

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 19**

**INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, AFL-CIO**

**and**

**INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, LOCAL 8, AFL-CIO**

**and**

**INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, LOCAL 40, AFL-CIO**

**and**

**ICTSI OREGON, INC.**

**Case 19-CC-82533**

**and**

**PORT OF PORTLAND.**

**Case 19-CC-82744**

**MOTION FOR SPECIAL PERMISSION TO FILE A SPECIAL EMERGENCY APPEAL  
AND APPEAL OF THE DENIAL OF CHARGED PARTIES' MOTION TO CONTINUE  
ULP TRIAL**

**MOTION FOR PERMISSION TO FILE A SPECIAL EMERGENCY APPEAL**

Respondents International Longshore and Warehouse Union (“ILWU”), ILWU Local 8 and ILWU Local 40 (collectively, “the Unions”) hereby request permission pursuant to 29 CFR § 102.26 to file a special emergency appeal of the denial of their motion to continue the ULP trial in this matter. As shown in the appeal set forth below, the Unions are substantially prejudiced by starting the trial in these consolidated matters on July 24, 2012 – a date three

MOT. TO FILE SPECIAL APP. & APP. OF DENIAL OF MOT. TO CONT. ULP TRIAL

weeks earlier than the date on which the trial was originally set to start. Unless the Unions are permitted to file this special appeal, they will be required to defend against the charges in these cases without having the benefit of time to prepare. This will prejudice the Unions and deny them their due process right to have the charges against them – charges that the Unions contend are entirely meritless – tried on a full and fair record. In addition, requiring the Unions to proceed with the trial will place an enormous and unjust burden on the Unions’ counsel and their families given the significant and unalterable personal and professional obligations that counsel have this week and next, as described in the appeal. The only way to avoid this prejudice and denial of due process is for the Board to hear the Unions’ special appeal. On the other hand, the General Counsel and charging parties will suffer no prejudice if the trial is continued as Region 19 has already obtained a preliminary injunction against the Unions under section 10(l) of the Act pending resolution of these proceedings. For the foregoing reasons, the Unions respectfully request permission to file a special appeal of the denial of their motion to continue the trial.

Dated: July 25, 2012

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Attorneys for Respondents,  
ILWU and LOCALS 8 AND 40

**SPECIAL APPEAL OF THE DENIAL OF CHARGED PARTIES' MOTION TO  
CONTINUE ULP TRIAL**

Respondents International Longshore and Warehouse Union (ILWU) and its Locals 8 and 40, hereby specially appeal the denial of their motion to continue the ULP trial in these consolidated cases. A continuance of the trial is required in order to provide the Unions with due process and avoid unfairly prejudicing them. The Unions respectfully submit that the Chief Judge and ALJ were wrong to deny their motion and urge the Board to reverse the ruling and continue the start of the trial to September 5, 2012, or alternatively, to August 14<sup>1</sup> – the date the trial was originally scheduled to start.

A continuance is necessary and appropriate and the Board should reverse the Chief Judge and ALJ's rulings for the following reasons: 1) the Region improperly advanced the trial date from August 14 to July 24; 2) Respondents have not had adequate time to prepare for hearing because of the ongoing litigation; 3) Respondents' counsel Robert Lavitt is unable to attend the trial as scheduled due to a recent death in his family and pre-existing professional obligations; Respondents' counsel Robert Remar (based in another state, the California Bay Area) is presently in the midst of relocating his personal residence in Oakland, California largely in response to an emergency situation created by his having been burglarized three times within recent months, and Respondents' counsel Eleanor Morton also lives and works in the San Francisco Bay Area and she and her partner are expecting their first baby any day; 4) Respondents' key representatives and witnesses are unavailable at the scheduled time; 5) the extensive allegations in the complaint warrant several weeks of trial preparation once the current litigation schedule subsides; 6) the all-consuming litigation prevented Respondents preparing

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<sup>1</sup> All dates herein are in 2012 unless otherwise indicated.

sooner their motion for continuance; and 7) there is no urgency as the United States District Court for the District of Oregon has issued a preliminary injunction against the Respondents. Respondents urge the Board to reverse the Judges' decisions and order that the trial be re-scheduled to start Wednesday, September 5 or, alternatively, August 14 as originally scheduled.

**1. The Region Improperly Advanced The Start Of The Trial.**

The complaint in this matter issued on June 15, based on charges filed between June 6 and June 13, alleging secondary boycott violations under section 8(b)(4)(B) of the Act. The theory of the complaint is that Respondents have unlawfully directed concerted actions to secure the work of plugging, unplugging and monitoring refrigerator containers ("reefers") against their allegedly "neutral," signatory employer, ICTSI, which operates Terminal 6 in the Port of Portland under the terms of the ILWU-PMA Pacific Coast Longshore and Clerks agreement (PCL&CA). According to the complaint, the primary employer is the Port of Portland, a public entity organized and administered under the laws of the State of Oregon. Paragraph 6 of the complaint alleges 24 separate violations of the Act by various named and unnamed agents of Respondents. Most of the allegations referred to "unnamed agents" of Respondents and provide little information for meaningful response. The complaint set the trial date for August 14. By the terms of the complaint, Respondents' answer to the allegations was due June 29. Respondents timely filed an answer to the complaint.

On July 5, the region unilaterally issued an order advancing the start of the trial date from August 14 to July 24. The Region provided no advance notice to Respondents nor an opportunity for them to provide any input as to the trial date change.

On July 16, during a conference call with the ALJ, Respondents alerted the other parties and the ALJ that they would be filing a motion for continuance of ULP trial. The General Counsel expressed opposition. On July 19, Respondents filed their motion for a continuance with Chief Judge Cracraft in San Francisco. On July 20, Judge Cracraft denied the motion and referred the matter to the ALJ for ruling. On July 24 at the start of the hearing, Respondents renewed their motion for continuance and made argument on the record as to the grounds. The ALJ denied the motion and commenced the hearing.

The July 5 order advancing the trial date states the reason as "due to the serious nature of the alleged violations." However, the Region has necessarily known the nature of the allegations of its complaint since it originally issued it on June 15. The last violation alleged in the complaint is dated June 10. Thus, there is no compelling reason to justify a change in the Region's initial judgment that the nature of the allegations warranted an August 14 trial date. Moreover, the late timing of the Region's order advancing the trial date -- three weeks after issuance of the complaint with the original trial date and only 19 days before the start of the new trial date -- provides Respondents with very little notice and opportunity to prepare their case accordingly.

**2. Respondents Have Not Had Adequate Time To Prepare For The Advanced Trial Because Of The Ongoing Litigation.**

The complaint herein was filed a few days after the start of three separate but related federal court lawsuits in US District Court in Portland Oregon, concerning the underlying labor dispute. The first lawsuit, *ILWU/PMA v. ICTSI*, Case No. 3:12-cv-01058-SI was filed on June 13 by ILWU and PMA (the multi-employer Association of approximately 70 ocean carriers, stevedores, marine terminal operators and waterfront maintenance companies including ICTSI)

MOT. TO FILE SPECIAL APP. & APP. OF DENIAL OF MOT. TO CONT. ULP TRIAL

under § 301 of the Labor Management Relations Act (LMRA) to enforce Joint Labor Relations Committee rulings and an arbitration award directing ICTSI to assign the reefer work to ILWU mechanics at Terminal 6. On June 21, ICTSI filed counterclaims against ILWU and PMA including claims for damages and antitrust violations. On June 21 and 22, the Port of Portland (POP) and IBEW Local 48 were granted intervention with the right to file counterclaims against ILWU and PMA.

The second lawsuit, *Hooks v. ILWU*, Case No. 3:12-cv-01088-SI, was filed by the Region on June 18 for a TRO and section 10(l) injunction.

The third lawsuit, *PMA v. ILWU Local 8*, Case No. 3:12-cv-1100-SI was filed on June 19 by PMA under § 301 of the LMRA to enforce arbitration awards finding the locals guilty of concerted actions in violation of the no-strike provision of the PCL&CA. The federal court has treated all three cases, along with the counterclaims, together.

Since June 13, the litigation has required the parties to prepare extensive legal pleadings and to prepare and participate in numerous court proceedings on an almost daily basis, including most weekend days. Respondents here are carrying an even greater litigation burden because they have been required to respond to the court filings and legal tactics of five other parties -- the Region, ICTSI, POP, IBEW and PMA.

And the daunting litigation schedule will continue unabated for several more weeks to come. Below is a chronology of the major litigation events, filings and proceedings in the three lawsuits, with excerpts of the court's scheduling minutes from the court records. Also included are some of the events in the instant NLRB administrative proceeding:

MOT. TO FILE SPECIAL APP. & APP. OF DENIAL OF MOT. TO CONT. ULP TRIAL

## Chronology of Litigation

June 13 -- *ILWU/PMA v. ICTSI*, Case No. 3:12-cv-01058-SI filed

June 18 -- ICTSI motion to stay the case filed

June 18 -- *Hooks v. ILWU*, Case No. 3:12-cv-01088-SI filed

June 18 -- ILWU/PMA motion for TRO against ICTSI filed

June 19 -- *PMA v. ILWU Local 8*, Case No. 3:12-cv-1100-SI filed

June 21 -- PMA motion to enforce arbitration awards against Local 8 filed

June 21 -- Port granted intervention

June 21 -- ICTSI counterclaims for § 303 damages against ILWU and antitrust violations against ILWU/PMA filed

June 21 - ILWU opposition to TRO in *Hooks* and response to ICTSI motion to stay filed

June 22 -- IBEW granted intervention

June 22 -- Court Hearings:

ORDER - For the joint TRO hearing scheduled for 6/22/2012, at 1:30 p.m. in Courtroom 15A, the initial order of presentation by counsel shall be: (1) the National Labor Relations Board ("NRLB") in support of its petition for a TRO (Dkt. 1) in case 3:12-cv-01088-SI; (2) the International Longshore and Warehouse Union ("ILWU") in opposition to the NRLBs petition for a TRO in case 3:12-cv-01088-SI and in support of the ILWU's joint motion for a TRO (Dkt. 13) in case 3:12-cv-1058-SI; (3) the Pacific Maritime Association ("PMA") in support of its joint motion for a TRO (Dkt. 13) in case 3:12-cv-1058-SI; (4) ICTSI Oregon, Inc. ("ICTSI") in support of its motion to stay (Dkt. 11) in case 3:12-cv-1058-SI and in opposition to ILWU and PMA's joint motion for TRO; (5) The Port of Portland ("PORT") in opposition to ILWU and PMA's joint motion for TRO; and (6) The International Brotherhood of Electrical Workers Local 48 ("IBEW") in opposition to ILWU and PMA's joint motion for TRO. Ordered by Judge Michael H. Simon. (mja) (Entered: 06/22/2012)

JUNE 22 MINUTES of Motion Hearing: Order - Defendant's Motion to Stay is DENIED for the reasons stated by the court during the hearing. Hearing held on Plaintiffs' Joint Motion for Temporary Restraining Order. Hearing continued to

MOT. TO FILE SPECIAL APP. & APP. OF DENIAL OF MOT. TO CONT. ULP TRIAL

June 29, 2012, at 9:00 a.m. in Courtroom 15A. Parties ordered to participate in settlement conference before Special Master Theodore R. Kulongoski 46. By stipulation of the parties, it is further ordered that the parties and their counsel shall keep confidential all settlement discussions. The National Labor Relations Board, Region 19 and its counsel in Case No. 3:12-cv-1088-SI may participate in these settlement discussions as if the NLRB was a party in this case. Robert S. Remar, Robert H. Lavitt, Jason Steele, and Jeffrey P. Chicoine present as counsel for plaintiff(s). Thomas M. Triplett, Amanda Gamble and Roman D. Hernandez present as counsel for defendant(s). Lisa Dunn and Mara-Louise Anzalone present as counsel for NLRB. Kathy Ann Peck and Randolph C. Foster present as counsel for the Port of Portland. Norman D. Malbin present as counsel for IBEW Local 48. Court Reporter: Dennis Apodaca. Judge Michael H. Simon presiding. (mja) (Entered: 06/22/2012)

June 22 to July 3 -- all parties, including Respondents, participate in the marathon settlement negotiations under the direction of former Oregon Gov. Theodore R. Kulongoski

June 29 -- Court Status conference -- Region's oral motion for §10(l) injunction denied without prejudice for later consideration

July 3, 1 AM -- Gov. Kulongoski announces no likelihood of settlement and releases the parties from the mandatory negotiations

July 3 -- Third court hearing on the competing motions in the cases; § 10(l) TRO granted:

MINUTES of Status Conference: Order - Plaintiffs' Motion for Temporary Restraining Order is DENIED for the reasons stated on the record. Setting a Scheduling Conference for 7/13/2012 at 09:00AM in Portland, Courtroom 15B, before Judge Michael H. Simon. Any proposed agreed upon schedule must be submitted to the Court no later than 5:00PM on 7/11/2012. Robert S. Remar present as counsel for ILWU. Clifford D. Sethness present as counsel for PMA. Mara-Louise Anzalone present as counsel for NLRB. Michael T. Garone present as counsel for ITSCI. Kathy Ann Peck and Randolph C. Foster present as counsel for the Port of Portland. Norman D. Malbin present as counsel for IBEW Local 48 Court Reporter: Bonita Shumway. Judge Michael H. Simon presiding. (mja) (Entered: 07/03/2012)

July 6 -- Region's motion for contempt of § 10(l) TRO against Respondents filed

July 9 -- PMA motion for TRO to enforce arbitration awards and injunction against Local 8 filed

MOT. TO FILE SPECIAL APP. & APP. OF DENIAL OF MOT. TO CONT. ULP TRIAL

July 11 -- The Parties' joint and separate scheduling reports filed

July 13 -- Court hearing on scheduling of cases and extension of § 10(l) TRO

July 13 -- Region's subpoenas served on Respondents

July 13 -- Respondents request for blank subpoenas from Region filed

July 16 -- ILWU opposition pleadings to contempt and to PMA motion to enforce filed

July 18 -- ILWU will file motion to quash Region's five subpoenas

July 19 -- Fourth court hearing on the competing motion and half-day court trial. 10(l)

preliminary injunction motion granted, Region's motion for contempt denied and PMA's motion for a TRO denied.

MINUTES of Motion Hearing: Hearing held on 7/19. Testimony taken. Brian Yockey sworn and examined. NLRB's Motion for Preliminary Injunction 10 is GRANTED for the reasons stated on the record. NLRB's Petition for Civil Contempt 26 is DENIED for the reasons stated on the record with written findings and conclusions to follow. Robert S. Remar present as counsel for ILWU. Clifford D. Sethness present as counsel for PMA. Michael T. Garone present as counsel for ICTSI Oregon, Inc. Mara-Louise Anzalone and Lisa Dunn present as counsel for the NLRB, Region 19. Kathy Ann Peck present as counsel for the Port of Portland. Norman D. Malbin present as counsel for IBEW Local 48. Court Reporter: Bonita Shumway. Judge Michael H. Simon presiding. (mja) (Entered: 07/20/2012)

July 23 -- POP and IBEW counterclaims filed against Respondents.

July 24 -- Pursuant to Court order, Respondents prepare and provide mailed notice of preliminary

injunction to more than 100 companies that call at Terminal 6

July 25 -- ILWU motion to dismiss ICTSI counterclaims due

Aug 12 -- ILWU answers or motion to dismiss POP and IBEW counterclaims due

This brief chronology does not (because it cannot) begin to convey the extensive legal writing and hearing preparation required during this period. Suffice it to say that 63 pleadings

MOT. TO FILE SPECIAL APP. & APP. OF DENIAL OF MOT. TO CONT. ULP TRIAL

have been filed in *ILWU/PMA v. ICTSI*, Case No. 3:12-cv-01058-SI; 53 pleadings have been filed in *Hooks v. ILWU*, Case No. 3:12-cv-01088-SI; and 31 pleadings filed in *PMA v. ILWU Local 8*, Case No. 3:12-cv-1100-SI 27; for a total of 147 pleadings/hearings prepared and filed in a 5 1/2 week period.

By any measure, this is an extraordinary amount of legal work. The point, of course, is that this has prevented respondent's counsel and their representatives from preparing for the NLRB administrative trial. To be sure, some issues in the administrative proceeding overlap with those in the court litigation. However, the vast majority of issues in the court litigation have little relevance to the administrative case. This is because the litigation has concerned mostly legal questions concerning the appropriateness of court injunctions here, the enforceability of various, competing arbitration rulings, and whether to stay some or all of the lawsuits. Additionally, almost 2 weeks were spent in mandatory, marathon settlement negotiations with former Gov. Kulongowski.

None of the 24 allegations of misconduct set out in paragraph 6 the NLRB administrative complaint has been litigated in the court litigation. Consequently, Respondents have not had any opportunity yet to review with care, investigate, and prepare witnesses concerning the 24 alleged incidents of unfair labor practices.

ICTSI's filing of a legal claim for damages under § 303 for alleged secondary boycott violations only increases the importance of the NLRB administrative proceeding. These heightened stakes compel greater preparation and care by Respondents, requiring additional time for trial preparation.

**3. Respondents' Counsel Are Either Unable Attend Or Have Extremely Pressing Family Obligations That Make Their Attendance Extraordinarily Burdensome To Them And Their Families.**

While the law firm of Leonard, Carder, LLP, serves as ILWU International counsel in general and counsel for Respondents here in particular, Robert Lavitt of the Schwerin, Campbell, Barnard, Iglitzin and Lavitt, LLP, law firm in Seattle, Washington, has served as co-counsel for Respondents in this matter as well as in the underlying litigation. His participation is essential to the defense against the ULP complaint. In particular, Lavitt serves as an important and necessary, independent legal voice for the interests of the Respondent locals.

Mr. Lavitt suffered a death in the family and had to fly across the country to Connecticut on Monday, July 23 for a funeral on July 24. In addition, Mr. Lavitt of course, has other clients and previously scheduled obligations to them. Specifically, he has a two-day arbitration on July 26 and 27 that requires extensive preparation in the days beforehand. Thereafter, Mr. Lavitt has two major interest arbitrations on August 7-10, 14-15 and 20-24, involving two unrelated large bargaining units of Washington state employees, scheduled months ago. Mr. Lavitt then has a scheduled family vacation August 29 to September 1. In the month of September, Mr. Lavitt will be unavailable on September 17 and September 26 in observance of religious holidays.

Counsel for the ILWU International is based in the Bay Area in California. Lead counsel Robert Remar has experienced three burglaries to his home in the last few months. These have virtually forced him and his family to move their personal residence. Mr. Remar is in the midst of trying to move out of his house and sell it. Representing the ILWU in a trial in another state while his family manages this massive job without him, all under the specter of these recent and frightening break-ins is unfair to Mr. Remar and to his family. ILWU International counsel

Eleanor Morton and her partner are expecting their first child any day. Representing the union in a trial in another state is simply not possible for her at this time.

**4. Key Representatives Of Respondent ILWU Are Unavailable.**

The importance of this case requires the personal attendance of the ILWU International officers. In the ILWU International, President Bob McEllrath and ILWU Coast Committeeman Leal Sundet have attended all court hearings in the underlying litigation. Neither of them are available for the July 24 ULP trial due to previously scheduled obligations.

Specifically, president McEllrath is attending the regional meeting of the Maritime Advisory Committee for Occupational Safety and Health (MACOSH) in Seattle, Washington from July 23-July 27. Mr. Sundet is scheduled to be in Montana for family obligations July 20-July 25. Mr. Sundet will be a key witness for Respondents at trial.

**5. The Extensive Allegations In The Complaint Warrant Several Weeks Of Trial Preparation Once The Current Litigation Schedule Subsides.**

Respondent's counsel will not be able to begin preparation for the administrative trial until the current intensity of court litigation subsides. Under the current litigation schedule, it is likely that this will not occur until several weeks, sometime in the middle of August. It is only at that point that Respondents' counsel will be able to actually prepare witnesses and evidence for the ULP trial.

**6. The All-Consuming Litigation Has Prevented Respondents From Preparing Sooner This Motion For Continuance.**

The detailed chronology of litigation set out above should speak for itself to explain the difficulty respondent's counsel has had in attending to this administrative case and preparing the instant motion for a trial continuance.

**7. The General Counsel and Charging Parties Will Not be Prejudiced by a Short Delay As The Court Has Granted The Region's Motion For Preliminary Injunction Under Section 10(l).**

As shown in the chronology above, the court in *Hooks v. ILWU* has granted the Region's motions for a temporary restraining order and preliminary injunction under section 10(l) of the Act pending the resolution of the charges at issue in this proceeding. Thus, there is no urgent need to conduct a ULP trial. The Region has already obtained preliminary relief from the court and will not be prejudiced by a delay of the trial date, particularly given the modest delay that Respondents seek until September 5. A September 5 trial start would be only three months after the alleged commission of the ULP's at issue. This is still a considerably fast timeframe for ULP trials.

**CONCLUSION**

For all of the above reasons, Respondents respectfully request that the Board reverse the rulings of the Chief Judge and ALJ and order that the ULP trial be rescheduled to start on Wednesday, September 5 in this matter or, alternatively, to August 14.

Dated: July 25, 2012.

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MOT. TO FILE SPECIAL APP. & APP. OF DENIAL OF MOT. TO CONT. ULP TRIAL

## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July 2012, I caused the foregoing  
MOTION FOR SPECIAL PERMISSION TO FILE A SPECIAL EMERGENCY APPEAL AND  
APPEAL OF THE DENIAL OF CHARGED PARTIES' MOTION TO CONTINUE ULP  
TRIAL to be e-filed with the National Labor Relations Board, Office of the Executive Secretary  
and a copy of the same to be e-mailed to the following:

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I declare under penalty of perjury under the laws of the United States that the foregoing is  
true and correct.

Dated this 25<sup>th</sup> day of July, 2012.

\_\_\_\_\_/s/\_\_\_\_\_  
Eleanor Morton

MOT. TO FILE SPECIAL APP. & APP. OF DENIAL OF MOT. TO CONT. ULP TRIAL