

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: January 22, 2003

TO: Victoria E. Aguayo, Regional Director  
William M. Pate, Jr., Regional Attorney  
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Region 21

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: ILWU Local 13  
(Applied Industrial Materials Corp.) 560-7580-4033-0100  
Case 21-CD-643 560-7589-4033-8000

This Section 8(b)(4)(D) case was submitted for advice concerning whether the Union's alleged picketing and work stoppage to protest the Employer's decision to stop subcontracting work to the company that employed the Union's members, and to use its own employees instead, constitutes a jurisdictional dispute.

We conclude that no jurisdictional dispute exists, and therefore no Section 10(k) hearing is warranted, because the Union has a valid work preservation object in seeking to prevent the subcontracted work it was performing for the Employer from being reassigned to the Employer's employees.

### FACTS

The Employer (AIMCOR)<sup>1</sup> is in the business of buying petroleum coke from various refineries in the Los Angeles area, and shipping it overseas. AIMCOR has four warehouses in the Port of Long Beach ("POLB"), where it stores the coke until ready for shipment. The warehouses are located adjacent to Berth G, where the coke is loaded onto the vessels.

Each warehouse has a series of holes down the center of the floor. During the shiploading process, front-end loaders are used to push the coke stored in the warehouses into these holes. The coke falls onto AIMCOR's warehouse conveyor belts that run through tunnels under the holes and connect to the POLB shiploading terminal conveyor belt system. The end of the POLB terminal conveyor belt is positioned above the hold of the ship. When AIMCOR's

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<sup>1</sup> Applied Industrial Materials Corporation.

product reaches the end of the POLB terminal conveyor belt, it drops into the vessel.

For years, AIMCOR has contracted with Metropolitan Stevedoring Company ("Metro"), whose longshore employees are represented by the Union (ILWU Local 13),<sup>2</sup> to perform its entire ship-loading conveyor operation. This has entailed the movement of coke from AIMCOR's warehouses down the holes onto AIMCOR conveyor belts,<sup>3</sup> as well as the transfer of the coke from AIMCOR conveyor belts to the POLB conveyor belt system and onto the vessels. Metro oversees the POLB belt system and placement of coke onto ships pursuant to its own contract with POLB rather than its subcontract with AIMCOR; the Employer therefore is not permitted to operate this portion of the loading process.

A number of AIMCOR's own employees, represented by International Union of Public and Industrial Workers ("IUPIW"), also work at the warehouses. These employees generally maintain equipment and perform clean-up and repositioning of coke that is left in the warehouse after loading.

According to AIMCOR, for a number of years it has experienced decreasing productivity and efficiency. AIMCOR discussed these problems with Metro and sought economic concessions, which Metro unsuccessfully solicited from the Union. On April 15, 2002,<sup>4</sup> AIMCOR notified Metro by letter that it had decided to terminate its contract with Metro pertaining to the work performed at the AIMCOR warehouses and on the AIMCOR conveyor belts, and to assign the work to its own IUPIW-represented employees.<sup>5</sup>

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<sup>2</sup> Metro is a member of the Pacific Maritime Association ("PMA") and employs ILWU Local 13 members to perform all its Berth G longshore work under the parties' Pacific Coast Longshore Contract Document (PMLCD).

<sup>3</sup> It also includes front-end loader work inside the warehouse and in the tunnel during ship loading, and tunnel cleanup and maintenance work for the shipping system.

<sup>4</sup> Herein all dates are 2002 unless otherwise indicated.

<sup>5</sup> AIMCOR did not terminate that part of its contract with Metro involving the latter part of the conveying operation (moving the coke from AIMCOR conveyor belts onto POLB conveyor belts, and then onto the vessels) since Metro has a contract with POLB to operate the Berth G ship-loading conveyor system and equipment.

On June 6, AIMCOR Vice President Lombardi, ILWU Local 13 President Ponce de Leon, Metro's vice president, and the Berth G manager, met to discuss AIMCOR's decision to terminate the Metro contract. Lombardi stated that the decision to terminate the Metro contract was purely economic; that business had steadily decreased; and that Metro had not responded to AIMCOR's requests for assistance with its economic problems. Ponce de Leon responded that he did not think that AIMCOR had the right to assign its own, non-ILWU employees, to perform ILWU work. At the Union's request, Lombardi agreed to wait until after June 30 to begin using its own employees.

Some time between June 6 and June 30, AIMCOR tried to use its own employees to perform front-end loading work moving coke between the warehouses. ILWU Local 13 employees closed the warehouse doors and told AIMCOR employees not to enter the warehouses. Lombardi contacted Ponce De Leon and again agreed not to have AIMCOR employees perform any front-end loading work until after June 30. Ponce de Leon told Lombardi that the Union would do everything it could legally do to prevent AIMCOR from assigning the work to its own employees.

On the morning of July 18, AIMCOR began loading coke from one of its warehouses onto the AIMCOR conveyor belt, using its own front-end loaders and maintenance employees. After about ten minutes of loading, ILWU Local 13 employees, working on the Metro-operated POLB conveyor belts and shiploaders, shut down the loading operation and refused to work.

Metro's vice president telephoned Lombardi and told him that ILWU had shut down the job and that PMA and the Union had called an arbitrator pursuant to the PCLCD. Lombardi responded that AIMCOR was not a party to the arbitration and was ready to load the coke product. Before noon that day, the arbitrator called Lombardi to testify. A PMA representative asked Lombardi whether AIMCOR had cancelled the work previously performed by Metro, and whether AIMCOR had considered joining PMA. Lombardi said that AIMCOR had a contract with IUPIW and had its own employees to perform the work. After testifying, Lombardi returned to the warehouse area and noticed about 20 ILWU Local 13 workers gathered across the street from the East warehouse. The workers began yelling at Lombardi and the IUPIW employees.

About 30 minutes later, the Arbitrator announced his decision that although the Union was guilty of an illegal work stoppage under the PMA-ILWU contract, Metro could not

load cargo to the vessels that was placed onto cargo belts by non-ILWU longshore workers.<sup>6</sup> Since that time, AIMCOR has used Metro's ILWU Local 13-represented employees to operate front-end loaders and conveyors to move coke from its warehouses to the vessels.

#### ACTION

We conclude that no jurisdictional dispute exists, and therefore no Section 10(k) hearing is warranted, because even assuming the Union was engaged in a work stoppage, it has a valid work preservation object in seeking to retain this work.

Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization to threaten, coerce, or restrain any person engaged in commerce with the object of forcing or requiring any employer to assign particular work to employees belonging to one labor organization rather than employees belonging to another or no labor organization. A jurisdictional dispute arises within the meaning of Sections 8(b)(4)(D) and 10(k) when an employer is "an obviously neutral party thrust into a work dispute that it did not cause."<sup>7</sup> The purpose of a 10(k) hearing is to relieve the employer of the burden of choosing between the employee groups that are competing for the assignment of work.<sup>8</sup>

On the other hand, an employer may not rely on Sections 10(k) and 8(b)(4)(D) if the union's action is designed to pressure the employer to preserve for its members work that had been done by them.<sup>9</sup> Thus, where an

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<sup>6</sup> A written decision issued on October 15.

<sup>7</sup> Mine Workers (Bronzite Mining), 280 NLRB 587, 590 (1986) (Section 10(k) determination proper where union picketed to force new coal mine operator to hire its members rather than operator's own employees, and dispute was between those competing groups of employees rather than between union and employer over interpretation of contract).

<sup>8</sup> ILWU Local 62-B v. NLRB (Alaska Timber), 781 F.2d 919, 922 (D.C. Cir. 1986).

<sup>9</sup> Teamsters Local 107 (Safeway Stores), 134 NLRB 1320, 1323 (1961) (no jurisdictional dispute where union local picketed in response to the employer's decision to discharge three member drivers and to give the work to employees of another plant who were members of another local; the real dispute was not between the two locals, but between the discharged employees' union and the employer).

employer's unilateral action created the dispute, by transferring work away from a group already performing it, Sections 10(k) and 8(b)(4)(D) do not apply.<sup>10</sup>

A group of employees can have a valid object in seeking to preserve work they had been performing for an employer, even where they are not the employer's employees and their union does not have a collective-bargaining relationship with the employer.<sup>11</sup> In Alaska Timber, for example, the court found that longshoremen did not violate Section 8(b)(4)(D) by picketing to protest loss of work resulting from the employer's decision to stop subcontracting to a company that employed the longshoremen, and to use its own employees instead.<sup>12</sup> Similarly, in ILWU

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concerning the union's attempt to retrieve the jobs of its members); Teamsters Local 578 (USCP-Wesco), 280 NLRB 818, 820 (1985), affd. 827 F.2d 581 (9<sup>th</sup> Cir. 1987) (Section 8(b)(4)(D) not applicable where Safeway historically assigned certain work tasks to its own employees represented by UFCW, and later subcontracted the work to a company whose employees were represented by the Teamsters; "Although this dispute may literally fall within the terms of Section 8(b)(4)(D) and 10(k) of the Act because there are two competing claims to the work and one of the parties threatened to picket to prevent a change in work assignment, the Board should look to the real nature and origin of the dispute in deciding whether it is actually jurisdictional").

<sup>10</sup> Safeway Stores, 134 NLRB at 1323; Alaska Timber, 781 F.2d at 925. See also Electrical Workers IBEW Local 292 (Franklin Broadcasting Co.), 126 NLRB 1212, 1215 (1960) (the employer created a dispute with the union by terminating a group of employees, whom the union represented, and assigning their duties to another group of employees. Picketing to "obtain reemployment" of the discharged employees and get a collective-bargaining contract for them was not proscribed by Section 8(b)(4)(D)).

<sup>11</sup> Alaska Timber, 781 F.2d at 925; ILWU Local 26 (American Plant Protection), 210 NLRB 574, 576 (1974); Teamsters Local 331 (Bulletin Co.), 139 NLRB 1391, 1395 (1962).

<sup>12</sup> The Board has implicitly embraced the court's Alaska Timber decision by distinguishing it rather than treating it simply as the law of that case. See Longshoremen ILWU Local 14 (Sierra Pacific Industries), 314 NLRB 834, 836 (1994), enfd. 85 F.3d 646 (D.C. 1996) (in contrast to Alaska Timber, union here did not have a work preservation object where employer had never had a chip-loading

Local 26,<sup>13</sup> the Board found no jurisdictional dispute where ILWU picketed to protest U.S. Lines' decision, upon relocating to another pier, to replace the ILWU security guard contractor that it had been using with another contractor. The Board concluded that ILWU was merely demanding continued employment of those already working. As the Board stated, although the dispute might be deemed to fall within the literal terms of Section 8(b)(4)(D), "that proscription was not designed to authorize the Board to arbitrate disputes between an employer and a union, particularly with regard to the union's attempt to retrieve the jobs of employees whom the employer chose to supplant by reallocating their work to others."<sup>14</sup>

We conclude that the instant case is directly controlled by the Alaska Timber line of cases. It is undisputed that ILWU Local 13 members were performing the work in question until the Employer decided to cancel its contract with Metro and to use its own employees to do the same work instead. As in Alaska Timber and ILWU Local 26, the object of the Union's alleged work stoppage was to "attempt to retrieve the jobs of those employees whom the employer chose to supplant by reallocating their work to others."<sup>15</sup> Moreover, as discussed above, the fact that AIMCOR did not directly employ ILWU Local 13 members does not preclude the Union from having a work preservation object, since its members were performing that work.

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facility, and its takeover of the work from subcontractor involved new business venture of storing, handling, and loading wood chips).

<sup>13</sup> 210 NLRB at 576.

<sup>14</sup> Ibid. See also Teamsters Local 331 (Bulletin Co.), 139 NLRB at 1395-1396 (no jurisdictional dispute, where employer discontinued a subcontract and assigned the work previously performed by the subcontractor to its own employees). By contrast, a work preservation object does not exist where a union pressures an employer to provide work for its members that those employees did not traditionally perform for that employer. See Millwrights Local 1026 (Intercounty Construction Corp. of Florida), 266 NLRB 1049, 1051-1052 (1983) (reasonable cause to believe that the union's picketing violated Section 8(b)(4)(D), where the object was to force the employer to assign work on a new project to the union's members, rather than to the employer's own employees); Longshoremen ILWU Local 14 (Sierra Pacific Industries), 314 NLRB at 836.

<sup>15</sup> ILWU Local 26, 210 NLRB at 576.

Finally, IUPIW has made no direct effort to obtain the work or threatened any actions in order to retain it, and thus the Employer is not caught between two unions who are vying for the same work. Since the employer's unilateral action created the dispute, by reassigning the work away from the group which had been performing the work and which is now claiming it, Sections 10(k) and 8(b)(4)(D) do not apply.<sup>16</sup>

Accordingly, we conclude that the Union has a valid work preservation object and that no 10(k) notice of hearing should issue.<sup>17</sup>

B.J.K.

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<sup>16</sup> See Safeway Stores, 134 NLRB at 1323 (the second local did not even "press Safeway for the work").

<sup>17</sup> The Region is currently investigating ULP charges alleging that the same conduct violated Sections 8(b)(4)(B) and 8(e). The Region should submit those cases to Advice when it has completed its investigation and reached a recommendation.