

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

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 48)	
)	
Charged Party,)	
)	
and)	Case 19-CD-080738
)	
ICTSI OREGON, INC.,)	
)	
Charging Party,)	
)	
and)	
)	
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 8,)	
)	
Involved Party.)	
)	

**PACIFIC MARITIME ASSOCIATION’S REPLY TO ICTSI OREGON, INC’S
RESPONSE TO APPEAL OF DENIAL OF MOTION TO INTERVENE AND MOTION
TO QUASH SECTION 10(k) HEARING**

In its appeal, the Pacific Maritime Association (PMA) explained that the Board should either quash the notice of Section 10(k) hearing because the jurisdictional dispute here is not between “employees” under the Act, or allow PMA to intervene and present evidence and argument on this and other issues. In its response, ICTSI makes several arguments, none of which addresses the issue raised in PMA’s motion and appeal.

First, ICTSI argues that the Board cannot consider a motion to quash based on PMA’s argument because this argument was never made to the Hearing Officer. This ignores the main point of PMA’s appeal: this issue was never presented at the hearing because PMA was not allowed to intervene. The Hearing Officer denied PMA’s motion to intervene even though it was

clear that no other party could adequately represent PMA's interests. And as PMA's senior counsel explained at the conclusion of the hearing, no other party introduced all of the evidence PMA wanted to introduce or made all of the argument that PMA wanted to make. (Tr. 788.) The fact that no other party argued that the Board lacked jurisdiction under Section 10(k) only highlights why PMA should have been allowed to intervene. Moreover, this issue is now before the Board. Whether or not this issue was clearly raised at the hearing, the Board should not issue a 10(k) determination when it so clearly lacks jurisdiction to do so.

Second, ICTSI argues that the Board should reject PMA's appeal because "no record was made to support a conclusion as to whether the Port is a political subdivision of the state." (ICTSI Brf. at 3.) Once again, to the extent the record was not fully developed on this issue, this only supports PMA's position that it should have been permitted to intervene. PMA could have presented this argument directly and presented evidence to support it. Yet even without PMA's formal participation, the record reflects that, in fact, the Port of Portland is a political subdivision of the State of Oregon. Perhaps the best support for this came from ICTSI's own counsel, who noted that "this is a port that is not even subject to the National Labor Relations Act, subject to a completely different statutory system in Oregon, the Public Employees Board in Oregon" (Tr. 777.) That is the very point PMA is making in this appeal.

Most importantly, even if the record were completely silent on this point, it is beyond dispute that the Port of Portland is a subdivision of the State of Oregon. *See, Hale by Hale v. Port of Portland*, 783 P.2d 506, 511 (Or. 1989) ("[T]he Port [of Portland] is an instrumentality of the state government, performing state functions"). Or. Rev. Stat. §§ 778.010, 174.116(2)(hh), 198.605 (Port was created as a public agency by the Oregon Legislature). The Port's website states that the Oregon Legislature created the Port in 1891 as a regional government and that the

Port's commissioners are appointed by the Governor and confirmed by the State Senate. *See*, http://www.portofportland.com/PDFPOP/Newsroom_Corporate_Fact_Sheet.pdf. Certainly the Board can take judicial notice of the Port's status as a political subdivision of Oregon.

Finally, ICTSI suggests that somehow the Board still has jurisdiction over this dispute even if the IBEW workers are employed by the Port of Portland and thus not "employees" under the Act. The cases ICTSI cites are irrelevant. They address the issue of whether the Board may issue a Section 10(k) award even though one employer had no power to assign the work in dispute. Those cases do not address the argument PMA is making here. PMA's argument does not depend on whether ICTSI has the power to control the assignment of the work, but rather that the alleged jurisdictional dispute involves a group of workers who *are not employees under the Act*. The IBEW workers are employed by the Port, an arm of the State of Oregon, and therefore clearly are not "employees" within the meaning of the Act.

In its brief, PMA cited *Local 326, Int'l Broth. of Teamsters*, 194 NLRB 594 (1971), in which the Board held unequivocally that a 10(k) notice of hearing should be quashed where one of the two groups competing for the work are not statutory employees under the Act. That decision controls here. ICTSI does reference or make any attempt to distinguish this case. Instead, it argues that, under *Int'l Broth. of Painters and Allied Trades, Dist. Council 9*, 313 NLRB 1111 (1994), the Board may make a Section 10(k) determination "even when the entity that in actuality does control the work in question may not be subject to the Board's jurisdiction." (ICTSI Brf. at 5.) But this misconstrues PMA's argument. The issue here is not which entity actually controls the work or whether the Board has jurisdiction over that entity. The issue is whether there is a dispute between two groups of "employees" under the statute, which necessarily requires that the IBEW workers here be statutory employees. The Board did

not address this issue at all in the *Painters and Allied Trades* case, the sole case upon which ICTSI relies. ICTSI does not cite a single case – and there is none – holding that the Board can issue a 10(k) award where, as here, one group of workers claiming the disputed work is employed by a state government entity.

For all the reasons stated above and in its prior brief, PMA respectfully requests that the Board quash the notice of hearing in this matter. If the Board determines that there is insufficient evidence in the record, it should remand to the Regional Director with instructions to re-open the proceedings and grant PMA's motion to intervene.

Respectfully submitted this 18th day of June 2012

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CERTIFICATE OF SERVICE

This certifies that today I electronically filed the foregoing document and served it by electronic mail on:

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/ s / Jason M. Steele

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