**

The ILWU appreciates the inclusion of language in Rep. Sanchez's bill requiring the Department of Homeland Security to develop a plan for collecting biometric data from people who cannot provide fingerprints. TSA has been unable to capture fingerprint data from some ILWU members. This has put them out of work through no fault of their own. ILWU member Jim Green, discussed above, is one example. Mr. Green was prevented from being able to work and lost his steady longshore job because TSA could not capture clear fingerprints, even though he gave them prints on three different occasions.

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<sup>11</sup> *The Attorney General's Report on Criminal History Background Checks*, at page 108.

**B. LABOR MUST BE INCLUDED IN STRATEGY AND RECOVERY PLANNING.**

It is vital to the success of any port security strategy that it take into consideration the interests of the working people who staff our ports on a daily basis, like longshoremen and marine clerks. This is especially true during these difficult economic times when any strategy must carefully avoid impeding workers' abilities to do their jobs and earn a living.

The ILWU appreciates that Rep. Sanchez's draft bill requires the Secretary of the Department Homeland Security to consult with organized labor, among others, in developing a strategy for border security. However, the bill improperly omits longshoremen and organized labor in recovery planning. We urge that the bill be amended accordingly.

**CONCLUSION**

The requirement that all longshoremen and marine clerks physically possess a TWIC in order to work on any given day, and to not allow escorting, has virtually no real impact on Port security. Port security is impacted almost exclusively on cargo integrity and access to it; not just on dock, but also in route to the dock. In a modern container terminal, longshoremen and marine clerks have no real access to cargo. The cargo is locked in a container and the container is not opened.

While the ILWU has always cooperated with the TWIC program, it has been on the basis that the program is administered fairly and non-discriminatorily. It has also been with the understanding that some level of common sense be applied. The American longshoremen and marine clerk work force are not the terrorists and should not be treated as such.

The immediate solution is simple. All incumbent longshoremen and marine clerks who have a receipt that shows that a TWIC application is pending as well as those workers known by the the terminal operator to have obtained a TWIC, should be entitled to escorting in keeping with the principles set out in the MTSA of 2002, the implementing regulations and the Coast Guard's NVIC 03-07.