

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

INTERNATIONAL ASSOCIATION OF
MACHINISTS DISTRICT LODGE 160, LOCAL
LODGE 289

and

Cases 19-CD-502
19-CD-506

SSA MARINE, INC.

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to § 102.46(a) of the Board's Rules and Regulations, Series 8, as amended, Counsel for the Acting General Counsel hereby files the following exceptions to the Decision and Order of Administrative Law Judge William G. Kocol ("the Judge") dated May 8, 2012, based upon a stipulated record after issuance of a Consolidated Complaint on October 31, 2011 ("the Consolidated Complaint"). Counsel for the Acting General Counsel takes exception to the following:¹

1) The Judge's finding that the facts in this case do not easily fall within the evil that Congress sought to proscribe through § 8(b)(4)(D) (ALJD 8: 1-2) because Respondent's

¹ References to the Administrative Law Judge's Decision and Order appear as (ALJD____:____). The first number refers to the pages and the second number refers to the lines.

pursuit of its pay-in-lieu contractual claim undermines the Board's § 10(k) determination in violation of § 8(b)(4)(D) under well-established Board precedent.

2) The Judge's finding that Charging Party SSA Marine, Inc. ("SSA"), created the jurisdictional dispute and was not an innocent bystander (ALJD 8: 7-9) because it ignores the fact that the Board invoked its § 10(k) jurisdiction because it determined that there was a legitimate work jurisdictional dispute and found insufficient evidence that SSA's assignment of the disputed work resulted from any coercion.

3) The Judge's finding that the Acting General Counsel sought to have Respondent reimburse SSA for the costs involved in defending against Respondent's grievance (ALJD 8: 9-11) because the appropriate remedy, and that requested, was that Respondent should reimburse SSA for its costs associated with defending against the pay-in-lieu damages action maintained by Respondent *following* the Board's § 10(k) determination, *not* the costs associated with defending against the grievance *prior* to that § 10(k) determination.

4) The Judge's finding that Respondent's grievance was "clearly meritorious" [sic] (ALJD 8: 11) because the Judge does not have the authority to determine the merits of that contractual dispute or to ignore the Board's conclusion that it would not rely on the arbitrator's award in that contractual dispute, and because whether Respondent's contractual grievance was meritorious is legally irrelevant under established Board precedent to resolving the Consolidated Complaint's allegations that Respondent's maintenance of its contractual damages action following issuance of the Board's § 10(k) decision violated § 8(b)(4)(ii)(D) of the Act.

5) The Judge's finding that the manner in which the Board fulfills its obligations under § 10(k) may be contributing to the creation of jurisdictional disputes (ALJD 8: 17-19) because the finding is unsupported by record evidence and is legally irrelevant under

established Board precedent to resolving the Consolidated Complaint's allegations that Respondent's maintenance of its contractual damages action following issuance of the Board's § 10(k) decision violated § 8(b)(4)(ii)(D) of the Act.

6) The Judge's finding that in issuing its § 10(k) decisions the Board always awards the work to the labor organization to whom the employer has most recently assigned the work (ALJD 8: 19-24) because the overbroad finding is unsupported by citation to any case precedent and is legally irrelevant under established Board precedent to resolving the Consolidated Complaint's allegations that Respondent's maintenance of its contractual damages action following issuance of the Board's § 10(k) decision violated § 8(b)(4)(ii)(D) of the Act.

7) The Judge's finding that SSA, PMA, and ILWU made a joint decision "to take the work from employees represented by Respondent" (ALJD 8: 25-26) because it is unsupported by any record evidence.

8) The Judge's question regarding what remedies are available to employees who suffer dislocations caused by their employer's breach of the collective-bargaining agreement (ALJD 8: 29-31) because it is legally irrelevant under established Board precedent to resolving the Consolidated Complaint's allegations that Respondent's maintenance of its contractual damages action following issuance of the Board's § 10(k) decision violated §8(b)(4)(ii)(D) of the Act.

9) The Judge's finding that cases cited by Acting General Counsel are inapposite here, where Respondent has clearly renounced any claim that it is seeking the disputed work (ALJD 8: 40-52), because the finding is legally erroneous; those cases, as well as others cited by Counsel for the Acting General Counsel in his brief to the Judge, establish that Respondent's maintenance of its contractual damages action following the Board's

§10(k) decision violates § 8(b)(4)(D) where Respondent's objective is to obtain the disputed work or to obtain monetary damages *in lieu of* the disputed work.

10) The Judge's finding that there is no statutory or direct case authority that bars all undermining of the Board's § 10(k) award by a union (ALJD 9: 1-2) because it is unsupported by precedent and is legally erroneous; Board precedent establishes that the maintenance of any legal action that directly conflicts with the Board's §10(k) decision, as here, undermines the Board's § 10(k) decision and violates § 8(b)(4)(D).

11) The Judge's rhetorical question as to whether Respondent's efforts to regain the disputed work through collective bargaining with SSA would undermine the Board's § 10(k) decision (ALJD 9: 2-4) because there is no record evidence showing that Respondent made such efforts, and, therefore, it is legally irrelevant to resolving the Consolidated Complaint's allegations that Respondent's maintenance of its contractual damages action following issuance of the Board's § 10(k) decision violated § 8(b)(4)(ii)(D) of the Act.

12) The Judge's finding that it is not clear as to what Respondent has done that results in the undermining of the Board's § 10(k) decision (ALJD 9: 4) because the record evidence and established Board precedent cited to the Judge demonstrate that Respondent's maintenance of its contractual damages action following issuance of the Board's § 10(k) decision violated § 8(b)(4)(ii)(D).

13) The Judge's finding that the Acting General Counsel has failed to show that Respondent's conduct had a prohibited object (ALJD 9: 8-9) because established Board precedent cited by the Counsel for the Acting General Counsel demonstrates that Respondent's maintenance of its contractual damages action seeking monetary payments in lieu of the disputed work directly conflicts with and undermines the Board's § 10(k) decision and, therefore, has an objective proscribed by § 8(b)(4)(D) of the Act.

14) The Judge's finding that the Acting General Counsel has failed to show that Respondent's conduct restrained or coerced SSA because PMA has agreed to indemnify SSA arising from SSA's breach of contract (ALJD 9: 9-11) because it: is unsupported by any Board precedent warranting dismissal of the Consolidated Complaint's allegations; conflicts with established Board precedent holding that Respondent's contractual damages action has an objective proscribed by § 8(b)(4)(D) where SSA has lawfully assigned the work to ILWU-represented employees under the Board's § 10(k) determination; and ignores the fact that SSA remains ultimately liable for any damages arising from the arbitrator's award under Respondent's legal action should PMA elect not to honor its agreement with SSA.

15) The Judge's finding that PMA could confidently assume that the Board would affirm SSA's taking of the disputed work from Respondent in breach of its collective-bargaining agreement, give the work to ILWU and bar Respondent from seeking an effective remedy for the contract breach (ALJD 9: 12-15) because it is unsupported by record evidence and is legally irrelevant under established Board precedent to resolving the Consolidated Complaint's allegations that Respondent's maintenance of its contractual damages action following issuance of the Board's 10(k) decision violated § 8(b)(4)(ii)(D) of the Act.

16) The Judge's finding that PMA's conduct in agreeing to indemnify SSA has removed any coercive effect of Respondent's conduct on SSA (ALJD 9: 15-16) because of the reasons set forth above in Exception No. 14.

17) The Judge's finding that he agrees with Respondent's argument that Congress did not intend for the Board to protect an employer under the circumstances present here (ALJD 9: 26-35) because it is legally erroneous and conflicts with established Board

precedent that Respondent's maintenance of its contractual damages action following the issuance of the Board's § 10(k) decision here violated § 8(b)(4)(ii)(D).

18) The Judge's finding that a confluence of factors under § 8(b)(4)(D) and § 10(k) here have undermined the Act's core policies of discouraging contract breaches, encouraging parties to use the grievance-arbitration process and to respect arbitration awards, and encouraging effective remedies for contract breaches (ALJD 9: 37-44) because it is legally erroneous and conflicts with established precedent honoring the primacy of the Board's § 10(k) determination over any conflicting contractual claims or arbitration awards.

19) The Judge's finding that in the absence of clear precedent he will not take the next step down the road of undermining the above core policies of the Act (ALJD 9: 44-45) because of the reasons set forth above in Exception No. 18.

20) The Judge's Order that the complaint [sic] is dismissed (ALJD 10: 6) because established precedent mandates that Respondent's continued maintenance of its contractual damages action following issuance of the Board's § 10(k) decision here violated § 8(b)(4)(ii)(D).

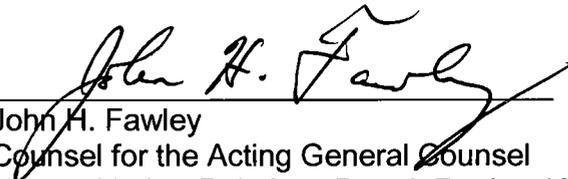
21) The Judge's failure to find that Respondent has violated § 8(b)(4)(ii)(D) by maintaining its contractual damages action that conflicts with the Board's § 10(k) decision under established Board precedent.

22) The Judge's failure to order Respondent to: withdraw its contractual damages action that conflicts with the Board's § 10(k) decision; reimburse SSA for any reasonable legal fees and expenses associated with the defense of Respondent's contractual damages

action following issuance of the Board's § 10(k) decision, and post a remedial notice consistent with established Board precedent.

DATED at Seattle, Washington, this 12th day of June 2012.

Respectfully submitted,



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