UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 19

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 48

and

ICTSI OREGON, INC. Case 19-CD-080738

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 8

INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 8'S POST HEARING BRIEF

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I. INTRODUCTION

With this proceeding, ICTSI Oregon, Inc. ("ICTSI") and IBEW Local 48 ("IBEW") ask the NLRB to approve and ratify ICTSI's rogue behavior. They ask the Board to permit ICTSI to violate the coastwise collective bargaining agreement with the International Longshore and Warehouse Union ("ILWU") and defy agreements made by the West Coast shipping industry represented by the Pacific Maritime Association ("PMA"), of which ICTSI is a member. Granting the relief ICTSI seeks here would not only upset the bargaining relationship between ICTSI and ILWU at one terminal in Portland, Oregon, it could have repercussions for the legitimacy and efficacy of the system of multiemployer coastwise bargaining that has existed on the West Coast for more than 70 years.

Fortunately, the Board need not grant ICTSI and IBEW the remedy they seek. Indeed, the Board should not wade into this dispute at all. According to ICTSI and IBEW, the work in dispute is assigned by the Port of Portland – an entity excluded from coverage by the Act. Therefore, the Board has no jurisdiction to resolve the matter under Section 10(k). In addition, the matter does not raise a valid jurisdictional dispute of the sort 10(k) was intended to address: The dispute turns on a commercial lease, according to ICTSI; the ILWU has legitimate contractual and work preservation claims to the work at issue, and ICTSI is far from innocent. ICTSI created this dispute. Any of these reasons is sufficient to require the Board to quash the notice of hearing.

Even if the Board were to address this matter by applying the customary 10(k) factors, the Board would have to find that they weigh in favor of awarding the work to the ILWU. The ILWU's certification, collective bargaining agreement, greater efficiency, area and industry

practice of performing the work and the preference of the longshore industry as expressed by PMA all warrant awarding the work to longshore mechanics represented by the ILWU.

II. STATEMENT OF THE FACTS AND BACKGROUND

A. The Work in Dispute.

Shipping lines own or lease refrigerated containers (commonly referred to as "reefers") to move sensitive products such as food or industrial materials that must be kept at a particular temperature. (Tr. 75:8-16, 76:2-6 [Ruda] and 197:17-18 [Mullen]).[1] Like a large refrigerator, reefers run on electricity and have cords with plugs that must be plugged into an electrical outlet or generator (called a "genset"). (Tr. 128:2-12, 187:4-8 [Mullen]). Also like some home appliances, a reefer has a vent to let in or close off air flow. (Tr. 135:9-22 [Mullen]). A digital display panel or dial on the outside of the reefer shows its internal temperature. (*Id.* at 190:13-21 [Mullen]). The work of plugging or unplugging a reefer into a power outlet is essentially the same as the act of plugging or unplugging a large appliance in the home. The only real difference is that the plug and outlet are a little bigger. (Tr. 187:25-188:16 [Mullen]).

To make sure the product in the reefer does not spoil due to a malfunction or error, reefers have to be periodically monitored. Monitoring the reefer requires simply looking at the temperature reading on the digital panel or dial and the vent setting (e.g., closed, ¼ open, etc.) and comparing them to the temperature and vent setting mandated by the customer. (Tr. 135:15-22, 190:13-23 [Mullen]; Exh. U-10).

Whether they are on a dock or on a vessel, reefers have to be plugged in and unplugged before and after they are moved. The ILWU does the work of plugging and unplugging reefers

[1] "Tr." refers to the transcript of the hearing. The number before the colon refers to the page number of the transcript and the number after the colon refers to the line number on that page. The name of the witness appears in brackets.

aboard vessels at Terminal 6 in the Port of Portland. (Tr. 150:8-11, 151:22-152:5 [Mullen]). The work of plugging and unplugging reefers and monitoring them on the dock at Terminal 16 is the work in dispute in this case.

B. Until 2011, The Port of Portland Ran a Container Operation at Terminal 6.

For decades, the Port of Portland ran a container operation at the Port's Terminal 6 handling various types of containers, including reefers. (Tr. 74:24-75:2 [Ruda]). The Port contracted directly with shipping companies, owned cargo-handling equipment and employed a workforce, including electricians represented by IBEW, a member of the District Council of Trade Unions ("DCTU"). (Tr. 39:15-21, 40:3-10 [Ruda]). To obtain ILWU longshore and marine clerk work, the Port initially hired ILWU labor on its own, and later used labor brokers Marine Terminals Corporation or Ports America, members of the Pacific Maritime Association bound to the ILWU's coastwise collective bargaining agreement. (Tr. 41:15-24, 42:19-21, 22, 43:1-10 [Ruda]; Tr. 120:22-121:6 [Mullen]). Through this arrangement, the ILWU performed most of the cargo handling work, including the associated maintenance and repair of containers and cargo-handling equipment. IBEW-represented workers employed directly by the Port performed electrical maintenance on the Port's physical plant at all of its terminals and on the large, stationary Port-owned cranes used to lift containers onto or off of vessels. (Tr. 40:4-7, 25, 41:1-2 [Ruda]). Since the Port contracted directly with the shippers and was responsible to the shippers for their sensitive cargo, the Port assigned the work of plugging, unplugging and monitoring reefers on the dock to its own employees – Port electricians represented by the IBEW. (*Id.* at 41:5-12 [Ruda]). Meanwhile, ILWU longshore mechanics performed the same work of plugging and unplugging reefers when they were aboard a vessel, next to the dock. Whether on the vessel or the dock, the work did not involve exposed wires or require any special

skills or license or certification. (Tr. 189:17-190:1, 192:6-12 [Mullen], 342:11-17 [Cordell]).[2]

C. The ILWU-PMA Coastwise Collective Bargaining Agreement.

The ILWU represents longshoremen and marine clerks working in all major ports on the West Coast of the United States. (*See* Tr. 563:12-20 [Sundet]). The ILWU (on behalf of itself and its longshore and marine clerk locals) and PMA (on behalf of itself and its member companies) have been parties to a series of coastwise collective bargaining agreements called the Pacific Coast Longshore and Clerks' Agreement ("PCL&CA") consisting of two contract documents – the Pacific Coast Longshore Contract Document ("PCLCD," Exh. I-3) covering longshoremen and the Pacific Coast Clerks' Contract Document ("PCCCD") covering marine clerks. Currently, there are approximately 14,000 registered longshoremen and marine clerks and approximately 14,000 casual workers employed by PMA and its member companies working under the PCL&CA. (Tr. 563:18-20 [Sundet]).

PMA is a membership organization consisting of approximately 70 stevedoring companies, terminal operators and shipping lines (also referred to as carriers) serving every major port on the West Coast of the United States. Every major stevedore, terminal operator and shipping line serving the West Coast is a member. (Tr. 357:13-358:14 [Marzano]; *see also* Exh. I-7 [PMA's 2011 Annual Report]). With the ILWU, PMA negotiates and administers the PCL&CA on behalf of itself and its member companies.

PMA has an internal process by which member companies participate in the industry's decision-making over matters of contract bargaining and labor relations with the ILWU. (Tr.

[2] Port witnesses identified an old collective bargaining agreement between the Port and ILWU dated from 1984 when the Port directly employed ILWU labor. (Exh. E-4). There is no dispute that the Port attempted to terminate the agreement on April 27, 1994 (Exh. I-1), and then sent ILWU Local 8 a letter on June 30, 1994 rescinding the termination letter but stating "the Port is not an employer of longshore labor and as a result, the agreements have no effect." (Exh. I-2). There is no dispute that there has been no re-negotiation of the agreement or any grievances or labor relations committee meetings under the agreement since then. (Tr. 752:7-12, 753:17-20 [Pippenger]).

359:23-362:14 [Marzano]; Exh. E-25 at Art. V, §4, Art. VI and Art. VII). However, at the end of the day, the industry represented by PMA speaks with one voice and the interests of a particular member may have to give way for the benefit of the industry as whole. (Tr. 210:2-20 [Mullen]; Tr. 362:15-25, 422:11-18 [Marzano]). Whether a particular member agrees with a particular decision or not, that member is still bound. (*Id.* at 368:6-10 [Marzano]). PMA's right to resolve matters for the benefit of the industry as a whole and the members' corresponding duty to comply with those decisions derive from PMA's charter, its internal governing bodies and is inherent in the integrity of the system of multi employer, coastwide bargaining. (*See id.* at 367:25-368:5).

For more than 70 years, PMA or its predecessor entities have been the voice of the industry when it comes to bargaining and labor relations with the ILWU. *See Shipowners' Ass'n of the Pacific Coast, et al.*, 7 NLRB 1002, 1041 (1938); *Int'l Longshoremen's and Warehousemen's Union Local 10 (Howard Terminal)*, 147 NLRB 359, 367 n. 2 (1964). Coastwise, industry-wise bargaining has become a part of the nation's labor policy and has helped to foster relative stability in the industry in the decades since the strikes of the 1930s. *See generally Shipowners' Ass'n of the Pacific Coast, et al.*, 7 NLRB 1002.

In its 2011 Annual Report, PMA reports that its member companies using ILWU labor under the PCL&CA handled and transported "just over 15 million loaded container TEUs (twenty-foot equivalent units)" through West Coast ports in 2011, "[w]ith cargo ranging from tennis shoes and personal computers to heavy equipment and produce." PMA further reported that "[w]hen non-containerized goods such as bulk cargo and autos are included, West Coast port activity supports 8 million U.S. Jobs." According to PMA:

As the primary gateway for international trade between the United States and

> Asia, the economic impact of the West Coast ports is staggering…. [¶] The significance of West Coast cargo movement is not limited to any one region of the country, or to any one industry. The West Coast ports truly supply the nation, and in the coming years, further investment in infrastructure and technology – including new cargo-handling technology – will be essential to enabling these national assets to continue playing this vital role. (Exh. I-7 at p. 33).

D. ILWU and PMA's Historic Efforts to Address Technological Change in the Industry Continue in 2008, with New Contract Language Intended to Make Clear ILWU Jurisdiction Over Maintenance and Repair Work and to Require the Employers to Defend that Jurisdiction.

Since before the ILWU was certified as collective bargaining agent of longshoremen on the West Coast in 1938, ILWU longshoremen have performed the maintenance and repair ("M&R") of cargo-handling equipment. (Tr. 629:15-630:6 [Sundet]). In 1978, ILWU and PMA established a specific type of longshoreman called a longshore mechanic, whose primary duties consist of M&R and the parties included specific language setting forth ILWU's jurisdiction over M&R in the PCLCD. (*See id.* 582:16-18). Sections 1.7 and 1.71 of the PCLCD require PMA-member companies to assign to the ILWU "**the maintenance and repair of <u>containers of</u> <u>any kind</u>** and of chassis, and the movement incidental to such maintenance and repair" and "the **maintenance and repair of <u>all stevedore cargo handling equipment</u>**." (Exh. 1-3A [emphasis added]). *See PMA*, 256 NLRB 769, 769 (1981) (addressing Sections 1.7 and 1.71).

Over the decades, technology has modified longshore work and made M&R an increasingly important component. ILWU and PMA have reached historic accords to allow the employers to take advantage of technological innovation and, at the same time, to allow the union to preserve and protect its jurisdiction over the cargo-handling operations as those operations evolve. *E.g., Int'l Longshoremen's & Warehousemen's Union Local No. 19 (Albin Stevedore Co.),* 144 NLRB 1443, 1448 (1963); *Int'l Longshore and Warehouse Union Local 10 (Howard Terminal),* 147 NLRB 359, 360-61 (1964); *Int'l Longhore & Warehouse Union Local*

13, 208 NLRB 995-97 (1974).

In coastwise contract negotiations in 2008, the parties agreed to a new such accord. The parties had previously agreed that, as a general rule, all M&R of containers, chassis and cargo handling equipment had to be assigned to the ILWU. However, inconsistent practices and corporate shell games had led to some arbitration decisions holding that the ILWU did not have the right to perform the work at certain locations. (Tr. 589:15-24 [Sundet]). In exchange for the ILWU agreeing to cooperate with the Employers in introducing new technologies, the Employers agreed to clarify and shore up the ILWU's right to perform M&R work by making express which specific facilities and which work were excluded from the general rule that M&R had to be assigned to the ILWU.[3] Specific facilities or types of M&R work at specific facilities where the employer had a CBA with another union were "red circled," meaning that the Employer could continue to assign the work to that workforce at that facility. (Exh. I-3A sec. 1.7-1.81 and pp. 218-222; Tr. 369:4-15 [Marzano]; Tr. 589:15-17, 589:24-590:8 [Sundet]). The Employers reaffirmed that at all other facilities all M&R work had to be assigned to the ILWU. (Exh. I-3A sec. 1.72; Tr. 589:15-17 [Sundet]). Portland Terminal 6 Manager Jim Mullen proposed red circling Terminal 6 in the Port of Portland, but the request was denied. (Tr. 215:19-24 [Mullen]). Therefore, at Terminal 6, all M&R work within the scope of Section 1 without exception must be assigned to the ILWU. (Tr. 371:25-372:2 [Marzano]).

To ensure that the Employers could not use Section 10(k) of the Act to nullify these commitments to the ILWU over jurisdiction, the parties also added a provision requiring PMA and its member companies to defend the ILWU's jurisdiction in legal proceedings. (Exh. I-3A sec. 1.76; Tr. 375:6-24 [Marzano]). There is no dispute that this provision was negotiated with

[3] The parties also made an exception for bulk operations with a past practice of subcontracting that pre-dated July 1, 1978. (Exh. I-3 at pp. 225-226). This provision is not relevant to the dispute at hand.

Section 10(k) specifically in mind to require Employers to, among other things, express a "preference" for the ILWU when the dispute concerns work that the Employers agreed to assign to the ILWU. (Tr. 376:5-10 [Marzano]; Tr. 655:3-6, 721:7-9, 729:9-15 [Sundet]).

After the 2008 agreement was reached, PMA-member companies operating at Terminal 6 continued to decline to assign to the ILWU the work of plugging, unplugging and monitoring reefers on the dock – work that was clearly ILWU jurisdiction under Section 1.7. (Tr. 368:17-25 [Marzano agreeing that the work is covered by Section 1.7]). The ILWU filed grievances seeking lost work opportunity payments against labor broker Marine Terminals Corporation and against the shipping lines that owned the reefers and were members of the PMA. (Tr. 218:10-11 [Mullen]; Exh. I-4 and I-5). The grievances remained pending for some time. (*Id.*) Terminal Manager Jim Mullen was fully aware of them and discussed them at labor relations committee meetings with the ILWU. (*Id.*)

E. The Port of Portland Gets Out of the Business of Operating Terminal 6 and Leases the Operation to ICTSI, Which Becomes a Member of PMA and Bound to the Coastwise Agreement with the ILWU.

In 2006, the Port of Portland began to take steps to privatize the operation of Terminal 6. (Tr. 44:10-45:14 [Ruda]). The Port solicited information and proposals from private terminal operators interested in operating Terminal 6 under a long-term lease. (*Id.*) ILWU representatives met with the Port on approximately six occasions to discuss the Port's actions and, specifically, the ILWU's claim to the plugging/unplugging and monitoring of reefers on the dock at Terminal 6 under the PCLCD. (Tr. 593:17-596:24, 598:18-599:18 [Sundet]). The testimony is undisputed that Port managers repeatedly encouraged the ILWU to resolve the issue by prosecuting their grievances under the PCLCD since the Port was getting out of the business of operating the terminal. (*Id.* at 660:5-8; Tr. 802:19-23 [Smith]; Tr. 750:8-18 [Pippenger]; Tr.

767:10-11 [Ruda]).

After evaluating multiple proposals, the Port selected ICTSI to lease the facility – a multi-national terminal management company with no prior experience on the West Coast. (Tr. 50:13-16 [Ruda]). The Port wanted the ILWU to support the proposed lease agreement and therefore facilitated a meeting between the ILWU and ICTSI's new CEO. With Port management representatives present, ILWU Coast Committeeman Leal Sundet and ILWU Local 8, President Jeff Smith met with ICTSI's CEO at the Port offices. ICTSI's CEO expressed his intention to join the PMA and explained that he was familiar with the ILWU and the coastwise agreement through his prior work for PMA-member companies in California. Sundet expressly stated that the ILWU intended to continue to pursue its right to perform the reefer plugging/unplugging and monitoring work on the dock at Terminal 6 under the PCLCD. The Port and ICTSI representatives said nothing. (Tr. 599:19-603:6 [Sundet]). Based on their meetings with the Port and with ICTSI, Sundet and Smith voiced support for the lease as a general concept at the Port Commission meeting days later on May 12, 2010.[4] (Exh. E-3).

On May 12, 2010, the Port Commission approved a 25-year lease to ICTSI. (*Id.*) The Port relinquished control of terminal operations, leased or sold its cargo handling equipment to ICTSI (with the exception of the stationary cranes), "signed over all of [its] steamship line contracts to ICTSI" and became a landlord. (Tr. 51:11-14, 77:19-25 [Ruda]). ICTSI, not the Port, became answerable to the shipping lines for maintaining the reefers and the shippers' products inside. (Tr. 79:12-16, 25, 80:1-3 [Ruda]).

The Port and ICTSI kept the language of the lease confidential until it was signed. The

[4] ICTSI and IBEW may ask the Board to find some significance in the fact that ILWU Local 8 Secretary-Treasurer Bruce Holte served as a Port Commissioner during this time period. However, the Port did not provide Mr. Holte with a complete copy of the lease and, in any event, he had no authority to speak on behalf of the entire ILWU or re-negotiate the ILWU's jurisdiction under the PCLCD. (Tr. 500:11-14, 503:17-20 [Holte]).

Port-ICTSI lease contains the following clauses:

> **Section 2.8** 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.
> …
>
> **Section 3.23 (a)** The Port shall … make available to the Lessee [ICTSI] the DCTU for the provision of the DCTU Work. The Lessee shall accept the Port's utilization of the DCTU Employees with respect to 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. The Port shall have responsibility for the conduct of the DCTU Employees in performing the DCTU Work.

(Exh. E-2 at pp. 40, 58).

The lease defines the "DCTU Work" by referring to the DCTU-Port collective bargaining agreement. (*Id.* at pp.6). The DCTU-Port agreement defines the work vaguely as the work the DCTU has "historically and consistently" performed, generally consisting of facilities maintenance. (Exh. U-5 pp.1-2). However, Port Chief Commercial Officer Nathaniel Ruda testified that the Port intended for the "DCTU Work" in the lease to include the plugging, unplugging and monitoring of reefers on the dock. (Tr. 57:1-4). He testified that "the lease contemplates that the Port of Portland will provide and continue to provide" those services using its own employees represented by the IBEW. (Tr. 57:19-22).

Days after the lease was approved, ICTSI submitted an application to join PMA. (Exh. I-10). In response to a question on the application about whether "ICTSI or any affiliate [was] bound to any labor agreement(s)," ICTSI circled "No." (*Id.*) Soon thereafter, PMA accepted ICTSI's application. (Exh. I-11). Pursuant to Section 1.82 of the PCLCD, ICTSI became bound

to the coastwise agreement. (Exh. I-3A § 1.82 [stating that an "employer in a port covered by this Contract Document who joins the [Pacific Maritime] Association subsequent to the execution hereof and who is not a party to any conflicting longshore agreement becomes a party to this Contract Document."]; *see also* Tr. 793:14-18 [ICTSI's CEO Elvis Ganda admitting that ICTSI is bound by the PCLCD and obligated to comply with its terms]).

F. ICTSI Begins Operating Terminal 6 in 2011, ILWU Pursues Its Grievances and IBEW Threatens to Picket ICTSI.

Operations at Terminal 6 began under ICTSI's direction on February 12, 2011, with ICTSI employing ILWU labor under the PCLCD and contracting directly with the shipping lines to handle their containers. (Tr. 126:16-23, 157:11-13 [Mullen]). ICTSI hired the same terminal manager who had previously run Terminal 6 for Marine Terminals Corporation – Jim Mullen. (Tr. 113:13-20 [Mullen]). Mullen was already familiar with the ILWU's position that it had a bargained right to perform the reefer plugging/unplugging and monitoring work on the dock at Terminal 6. (Tr. 218:10-220:5, 223:3-7 [Mullen]).

In his testimony, Mullen described the reefer-cargo handling operation at ICTSI in detail (Tr. 129:14-157:2) and agreed that each and every step is performed by ILWU labor from start to finish, with one exception: the plugging, unplugging and monitoring of reefers on the dock. (*Id.* and at 194:18-25).

At Terminal 6, reefers may arrive by truck or vessel. When they arrive by truck, an ILWU marine clerk employed by ICTSI checks in the reefer and documents its arrival into ICTSI's system. (Tr. 131:4-133:1 [Mullen]). The temperature and vent setting needed for the container previously provided by the shipping line are already contained in ICTSI's computer system. The ILWU clerk directs the truck driver to a waiting area. (*Id.* at 133:10-13). As a

result of the actions of the clerk, ICTSI's computer system automatically sends a Blackberry message to a Port electrician represented by IBEW. The message notifies him or her that the container has arrived and tells the electrician the temperature and vent setting required by the customer. (*Id.* at 133:20-134:1, 136:1-5). The Port electrician reads the temperature on the reefer, looks at the vent setting and compares them to what appears in the message. (*Id.* at 134:18-19). If anything is incorrect, the Port electrician brings the issue to an ILWU marine clerk employed by ICTSI, who then communicates directly with the shipping line to determine whether the terminal should accept the reefer or not. The Port electrician then waits for instructions from the ILWU clerk. (*Id.* at 134:21-135:7).

If the vent and temperature settings are correct, the electrician unplugs the reefer from the genset, wraps up the cord and the truck driver drives the reefer to a spot in the yard selected by an ILWU worker. (*Id.* at 136:10-137:6). Once the truck reaches the correct spot, an ILWU marine clerk employed by ICTSI confirms that the truck is in the right spot and then radios for an ILWU longshoreman employed by ICTSI. The longshoreman comes with a toploader and lifts the container from the truck and put it on the dock. (*Id.* at 138:3-15). If the container has a genset that has to be removed, ILWU longshore mechanics employed by Terminal Maintenance Corporation under contract with the shipping lines will remove it at that point. (*Id.* at 138:20-139:13, 139:25-140:2). Then, a Port electrician plugs the container into an electrical outlet on the dock. (*Id.* at 143:7-9).

While the reefer sits on the dock, a Port electrician looks at the temperature and vent settings twice a day to make sure they are the same as the settings required by the customer. (*Id.* at 144:10-11). The Port electrician also documents the settings in a log, even though the reefer's internal computer already contains the information. (*Id.* at 144:12-16). If the settings are

different from what the Port electrician was told they should be, the electrician notifies an ILWU longshore mechanic employed by Terminal Maintenance Corporation (*Id.* at 144:25-145:2). The Port electrician does not troubleshoot or perform repairs on the reefer; this work is done by ILWU workers employed by Terminal Maintenance Corporation. (*Id.* at 139:25-140:5, 145:22-23).

When a vessel is coming into port, ILWU vessel planners determine where the containers should be placed on the vessel and in what order, including reefers. (*Id.* at 146:13-17). ILWU clerks and foremen review the sequence. When the vessel is ready to be loaded, an ILWU supercargo or marine clerk notifies the electricians which reefers need to be unplugged. (*Id.* at 146:21-147:2, 147:14-16, 147:23-24). The Port electrician will unplug the reefer from the outlet on the dock according to the ILWU worker's instructions. (*Id.* at 148:9-11). An ILWU longshoreman uses a toploader or other piece of equipment to lift the container onto a yard truck. (*Id.* at 148:16-18). Another ILWU longshoreman drives the truck carrying the container from the yard to a specific crane next to the ship. (*Id.* at 149:1-3, 149:12-17). Then, an ILWU longshore crane driver lifts the reefer and lowers it into the appropriate spot on the vessel. (*Id.* at 149:20-24). Aboard the vessel, ILWU longshoremen secure the reefer and longshore mechanics plug it into an outlet when directed to do so by an ILWU foreman or supercargo. (*Id.* at 150:4-7). The process is essentially reversed when a reefer comes to Terminal 6 aboard a vessel. (*Id.* at 151:3-156:16).

After ICTSI started operating Terminal 6, ILWU continued to pursue grievances over the reefer work on the dock against ICTSI and the PMA-member shipping lines that contract with ICTSI and own the reefers. (Exh. E-9 to E-16, E-180 to E-19). Weeks before the grievances were scheduled for arbitration, IBEW counsel sent an email to ICTSI's counsel threatening to

picket if ICTSI assigned the work to the ILWU. (Exh. E-20). ICTSI filed a charge against IBEW alleging a violation of 8(b)(4)(D).

G. The Coast Labor Relations Committee – the Highest Decision-Making Body Under the Coastwise Contract – Agrees that ICTSI is Violating the PCLCD By Failing to Assure that the Work is Assigned to the ILWU.

ILWU International President Robert McEllrath and PMA's President and CEO James McKenna discussed the grievances and unfair labor practice charge. (Tr. 377:18-20 [Marzano]). At the direction of Mr. McKenna, PMA's Director of Contract Administration and Arbitration Richard Marzano reviewed the matter and determined that the ILWU had a right to perform the work under Section 1 of the PCLCD. (Tr. 377:21-22, 378:3-8 [Marzano]). He consulted with all of the members of PMA's Coast Steering Committee – the body of industry representatives chosen by PMA's elected Board of Directors to direct PMA's coastwide labor policy. (Exh. E-25 Art. VII; Exh. I-7 pp. 6-7 [identifying the committee]). They agreed unanimously that the work belonged to the ILWU under the PCLCD. (Tr. 379:9-24 [Marzano]).

On May 23, 2012, the ILWU and PMA convened a meeting of the Coast Labor Relations Committee ("CLRC"), the highest decision-making labor-management committee under the coastwise collective bargaining agreement. (Exh. I-3B §17.14; Tr. 722:4-6 [Sundet]). Their decisions bind PMA and every member employer. (Exh. I-3A § 1.76). The CRLC ruled that the work belonged to the ILWU and ordered ICTSI to assign the work to the ILWU and to defend the ILWU's right to perform the work under Section 1.76. (Exh. I-8).

H. The Section 10(k) Proceeding

The next day, the hearing under Section 10(k) commenced. The ILWU intervened to protect its bargained-for right to perform the work. (Tr. 9:14-16). PMA also sought to intervene to protect the interests of the industry. (Tr. 6:13-9:6). Its motion was denied, even though no

other party to the proceeding could speak on the industry's behalf. (Tr. 9:17-18).

ICTSI emphasized its lease agreement with the Port, offered extensive testimony from Port managers about the Port's assignment of the work to the IBEW and argued that the lease deprives ICTSI of authority to assign the work at all. According to ICTSI:

> Under the clear and unambiguous language of that lease ICTSI does not have the right to control or assign the work in dispute in this case. The lease reserves the performance of the work in dispute to the Port of Portland to be performed by employees represented by the District Counsel of Trade Unions, and more particularly by IBEW 48.

(Tr. 15:3-11).

ICTSI Terminal Manager Mullen testified about the company's operation of Terminal 6. He agreed that ICTSI's existing steady, ILWU-represented workforce has the skills to do the work, does the same reefer plugging/unplugging work aboard vessels and that ILWU mechanics perform the reefer repair work, requiring more skill than the rather simple job of plugging, unplugging and monitoring. (Tr. 167:5-9, 194:6-10, 196:13-16, 201:19-25). He further testified that using the ILWU would be more efficient because ICTSI already has a workforce of ILWU mechanics and because the entire container operation is ILWU from start to finish, with the exception of the work in dispute. (Tr. 194:178-195:4). However, out of fear that the Port would find the company in violation of its lease, he testified that ICTSI had declined to assign the work to the ILWU because "[o]ur preference is not to breach our lease agreement with the Port of Portland." (Tr. 167:13-14, 258:7-11).

Witnesses for the ILWU included elected ILWU Coast Committeeman Leal Sundet and PMA's Director of Contract Administration and Arbitration Richard Marzano, both of whom played key roles in contract negotiations in 2008 and have authority over contract administration coastwide as members of the CLRC. They testified that ICTSI is violating the PCLCD and the

CLRC decision by failing to assign the work to the ILWU and by failing to defend the ILWU's jurisdiction in the proceeding. Further, ICTSI's rogue behavior undermines collective bargaining coastwide to the detriment of the industry as a whole. (*E.g.*, Tr. 373:2-7).

III. THE BOARD SHOULD QUASH THE NOTICE OF HEARING

Two independent reasons make it improper for the Board to consider this matter pursuant to Section 10(k) of the Act – (1) there is no violation of Section 8(b)(4)(D) because, according to ICTSI and IBEW, the dispute concerns the assignment of work by a public employer to its own employees excluded from coverage by the Act, and (2) there is no valid jurisdictional dispute because Section 10(k) was not intended to protect commercial leases and because ICTSI created and facilitated the dispute. Either reason is sufficient to quash the notice of hearing.

A. The Board Should Quash The Notice Of 10(K) Hearing Because ICTSI And IBEW Contend That The Assignment Of Work Is Controlled By The Port Of Portland – An Entity Excluded From The Act.

Before the Board may proceed to determine a dispute pursuant to Section 10(k) of the Act, it must be established that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. In order to establish a violation of Section 8(b)(4)(D), it must be shown that a labor organization has "threaten[ed], coerce[d], or restrain[ed] any person … where an object thereof is – … forcing or requiring any employer to assign particular work to employees in a particular labor organization … rather than to employees in another labor organization…."

According to ICTSI, only the Port has the authority to assign the work in dispute. ICTSI counsel argued at the outset of the hearing:

> ICTSI does not have the right to control or assign the work in dispute in this case. The lease reserves the performance of the work in dispute to **the Port of Portland** to be performed by employees represented by the District Council of Trade Unions, and more particularly by IBEW 48. (Tr. 15:3-11 [emphasis added]).
> …

> [T]his work was never given to my client [ICTSI] to control or assign…. **[T]he Port ... is the Employer with the right to control and assign** the work in question and to manage the workforce. The Port has their own supervisor on site that manages these electricians that perform the work in question. (Tr. 27:2-3 and 13-16).
> [Emphasis added]

ICTSI Terminal Manager Mullen similarly testified, the Port "did not give us the right to control this work." (Tr. 167:14-23 [Mullen]). ICTSI CEO Elvis Ganda testified:

> Q: [D]oes ICTSI have the right to control or assign the reefer plug and unplug work on container – refrigerated containers at the Port – at Terminal 6?
> A: According to the lease agreement, no.
> …
> Q: Has the Port of Portland ever given you any indication that it was prepared to allow ICTSI to take control of the plug, unplug and monitoring work of reefer containers at Terminal 6?
> A: No.

(Tr. 791:5-16). Port Chief Commercial Officer Nathaniel Ruda similarly testified that ICTSI has no authority to assign the work in dispute and the only entity that can perform the work is the Port using its own employees represented by the DCTU or IBEW. (Tr. 39:15-41:19, 82:1-4).

The Port of Portland is "a political subdivision" of the State of Oregon and therefore not a statutory employer under section 2(2) of the Act. Or. Rev. Stat. §§ 778.101; 174.116(2)(hh), 198.605; *Hale by Hale v. Port of Portland*, 783 P.2d 506, 511 (Or. 1989) ("[T]he Port is an instrumentality of the state government, performing state functions."). It follows that the Port electricians represented by IBEW are not statutory employees under the section 2(3) of the Act. *Children's Hospital of Michigan*, 299 NLRB 430, 432 (1990) ("To be a statutory employee under the NLRA, one must be employed by a statutory employer."); *United Truck and Bus Service Co.*, 257 NLRB 343, 344 (1981). Thus, the Board could never find a violation of Section 8(b)(4)(D) in this case. Nor could the Board issue an order awarding the work in dispute to Port employees represented by IBEW. Neither the Port that ICTSI claims to controls the work, nor the Port's

employees who perform the work are covered by the Act.

The Board established the inapplicability of Section 10(k) in such circumstances in a case addressing a sister local to respondent IBEW Local 48 – *Local Union No. 3, International Brotherhood of Electrical Workers*, 219 NLRB 528 (1975). The IBEW local in that case struck to try to obtain work from private contractors on publicly-funded projects bid out by the New York Board of Education, a state agency. The NLRB held that if the state agency controlled the assignment of the work, the notice of 10(k) hearing had to be quashed:

> The Board of Education is an agency of the State of New York and, as a governmental entity, it is statutorily excluded from the definition of employers over which this Board may assert jurisdiction under Section 2(2) of the Act. While it is true that a governmental entity, such as the Board of Education, is considered a person within the meaning of Section 8(b)(4) of the Act, it has not and cannot be held to be an employer for any purpose under the Act due to the restriction in Section 2(2). Thus, if in fact, the Board of Education is deemed to be in control over the assignment of the work alleged in dispute and Local 3's work stoppages were for the purpose of forcing the Board of Education to assign the work in issue to members of Local 3 rather than to members of Local 363, we would still be required under the Act to quash the notice of hearing.

Id. at 529.

This case requires the same result. At its core, IBEW's threat, while directed at ICTSI, was "for the purpose of forcing the [Port] to assign the work in issue to" the Port's own employees as opposed to employees of ICTSI represented by another labor organization. *Id.* The Board has no jurisdiction under these circumstances.

ICTSI and IBEW will point to *Cargo Handlers, Inc.*, 236 NLRB 1439, 1440 (1978) and other cases relying it for the proposition that the Act applies even where the threatened employer has no authority to assign the work. However, in *Cargo Handlers, Inc.*, both the employer assigning the work and the struck employer were statutory employers under Section 2(2). *Id.* at 1439. Thus, *Cargo Handlers* fails to establish that the Board can resolve the dispute here. For

this reason alone, the Notice of Hearing should be quashed.

B. The Board Should Quash The Notice Of 10(K) Hearing Because This Is Not A Valid Jurisdictional Dispute.

In order to trigger the Board's duty under Section 10(k), there must be a valid jurisdictional dispute. *See Highway Truckdrivers & Helpers, Local 107, Int'l Bhd. of Teamsters (Safeway Stores)*, 134 NLRB 1320, 1322 (1961); *Teamsters Local 578 (USCPWesco)*, 280 NLRB 818, 820-21 (1986); *Indus., Prof. & Tech. Workers Int'l Union, SUINA (Recon Refractory & Construction, Inc.*), 339 NLRB 825, 827 (2003). A "jurisdictional dispute," within the meaning of Sections 8(b)(4)(D) and 10(k), does not exist "every time an employer elects to reallocate work among his employees or supplant one group of employees with another." *Safeway Stores*, 134 NLRB at 1323. Rather, Section 10(k) is meant to protect innocent employers whose own actions have not created a dispute. *See, e.g., Safeway Stores*, 134 NLRB at 1323. The Board looks beyond the fact that competing claims may fall within the literal terms of Sections 8(b)(4)(D) and 10(k) of the Act to determine the "real nature and origin of the dispute." *Recon Refractory & Construction, Inc.*, 339 NLRB at 827 (citing *USCPWesco*, 280 NLRB at 820). Where the real nature of the dispute is not jurisdictional, the Board will quash the notice of 10(k). *USCPWesco*, 280 NLRB at 823 (quashing notice where dispute turned on the employer's right to subcontract); *Int'l Ass'n of Machinists & Aerospace Workers Dist. 190 (SSA Terminal, LLC.)*, 344 NLRB 1018, 1021 (2005) (quashing the 10(k) notice where dispute turned on the work preservation); *Chicago Web Printing Pressmen's Union No. 7*, 209 NLRB 320, 322 (1974) (quashing notice where dispute turned on the employer's right to transfer work); *Buffalo Elec. Constr.*, 298 NLRB 937, 939-40 (1990) (quashing notice where dispute turned on the employer's right to subcontract).

Given the potentially intrusive nature of a 10(k) proceeding into a union and employer's labor relations when the two are parties to a collective bargaining agreement, the Board determines whether a valid jurisdiction dispute exists with an eye toward promoting the Board's policy of respect for collective bargaining. *USCPWesco*, 280 NLRB at 821 (determining that the matter did not present a valid jurisdiction dispute because treating the matter under 10(k) would undermine "the private settlement … through the collective bargaining process" and deny "employees the benefits of their negotiated" contractual terms); *Buffalo Elec. Constr.*, 298 NLRB 937, 939-40 (1990); *Reber-Friel Co.*, 336 NLRB 518, 523-24 (2001) (Liebman, dissenting) ("To the extent that we [in 10(k) proceedings] permit employers to make light of their agreements, we undermine the Act's objectives of promoting stability of bargaining relationships and reducing disruption in commerce.").

This case fails to present a valid jurisdictional dispute for three reasons. ***First, according to ICTSI and IBEW, the dispute turns on ICTSI's commercial lease with the Port.*** ICTSI asks the Board to allow it to comply with its lease and violate its collective bargaining agreement against the wishes of the entire multiemployer bargaining association so that ICTSI can avoid paying damages to the Port. No authority supports using 10(k) in these circumstances.[5] For the NLRB to wade into this dispute and assign the work according to the commercial lease against the language of the PCLCD, and against the express wishes of the ILWU and the entire multiemployer bargaining group would be to run roughshod over the bargaining rights, obligations and expectations of the entire industry. It would not only undermine collective bargaining between ICTSI and the ILWU, it could destabilize labor relations coastwide.

Second, this case fails to raise a valid jurisdictional dispute because ILWU has a work

[5] To the extent ICTSI or IBEW argue that the Port-DCTU agreement makes 10(k) appropriate, their arguments fails because the NLRB has no jurisdiction over the Port or its employees for the reasons discussed above.

preservation claim to the work. "[I]f a dispute is fundamentally over the preservation, for one group of employees, of work they have historically performed, it is not a jurisdictional dispute." *SSA Terminal, LLC*, 344 NLRB at 1020. Under *NLRB v. International Longshoremen's Association*, 447 U.S. 490 (1980) (hereinafter *ILA I)* and *NLRB v. International Longshoremen's Association*, 473 U.S. 61 (1985) (hereinafter *ILA II),* a union has a work preservation claim where the work is the "functional equivalent" of work that the union performed previously. Maintaining and monitoring containers used to move cargo, including plugging and unplugging reefers, is the functional equivalent of the work that longshoremen traditionally performed, hauling cargo and maintaining the items used to haul it. (*See* Tr. at 581: 22-582:2, 583:4-17, 630:2-6 [Sundet]).

"[A]s is surely clear after *ILA I*, the fact that [ILWU] longshoremen have never previously performed work at the exact same location does not prevent the work sought from being the functional equivalent of work the longshoremen have performed." *California Cartage Co. v. NLRB*, 822 F.2d 1203 (D.C. Cir. 1987) (Emphasis in original). Nor is the fact that the ILWU has not regularly and consistently performed the disputed work for ICTSI determinative when the union has performed the work for other employers in the multiemployer bargaining unit. *Bermuda Container Line Ltd. v. Int'l Longshoremen's Ass'n*, 192 F.3d 250, 256-257 (2nd Cir. 1999), *affirming* 157 LRRM 2157, 1997 WL 2157 (S.D.N.Y. 1997); NLRB General Counsel Advice Memorandum, Case 4-CE-107, 1997 WL 731472 (Aug. 22, 1997); NLRB General Counsel Advice Memorandum, Case 4-CE-107, 1996 WL 1250062 (Dec. 13, 1996). In these cases, the court of appeals, the federal district court and the NLRB-GC Division of Advice unanimously ruled that an arbitrator's decision ordering a shipping line, which relocated its stevedore operations to a new port, to use union longshore labor there, constituted valid "work

preservation" action permitted under the NLRA. The material factors supporting the rulings were that the shipping line belonged to the New York Shipping Association (an East Coast counterpart to PMA), was subject to a single, coastwise longshore agreement covering the entire East and Gulf Coasts and the union had performed the work for other employers in the association under the agreement. *Bermuda Container Line Ltd.*, 192 F.3d at 257. As the NLRB General Counsel concluded, that the "work preservation analysis applies to fairly claimable multiemployer, as well as single employer, unit work .. is implicit in many NLRB decisions involving multiemployer bargaining units." Advice Memo, p.2, Case 4-CE-107 (Aug. 22, 1997). The same facts are present here – ICTSI is a member of PMA, is subject to a single, coastwise longshore agreement covering the West Coast, and the ILWU has performed the disputed work for other PMA members at the majority of the West Coast's container terminals covered by the PCLCD. (Tr. 373:8-12, 379:3-6 [Marzano]).

Third and finally, this case fails to raise a valid jurisdictional dispute because ICTSI is not an "innocent employer" stuck between competing unions. ICTSI executed the lease knowing and having committed to the ILWU that it would join the PMA and become bound to the PCL&CA. (Tr. at 794:6-8 [Ganda]).[6] Then, after signing the lease, ICTSI represented to PMA that it had no other collective bargaining agreements with any other unions and failed to come clean about any potential conflict to complying with the PCLCD. (Exh. I-10). ICTSI is not "the helpless victims of [a] quarrel[] that do[es] not concern [it] at all." *NLRB v. Radio & Television Broadcast Engineers Union Local 1212*, 364 U.S. 573, 581 (1961) (quoting H.R.Rep.No. 245, 80th Cong., 1st Sess., p. 23 (1947)). ICTSI (together with the Port acting on

[6] ICTSI argued in its opening statement that the Port presented the DCTU provisions of the lease as a "take-it-or-leave-it" proposition. However, the actual testimony indicated that the Port merely included the language and ICTSI never asked about it. (Tr. 82:5-10, 83:11-18 [Ruda]).

behalf of IBEW) is the orchestrator and facilitator of the dispute.[7]

This case is unlike *International Brotherhood of Electrical Workers Local 48 (Kinder Morgan Terminals)*, 357 NLRB No. 182 at 3 (2011) and the cases on which it relied. *Id.* (citing *Teamsters Local 174 (Airborne Express)*, 340 NLRB 137, 140 (2003); *Stage Employees IATSE Local 39 (Shepard Exposition Servs.)*, 337 NLRB 721, 723 (2002) or *Teamsters Local 107 (Reber-Friel Co.)*, 336 NLRB 518, 521-22 (2001)). In each of those cases, denying the motion to quash was consistent with the Board's overriding policy of respecting collective bargaining. In *Kinder Morgan* and *Airborne Express*, the Board found that the collective bargaining agreements of the unions seeking to quash the notice did not cover the work. Therefore, the Board could proceed to assign the work without undercutting the unions' collectively bargained rights. In *Shepard Exposition Services* and *Reber-Friel Co.*, the employer had engaged in collective bargaining with both unions and given both the right to perform the work in dispute. Because both unions were in the same spot, the Board could proceed to assign the work and still respect the bargaining rights of one union while also protecting the employer caught in the middle. Here, unlike the facts found by the Board in *Kinder Morgan* and *Airborne Express*, the collective bargaining agreement – the PCLCD – covers the work in dispute. (*See* Exh. I-8). Unlike the employers in *Shepard Exposition* and *Reber-Friel*, ICTSI claims to have a collective bargaining agreement with only one of the two unions – the ILWU. What is more, none of those

[7] During the hearing, ICTSI showed that it is completely uninterested in trying to meet its collective bargaining obligation to the ILWU, even if it could do so without violating the lease. ICTSI offered Port Chief Commercial Officer Ruda. He testified twice at length and with great apparent authority about the meaning of the lease agreement when asked questions by ICTSI and IBEW counsel intending to make plain the supposed onerousness and iron-clad nature ICTSI's obligations to use and pay for Port labor. However, when asked questions by ILWU counsel suggesting ways that ICTSI could use ILWU labor under the very same provision of the agreement and comply with the PCLCD without breaching the lease, Ruda was suddenly unsure of what the provision meant. (Tr. 777:13-780:24). Shockingly, rather than explore a potential way ICTSI might comply with both the lease and its collective bargaining agreement, ICTSI counsel struggled on redirect to elicit testimony to try to rehabilitate Mr. Ruda and make the lease provisions appear as onerous and unreasonable as possible. (*Id.* at 785:19-786:12).

cases presented a set of circumstances like those presented here, where the multiemployer association that bargained the agreement opposes the employer's position in the case.

For the foregoing reasons, the notice of hearing should be quashed.

IV. IF THE BOARD REACHES THE MERITS, THE 10(K) FACTORS FAVOR AWARDING THE WORK TO THE ILWU.

Once it has been determined that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that the dispute is properly before the Board, the Board must decide which group of employees is entitled to the disputed work and make an award accordingly. *Safeway Stores*, 134 NLRB at 1322 (citing *Radio & Television Broadcast Engineers Union Local 1212*, 364 U.S. at 585). "The determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors in the particular case." *Machinists Lodge 160 (SSA Marine)*, 347 NLRB 549, 553 (2006) (citing *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410-1411 (1962)). Among the factors relevant to determining which group of employees is entitled to the disputed work are: (1) applicable certifications and collective-bargaining agreements; (2) economy and efficiency of operations; (3) employer preference; (4) past practice; (5) area and industry practice; and (6) relative skills and experience. *Id.* In this case, these factors, taken as a whole, compel awarding the work in dispute to longshore mechanics represented by ILWU.

A. ICTSI's Arguments And Evidence In Opposition To The ILWU And PMA Must Be Disregarded Because ICTSI Waived Its Right To Present Them By Agreeing To Section 1.76 Of The PCLCD.

By agreeing to be bound by the PCLCD, ICTSI agreed to Section 1.76:

> 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. (Exh. I-3A).

With this provision, ICTSI waived the right to defend another union's jurisdiction in a 10(k) proceeding when it comes to performing work that ICTSI agreed to assign to the ILWU. (*Id.*) ICTSI further waived the right to deviate from PMA in defending the ILWU's jurisdiction. (*Id.*) The un-rebutted testimony establishes that this was the express intent of this language negotiated in 2008. (Tr. 376:5-10, 439:18-24 [Marzano]; Tr. 655:3-6 [Sundet]).

It is well established that parties can waive rights granted by the Act. *E.g.*, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983). A waiver of rights granted by the Act will be upheld where the parties' language is "clear and unmistakable." *Id.* at 708. Section 1.76, requiring without exception, that PMA and member companies "participate" and "defend [the ILWU's jurisdiction] in any legal proceeding," meets this standard.

The Act permits a party to waive its right to access the 10(k) procedure. 29 U.S.C. § 160(k); *Local 423, Laborers' Int'l Union of North Am. (V&C Bricklayers Co.)*, 199 NLRB 450, 451 (1972). If a party can waive its right to utilize a 10(k) procedure altogether, it follows that a party can waive its right to take certain positions in a 10(k) proceeding.[8]

By refusing to consider arguments and evidence offered by a PMA-member in violation of the PCLCD and against the interests of the industry, the Board would be acting pursuant to the Act. It is well established Board law that an employer who enters a multiemployer bargaining group is not free to examine the product of such negotiations to decide whether to accept those terms but must abide by the terms of that agreement negotiated on a group basis. *Retail Assocs., Inc.*, 120 NLRB 388 (1958); *Falkowski Grocery*, 236 NLRB 473, 475 (1978) (individual member of multiemployer association violated the Act by refusing to adhere to CBA negotiated

[8] We assume for the sake of argument that ICTSI had a right to take such positions in this first place.

on its behalf by multiemployer group). Here, ICTSI joined PMA and agreed to be bound by the PCL&CA in its entirety, including Section 1.76.

The Board should respect the parties' agreement and find that ICTSI's evidence and arguments contrary to the position of the ILWU and PMA are waived and may not be considered by the Board. To do otherwise would be to deny the ILWU the benefit of the language it negotiated coastwise in 2008. This would undercut the Board's policy of promoting collective bargaining and stability and predictability in labor relations and would likely have repercussions for labor relations with other PMA-member employers bound by the same term.

B. The Record As A Whole Supports Awarding The Work To Longshore Mechanics Represented By The ILWU.

1. CERTIFICATIONS AND CBAs—ILWU is entitled to the disputed work under its certification and collective bargaining agreement with PMA.

In 1938, the ILWU became the Board-certified representative of "workers who do longshore work in the Pacific Coast ports of the United States for companies which are members of the Waterfront Employers' Association[s]," the predecessors to PMA. *Shipowners' Ass'n of the Pacific Coast, et al.*, 7 NLRB 1002, 1041 (1938); *Int'l Longshoremen's and Warehousemen's Union Local 10 (Howard Terminal)*, 147 NLRB 359, 367 n.2 (1964) (recognizing the Waterfront Employers' Associations as the predecessors of PMA); Exh. I-14 (showing the formation of the PMA out of the prior associations). As Coast Committeeman Leal Sundet explained, the maintenance and repair of stevedore cargo handling equipment was part of "longshore work" in 1938. (Tr. 629:15-630:6 [Sundet]). Monitoring and plugging/unplugging reefers is a modern version of the same task. (*Id.* 580:4-10).

The PCLCD clearly covers the work in dispute. Under Section 1.7 and 1.71, the ILWU is entitled to perform "maintenance and repair of containers of any kind" and "maintenance and

repair of all stevedore cargo handling equipment" used by PMA-member companies. (Exh. I-3a [emphasis added]). Under Section 1.76, ICTSI must "assign work in accordance with Section 1 provisions and as may be directed by the CLRC…." (*Id.*) The Board has previously reviewed sections 1.7 and 1.71 and upheld them. *Pacific Maritime Association*, 256 NLRB 769 (1981) (addressing Sections 1.7 and 1.71 and rejecting the claim that they violate the Act). ICTSI and the carriers that own the containers are each bound by these provisions. (Tr. 465:17-22, 467:6-12 [Marzano]).

Here, the work involves the maintenance of refrigerated containers used to handle cargo. Thus, it is covered by Section 1.7 and 1.71. If there were any room for doubt, the CLRC – the highest decision-making body under the coastwise collective bargaining agreement and grievance machinery – expressly ruled that the work in dispute at Terminal 6 is covered by Section 1.7 and instructed ICTSI that the work must be assigned to the ILWU. (Exh. I-8).[9]

ICTSI concedes that it is obligated to comply with the decisions of the CLRC. (Tr. 211:4-5 [Mullen]; Tr. 793:19-21 [Ganda]). But ICTSI will argue that it was excluded from the process by which this CLRC decision was made or that the decision was made in violation of proper procedures. The evidence shows the opposite. ICTSI has a say in the development of the industry's labor policies. ICTSI has the right to vote on the selection of the PMA Board of Directors and holds a position on the PMA Regional Substeering Committee, which provides recommendations to the Coast Steering Committee. (Tr. 206:8-16, 207:4-208:7, 209:17-210:12

[9] ICTSI may try to argue that the disputed work does not qualify as "maintenance" or "repair." However, the CLRC clearly ruled otherwise. (Exh. I-8; *see generally* Tr. 638:12-642:7 [Sundet explaining the meaning of "maintenance and repair" under the PCLCD]). The Board should defer to the CLRC's decision on the meaning of the contract, as the Board has done in the past. *Int'l Longshoremen's & Warehousemen's Union Local 10 (Howard Terminal)*, 147 NLRB 359, 366 (1964) (holding that although "[t]here may be room for disagreement with respect to the meaning of the ILWU-PMA agreements as to whether the whirley cranes are 'new' equipment" under the language of the agreements that must be operated by longshoremen, the CLRC "determined that the whirley cranes were 'new' equipment which, under the terms of the ILWU-PMA agreement" and the CLRC's determination is controlling with regard to whether the work is covered by the agreement).

[Mullen]). By virtue of joining PMA, ICTSI has the right to participate in these processes, but agrees that it has ceded final decision-making authority over matters of labor relations to the industry as a whole. (Tr. 210:-20 [Mullen]; Tr. 367:21-368:10 [Marzano]). There is no dispute that PMA, as the voice of the industry, has the authority to take positions and reach agreements that are contrary to the express desires of an individual member. (*Id.*). Whether an individual member company agrees with the decision or not, that member is still obligated to comply. (Tr. 211:4-6 [Mullen]).

PMA consulted with ICTSI directly before reaching a decision, although nothing required PMA to do so. (Tr. 236:5237:1, 237:23-238:9 [Mullen]). ICTSI's Terminal Manager conceded that PMA staff and officers gave ICTSI an opportunity to explain its position and voice objections. (*Id.*) PMA staff then consulted with all but two of the approximately twelve members of the Coast Steering Committee. (Tr. 379:11-24 [Marzano]). The Coast Steering Committee voted unanimously to reject ICTSI's position and support the ILWU's claim that the work be assigned to the ILWU. (*Id.* and 460:18-461:13). As PMA Coast Director of Contract Administration and Arbitration Richard Marzano testified, this was not a close case. (Tr. 378:10, 379:3-4). Indeed, the ILWU's right to perform the work was so clear that he was concerned that his staff would lose credibility with the standing arbitrator if they tried to present ICTSI's argument. (Tr. 463:16-20 [Marzano]).

The top officers of the ILWU Coast Longshore Division and the PMA Coast Director of Contract Administration and Arbitration comprising the CLRC met, evaluated the language of the contract and relevant arbitral precedent interpreting those provisions and concluded that the work belonged to the ILWU. (Exh. I-8; Tr. 378:378:3-8 [Marzano]). The fact that an ICTSI employee was not present at the CLRC meeting is of no moment. Nothing in the PCLCD

required that ICTSI be present and ICTSI chose to be represented by PMA in labor relations matters like this one by joining PMA. (*See* Tr. 450:4-6).

ICTSI will also argue that the CLRC decision was somehow inadequate because it failed to account for or give adequate weight to ICTSI's lease with the Port or claimed lack of control over the work. This is inaccurate because Mr. Marzano testified that the PMA and the CLRC did consider the lease and ICTSI's position that it had no authority to assign the work at issue because of the lease; PMA and the CLRC simply rejected ICTSI's arguments. (Tr. 382:14-383:1, 404:7-12 [Marzano]; *see also* Exh. I-8). If ICTSI argues that its lease should have been given more weight, this argument will fail. ICTSI, as a member of the PMA, has bargained for a dispute resolution procedure in which the PCLCD controls and outside authorities are given little or no weight. (*See* Tr. 476:23-477:2 [Marzano]). To the extent the CLRC declined to use the lease as the touchstone of its decision-making, the CLRC was merely following the terms of the agreement that ICTSI signed on to. *Int'l Longshoremen's & Warehousemen's Union Local 10 (Howard Terminal)*, 147 NLRB 359, 366 (1964) (giving deference to the CLRC's determination of the meaning of the PCLCD).

ICTSI and IBEW will point to the Port's CBA with the DCTU to argue that IBEW has a contractual claim to the work also. However, unlike the PCLCD, the Port-DCTU collective bargaining agreement includes no express language addressing the IBEW's right to perform work on containers or cargo-handling equipment. (Exh. U-5). The thrust of the DCTU agreement is Port facilities maintenance: "construction, demolition, installation, and maintenance assignments ... at all marine cargo handling facilities <u>owned and operated by the Port</u>, including any marine cargo handling facilities leased <u>and operated by the Port</u>." (*Id.* at p. 1 [emphasis added]). The DCTU agreement only covers facilities leased to private operators (such as ICTSI)

"to the extent the Port retains responsibility for the maintenance or repair of any such leased facility." (Exh. U-5 p.2 [emphasis added]). If the "operator is responsible for maintenance of such facility, the jurisdiction of the respective crafts shall be maintained." (*Id.* [emphasis added]). Terminal 6 is operated by ICTSI. (Tr. 224:16-18 [Mullen]). Plugging, unplugging and monitoring carrier-owned reefers that ICTSI moves through Terminal 6 as part of ICTSI's cargo delivery operation cannot reasonably be construed as "maintenance .. of [the] facility." IBEW offered no evidence of any arbitration decisions awarding the work at issue to IBEW and the Port manager who oversees the Port electricians testified that he was not aware of any. (Tr. 296:4-9 [Staple]). Thus, IBEW does not have a contractual claim to the work, at least not a strong one.

For these reasons, the certification and collective bargaining agreements weigh entirely in favor of the ILWU.

2. EFFICIENCY AND ECONOMY – ICTSI agrees that using ILWU would be more efficient. The IBEW's performance of the disputed work is inefficient and inconsistent with the rest of the container operation at Terminal 6.

ICTSI agrees that it would be more efficient to use ILWU labor to perform the work in dispute. (Tr. 195:1-4 Mullen]). From the moment a reefer enters the terminal on a truck until it leaves aboard a vessel or vice versa, every step of the process involved in receiving, handling, moving, loading, tracking, maintaining and repairing the reefer is performed by ILWU labor with the exception of the work in dispute. (Tr. 194:18-25 [Mullen]). Meanwhile, the IBEW's other work is entirely different; it consists of electrical maintenance of the Port's physical plant and the Port-owned cranes. (Tr. 197:8-13 [Mullen]). The reefers, by contrast, are owned by the shipping lines that have contracted with ICTSI to handle their containers. (770:20-771:1, 771:23-25

[Ruda]). ICTSI and the shipping lines are all members of the PMA bound by the PCL&CA. (358:2-6, 359:18-21 [Marzano]).

Whereas the Port electricians work at all Port facilities, ICTSI employs 22 steady ILWU longshore mechanics at Terminal 6 exclusively who are guaranteed forty hours per week. (Tr. 193:7-23 [Mullen]). As Mullen agreed, it is in ICTSI's interests to keep those individuals busy and they already perform virtually the same reefer plugging/unplugging work on the vessels. (Tr. 194:3-5, 13-16). *Int'l Longshoremen's & Warehousemen's Union Local 19 (West Coast Container),* 266 NLRB 193, 198 (1983) (machinists' forty-hour guarantee in contract weighed in favor of awarding them the work). As ICTSI is required to pay into the ILWU/PMA Pay Guarantee Plan, which compensates longshore workers when work is slow, ICTSI and all PMA-member companies have still more incentive to keep the registered longshore workforce working as much as possible. (Tr. 388:10-389:17 [Marzano]).

The PCLCD provides ICTSI substantial flexibility. If work volumes increase, ICTSI can hire more steady longshore mechanics or it can hire on an as-needed basis one of the more than 100 registered longshoremen who perform longshore mechanic work out of the dispatch hall. (Tr. 392:14-24 [Marzano]; Exh. I-12). And ILWU longshore mechanics do not perform only one task for ICTSI; they can and do perform work on all of ICTSI's cargo-handling equipment and have performed the reefer plugging/ unplugging on the dock when needed. (Tr. 552:23-553:5, 553:20:554:5 [Miken]). Thus, they are more versatile.

When, as here, one of the two competing unions represents other workers at the jobsite, the Board generally finds that the factor of efficiency of operations favors awarding the work to that union. *Laborers (Eshbach Bros.),* 344 NLRB at 204; *Machinists District 118 (Meredith Printing),* 243 NLRB 892 (1979). Similarly, the factor of efficiency favors awarding work to

workers represented by the same union when they are working on the same equipment or as part of the same continuous operation. *Paper Workers Local Union No. 194*, 267 NLRB 26, 30 (1983); *Local Union No. 2592, Lumber Sawmill Workers Union*, 268 NLRB 126, 128 (1983) (declining to assign the work to ILWU workers because it would "result in the fragmentation of [the employer's] workforce"); *Longshoreman & Warehousemen Local 10 (Matson Navigation Co.)*, 140 NLRB 449, 457-58 (1963) (awarding work of assembling loads on the dock to carpenters because they worked closely with workers in the hold also represented by the carpenters); *Int'l Longshoremen's & Warehousemen's Union Local 19 (Am. Mail Line Ltd.)*, 144 NLRB 1432 (1963) (awarding crane operation work to ILWU workers because they had to work closely with ILWU hatchtenders). When one group of employees is more versatile, the factor of efficiency also favors awarding the work to that group. *Laborers (E&B Paving)*, 340 NLRB 1256 (2003). Indeed, noting the same elements of versatility and use of temporary employees through the joint dispatch halls, the Board has on many occasions found these features of the ILWU-PMA bargaining unit to warrant a finding of greater economies and efficiencies in awarding the work to ILWU represented workers. *See, e.g. Teamsters Local 85 (PMA)*, 208 NLRB at 1016 ("It is easier and more practical to attract and maintain a pool of longshoremen of the size necessary to perform the required work during peak periods and it reduces the amount of money the Employer may be required to pay out under the mechanization and modernization agreements between PMA and the ILWU. In short, it permits the Employer greater economy and the available and versatile workforce necessary to its operations. Similarly, the use of longshoremen to load and unload containers employs those who might otherwise receive pay under the guarantees without performing useful work.") (awarding to ILWU longshoremen the work of loading and unloading trucks at marine terminals)*; Teamsters Local 85 (PMA)*, 191

NLRB 493, 496 (1971) ("The familiarity and experience obtained as a longshoreman in the use of all types of gear is very helpful if not, in fact, necessary, to a gearman. In addition, a gearman must be able to operate the mechanical gear such as pay loaders and tractors used in longshore work since he is required to load and unload such mechanical gear from the gear trucks. If a gearman's services are not required by one of the PMA members he can be dispatched as an ordinary longshoremen from the hiring hall.")(awarding the work of the gear truck driving to ILWU longshoremen); *UIW (Albin Stevedore Company),* 162 NLRB at 1011 ("As noted, the evidence shows that longshoremen with hatchtending experience are capable of interchanging between the positions of hatchtender and hammerhead operator. Thus, the periodic interchange by longshoremen between the two positions would eliminate the need for a relief operator, and enable the operator to perform safer and more efficiently by virtue of his familiarity with the physical conditions aboard ship.") (awarding to ILWU longshoremen the operation of the hammerhead cranes that were previously performed by Operating Engineers).

ICTSI will argue that using the Port electricians is more economical because they receive a lower hourly wage rate. But this ignores the fact that ICTSI could perform the work using its existing ILWU workforce and supplementing only when needed by hiring out of the ILWU hall.

The factor of efficiency and economy favors awarding the disputed work to the ILWU.

3. EMPLOYER PREFERENCE – ICTSI did not "prefer" the IBEW. The industry's clear preference for the ILWU, as shown by PMA, is the operative preference.

The employer's preference in work assignment is given significant weight, but "cannot be made the touchstone in determining a jurisdictional dispute." *Plasterers' Local 180 (Jack Ebert & Co.),* 226 NLRB 242, 245 (1976).

a. ICTSI never stated a preference for the IBEW, but merely expressed concern over the actions the Port might take if ICTSI violated its lease.

While IBEW may argue in its brief that ICTSI "prefers" the IBEW to perform the work, review of the record evidence reveals that ICTSI never stated a preference for the IBEW. Indeed, ICTSI's Terminal Manager testified that using ILWU labor would be more efficient. When asked specifically whether ICTSI "preferred" IBEW or ILWU, ICTSI's Terminal Manager merely testified, "our preference is not to breach our lease."
(Tr. 258:2-11). He testified that this was ICTSI's preference because the Port might consider ICTSI to be in breach of the lease if ICTSI said otherwise or assigned the work to its own workforce.

ICTSI offered the Port's General Manager of Marine Operations Dan Pippenger who testified menacingly about the most serious adverse consequences that could befall ICTSI if it were found to have "materially breached" the lease in the abstract. (Tr. 747:748:3). However, the witness refused to answer when asked the key questions, such as whether assigning the work to the ILWU in compliance with the PCLCD would be considered a material breach or what measures the Port would actually take if ICTSI is required by law or an order of the NLRB to assign the work at issue to the ILWU. (Tr. 763:19-764:19, 765:7-21). ICTSI further offered Port Chief Commercial Officer Ruda, whose testimony about the meaning of the lease provisions would render them so onerous as to be absurd. (Tr. 771:7-777:12). He claimed to be unable to answer when asked about the express language in the lease that permits ICTSI to decline to use IBEW labor if required to do so by law. (Tr. 779:23-780:24 [Ruda]). Given their obvious bias and refusal to answer the key questions, the Port witnesses' testimony of the potential consequences of material breach in the abstract must be construed as substantively baseless

partisan threats made in the service of the IBEW.[10]

When a union threatens an employer to coerce it into assigning work to its members, the Board looks at whether the employer's stated preference "may not be representative of a free and unencumbered choice," *Teamsters Local 158 (Holt Cargo Systems)*, 293 NLRB No. 112 at 13 (1989), but may in fact have been forced upon the employer by the union's coercive activity, the Board has discounted the employer's choice as a product of duress. *See International Longshoremen's Local 50 (Brady Hamilton Stevedore Company)*, 223 NLRB 1034, 1037 (1976) (employer's preference discounted because its stated preference was brought about by that union's work stoppage on other jobs).

Here, it is not clear that ICTSI's fear of noncompliance with its lease is legitimate, given ICTSI's seemingly illogical efforts during the hearing to make the lease it signed seem as inflexible and burdensome as possible. (*See, e.g.*, Tr. 785:19-186:7). However, to the extent ICTSI's fear is legitimate and can be construed as a "preference" for the IBEW, such a preference must be discounted for the same reasons as in the cases above. IBEW (not the ILWU) threatened to picket ICTSI in clear violation of the Act. The Port, acting at the behest of IBEW, forced its workforce on ICTSI and obliquely threatened to revoke the lease if ICTSI assigned the work to ICTSI's own workforce or so much as objected to the IBEW. The testimony of ICTSI Terminal Manager Jim Mullen, shows that, absent this coercion by IBEW and the Port, ICTSI Terminal Management would prefer to have the ILWU do the work for all of the appropriate reasons: the ILWU's greater efficiency, continuity in cargo handling for the benefit of ICTSI and its customers, the ILWU's skills and the collective bargaining agreement

[10] The Port's witnesses testified that they were currently in contract negotiations with the DCTU. It appears that the Port was improperly attempting to use this 10(k) proceeding to curry favor with the DCTU or to make gains at the bargaining table.

covering the work.

In any event, the plain language of the lease permits ICTSI to both comply with the lease and assign work to the ILWU in accordance with its CBA and the law. The lease only requires ICTSI to accept DCTU labor to perform the "DCTU Work" if ICTSI determines that the "work complies with the provisions of this Agreement … and applicable law." (Exh. I-2 §3.23(a) [emphasis added]). It follows that if ICTSI would violate the law by accepting the DCTU Work, then ICTSI can reject it without breaching the lease. Here, ICTSI is violating the PCLCD enforceable under Section 301 of the Labor Management Relations Act by accepting labor from Port electricians to perform the work in dispute. Thus, ICTSI can reject the Port electricians' labor without breaching its lease. Similarly, if the NLRB ruled that the work had to be assigned to the ILWU, ICTSI could reject the Port electricians' work labor breaching the lease. Thus, the Board can and should award the work to the ILWU based on ICTSI's implicitly stated preference that, absent the lease, the work be assigned to its own ILWU workforce.[11]

b. The Pacific Maritime Association's preference for the ILWU deserves controlling weight when evaluating this factor.

While ICTSI declined to state a preference for either union expressly, the Pacific Maritime Association stated a clear preference for the ILWU. (Tr. 391:9-13 [Marzano]). To the extent any party suggests that PMA is not an employer of longshoremen for purposes of the Act or that the preferences of the entire longshore industry, as represented by PMA, lacks weight here, that party contradicts controlling law.

The Board has consistently and unwaveringly treated PMA as an "employer" of

[11] Port Chief Commercial Officer Ruda's inability to explain what this provision of the lease meant is immaterial as the language of the provision speaks for itself. (Tr. 78:24). Moreover, his testimony establishes him to be so biased in favor of the IBEW as to be not credible.

longshoremen for purposes of the Act and the Board has acted to ensure the continued vitality of the multiemployer unit as a fundamental component of national labor policy. The history of strikes on West Coast waterfronts persuaded the NLRB that "a unit consisting of all the workers employed as longshore labor in the Pacific Coast ports is *the one* that will insure to employees the full benefit of the right to self-organization and to collective bargaining." *Shipowners' Ass'n of the Pacific Coast*, 7 NLRB at 1022 (emphasis added). The NLRB specifically noted "the failure of the longshoremen to achieve *any* satisfactory collective bargaining agreement when the bargaining was on a local scale" as "contrasted with the highly successful achievements when the longshoremen bargained as a coast unit." *Id.*

Approximately thirty-five years later, the Board recognized the continuing importance of multiemployer bargaining in this industry:

> [The Board] was cognizant [in 1938], as it is now, that employers in the shipping industry on the Pacific Coast have a direct and vital interest in the terms and conditions of employment for longshoremen. The history of labor relations in that industry has been fraught with extraordinary problems, which have extended beyond the customary employer-employee relationship … All members of the PMA have given that agency authority to act as their agent and PMA, in turn, is clearly the agent of employers employing longshoremen. In this particular industry the community of interest of the participating employers is unmistakable.

ILWU (Cal. Cartage Co.), 208 NLRB 994, 997 (1974).

With regard to maintenance and repair work in particular, the Board has treated PMA as an employer of longshoremen. In *Pacific Maritime Association*, 256 NLRB 769 (1981), the NLRB rejected the claim that an earlier versions of the same provisions of the PCLCD at issue here – Sections 1.7 and 1.71 giving the ILWU jurisdiction over maintenance and repair – violate the Act and found PMA to be an employer with regard to that dispute. *Id.* at 770.

In cases addressing various other types of unfair labor practices, the Board has treated the

PMA as an employer of longshoremen for purposes of the Act. *PMA and Wilson*, 184 NLRB 312, 314 (1970) (holding that PMA violated the Act by joint operation of a discriminatory referral system); *ILWU Local 27 (Morris R. Bond*), 205 NLRB 1141 (1973) (holding PMA jointly liable with ILWU for decision of CLRC to "fire" where PMA acceded to personal hostility of union committee members); *PMA*, 208 NLRB 519, 526 (1974) (holding PMA liable as an employer for sex discrimination in hiring and dispatch); *ILWU Local 13*, 210 NLRB 952, 956 (1974) (holding PMA liable for "acquiesce[ing]" to union's unlawful hiring policy); *ILWU Local 13 and Sullivan*, 228 NLRB 1383, 1387 (1977) (Union and PMA violated NLRA when they failed to dispatch a longshoreman for unlawful reasons); *PMA and Ramirez*, 308 NLRB 39, 48 (1992) (holding PMA and union not liable for refusal to transfer registered longshoreman); *PMA*, 315 NLRB 24, 24-26 (1994) (holding PMA required to respond to union information requests regarding member companies' wage practices). [12]

In Section 10(k) proceedings in particular the Board has explicitly and emphatically given substantial weight to the interests of all PMA member companies, as an industry, in making work assignments to ILWU longshore workers. *See, e.g., Teamsters Local 85 (PMA)*, 208 NLRB at 1015 ("These cases have arisen because of PMA's need to mechanize and improve the efficiency of its operations. Moreover, though containers are the focus of these disputes, the record convinces us that a meaningful inquiry into economy and efficiency cannot be limited to the precise operations involved in the disputes here. Because of the nature of the industry, and that of the employment relationship, it is not only the longshoreman who has an interest in the availability of longshore work, but also the Employer."); *UIW (Albin Stevedore Company)*, 162

[12] The Supreme Court too has considered PMA to be the employer of West Coast longshore workers for purposes of the Shipping Act. *Fed. Maritime Comm'n v. PMA*, 435 U.S. 40, 40 (1978); *Volkswagenwerk Aktiengesellchaft v. Fed. Maritime Comm'n*, 390 U.S. 261, 263064 (1968), *amended by*, 392 U.S. 901 (1968).

NLRB at 1011-1012 (agreeing "to view this dispute against the background of protracted negotiations" between PMA and ILWU to provide longshoremen the new work of operating cranes, previously operated by Operating Engineers, because containerization "will eliminate not only longshoremen formerly employed as crane and winch operators, but other traditional longshoremen classifications such as forklift drivers and swingman"); *ILWU (Howard Terminal)*, 147 NLRB at 366 (holding, "the automation concord set forth in the present agreement between the Respondents and the Employers is a most persuasive circumstance in this case…. to lighten the impact of unemployment problems created by automation" and compelling the conclusion that "longshoremen are entitled to perform the disputed work"); *ILWU Local 19 (Albin Stevedore Company)*, 144 NLRB 1443, 1448 (1963) (holding that "the larger automation concord between Respondents and PMA far outweighed all other considerations"). In a more recent case, the Board continued to give consideration to the industry's preference when deciding how to award work under Section 10(k). *Int'l Ass'n of Machinists (SSA Marine)*, 355 NLRB No. 3 at 5 (2010) (awarding work to the ILWU in part because of the industry's preference, as expressed by PMA).

In keeping with this policy, the NLRB General Counsel has recognized the right of the ILWU and PMA to require an objecting PMA-member company to comply with new work assignment provisions. In *PMA and Stevdoring Servs. of Am.*, Cases 27-CA-18300-1 and 27-CB-444-12003, 2003 WL 21360833 (NLRBGC) (Apr. 28. 2003), the General Counsel sustained the ILWU and PMA's position that the member company had to assign work according to the language negotiated on behalf of the industry as a whole.

Thus, the Board would have to reverse more than 70 years of consistent labor policy to disregard the preference of PMA expressed in this case.

What is more, Section 1.76 and the integrity of the coastwise agreement mandate that PMA's preference must control for purposes of the "employer preference" factor, particularly given that ICTSI did not state a preference for either union. As shown above, ICTSI ceded control over its labor relations to PMA when it joined. Also, by agreeing to Section 1.76 of the PCLCD, ICTSI waived the right to "prefer" any workforce besides the ILWU when it comes to performing work that PMA and its member companies agreed to assign to the ILWU or to depart from PMA on the issue. For the Board to countenance ICTSI's rogue conduct contrary to the language of the PCLCD and the express direction of the CLRC and of the industry as a whole would tear at the very fabric of the system of multiemployer bargaining on the West Coast, the value of which the Board has repeatedly reaffirmed in the cases cited above.

PMA's preference for the ILWU is not the result of improper coercion. ILWU did not threaten to picket or strike; ILWU prosecuted its grievances following the collectively-bargained procedure under the PCLCD. ICTSI may try to argue that PMA was "pressured" into supporting the ILWU's position. PMA's witness Richard Marzano emphatically denied having experienced "pressure" from the ILWU. Based on his own knowledge of the contract and arbitral precedent and independent of any discussions with the ILWU, Marzano thought ICTSI's position was frivolous. In any event, the Board has expressly held that no improper coercion is shown when an entity is influenced in a 10(k) proceeding by its obligations as a member of PMA. *Int'l Ass'n of Machinists (SSA Marine)*, 355 NLRB No. 3 at 5 (2010).

4. PAST PRACTICE AND CURRENT ASSIGNMENT – This factor does not favor either union because, although IBEW performed the work in the past, the Port gave up operating terminal in 2011 and the industry has said that it is longshore work.

There is no dispute that the Port assigned the work to its own employees represented by

the IBEW when the Port operated the terminal or that these employees continued to perform the work after ICTSI took over in 2011. However, these facts warrant little weight in the context of this case.

ICTSI's take-over of Terminal 6 in 2011 marked a new operation at the facility. By leasing the property to ICTSI for 25 years, signing over its contracts with the shipping lines that call at Terminal 6 and leasing and selling its cargo-handling equipment, the Port relinquished its operation of the terminal and became a landlord. (*See* Tr. 224:13-18 [Mullen testifying that ICTSI took over running the terminal after signing the lease]; Tr. 272:11-16 [Mullen testifying that ICTSI purchased the rolling stock from the Port]; Tr. 754:4-9 [Pippenger testifying that the Port signed over its shipping line contracts to ICTSI]). IBEW has only performed the work pursuant to ICTSI's contracts with the shipping lines since 2011, all the while doing so in violation of the PCLCD. These circumstances make no business sense for the industry, as shown by PMA's active support and preference for the ILWU in this dispute and ICTSI Terminal Manager Mullen's admissions that using the ILWU would be more efficient.

The Board has found that substantial changes are akin to establishing an entirely new operation for purposes of evaluation the past practice factor. *See, e.g., UIW (Albin Stevedore Company)* 162 NLRB at 1011 ("Indeed, the substantial changes brought by the introduction of the new type of cargo ship and new type of crane could be readily likened to the establishment of an entirely new operation.") Here, the changes in 2011 when ICTSI took over were fundamental, particularly when it comes to the economics of the operation. Port management employee Ruda essentially conceded that the Port no longer has a direct financial stake in the container operation at Terminal 6 except as a landlord. (Tr. 77:19-25, 79:12-80:3). To the extent the Port has any financial stake at all, it is only because the IBEW has insisted on forcing the

Port electricians into the middle of ICTSI's operation.

In addition, regardless of the past practice at Terminal 6, PMA and its member companies agreed to assign the work in dispute to the ILWU in contract negotiations in 2008. Where a party contracts to assign the work to one union, a past practice of assigning it to another deserves little weight. *Longshoreman & Warehousemen Local 19*, 144 NLRB 1432, 1441 (1963).

Finally, as shown by the collective bargaining agreements, testimony and the industry's support for the ILWU in this dispute, ICTSI's current assignment of the work deserves little or no weight because the work at issue is not traditional IBEW work, particularly when compared to ILWU work. The work in dispute is no more "electrical" in nature than plugging or unplugging an appliance in the home. The majority of the IBEW work performed for the Port consists of maintenance on the Port's physical plant (including working at other terminals besides Terminal 6) and electrical maintenance and repair on the Port-owned cranes. (Tr. 197:8-16 [Mullen]). The Port electricians perform no other work on ICTSI's cargo delivery system. (*Id.*) The Port electrician job description lists reefer monitoring and plugging/unplugging on the dock as the electricians' least important task and some Port electricians rarely perform this work at all. (Exh.E-21 at p.1; Tr. 342:7-9 [Cordell]).

Meanwhile, longshore mechanic work consists primarily of work in this specific industry. (*See, e.g.*, I-3A §§ 1.7-1.8). The ILWU workforce works at Terminal 6 everyday, operating and performing maintenance and repair on all aspects of ICTSI's cargo-delivery system and receiving, monitoring, tracking, moving and repairing containers, including reefers. This is their core function. (Tr. 552:23-553:5 [Miken]).

In *Howard Terminal*, 147 NLRB at 366, the Board found that the PCLCD "expressly and primarily pertains to the shipping and stevedoring industries." Operating cranes in a stevedoring

operation was "traditionally longshore work since it involves the loading and discharge of cargo from vessels." Thus, the Board gave little weight to the fact that the employer had previously assigned the crane work to a union that was primarily focused on the construction industry. *Id.* The Board should do the same here. The work at issue is core longshore mechanic work. It is peripheral to if not entirely distinct from the core work of the IBEW.

5. AREA AND INDUSTRY PRACTICE – The ILWU performs the plugging, unplugging and monitoring of reefers on the dock at container facilities up and down the West Coast. IBEW performs it nowhere else.

There is no dispute that the ILWU performs the work of plugging and unplugging reefers on vessels at Terminal 6 and performs the plugging/unplugging and monitoring on the dock at the majority of the approximately 30 container facilities on the West Coast, including those at other Columbia River and Pacific Northwest ports. (Tr. 373:8-12, 379:3-6 [Marzano]). ILWU also has always performed the plugging/unplugging and monitoring of reefers on the dock at Terminal 2 in the Port of Portland. (Tr.488:9-13 [Huculak]).

Meanwhile, witnesses with coastwide experience in the industry were not aware of IBEW performing this work anywhere besides Terminal 6 in Portland. (*E.g.*, Tr. 373:23-374:2 [Marzano]). IBEW and ICTSI offered no evidence that IBEW performs this work anywhere else. Thus, the only reasonable inference is that Terminal 6 is the sole facility on the West Coast where workers represented by the IBEW perform the work in dispute. *Howard Terminal*, 147 NLRB at 366.

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It follows that the area and industry practice weigh entirely in favor of ILWU.

6. <u>SKILLS</u> – Both ILWU longshore mechanics and the Port electricians are capable of performing the disputed work.

As Terminal Manager Mullen agreed, the work of plugging, unplugging and monitoring of reefers on the dock is "fairly simple" and ICTSI has existing steady longshore mechanics with the skills to do it. (Tr. 186:24-187:1, 194:6-10). He agreed that the work is not any different from the work that ILWU longshore mechanics already perform on the vessels. (Tr. 192:13-16). There is no dispute that the Port electricians also have the necessary skills. When both groups of employees have the skills and training necessary to perform the work in dispute, this factor will not favor an award to either group. *Laborers (Eshbach Bros.),* 344 NLRB 201, 204 (2005).

V. <u>CONCLUSION</u>

For the reasons set forth herein, the Notice of 10(k) hearing should be quashed. Alternatively, the Board should award the work to ILWU longshore mechanics because the factors weigh in their favor when properly construed.

Dated: June 13, 2012 Respectfully Submitted,

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By: _____//s//_____
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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 with the National Labor Relations Board's eFiling system:

ILWU'S POST-HEARING BRIEF

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

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