

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

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

ICTSI OREGON, INC.'S RESPONSE  
TO PACIFIC MARITIME  
ASSOCIATION'S APPEAL OF  
REGIONAL DIRECTOR'S DENIAL  
OF MOTION TO INTERVENE AND  
MOTION TO QUASH SECTION  
10(K) HEARING

ICTSI Oregon, Inc. the "Charging Party" has, by separate memorandum, articulated why special permission to file an appeal should be denied. Those arguments will not be repeated here. Suffice to say, permission to appeal should be denied.

Motion to intervene was properly denied.

It is true that the Regional Director denied permission to intervene. It was his judgment that the interests of PMA and the ILWU were fully aligned and consistent. Most certainly that is true, given the fact that the PMA and the ILWU want the same result: Quash the hearing notice; and/or win the 10(k) jurisdictional award. For this reason, the Regional Director held that the ILWU would adequately represent the interest of PMA in this jurisdictional matter; and that any party could call representatives of the PMA to testify, if needed. Further the PMA's attorney attended the four day hearing and conferred with witnesses and with counsel for the ILWU throughout. Indeed they were in lock step with one another. E.g. See Exhibits A and B in which counsel for PMA attempted to coerce the Charging Party, its member, to suborn perjury or collapse and accept the ILWU jurisdictional demands. There can be no question but that the Regional Director, exercising the discretion vested in him, properly denied the motion. An

identical ruling was made in *International Brotherhood of Electrical Workers, Local 48 (Kinder Morgan Terminals)* 357 NLRB No. 182 (2011)

Neither Section 554 of the APA nor *Camay Drilling* compels a different conclusion. The case is both factually and procedurally inapposite. The decision came after a decision on the merits by an ALJ. Second, the ERISA obligations of the trustees to the beneficiaries differ radically. Indeed the Regional Director is entitled to consider time, nature of the proceedings and the public interest. Merely being a “party of interest” if indeed the PMA is, does not foreclose denial of a motion to intervene. Again the issue is remitted to the discretion of the Regional Director in balancing the APA factors. The proper balance was struck and his ruling is sound.

Motion to Quash.

ICTSI Oregon, Inc. (“ICTSI”) is a tenant of the Port of Portland. The Port is party to Collective Bargaining Agreements with both the ILWU and with the IBEW. Under its Agreement with the ILWU it is to honor historic jurisdictional work assignments. When it entered into this Collective Bargaining Agreement it was obligated to assign the plugging and unplugging of reefers, on the dock, to the IBEW with whom it had a Collective Bargaining Agreement. Accordingly when it leased one of its terminals to ICTSI, the terms required the lessee to utilize electrical supervisors and journey electricians employed by the Port to perform this work. This Agreement was entered into prior to the time that ICTSI became a member of PMA and thus signatory to an agreement with the ILWU.

ICTSI faces this conundrum. It does not control assignment of the work as that right is vested in the Port. If it violated the terms of the Lease, it would be terminated as the lessee. If it honors the terms of the Lease, it faces both the IBEW threat and the current slowdown and work stoppages of the ILWU.

The PMA asks the Board to rule on a motion not presented nor ruled upon below. The issue it presents is whether the status of the Port, as an alleged political subdivision of the state of Oregon, requires that the 10(k) notice be quashed. Seeking a ruling on a motion not presented or ruled upon below is procedural folly. There is no authority for this Board to consider and decide an issue upon which no ruling was made by the Regional Director. Second, the ILWU filed an initial motion to quash, but not on this ground. It was denied. In its brief filed on June 13, 2012 it fully argued this precise issue as did the Charging Party. In consequence the Regional Director will make a ruling from which a review may be requested.

Secondly, since this is a Johnny-come-lately argument, no record was made to support a conclusion as to whether the Port is a political subdivision of the state. It may well be a public agency, but it does not follow that it is a political subdivision of the state. A record would have to be made on this issue and, at most, a remand would be required for that purpose.

Finally, the PMA is dead wrong.

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”);<sup>1</sup> *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 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)*,

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<sup>1</sup> 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.

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.

#### Conclusion

It is respectfully submitted that the NLRB should:

1. Decline to grant special permission to appeal;
2. Alternatively, deny the motion to intervene obviating consideration of the motion to Quash; and
3. If intervention is granted, deny the motion to quash.

DATED this 15th day of June, 2012.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

/s/ Thomas M. Triplett

By \_\_\_\_\_

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Attorneys for ICTSI Oregon, Inc.

**Kirsch, Beth**

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**From:** TAmidon@pmanet.org  
**Sent:** Friday, May 25, 2012 10:57 AM  
**To:** Garone, Michael  
**Subject:** Violation of CLRC Decision

Mike,

Be advised that I am informing PMA management that ICTSI violated the CLRC's decision and Section 1.76 by the way it presented its case. Examples include:

1. Calling a clearly biased witness from the Port and not challenging the Port's flimsy (at best) claim of a right to control work on ICTSI's customer's containers under the lease business model.
2. Stating a subjective "preference" for honoring the lease without, at the very least, stating a preference for honoring the PCLCD.

You stated during your opening that Section 1.76 required that ICTSI do no more than present a factual case. Even if that were true, ICTSI has not presented a purely factual case.

ICTSI has failed to honor its contractual commitments to the ILWU as directed by the CLRC.

Todd

PAGE 1 EXHIBIT A



**MICHAEL T. GARONE**  
Admitted in Oregon and Washington  
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May 29, 2012

Todd C. Amidon  
Pacific Maritime Association  
555 Market Street, Third Floor  
San Francisco, CA 94105

Re: ICTSI/Port of Vancouver  
Our File No.: 119639/181646

Dear Mr. Amidon:

Please consider this letter ICTSI's response to your email dated May 25, 2012, which you apparently dispatched from the hearing room while I was participating in the 10(k) hearing. After having now had the chance to fully consider the contents of your email, ICTSI respectfully disagrees with your unfounded contention that it has violated Section 1.76 in the way that it conducted the Section 10(k) hearing.

Your first assertion is that ICTSI violated Section 1.76 by calling an allegedly "clearly biased witness from the Port" and by then failing to challenge the Port's allegedly "flimsy" claim that it retained the right to control the work in question. In making this groundless assertion, you ignore the fact that Mr. Ruda was subpoenaed by ICTSI and swore to tell the truth. His testimony was that the Port presented its lease language regarding the DCTU work as a "take it or leave it" proposal and that the Port expected ICTSI to comply with that lease language, language which clearly requires that the Port retain the right to perform the DCTU work. While I can understand that you may not like this testimony because it does not suit your current needs, it is difficult to understand how this statement of the Port's factual and legal position can be considered biased. And in any event, counsel for the ILWU had an opportunity to establish that Mr. Ruda was somehow biased and failed to do so.

Your secondary opinion that, along with being biased, Mr. Ruda's testimony was "flimsy," is also nothing more than your subjective opinion and cannot support any good-faith claim that Section 1.76 was violated. ICTSI believes that a neutral fact finder such as the NLRB or a court of law will find that the Port's claim based on clear lease language is anything but flimsy. The bottom line is that Mr. Ruda testified truthfully and your contention that somehow

Todd C. Amidon  
May 29, 2012  
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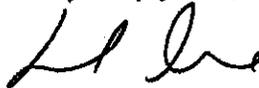
ICTSI violated Section 1.76 by asking questions which elicited truthful responses from a witness under subpoena is specious.

Your second assertion that ICTSI violated Section 1.76 by stating its preference that it follow the clear lease language (which gives ICTSI no right to control or assign the DCTU work and requires it to order such work from the Port) is equally baseless. First, Section 1.76 states that an employer will defend a CLRC or arbitration decision in a legal proceeding. It does not require witnesses to perjure themselves in order to do so. Mr. Mullen truthfully testified that it was ICTSI's preference to honor the clear lease provisions. Your suggestion that he should have been influenced to offer different testimony is troubling to say the least. Second, in presenting this testimony and during his answers to questions on cross-examination, Mr. Mullen did not attack the CLRC decision.

Additionally, do not assume that ICTSI agrees that the CLRC determination in this case is binding or legitimate. Serious procedural defects which violate the PCLCD as well as the PMA bylaws have permeated the decision. The result of a meeting called under these conditions is a nullity and cannot form the basis for any action under Section 1.76.

Your email of May 25, 2012 appears to constitute another effort to coerce ICTSI regarding its conduct of the Section 10(k) hearing. You have already indicated to me that the ILWU is pressuring the PMA to fine and/or expel ICTSI due to the positions that ICTSI is currently taking regarding the hearing. Please be advised that, if the PMA takes any action to retaliate against ICTSI related to positions it took or statements that ICTSI employees or agents made during the Section 10(k) process, ICTSI will pursue all available legal remedies to defend itself. As you are doubtless aware, a Section 10(k) hearing provides a remedy to employers subject, as in this case, to competing jurisdictional claims. Efforts to coerce or retaliate against such an employer for the positions taken during such a non-adversarial, investigative proceeding clearly violate the law.

Very truly yours,



Michael T. Garone

MTG:kbc

PAGE 2 EXHIBIT B



## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 15th day of June, 2012, I electronically filed the foregoing ICTSI'S RESPONSE TO PACIFIC MARITIME ASSOCIATION APPEAL OF REGIONAL DIRECTOR'S DENIAL OF MOTION TO INTERVENE AND MOTION TO QUASH SECTION 10 (K) HEARING with the National Labor Relations Board with the eFiling system.

I further certify that on the 15th 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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