

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR REALTIONS BOARD

REGION 19

In the Matter of:

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 48,
AFL-CIO,

and

ICTSI OREGON, INC.,

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 8.

Case No. 19-CD-080738

BRIEF OF THE EMPLOYER – CHARGING PARTY

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I. INTRODUCTION

There are four central facts in this Section 10(k) proceeding that are beyond dispute and compel the Board to maintain the status quo: (1) electricians employed by the Port of Portland, Oregon (“the Port”) and represented by the International Brotherhood of Electrical Workers, Local 48 (“IBEW”) have continuously and uniformly performed the plugging, unplugging and monitoring of refrigerated containers on the dock at Terminal 6 at the Port (“the disputed work”) since the Terminal began operations in 1974; (2) International Container Terminal Services, Inc. (“ICTSI”) has operated Terminal 6 since February 12, 2011 under a 25-year lease with the Port, a lease which unambiguously states that the Port’s electricians must continue to perform the disputed work they have previously performed for the last 38 years and that ICTSI is prohibited from taking any action to interfere with the Port’s continued performance of this work upon pain of ICTSI being held in material breach of its lease; (3) the Secretary-Treasurer of the International Longshore and Warehouse Union, Local 8 (“ILWU”), who is also a Commissioner of the Port, voted to approve the lease and other high-ranking ILWU officials spoke in favor of the lease at a public hearing held on May 11, 2010, at which time the Port Commission approved the lease; and (4) after the lease was entered into, ICTSI became a member of the Pacific Maritime Association (“PMA”) subject to a collective bargaining agreement between the PMA and the ILWU, an agreement which in its first paragraph states that it applies only to employees of member employers and therefore has no application to employees of non-members of the PMA such as the IBEW-represented electricians employed by the Port.

Despite these uncontradicted facts, the ILWU now makes a belated claim that ICTSI must wrest control of the disputed work from the Port in derogation of the clear

terms of ICTSI's lease and assign that work to ILWU members who have not performed this work at Terminal 6 for the last 38 years. In making this claim, the ILWU ignores the incontrovertible fact that ICTSI does not control and has no right to assign the disputed work. Electing to protect its lease with the Port which alone gives ICTSI the right to conduct business at Terminal 6, ICTSI has presented its position at the Section 10(k) hearing, 29 U.S.C. § 160(k), that it prefers to maintain the status quo that has existed at Terminal 6 since 1974. The result of maintaining the status quo is that the disputed work remains with the Port electricians. Based on this employer preference and other factors traditionally considered by the National Labor Relations Board ("the Board") in resolving jurisdictional disputes under Section 10(k), ICTSI respectfully seeks an order from the Board awarding the disputed work as required by ICTSI's lease with the Port.

II. STATEMENT OF FACTS

A. The Lease Between ICTSI and the Port

In 1974, the Port began operations at Terminal 6, a facility that is wholly owned by the Port. (Tr. 40.) Between 1974 and approximately 1993, the Port was a direct employer of longshore labor and had a contract with Local 8 of the ILWU. (Tr. 43.) However, the Port was not a member of the PMA. In 1984, the Port entered into a collective bargaining agreement with the ILWU, an agreement which both parties have continued to treat as effective pursuant to its annual automatic rollover provision. According to Section 5(d) of that CBA, the ILWU agreed that "[a]ll practices regarding jurisdictional lines with other labor organizations shall be observed." (E-4, p. 3.)¹

This included the practice between 1974 and 1984 under which the Port employed

¹ Although the Port has not directly employed longshore labor since 1993, the ILWU-Port collective bargaining agreement has never been effectively terminated by either party. It does not contain a clause incorporating future iterations of the PMA-ILWU agreement.

IBEW electricians as well as other craft employees at Terminal 6 pursuant to a labor agreement with the District Council of Trade Unions (“DCTU”). The Port’s DCTU employees, including the Port’s electricians perform general maintenance and repair work at Terminal 6.² The Port’s IBEW-represented electricians uniformly and consistently performed the disputed work between 1974 and 1984. In compliance with Article 5(d) of the 1984 contract between the Port and the ILWU, the practice of assigning the disputed work to the Port’s electricians continued uninterrupted through 1993, when the Port ceased directly employing longshoremen.

In 1993, the Port entered into a management agreement with Marine Terminals Corporation (“MTC”) under which the Port retained its status as port operator while MTC acted as a management company and labor broker for longshore work at Terminal 6. (Tr. 41-42.) At some point, MTC’s successor, Ports America, took over the management agreement. (*Id.*) Under this arrangement, the Port continued to be the operator of Terminal 6 and, in this capacity, it handled the marketing of the terminal and the pricing for the steam ship line contracts. (Tr. 42.) MTC and/or Ports America employed the longshore labor at Terminal 6 but the Port continued to employ electricians represented by IBEW as well as other craft employees pursuant to its labor agreement with the DCTU. Under the Port’s management agreement with MTC/Ports America, the Port’s DCTU employees, including the Port’s electricians, continued to perform the general maintenance and repair work at Terminal 6. (Tr. 40-41.) During the entire time that Terminal 6 was managed on behalf of the Port by either MTC or Ports America, the disputed work continued to be performed exclusively by Port electricians represented by the IBEW.

² The DCTU employees include seven different trades. (Tr. 273.)

In 2006, the Port's Executive Director, Bill Wyatt, asked the Port's Marine and Industrial Director, Sam Ruda, to take a "fresh strategic look" at the Port's container business line and, in particular, at the business model being utilized by the Port at Terminal 6. (Tr. 44.) Ruda was the "sponsor" and team leader of the process by which the operation of Terminal 6 was eventually turned over to a private company, ICTSI. (Tr. 52.) After much internal study and discussions and after enlisting the firm of Morgan Stanley as an advisor, the Port issued a Request for Qualifications ("RFQ") to identify potential parties that might be interested in becoming the operator of Terminal 6 under a concession agreement involving a long-term lease, which could extend for as long as 75 years. (Tr. 44-45, 49.) Such concession agreements often involve significant upfront payments by the concessionaire. (Tr. 49.)

The RFQ was issued on January 28, 2007 and solicited expressions of interest from interested parties no later than March 31, 2008. (Tr. 46.) The RFQ notified all potentially interested parties that, while MTC currently employed ILWU-represented labor, the Port also directly employed trade union members, including electricians, pursuant to its relationship with the DCTU. (E-1, p. 18.) This language was placed in the RFQ because "it was very important for the Port, very important for management of the Port to honor our historic labor contracts," which included both the Port's agreement with the ILWU and its agreement with the DCTU. (Tr. 47.)

During the RFQ process, there was a lot of interest from both U.S.-based and internationally-based companies in taking over operation of Terminal 6. (Tr. 48.) One of the companies expressing interest was ICTSI, which was introduced to the Port during the RFQ process. (*Id.*) The Port considered the qualifications from various companies and was moving forward in the RFQ process when, in late 2008, the global financial meltdown occurred, which dampened the appetite for investment in port facilities. (Tr.

49.) Due to these extreme financial conditions, the Port suspended the RFQ process.

(Id.)

However, in March or April of 2009, the Port began bilateral discussions with ICTSI for a standard lease agreement, which generally involves a shorter term than a concession agreement and a smaller upfront payment by the lessee. (Tr. 50-51.) The negotiations were lengthy and intensive. The Port was represented by a team of lawyers, including a locally prominent labor lawyer, Rick Liebman, who advised the Port regarding waterfront labor issues. (Tr. 52-53.) Importantly for this case, Liebman also represented the PMA during the same time frame. (Tr. 415.)

Entering into the negotiations with ICTSI regarding the lease, the Port had an “overarching” position that “historic work jurisdictions would be maintained” when the “new terminal operator took over the facility.” (Tr. 53.) “A foundational element of any maritime lease” that the Port was going to enter into “would be preservation of historic and in effect collective bargaining agreements,” including the Port’s 1984 contract with the ILWU as well as the Port’s ongoing contract with the DCTU. (Tr. 82-83.) As a result, the Port required in its lease proposal that the DCTU-represented employees continue to perform the work they had historically performed at Terminal 6. The Port’s position was formulated with guidance from its legal counsel and was “a nonnegotiable component of the lease.” (Tr. 54.)

On May 12, 2010, after approximately 15 months of negotiations between the Port and ICTSI, the parties entered into a 25-year lease under which ICTSI would operate Terminal 6. (Tr. 56.) Pursuant to the lease, the “DCTU Work” is defined as “the work to be undertaken by the Port at the Terminal by the DCTU Employees subject to the DCTU Agreement.” (E-2, p. 6; Tr. 56.) The DCTU Agreement states that it covers “all construction, demolition, installation and maintenance assignments which have been

historically and consistently performed by employees covered under this Agreement at all marine cargo handling facilities owned and operated by the Port, including any marine cargo handling facilities leased and operated by the Port.” (E-5, p. 1.) Importantly for this case, the “scope of [the DCTU] Agreement shall include any marine cargo handling facilities leased by the Port to an independent operator to the extent the Port retains the responsibility for the maintenance or repair of any such leased facility or facilities.” (E-5, p. 2.) As the Port retained maintenance and repair responsibilities for Terminal 6 under the Lease and as the disputed work has historically been performed by DCTU Employees since 1974, there can be no legitimate question that the DCTU contract by its express terms covers the disputed work.

Pursuant to Section 3.23(a) of the Lease, the “Port shall have responsibility for the conduct of the DCTU Employees in performing the DCTU Work.” (E-2, p. 58.) Section 3.23(a) further states:

The Port shall, for so long as the DCTU Agreement remains in effect with respect to the Terminal, make available to the Lessee the DCTU Employees for the provision of the DCTU Work. The Lessee shall accept the Port’s utilization of the DCTU Employees for the provision of the DCTU Work and shall, in accordance with Section 3.23(d) accept work performed by the DCTU Employees at such time as the Lessee determines that such work complies with the provisions of this Agreement (including the Operating Standards) and applicable law.

(*Id.* (emphasis in original).) Only “[i]n the event the DCTU Agreement is not in effect with respect to the Terminal” will ICTSI, under Section 3.23(e)(ii), “not be required to utilize the DCTU Employees with respect to the DCTU provision of the DCTU Work * * *.” (E-2, pp. 59-60.) Thus, ICTSI is “responsible for all aspects of the Port’s operations; *provided* that, for so long as the DCTU Agreement remains in effect, [ICTSI] shall comply with the provisions of Sections 3.23(a) through (d) * * *.” (E-2, p. 42 (emphasis in original).)

There can be no legitimate question that serious ramifications can occur if ICTSI does not comply with the lease provisions regarding provision of the DCTU Work. Thus, Section 2.8 of the Lease states:

The Lessee acknowledges that the DCTU Work is subject to the DCTU's jurisdiction under the DCTU Agreement. For so long as the DCTU Agreement remains in effect with respect to the Terminal, the Lessee shall not (i) perform, or except as permitted hereunder, cause to be performed, at the Terminal any DCTU Work or (ii) undertake any other action that would cause the Port to be in violation of the terms of the DCTU Agreement. The Lessee shall be responsible for any claims, including any labor claims that arise from the Lessee's failure to comply with this Section 2.8.

(E-2, p. 40 (emphasis added).) Thus, the Port reserves the right to enter the Terminal at all reasonable times to ensure compliance with the Lease and “to perform the DCTU Work * * *.” (E-2, p. 45.) Additionally, to the extent that any third party, including the DCTU, were to make claim against the Port, ICTSI would be required to defend and indemnify the Port for any loss occasioned thereby to the extent that the loss arose from “any failure by the Lessee * * * to comply with, observe, or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement * * *.” (E-2, p. 91.) And perhaps even more importantly for purposes of this case, the Port retains the power under the Lease Agreement to claim that any failures by ICTSI to comply with Sections 2.8 and 3.23 of the Lease constitute an Event of Default, which if not timely cured as set forth in the Lease, would justify termination of the Lease. (E-2, pp. 101-103.) The Port also retains the right under the Lease to seek specific performance or sue for damages for an Event of Default by ICTSI. (E-2, pp. 103-104.)³

Sam Ruda from the Port testified about the intentions of the lease language

³ The ILWU presented no evidence contradicting ICTSI's evidence that the lease between the Port and ICTSI created a binding agreement requiring that Port electricians perform the disputed work. (Tr. 400.)

regarding the DCTU Work. He testified that ICTSI pays the Port an annual sum for the privilege of operating the Port's Terminal. ICTSI also pays the Port for the various services that the Port provides, which involves both work performed by the DCTU Employees as well as work performed by others. Thus, ICTSI pays the Port for the DCTU work which includes electrical work on the Port-owned cranes at Terminal 6, general maintenance and repair work on the Terminal 6 premises owned by the Port, and the plugging, unplugging and monitoring of refrigerated containers, the disputed work in this case. (Tr. 57-58.) The Lease also calls for ICTSI to reimburse the Port for services related to mechanical work on the crane (which at the time the lease was entered was performed by ILWU-represented employees of Ports America) and for Port security (which is performed by security guards represented by a different local of the ILWU).

Ruda testified that, under the lease language which he negotiated, ICTSI is not permitted to perform work that is defined as DCTU Work. (Tr. 58.) The Port has never released ICTSI in any manner from its obligations to refrain from performing this work. (Tr. 60.) The Port's interest is in honoring its labor agreements with both the ILWU and the DCTU and because the DCTU has "historical jurisdiction" over the disputed work, Ruda testified that the Port preferred that the DCTU continue to perform the disputed work. (Tr. 60-61.)

The lease was approved by the Port Commission on May 12, 2010 at a public meeting. (Tr. 61.) Bruce Holte, the Secretary-Treasurer of Local 8 and a Port Commissioner voted in favor of the Lease.⁴ Ruda testified that Holte's "prominent

⁴ While Holte testified that he was not given a copy of the lease before he voted for it, he agreed that he was given "bits and pieces" of the lease, including the provisions of Section 3.23 governing the Port's control of the DCTU Work. (Tr. 507.) Holte knew when he voted for the lease that the Port's IBEW-represented electricians had been performing the disputed work since 1974. (Tr. 508.) Although he claimed to have discussed with Ruda the ILWU's claim that the disputed work belonged to the ILWU, he

concern” at the meeting was that the Port’s 1984 CBA with the ILWU “was either incorporated by reference or its jurisdictional boundaries carried forth” in the Lease. (Tr. 62.) The official minutes of the Port Commission meeting indicate that “Commissioner Holte asked if the lease references and recognizes the pertinent portions of the 1984 Collective Bargaining agreement between the ILWU and the Port” and that Ruda assured Commissioner Holte that the Lease did so. (E-3, p. 2.) In fact, Section 3.17 of the Lease expressly states: “Prior to the signing date, the Port has provided and the Lessee acknowledges receiving a copy of that certain Collective Bargaining Agreement between the I.L.W.U. Locals 8 and 40 and the Port dated October 22, 1984, which agreement has not been terminated as of the Signing Date.” (E-2, p. 52.) Local 8 President Jeff Smith and ILWU Coast Committeeman Leal Sundet spoke in favor of the Lease at the public meeting. (Tr. 61, 63.)

B. The Disputed Work

Jim Mullen, the current terminal manager for ICTSI at Terminal 6 and the prior terminal manager for MTC and Ports America (when it managed Terminal 6 for the Port) since 2004, offered a comprehensive description of the plugging/unplugging and monitoring of refrigerated containers as it has historically been performed at Terminal 6. (Tr. 113-115.)⁵ Upon his arrival at Terminal 6, Mullen became aware that the disputed

admitted that the Port “did not agree with that” and never promised to discontinue using DCTU Employees to perform the DCTU Work. (Tr. 502, 510.) Rather, the Port indicated to Holte that it would deal with the ILWU’s pursuit of the disputed work “when it happens.” (Tr. 520.) Holte further admitted that Section 3.23 of the Lease required ICTSI to order DCTU Work from the Port to be performed by Port employees. (Tr. 517.) However, Holte would not admit that ICTSI would be in breach of the Lease if it assigned the work to the ILWU because the lease “makes no difference” to him, it is only the ILWU-PMA contract that matters. (Tr. 518-519.)

⁵ Mullen worked at Terminal 6 since 1998 in various capacities prior to his promotion to terminal manager in 2004. (Tr. 117-118.)

work was performed by Port electricians represented by the IBEW pursuant to the Port's contract with the DCTU. (Tr. 122.) According to Mullen this practice dated back to the inception of the terminal in 1974 and continued to the date of the hearing. (Tr. 122.)⁶ Neither MTC, Ports America nor ICTSI ever assigned the disputed work to ILWU-represented employees. (Tr. 125.) Mullen understands that ICTSI's Lease with the Port does not permit ICTSI to assign the disputed work to the ILWU and Mullen has been instructed by his superior, Elvis Ganda, ICTSI's CEO, to protect the Lease. (Tr. 123-125.) As a result, Mullen testified as follows on behalf of ICTSI when asked about ICTSI's "preference regarding the continued performance of the plugging, unplugging, and monitoring of refrigerated containers on the dock at Terminal 6":

Our preference is not to breach our lease agreement with the Port of Portland. And as they did not give us the right to control this work, our preference is to honor and protect the lease, as we are a new company. And we look to have a long and prosperous growth in Portland. And that, at the end of the day, we adhere to the lease agreement between the Port of Portland and ICTSI.

(Tr. 167.) Mullen further testified that the Port had never advised ICTSI that it was permitted to control the disputed work or to assign that work to ICTSI employees. (Tr. 168.)

Containers, which are either owned or leased by the carriers, arrive at the Port by vessel, truck or rail. Since the largest number arrive by truck, Mullen described in detail

⁶ Myron Salo, the superintendent of marine operations for the Port at Terminal 6 when it began operations in 1974, testified that DCTU electricians performed the disputed work since 1974 and that this practice never changed. (Tr. 244-245.) Salo testified that this practice was imported from Terminal 2 of the Port where the electricians had also done the plugging, unplugging and monitoring of reefers. (*Id.*) Terminal 2 is about 10 miles from Terminal 6. A company called SSA manages Terminal 2 for the Port under a management agreement. Between 2001 and 2005, ILWU personnel performed the plugging, unplugging and monitoring of reefers. However, no reefers have been processed at Terminal 2 since 2005 and the management agreement with the Port does not require SSA to use DCTU employees to perform the reefer work. (Tr. 492-493.)

the process long used at Terminal 6 to process containers transported by truck.⁷ (Tr. 129.) Some containers are refrigerated containers, so-called “reefers” and some are non-refrigerated containers. While “reefers” are being transported by truck, the refrigeration unit is usually powered by a generator called a “genset” that is fueled by gasoline or diesel. (Tr. 130.)

When the truck enters Terminal 6, the truck driver will engage in a “gate transaction” with an ILWU-represented marine clerk employed by ICTSI during which the clerk will take the trucker’s booking number. The trucker is directed to a location about 100 yards from the gate called the “reefer check-in” station, otherwise known as the “reefer block.” (Tr. 133-134.) As part of the transaction, the ILWU clerks will inform a Port electrician that a reefer has arrived at the terminal. (*Id.*) The clerk will provide the electrician with the container number, the temperature and vent setting, and other information regarding the reefer. (Tr. 133-134, 180.)

Once the electrician gets the information, he will report to the reefer block. He will first confirm the temperature and vent settings for the reefer to confirm that they are in line with the carrier’s specifications. If there is a variance, the electrician will inform the ILWU marine clerk who will then contact the carrier to see how the carrier wishes to handle the container. (Tr. 134-135.) If the customer decides to reject a load, the ILWU marine clerk will explain that to the trucker. (Tr. 178.) Assuming that there is no variance, the electrician disconnects the genset from the reefer and tells the driver that he is free to go into the container yard where the trucker will proceed to a designated spot which was previously given to him by the marine clerk as part of the previously mentioned gate transaction. (Tr. 136-137.)

⁷ There was no indication that the disputed work is performed in a significantly different manner when the containers are transported by barge or other means.

Once the trucker arrives in the container yard to his designated spot, the genset will be physically removed from the unit by an ILWU-represented mechanic employed by Terminal Maintenance Corporation (“TMC”). Since the genset units are owned by the carrier, TMC handles and repairs these units as part of its contract with the carriers to perform maintenance and repair of the containers. (Tr. 139-140.) TMC has a Space Use Agreement with ICTSI which provides a shop area for TMC mechanics to work. (E-6; Tr. 140.) According to Article 6.10 of the Space Use Agreement, TMC “will not by any act or omission cause a default or violation by ICTSI or the Port under any union labor agreements and rules applicable to work by ICTSI, the Port or others at the Premises.” (E-6, p. 10.)

After the genset is removed from the container, a top loader operator represented by the ILWU and employed by ICTSI will remove the container from the truck chassis and set it in the designated yard spot. At that point, the Port electrician represented by DCTU will plug the reefer unit into a bank of electrical receptacles owned by the Port. (Tr. 142-143.)

Most export reefers sit on the dock for a few days. It is therefore necessary to monitor the reefer unit to insure that it is properly running and maintaining the carrier’s required temperature for the cargo. The Port’s electricians perform this function twice daily and record the temperature on a reefer monitor log, which is maintained by the Port and is not provided in the normal course of business to ICTSI. (Tr. 144.) If the Port electricians notice a problem with a reefer unit while monitoring it, they send an error report to the TMC mechanics calling on them to repair or otherwise correct any problem with the refrigeration unit. The error report form is also not provided in the normal course of business to ICTSI. (Tr. 145-146.)

When the vessel arrives and the reefer is ready to be loaded on the vessel, the

ILWU-represented marine clerks employed by ICTSI review the crane work sequence for loading the vessel and identify when reefers are to be loaded. (Tr. 146.) At this point, the marine clerks or a supercargo (represented by ILWU) will contact the electricians that a reefer is ready to be loaded and needs to be unplugged. The electricians will then report to the reefer block, unplug the reefer, wrap up the cord and prepare the container for loading on the vessel. (Tr. 146-147.) An ILWU-represented top end loader operator will then come and move the container to a yard truck, which will transport the container to the vicinity of the crane where it will be loaded onto the vessel. (Tr. 149.) Once the vessel is loaded on the vessel, the ILWU crane mechanics employed by ICTSI are called onto the vessel at which time they plug the reefers into the vessel's power supply. (Tr. 150.)

The importation of a reefer unit proceeds in much the same way, but in reverse order. After the vessel arrives, ICTSI prepares a work sequence that identifies where reefer containers are located and at what point they will be discharged. (Tr. 151.) The ILWU-represented supercargo (otherwise know as a walking boss) calls the ILWU mechanic employed by ICTSI who arrives on the vessel to unplug the reefer from the vessel's power source. (Tr. 151.) The reefer is then removed from the vessel to the reefer block by ILWU-represented equipment operators employed by ICTSI. (Tr. 152-153.) The ILWU-represented marine clerk will then contact the Port's electricians to notify them that they have a "live reefer" that needs to be plugged into the Port's power receptacles. (Tr. 153.) Once the reefer is plugged in by the Port electricians, the electricians will perform the required monitoring and fill out the monitoring log while the reefer sits in the reefer block waiting to be picked up by a trucker. (Tr. 154.) If a temperature variance is noted by the Port electrician, the electrician will notify a mechanic employed by TMC. (Tr. 155.) When a trucker comes to pick up the reefer, the

electricians are notified and will unplug the reefer. (*Id.*) TMC mechanics will be notified if the reefer needs a genset and, once the loader operator places the container on the ground, the TMC mechanic will install the genset. The reefer will then be placed on the truck and leave the Terminal. (Tr. 156.)

The disputed work performed by the Port's electricians is not directed in any way by ICTSI. The Port hires the electricians, sets their terms and conditions of employment, trains them, holds regular crew meetings and disciplines and discharges the employees when necessary. (Tr. 277-278.) The Port establishes the electrician's job duties by way of a written job description prepared by the Port without involvement by ICTSI. (E-21; Tr. 280.) Paperwork required to be filled out by the Port's electricians in performing the disputed work such as reefer check-in sheets, reefer monitor logs and error reports are filled out by the Port electricians and are not distributed to ICTSI in the regular course of business. (E-22-24; Tr. 280-284.)

C. The ILWU's Attempts in Conjunction with PMA to Force ICTSI to Wrest Control of the Disputed Work from the Port and Reassign the Work to Longshoreman

ICTSI began operating Terminal 6 on February 12, 2011. (Tr. 157.) On February 10, 2011, the ILWU sent ICTSI's CEO, Elvis Ganda, a letter claiming various categories of work under the 2008 Pacific Coast Longshore Contract document ("PCLCD"), including "reefer monitoring" and the "plugging/unplugging of reefers in the yard." (E-7.) Ganda responded to this letter on February 15, 2011 denying the ILWU's claim to the disputed work and pointing out that, under the Lease, ICTSI "had no right to control the work in question and must, consistent with its lease obligations, refrain from any action that would interfere with the continued performance by Port employees of work that they have historically performed and that is covered by the DCTU Agreement." (E-8.) This letter invited the ILWU to present any additional information that the ILWU wanted

ICTSI to consider concerning the ILWU's claim to the disputed work. (*Id.*) The ILWU did not respond to this letter or provide any additional information. Port electricians represented by the DCTU continued to perform the work in dispute and the ILWU did not file any grievances under the PCLCD protesting the continuation of that longstanding practice. (Tr. 159-160.)

However, in the spring of 2012, the ILWU began filing a flurry of grievances against ICTSI and others claiming the disputed work. (E-9-13, 15-19.) Each grievance sought back pay for lost work opportunity. (*Id.*) For example, on one of the five grievances dated March 9, 2012, the ILWU sought 1.5 hours of pay at a mechanics rate of pay for each of fifty one reefer units. (E-12.) The mechanic's hourly rate is approximately \$41, without consideration of fringe benefits. (Tr. 163.) Thus, for this one grievance only, the ILWU sought approximately \$3,100 in back pay.

The PMA initially defended ICTSI's position that it did not control the disputed work and therefore did not violate the PCLCD by not assigning the work to its ILWU mechanics. (Tr. 164, 417.)⁸ After the local PMA representatives and the local ILWU representatives deadlocked on the grievances, the ILWU in late April or early May submitted the grievances to arbitration. (Tr. 165, 425.) The arbitration was scheduled for May 31, 2012 before the PMA-ILWU Area Arbitrator Jan Holmes. Initially, the PMA informed ICTSI that it would defend ICTSI's position and it continued to deny the ILWU's grievances. (Tr. 165, 424-425.) On May 9, 2012, in a conference call between PMA attorney Todd Amidon, PMA representative Mike Dodd and ICTSI, the PMA continued to advise ICTSI that it would defend ICTSI's position at the arbitration. The

⁸ The PMA only has the authority to engage in collective bargaining for its members and to administer the PCLCD. (Tr. 423.) It has no authority to enter into commercial leases, carrier contracts or to assign workers. (Tr. 421-423, 472.)

purpose of the conference call was to prepare for the arbitration proceeding, which Dodd was planning to present on behalf of PMA. (Tr. 425-426.)

On May 10 2012, ICTSI received a letter from Norman Malbin, attorney for the IBEW, in which Mr. Malbin threatened that the IBEW “will do whatever we have to do to prevent losing jurisdiction over work we have been performing for over twenty years, up to and including picketing.” (E-20, p. 3.) As a result of receiving this threat, ICTSI filed an unfair labor practice charge on May 10, 2012 against the IBEW under Section 8(b)(4)(D) of the Act, 29 U.S.C. § 158(b)(4)(D), based on the conflicting grievance/arbitration claims of the ILWU and the picketing threat by the IBEW. The Regional Director of Region 19 scheduled a Section 10(k) hearing to commence on May 24, 2012.

After ICTSI filed the ULP charge, PMA received notice from Bob McEllrath, the President of the ILWU, that he was very unhappy “about ICTSI’s decision to file an unfair labor practice charge.” (Tr. 433.) The ILWU told PMA that PMA wasn’t “living up to its bargain” and “how are we going to be able to work together moving forward” regarding automation and other issues if individual members of PMA were not willing to abide by the Scope of Agreement clause of the PCLCD. (Tr. 433.) Over the next few days, the ILWU pushed the PMA for a meeting of the Coast Labor Relations Committee (“CLRC”), which is the highest level joint committee comprised of representatives of PMA management and ILWU officials. (Tr. 357, 433.) According to Rich Marzano, the Coast Director of Contract Administration and Arbitration for PMA, who testified for the ILWU at the hearing: “The acceleration of this issue and the urgency of getting resolution under the grievance machinery that the Union sought did happen after the filing of the ULP.” (Tr. 434.) Manzano testified that the ILWU stated to him that its urgency in setting up the CLRC meeting was motivated by its desire to “get the

arbitration cancelled” and “to have something contractual, which this agreement is, prior to this 10(k) hearing.” (Tr. 436.)⁹ Leal Sundet, Coast Committeeman for the ILWU, affirmed that the meeting was timed because of the Section 10(k) charges. (Tr. 620.) Sundet also admitted that part of the reason that the CLRC directed ICTSI, and not the carriers who were also objects of the ILWU grievances, to assign the disputed work to the ILWU was because ICTSI filed for a Section 10(k) hearing. (Tr. 728.)

The CLRC meeting was held on the afternoon of May 23, 2012, the day before the Section 10(k) hearing was to commence. (Tr. 436.) ICTSI was neither invited to the meeting or notified that it was taking place. (*Id.*) The President of the ILWU, Mr. McEllrath, its Vice-President, Mr. Familathe and Coast Committeeman Leal Sundet appeared for the ILWU along with two other ILWU representatives. Mr. Marzano was the sole representative for PMA. (Tr. 434-435.)

As a result of the meeting, the CLRC issued minutes which “instructed ICTSI to assign the subject work to ILWU represented personnel in accordance with the PCLCD and this CLRC agreement” and “to comply with Section 1.76, PCLCD.” (I-8.) Marzano testified at hearing that, in reaching the conclusion that it did regarding the subject work, the CLRC could only consider the PCLCD and no other documents, including the lease. (Tr. 404.) Marzano stated that: “[I]n addressing at the CLRC level, we could only look at the application of the [PCLCD] and couldn’t consider the lease or anything else. It was only the contract that was being considered. So we did not consider the control of the work.” (Tr. 403.) Thus, while the concept of “control of work” was admittedly an important concept regarding the application of the PCLCD concerning the movement of

⁹ Later in his cross-examination by IBEW’s lawyer, Marzano attempted to recant this testimony, indicating that his understanding of the ILWU’s motivation was not based on explicit statements by ILWU officials. (Tr. 443-445.)

cargo, Marzano was unable to state that it would not be similarly important with regards to maintenance and repair work. Instead, he merely testified without explanation that the right to control the disputed work was not a consideration simply because the language of the PCLCD allegedly defined the disputed work as maintenance and repair work. (Tr. 402-404.) However, when asked about Section 1 of the PCLCD which defines the scope of the contract and governs assignment of work to longshoreman, Marzano admitted that the PCLCD only applies to “employees who are employed by the members of the Association to perform work covered herein” and that the electricians currently performing the disputed work were not employed by a PMA member. (Tr. 396-397.)

As stated above, the CLRC minutes instructed ICTSI to comply with Section 1.76 of the PCLCD. Section 1.76 was made a part of the PCLCD in 2008. It states: “The Employers shall assign work in accordance with Section 1 provisions and as may be directed by the CLRC or an arbitration award, which the Employers shall defend in any legal proceeding. PMA shall participate along with the individual Employers assigning the work in any legal proceeding.” (I-3, p. 11.) According to Marzano, Section 1.76 was intended to mandate that any PMA member involved in a Section 10(k) hearing prefer the ILWU to any competing labor organization. (Tr. 439.) Mr. Sundet for the ILWU agreed that this was the intent of Section 1.76. (Tr. 655.)

Marzano admitted that the CLRC minutes of May 23, 2012 demonstrated “PMA’s position that ICTSI was required to prefer the ILWU to perform the work in question” and to “put on a strong case in defense of its position to use the ILWU.” (Tr. 440.) Marzano further admitted that the determination of the CLRC “was intended to affect ICTSI’s decision as to how it should testify regarding employer preference,” which he described as the “specific reason” why the CLRC minutes instructed ICTSI to comply with Section 1.76 of the PCLCD. (Tr. 437-438.) Marzano felt that ICTSI had not

complied with Section 1.76 based on the case it presented at hearing, a sentiment echoed in an email sent by PMA's attorney, Amidon, to ICTSI's attorney while the hearing was being conducted. (Tr. 440, Tr. 796; E-29.)

ICTSI became a member of the PMA in June 2010, after it entered into its lease with the Port. The PMA Bylaws authorize fines of \$50,000 per occurrence and expulsion from PMA if members "violate any provision of any contract or agreement" made by PMA. (E-25, p. 13.) The ILWU has filed a complaint with the PMA asking it to either fine and/or expel ICTSI because it allegedly violated Section 1.76 based on the positions that it took at the Section 10(k) hearing. (Tr. 724-725.) Additionally, Leal Sundet admitted at the Section 10(k) hearing to his intention to contact carriers to keep them from entering into contracts with ICTSI. (Tr. 726-727.)

Since the hearing, the ILWU has engaged in illegal work stoppages in an effort to coerce ICTSI to assign the disputed work (which ICTSI does not control) to ILWU-represented employees. Additionally, ILWU-represented employees of ICTSI have engaged in blatant insubordination and have forcibly taken over the disputed work from the Port's electricians despite being repeatedly advised by ICTSI management that they must not do so. These actions have resulted in several arbitration awards against the ILWU finding it guilty of work stoppages that violate the PCLCD, awards that the ILWU refuses to comply with. Additionally, the ILWU's actions have resulted in the planned issuance of formal unfair labor practice complaints and Section 10(l) injunction proceedings by Region 19 of the NLRB.

D. Industry Practice Regarding Performance of the Disputed Work

Prior to negotiation of the 2008 PCLCD, all Port facilities where there was a past practice of using non-ILWU employees to perform maintenance and repair work that predated 1978 could continue those practices. (Tr. 369, 582.) Prior to 2008, many

different companies, some of which were non-union, performed maintenance and repair of refrigerated containers at various ports on the West Coast. (Tr. 585-586.) In 2008, the PMA and ILWU specifically indentified and codified past practices at these facilities by “red-circling” them. (Tr. 369, 588-589.) Numerous facilities at West Coast ports were red-circled so that there would be no question that non-ILWU labor could perform certain maintenance and repair duties. (I-3, pp. 218-221.) Unless otherwise stated in the PCLCD, non-ILWU personnel represented by various unions perform the plugging, unplugging and monitoring of reefers at the many red-circled ports listed in the PCLCD. (Tr. 407-410.) In fact, the majority of Port facilities on the West Coast that process containers are red-circled facilities. (Tr. 459.) The only reason that the Port of Portland’s Terminal 6 was not red-circled in 2008 was because the company that managed the terminal for the Port at that time, MTC/Ports America, did not have a collective bargaining agreement with any union other than the ILWU. (Tr. 451.)

III. DISCUSSION

A. Jurisdiction Under Section 10(k)

The evidence was uncontradicted in this case that the Lease between the Port and ICTSI does not afford ICTSI the right to control or assign the disputed work and that ICTSI is prohibited from taking any action to interfere with the Port electricians’ performance of the disputed work. The evidence is similarly uncontradicted that the provisions of the Lease in this regard were presented by the Port to ICTSI on a take-it-or-leave-it basis and that ICTSI had no choice but to accede if it wanted to operate Terminal 6. Despite having no power to assign the disputed work to any union, ICTSI is caught between the claims of two competing unions, one, the ILWU, which is basing its claim on a provision of the PCLCD which does not by its terms apply to the employees of non-PMA members such as the Port, and the IBEW, which does not have a bargaining

relationship with ICTSI but which does have a contract with the Port under which the disputed work has been performed by Port employees for the last 38 years.

While these undisputed facts do not present a typical Section 10(k) quandary, the Board has nonetheless held on several occasions that they do support Section 10(k) jurisdiction. The standard factors establishing Section 10(k) jurisdiction are (1) competing claims to the disputed work between rival groups of employees; (2) the use of proscribed means by a party to assert a claim to the work in dispute; and (3) the lack of an agreed-upon method of voluntary adjustment of the dispute. *International Brotherhood of Electrical Workers, Local 48 (Kinder Morgan Terminals)*, 357 NLRB No. 182 (Dec. 31, 2011). Where these three factors are present, such as they are in this case, the Board has exercised its 10(k) jurisdiction even when the employer alleging the charge under Section 8(b)(4)(D) does not control the disputed work and has no power to assign it.

The seminal case on this issue is *Longshoremen ILA, Local 1911 (Cargo Handlers)*, 236 NLRB 1439 (1978). In that case, the respondent union coerced the stevedore to assign certain work which the stevedore had no power to assign. The NLRB stated as follows:

This case is unusual in that the Employer who was threatened with strike activity by Respondent, and whose employees subsequently struck in support of Respondent's claim for the disputed work, is not the employer whose work is in dispute. The record contains no evidence that the Employer has any control over who is assigned the work in dispute, or that it can in any way grant the wishes of Respondent concerning the reassignment of this work. Such a fact pattern certainly is not typical of jurisdictional disputes, but we believe it presents a situation which Section 8(b)(4)(D) was intended to remedy.

Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization to engage in, or to induce any individual employed by 'any person' engaged in commerce to engage in, a strike, or to threaten, coerce, or restrain 'any person' engaged in commerce, where an object thereof is 'forcing or requiring *any employer* to assign particular work to employees

in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class * * *.' (Emphasis supplied.) Such language, we believe, shows the clear intent of Congress to protect not only employers whose work is in dispute from such strike activity, but *any* employer against whom a union acts with such a purpose.

236 NLRB at 1440. The *Cargo Handlers* case establishes that the NLRB has long held that the purpose behind the Section 8(b)(4)(D) proscription “is to protect employers from being enmeshed in disputes of which they are not the cause,” even if the employer has no power to comply with the demands of the coercing labor organization. *Id.*

The *Cargo Handlers* case has been followed on several occasions and is still good law. For example, in *Int’l Longshoremen’s Ass’n (Rukert Terminals Corp.)*, 266 NLRB 846, 849 (1983), the NLRB again made it clear that an employer that was being threatened and coerced to assign work could maintain a Section 8(b)(4)(D) charge even if “it does not have the power to reassign the work in dispute to the Respondents.” *See also Int’l Union of Elevator Constructors, Local 8 (Otis Elevator Co.)*, 355 NLRB 76 (2010) (there is a valid jurisdictional dispute even where the union directs its proscribed activity against an employer that did not employ the employees “who performed the work in dispute”); *Int’l Union of Operating Engineers (Structure Tone, Inc.)*, 352 NLRB 635, 636 (2008) (Section 8(b)(4)(D) was intended to provide a remedy to an employer even if the employer is not “the party that employs the operator who currently performs the work in dispute”);¹⁰ *United Association of Journeyman, (Gulf Oil)*, 275 NLRB 484, 485 (1985) (Section 10(k) jurisdiction is proper even where the charging party does not directly employ the employees who perform the disputed work because the Act protects “not only employers whose work is in dispute but *any* employer against whom a union acts” for the

¹⁰ Both of these cases were abrogated by the Supreme Court’s decision in *New Process Steel, LP*, NLRB 13 S. Ct. 2635 (2010), but nevertheless represent persuasive authority.

purpose of forcing or requiring a work assignment (emphasis in original)); *Auto Workers (General Motors)*, 239 NLRB 365, 367 (1978) (even were the Board to accept the “finding that the employer lacks the authority to effect an assignment of the work in dispute, it would still find that the employer has raised a cognizable jurisdictional dispute”).

The *Cargo Handlers* case has been followed by the Board even when the entity that in actuality does control the work in question may not be subject to the Board’s jurisdiction. In *International Brotherhood of Painters & Allied Trades (Apple Restoration and Waterproofing)*, 313 NLRB 1111 (1994), there was a question raised at the Section 10(k) hearing about whether the business that actually performed and controlled the work in question, Historical Restoration, met the Board’s commerce standards for jurisdictional purposes. However, the Board concluded that whether the business that controlled the work was subject to the Act or not was beside the point:

Although testimony was presented at the hearing as to whether Historical meets the Board’s commerce standards for jurisdictional purposes, we find it unnecessary to decide the issue. In a 10(k) case, the Board need have jurisdiction only over an employer that is the object of a respondent’s unlawful conduct

Id. at 1111 n.1. The Board in *Apple Restoration* properly focused on the pressure being exerted on the charging employer, which did not control the work, with the object of forcing the employer that did control the work to transfer that work to the offending union. *Id.* at 1112 n.3. As a result, despite the fact that there was no finding that the entity that controlled the work was subject to the Act, the Board determined the dispute by holding that employees of a business that may not have been subject to the Board’s jurisdiction “are entitled to perform” the disputed work. *Id.* at 1113.

This result is not surprising. Section 10(k) states that “the Board is empowered and directed to hear and determine” a work assignment dispute under Section 8(b)(4)(D).

As noted by the Supreme Court in *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 126-27 (1971), “the 10(k) decision standing alone binds no one” and “no cease-and-desist order against either union or employer results from such proceeding.” Rather, “the impact of the § 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all practical purposes the Board’s award will determine who will prevail in the unfair labor practice proceeding.” (*Id.*) If the picketing union persists in its conduct despite an adverse 10(k) award, a Section 8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice. On the other hand, if that union prevails and “the employer does not comply, the employer’s § 8(b)(4)(D) case evaporates and the charges he filed against a picketing union will be dismissed.” *Id.* Thus the Board’s Section 10(k) function is to determine the dispute and the enforcement mechanism lies in its unfair labor practice jurisdiction. Any question about enforcing the award regarding the disputed work in this case should not dissuade the Board from providing the only viable mechanism provided by Congress to decide jurisdictional disputes, disputes which often have serious effects on interstate commerce.

B. The Union’s Motion to Quash Should Be Denied

At the beginning of the hearing, the ILWU moved to quash the Section 10(k) notice of hearing, making the baseless arguments that ICTSI was not an “innocent employer stuck between two competing unions” and that this case involved a contractual and work preservation dispute not properly within the purview of section 10(k) of the Act. (Tr. 14.) Very similar, if not identical arguments were made and rejected by the Board in the *Kinder Morgan* case, another Section 10(k) case involving competing claims by the ILWU and the IBEW to maintenance and repair work lodged against another innocent employer in the Portland metropolitan area. *International Brotherhood of Electrical Workers, Local 48 (Kinder Morgan Terminals)*, 357 NLRB No. 182 (Dec. 31,

2011.) Based on the evidence produced in this case and the Board cases cited in *Kinder Morgan*, the Board should again deny the ILWU's motion to quash.

The ILWU contention that ICTSI is not an innocent employer caught between two conflicting union claims is based on one alleged fact, that ICTSI "knowingly joined the PMA and entered into an agreement with the ILWU to assign the disputed work to the PCLCD [sic]." (Tr. 14.) In making this claim, the ILWU ignores the fact that ICTSI entered into lease negotiations in the spring of 2009 and that the Port presented its proposal that the DCTU Work, including the disputed work, remain with the DCTU Employees, including the IBEW-represented electricians, as a non-negotiable item. Thus, if ICTSI wanted to enter into the lease, it was compelled to follow the work jurisdiction lines that had been established at Terminal 6 for many years prior to ICTSI's arrival.

No evidence was presented at hearing that ICTSI entered into the Lease with the Port "in bad faith to take work away from the ILWU." (Tr. 471-472.) In fact, Section 3.17 of the Lease states that the Port provided to ICTSI prior to the signing of the Lease "a copy of that certain Collective Bargaining Agreement between the I.L.W.U. Locals 8 and 40 and the Port dated October 22, 1984, which agreement has not been terminated as of the Signing Date." (E-2, p. 52.) Section 5(D) of this agreement expressly stated in unambiguous terms that "all practices regarding jurisdiction lines with other labor organizations shall be observed." (Ex. 4, p. 3.) The Port's position is that the 1984 CBA with the Port is still in effect and that Section 5(D) memorializes the existing jurisdictional lines with the various labor organizations at Terminal 6.¹¹ This agreement

¹¹ There can be little doubt that the 1984 contract between the Port and the ILWU is still effective. ILWU Secretary-Treasurer Holte, who is also a Port Commissioner, made it a point to ask if the Port lease referenced the agreement during the Board meeting at which the Lease was approved. (Tr. 513; E-3, p. 3.) Holte testified that the agreement was still

in essence gives the Port rights with regard to maintenance and repair work similar to rights available to PMA members at ports “red-circled” under the PCLCD. The “red circle” effect of the 1984 agreement is not affected by the 2008 version of the PCLCD or any letters of agreement associated with that contract because the Port is not a PMA member and the 1984 agreement does not contain any language incorporating any new PMA agreements.

There is no logical conclusion to be drawn from the above other than that ICTSI entered into the Lease in good faith believing that it was perfectly proper for the Port to have required it to reserve the DCTU Work for the DCTU Employees. Any claim to the contrary by the Port does not hold water. For example, the ILWU will likely point to a conversation between ILWU officials and Elvis Ganda which occurred on May 11, 2010, the day before the Lease was approved by the Port Commission. Ganda had been hired only the day before, on May 10, 2010, and engaged in a brief “meet and greet” with ILWU officials. Jeff Smith, President of Local 6 and Leal Sundet, ILWU Coast Committeeman were present along with Port General manager Dan Pippinger. (Tr. 790.) Ganda recalled that the discussion centered mostly on small talk and pleasantries. Ganda made no commitment to the ILWU about who would be performing the disputed work once ICTSI began operations. (Tr. 790-791.) Smith testified that many things were discussed in the meeting, including the ILWU’s claim that the disputed work belonged to the ILWU, but that he didn’t recall Ganda making any response to that claim. (Tr. 799-

in effect. (Tr. 515.) It has never been terminated. When the Port tried to terminate it in 1994, the ILWU objected and stated there would be “trouble on the waterfront” if the Port persisted. (Tr. 733.) As a result, the Port rescinded the termination notice. (I-2; Tr. 734.) In 2009, the Port claimed some clean-up work at Terminal 2 and picketed that facility on the basis that the 1984 agreement entitled it to the work in question. As a result, the Port assigned the work to the ILWU. (Tr. 741-746; E-26-28.)

780.)¹²

ICTSI clearly entered into the fray between the competing unions in this case in good faith and it is entitled to utilize the Section 10(k) mechanism. The ILWU's further argument that its claims to the disputed work are contractual and involve a work preservation claim are frivolous and are defeated by the Board's decision in *Kinder Morgan*. The evidence in this case is undisputed that the IBEW-represented electricians have been performing the disputed work since 1974. As far as industry practice, Marzano, the PMA official, testified that the majority of Port facilities on the West Coast that process containers are red-circled facilities under the PCLCD contract at which non-ILWU personnel represented by various unions perform the plugging, unplugging and monitoring of reefers. (Tr. 407-410, 459.) Under these circumstances, it is difficult to understand how the ILWU can argue that the notice of hearing should be quashed because this case involves a work preservation dispute. As pointed out by the Board in *Kinder Morgan*:

But in all of the cases where the Board quashed a notice of hearing based on a work preservation claim, the work in dispute was historically performed by the union claiming the breach of its agreement with the employer. By contrast, when as here a union is claiming work for employees who have not previously performed it, the objective is not work preservation, but work acquisition.

357 NLRB No. 182. Under the authority of *Kinder Morgan*, the ILWU's motion must be denied.

C. The Relevant Factors

1. ICTSI Has No Power to Assign the Disputed Work

The Board's determination in a Section 10(k) jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors

¹² Sundet claimed that he specifically stated that the ILWU would be pursuing the disputed work through the grievance machinery of the PCLCD and Ganda merely stated "Okay." (Tr. 602-603.)

involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction Co.)*, 135 NLRB 1402, 1410-1411 (1962). The factors that go into the determination include the following (1) certifications and collective bargaining agreements; (2) employer preference, current assignment and past practice; (3) area and industry practice; (4) relative skills and training; and (5) economy and efficiency of operations. *Kinder Morgan*, 357 NLRB No. 182.

But in this case, before the Board even reaches these factors, it must first consider the most important fact in this case: that ICTSI has no right or power to control or assign the work in this case as that right is reserved by the express terms of the Lease for the Port. In the typical Section 10(k) case, the employer has two groups of organized employees that are competing for the same work, or it has one organized group and one group that is not organized. Situations in which the employer filing the Section 8(b)(4)(D) charge does not employ the employees performing the disputed work or does not have the right to control or assign the work are not typical. *Cargo Handlers*, 236 NLRB at 1440.

In such cases where the charging employer does not have the right to assign the disputed work, the Board has correctly and uniformly ruled that the work belongs to the employees of the business entity that does control the work. Thus, in *Cargo Handlers*, the disputed work was awarded to employees of the employer that controlled the work and whose employees were performing the work and not to the employees of the employer that had no right to assign the work. *Id.* at 1441. *See also Otis Elevator Co.*, 355 NLRB at 80 (work awarded to the employees who were performing the work in dispute); *Structure Tone, Inc.*, 352 NLRB at 639 (work awarded to the employees of the employer currently performing the work and not to the employee of the party who did not control the disputed work); *Gulf Oil*, 275 NLRB at 486 (work awarded to employer

whose employees were currently performing the work rather than to the employer who did not employ the workers); *General Motors*, 239 NLRB at 368 (1978) (work not awarded to employees of employer which claimed that it lacked the authority to effect an assignment of the work in dispute). The same result should obtain here. Since it is undisputed that ICTSI has no contractual or other authority to perform the work in question, the Board should not disturb the current assignment of the work.

The “right to control” test is a well-established legal test and has other relevance to this case. Thus, in *NLRB v. Pipefitters*, 429 U.S. 507, 528 (1977), the Court recognized longstanding Board law that “it was a violation of § 8(b)(4)(B) for a union to use economic pressure to obtain work that was not within the struck employer’s power to award.” Similarly, in *NLRB v. Int’l Longshoremen’s Ass’n*, 447 U.S. 490, 504 (1980), the Court, citing *Pipefitters*, held that a lawful work preservation agreement must pass two tests, first, the union’s objective must be preservation of work traditionally performed by bargaining unit employees and, second, “the contracting employer must have the power to give the employees the work in question—the so-called ‘right to control’ test * * *.” If a union attempts to enforce such a provision against an employer that does not possess the right to control the work, it violates Section 8(b)(4)(B).

An instructive case following *Pipefitters* is *Food & Commercial Workers Local 367 (Quality Food)*, 333 NLRB 771 (2001). In that case, the union exerted pressure on a grocery store employer with which it had a contract in order to obtain jurisdiction over work performed by another employer, which leased space from the grocery store. In finding that the “right to control” test had not been met and that the union violated Section 8(b)(4)(B), the Board stated:

The record evidence fully supports the judge’s finding that QFC has no power or authority, under the terms of the lease, to assign to its employees the work in controversy, This is not moreover, a case in which the employer has improperly

surrendered control to avoid its contractual obligations to the union. QFC has *never* had the authority to perform or assign the disputed work involving the handling and selling of Cinnabon's proprietary products, and thus it had no control to surrender. We emphasize that the parties' collective bargaining agreement exempts from the bargaining unit concessions not under QFC's direct control. By entering into the lease, QFT has not circumvented in some manner the collective-bargaining agreement. Indeed there is no contention that the contract prohibits QFC from entering into lease agreement. Accordingly, in agreement with the judge, we find that examination of all circumstances surrounding the Cinnabon work established that the right to control test has not been satisfied.

Id. at 772-773 (emphasis in original).

The *Quality Food* case is very similar to this case. Here, ICTSI never controlled the disputed work which was reserved in its Lease for Port employees to perform.¹³ The PCLCD does not cover work performed by employees of employers such as the Port which are not PMA members. There is no evidence that ICTSI entered into the lease before becoming a PMA member in order to circumvent the ILWU's jurisdiction. Rather, ICTSI reasonably believed that the Port retained the right to its past practice of performing the disputed work under its 1994 Agreement with the ILWU.

2. Certifications and Collective Bargaining Agreements

In this case, the ILWU makes the preposterous argument that the disputed work is covered by a Board certification dating back to 1938 which mentions longshore work but not maintenance and repair work and which was issued long before containerization of the cargo industry took place and before refrigerated container units even existed.

Shipowners' Association of the Pacific Coast, 7 NLRB 1002, 1041 (1938). ILWU's argument ignores the fact that there has been a longstanding practice at West Coast ports of non-ILWU labor performing maintenance and repair functions including the plugging,

¹³ As recognized by the ILWU, ICTSI has not subcontracted the disputed work to the Port. Subcontracting involves a decision on the part of one company to have work under its control performed by another. (Tr. 645-648.) According to the ILWU, the carrier and not ICTSI is the contractor regarding the disputed work. (Tr. 646-647.)

unplugging and monitoring of refrigerated containers. In light of the fact that a majority of facilities on the West Coast are red-circled facilities where past practices of non-ILWU personnel performing maintenance and repair continue to this day, it is clear that the certification being relied on cannot be deemed to cover this work. Additionally, there has been no adequate showing that the PMA is a successor to the multi-employer bargaining representatives which were parties to that 74-year-old certification.

In the most recent Section 10(k) case in which the ILWU has relied on this ancient certification, *Automotive Trades District Lodge 190 (Sea-Land Service)*, 322 NLRB 830, 833 (1997), the Board stated as follows:

The ILWU argues that inspection of cargo and containers is traditional ILWU work covered by the Board's certification. This general coast-wide certification predates the existence of the PMA, the Employer's presence on the West Coast and the advent of containers on the docks. There is no specific certification for the gate inspection work at issue here. Under these circumstances, we find the ILWU's coast-wide certification to be insufficient to warrant a finding that the Employer is 'failing to conform to an order or certification of the Board determining the bargaining representative for employees performing the [disputed] work.' We also find that this certification is insufficient to favor awarding the disputed work to employees represented by the ILWU. Accordingly, this factor does not support awarding the work in dispute to either group of employees.

The *Sea-Land* case is controlling here where the work at issue also did not exist at the time of the 1938 certification, the Employer was not present on the West Coast when the certification issued and the certification does not mention maintenance and repair work on containers.¹⁴

Additionally, the *Sea-Land* case discounts the 1938 certification because it predated the existence of the PMA. Although the ILWU attempted to establish that the

¹⁴ While this most recent Board case regarding the 1938 certification says it should be given no weight, prior cases state that "it is a factor entitled to relatively little weight." See, e.g., *Longshoremen ILWU Local 19 (West Coast Container Services)*, 266 NLRB 193, 196 (1983).

PMA is a successor to the employer associations mentioned in the 1938 certification, it failed to do so. The associations involved in the 1938 case included the Waterfront Employers Association of the Pacific Coast, the Waterfront Employers of Seattle, the Waterfront Employers of Portland, the Waterfront Employers Association of San Francisco and the Waterfront Employers Association of Southern California.

Shipowners' Association of the Pacific Coast, 7 NLRB at 1006, 1041. The PMA was formed in 1949 as a consolidation of the Waterfront Employers Association of the Pacific Coast and two others not involved in the 1938 case, the Waterfront Employers Association of California and the Pacific American Shipowners Association. (I-14.)

Thus, four of the five organizations involved in the 1938 case did not merge to form the PMA. According to Sundet from the ILWU, the PMA was a shipper-dominated organization while the prior organizations were dominated by stevedores. (Tr. 575.)

There is simply no evidence that the PMA is a legal successor to the prior employer organizations so that the prior certification can have any relevance here or favor either of the competing union's claims.

The rival unions' competing collective bargaining agreements at first blush might seem to constitute a neutral factor. However, in light of the "right to control" test discussed above, this factor, in fact, favors the IBEW. No party has claimed that the Port-DCTU contract does not cover the work in question. The Scope of Agreement clause of that contract clearly states that it covers "all maintenance assignments which have been historically and consistently performed by employees covered under this agreement" including assignments at facilities such as Terminal 6 where the Port leases the facility to an independent operator but "retains the responsibility for the maintenance or repair of any such leased facility or facilities." (E-5, pp. 102) There can be no question in this case that the Port leases the facility to ICTSI, retains responsibility for

“maintenance and repair” and that the maintenance and repair work at issue has been performed by IBEW-represented electricians for approximately 38 years. Under these circumstances, the relevant contract “is the one that has been negotiated with the employer who has the ultimate control over the assignment of the work.” *Int’l Union of Elevator Constructors (Perini Building Co.)*, 340 NLRB 94, 96 (2003).

The ILWU’s contractual claim is much more tenuous because it ignores the fact that the disputed work is not performed by any PMA member and that ICTSI has no right to perform, assign, control, or direct the work in question under its lease with the Port. As was admitted by both the ILWU and PMA witnesses, the Scope of Agreement of the PCLCD states that it “shall apply to all employees who are employed by members of the Association to perform work covered herein.” (I-3A, p. 1) While, in a vacuum, the PCLCD does apply “to the maintenance and repair of all stevedore cargo handling equipment,” this can only apply to maintenance and repair work directed or controlled by the PMA member which is signatory to the contract. (I-3A, p. 9) Thus, Mr. Sundet for the ILWU admitted that the PCLCD does not apply to the electricians who perform the disputed work. (Tr. 635.)

In taking a contrary view of the PCLCD, the ILWU and PMA admittedly ignore the lease between the Port and ICTSI and act as if it doesn’t exist. Marzano, for the PMA, thus testified that the CLRC could only consider the PCLCD and no other documents including the lease. (Tr. 404.) For the PMA, the “right to control” principle enunciated in various Supreme Court and Board cases is not worthy of any consideration. (Tr. 402-404.) The PMA and ILWU take this position even though the PCLCD by its express terms only covers the “movement of cargo” when it is under the control of an entity covered by the PCLCD. (I-3A, p. 1.) No explanation was given as to why this limitation would not logically apply to maintenance and repair work as well. ILWU

witnesses agreed and stated their position that the only relevant document is the PCLCD and no other documents can be considered. (Tr. 518.)

Because there is no contractual basis under the PCLCD to require ICTSI to wrest control of the disputed work from the Port in violation of the Lease, the ILWU's claim under its contract amounts to nothing more than an effort to acquire work that is not ICTSI's to give. Pressuring ICTSI to do what it cannot do violates both Section 8(b)(4)(B) and Section 8(b)(4)(D).

3. Employer Preference, Current Assignment and Past Practice

These factors support assignment of the work to the IBEW-represented electricians. ICTSI has testified that it prefers that the electricians continue to perform the disputed work. ICTSI's preference is based on its desire not to breach its lease with the Port of Portland. (Tr. 167.) It is no small wonder that ICTSI would have this preference because, if it breaches the lease and takes control of the disputed work from the Port, it risks serious consequences, including being required to indemnify the Port for any claims made by the IBEW or its members, facing claims and lawsuits from the Port, and even having the lease terminated. As Dan Pippinger, the General Manager for the Port stated, ICTSI could be liable for 25 years of lease payments to the Port if the lease was terminated based upon a material default. (Tr. 747-748.)¹⁵

Because ILWU knows that, in the vast majority of cases, the Board awards the disputed work in accordance with the employer's preference, it has attempted to substitute the PMA's preference for that of ICTSI. However, the PMA pursuant to its bylaws only has the authority to engage in collective bargaining, grievance handling, and

¹⁵ While the ILWU implied by its questioning of the Port's witnesses that the Port would never take such drastic action, ICTSI should not be made to test that proposition by being compelled to breach the Lease and assign work that it has no right to assign under clear lease language.

contract administration on behalf of ICTSI. (Tr. 423.) Additionally, it acts as a paying agent for ICTSI's employees. The PMA has no authority to enter into or to administer commercial contracts that ICTSI enters into with landlords, carriers, or other business entities. PMA also does not have the right to assign or direct ICTSI's work force. (Tr. 421-423, 473.) Neither does it have the right to speak for ICTSI at a Board hearing.¹⁶

There can be no question that the current assignment of the work and past practice also favor the IBEW in this case. As has been stated numerous times, the IBEW performed the disputed work at the time of the hearing and had previously done so for the last 38 years. Although the ILWU will likely argue that its members did reefer plugging and unplugging at Terminal 2, a terminal which is approximately ten miles away from Terminal 6, for several years up until 2005 when containers ceased passing through Terminal 2, this case is about Terminal 6 only. ICTSI does not engage in cargo handling at Terminal 2 and the Port management company which had previously used ILWU personnel to perform the work in question, did not have a lease agreement with the Port requiring it to use DCTU-represented employees. (Tr. 493.)

4. Area and Industry Practice

The factors of area and industry practice also favor the IBEW. Terminal 6 is the container facility at the Port of Portland. All containers go through that terminal and the disputed work on reefers is performed uniformly by IBEW-represented electricians. Terminal 2 has not handled containers since approximately 2005. Thus, for the last seven years, ILWU personnel have not performed reefer work at that facility.

With regard to industry practice, the PMA witness Marzano testified that the majority of Port facilities on the West Coast have been red-circled under the PCLCD and

¹⁶ PMA makes no claim that ICTSI requested that it speak for it at the section 10(k) hearing. ICTSI expressly disclaims and rejects any such attempt by PMA.

at most of these red-circled facilities, non-ILWU personnel perform the work at issue. (Tr. 459.) While such work is performed by ILWU personnel at some facilities, there is certainly no evidence produced that this practice prevails at a majority of the facilities on the West Coast.

5. Relative Skills and Training

This factor favors neither union. Both the electricians and the longshore mechanics have the ability to perform the disputed work. However, if the work were assigned to ILWU-represented employees who have not performed it in many years, there would likely be some training required. (Tr. 190-191.)

6. Economy and Efficiency of Operations

While Jim Mullen, the Port Manager for ICTSI, testified that it would be more efficient to have one craft perform all of the required work on the reefers, there was also testimony that, if ICTSI assigned the work to the longshoremen in breach of its lease, grave consequences could follow, up to and including serious economic liability and possible termination of the lease. (Tr. 747-748.) Under these circumstances, where the continued operation of the company is threatened by a work assignment that ICTSI has no power to make, it can hardly be claimed that it is more “efficient” to have the work done by the longshoremen. Additionally, if ICTSI assigned the work in contravention of the lease, the Port has the power to require ICTSI to indemnify it from any lost work opportunity claims made by the ILWU-represented electricians. (E-2, p. 20.) This could lead to double payment for the same work. All in all, the factor of economy and efficiency of operations favors the IBEW.

D. Anticipated ILWU Arguments

1. The ILWU Will Place Great Emphasis on the CLRC Decision of May 23, 2012

It is likely that the ILWU will place great emphasis on the CLRC decision which was rendered as the result of an admittedly rushed process which was timed by the union to influence the Section 10(k) hearing and the employers' testimony regarding preference. The CLRC decision should be given little or no weight in this proceeding. First, the NLRB has decided on various occasions that it gives little or no weight to arbitration awards when one of the parties to the jurisdictional dispute was not bound thereby. *See, e.g., International Association of Machinists (SSA Marine)* 347 NLRB 549, 551, n.4 (2006); *Teamsters Local 179 (USF Holland, Inc.)*, 334 NLRB 362, 364-365 (2001); *Teamsters Local 952 (Rockwell International)*, 275 NLRB 611, 614 (1985). In this case there can be no question that the IBEW was not a party to and is hence not bound by the CLRC decision, which the ILWU and PMA equate with an arbitration award.

Additionally, the Board should give very little or no weight to the CLRC directive based upon the circumstances surrounding its issuance. The evidence was uncontradicted that, up until the point that ICTSI filed an unfair labor practice charge against the IBEW on May 10, 2012, PMA at both the local and coast levels had supported its position and was prepared to defend it against the arbitration that the ILWU had sought, which was scheduled for May 31, 2012. After the charge was filed, the ILWU began pressuring PMA for a CLRC meeting in an effort to obtain a ruling before the Section 10(k) hearing and to influence ICTSI's testimony regarding preference. ICTSI was not notified of the emergency CLRC hearing which was held the afternoon before the Section 10(k) hearing began nor was it invited to participate or present evidence or argument. Despite the fact that the PCLCD states that the CLRC is to be comprised of three or more union members and three or more employer members, only one putative employer member was present for the meeting in question. (I-3, p. 85.) The participants did not consider in any

meaningful way ICTSI's defense based upon the Lease that it did not have the right to control or assign the disputed work under the Lease. Rather, the CLRC focused almost exclusively on the wording of the PCLCD, despite the fact that the PCLCD has no application to the Port or to the electricians who were actually performing the work in question. Interestingly, although the grievances being asserted by the ILWU were filed against parties other than ICTSI, including various shipping lines and TMC, no action was taken at the CLRC hearing regarding these entities. (E-9-13, 15-19.) The only directive made was against ICTSI which, according to Mr. Sundet for the ILWU, was partly influenced by the fact that ICTSI had filed for a Section 10(k) hearing. (Tr. 728.) Where a joint decision is made for the purpose of affecting a Section 10(k) hearing and influencing employer testimony regarding preference, it should in interests of fairness and justice be given no weight in the Board's process.

2. The ILWU Will Likely Rely Upon an Alleged Verbal Agreement with the Port and/or ICTSI

Mr. Sundet, for the ILWU, testified in a vague manner to certain verbal agreements with Port officials and/or ICTSI. However, there is nothing in writing to memorialize these discussions nor are there any written reminders to the individuals who allegedly entered into the agreements that they were violating them. (Tr. 674.) Under these circumstances, the testimony must be considered suspect. However, when distilled to its essence, Mr. Sundet's testimony really amounts to nothing more than the ILWU's notification to the Port and ICTSI that the ILWU planned to pursue the disputed work through the ILWU-PMC contract machinery and that the Port and/or ICTSI would have to deal with the competing claims of the IBEW to the disputed work at that time.¹⁷

¹⁷ For example, at one point, Sundet testified that the Port agreed to use the ILWU-PMA arbitrator "to get out of their agreement with the DCTU." (Tr. 599.) This indicates at the

Interestingly, other ILWU officials who were present at some of the meetings with Mr. Sundet disclaimed any agreement on the part of the Port or ICTSI to award work to the ILWU. For example, Bruce Holte, the Secretary/Treasurer of Local 8, testified that there were many discussions with Sam Ruda at the Port regarding the disputed work. Holte testified that, although the ILWU's position claiming this work was presented to Mr. Ruda, Ruda stated that the Port did not agree with the ILWU's claim. (Tr. 502.) However, Ruda did state, according to Holte, that the Port and ICTSI would deal with the situation regarding the ILWU's pursuit of the work "when it happens." (*Id.*) Similarly, Jeff Smith, the President of ILWU Local 8, could not testify in agreement with Mr. Sundet that Elvis Ganda, the CEO of ICTSI, agreed to any course of action with regard to the disputed work when Mr. Ganda and union officials engaged in a "meet and greet" the day before the lease was approved and only a day after Mr. Ganda was hired. (Tr. 799-800.)

Both Port officials and ICTSI officials denied that there was ever any agreement with the ILWU to award the disputed work to the ILWU merely because the ILWU obtained a favorable arbitration award. (Tr. 748, 767-768, 791.) In fact, the assertion of such an agreement is absurd because the Port still had a collective bargaining agreement with the DCTU which it was obligated to honor and it would have needed to deal with the IBEW's concerns regarding a possible breach of that agreement in order to take any action to relinquish its hold on the DCTU work.

3. The ILWU's Assertion that the Contractors Control the Work at Issue

During the hearing, the ILWU continuously questioned witnesses about its theory that the shipping carriers control the work at issue and could assign it to ILWU-

very least that some future unidentified action was necessary and no firm agreement was ever reached.

represented employees if they wished. However, Mr. Sundet admitted that there is no industry practice for carriers to handle their own containers or perform the disputed work at facilities which they don't lease. (Tr. 675.) Additionally, the ILWU did not submit any evidence that the carriers had any right under their contracts with either the Port or ICTSI to determine who would perform the disputed work at Terminal 6. Thus, any argument made by the ILWU with regard to this issue is speculative and based upon no evidence. Additionally, the carriers are not parties to this proceeding.

The fact remains that the work in question is done by non-ILWU-represented employees at numerous red-circled ports on the West Coast and there was no evidence presented at the hearing that the carriers have any problem with these practices. Nor was there any evidence presented at the hearing that the carriers have ever objected to the performance of the disputed work by the IBEW-represented electricians since 1974 at Terminal 6. While the ILWU expressed intent at the hearing to attempt to influence carriers to bypass Portland in an attempt to coerce ICTSI, this tactical approach, while likely in violation of the Act, does not bear directly on the resolution of this Section 10(k) dispute. (Tr. 726-727.)

IV. CONCLUSION

For the reasons advanced above, the Board should determine the dispute by protecting the status quo which requires that the disputed work remain with the IBEW-represented employees who have been performing it for the last 38 years.

DATED this 13th day of June, 2012.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 13th day of June, 2012, I electronically filed the foregoing Brief of the Employer – Charging Party with the National Labor Relations Board with the eFiling system.

I further certify that on the 13th day of June, 2012, I caused to be served a copy of the foregoing document by electronic mail to the following:

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