

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 19

In the Matter of:

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

and

ICTSI OREGON, INC.,

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 8.

Case No. 19-CD-080738

**ICTSI OREGON, INC.'S RESPONSE TO ILWU LOCAL 8'S MOTION TO REOPEN
THE RECORD TO ALLOW ADMISSION OF NEWLY ACQUIRED EVIDENCE**

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I. INTRODUCTION

International Longshore and Warehouse Union, Local 8 (“Local 8”) has moved the Board to reopen the Section 10(k) hearing in this case to offer evidence of an interim agreement between ICTSI Oregon, Inc. (“ICTSI”), the International Brotherhood of Electrical Workers, Local 48 (“IBEW”) and amicus Port of Portland (“the Port”) regarding temporary assignment of the Disputed Work. Failing to cite any legal support for the notion that this interim agreement is relevant in any way to the jurisdictional dispute currently before the Board, Local 8 takes statements made by ICTSI’s counsel at a federal court hearing out of context and fails to consider statements made by the Port’s counsel and IBEW’s counsel in response to those statements. Local 8’s motion to reopen the record should be denied.

II. FACTS

The Section 10(k) hearing commenced on May 24, 2012 and concluded on May 30, 2012. At the hearing, Local 8 failed to make any argument that the Board somehow lacked jurisdiction to hear the dispute simply because the Port employed the IBEW-represented electricians. The parties submitted post-hearing briefs on or about June 13, 2012. In the period between the end of the Section 10(k) hearing and the filing of the post-hearing briefs, Local 8, with the participation of ILWU Local 40 and the ILWU International (collectively “ILWU”), engaged in a series of threats, slowdowns, work stoppages, safety gimmicks, and other conduct in violation of the National Labor Relations Act.¹

¹ This conduct has not ceased.

As part of this conduct, employees represented by Local 8 began performing, in defiance of the directives of ICTSI management, the Disputed Work and effectively prevented the Port's IBEW-represented employees from performing the work they had performed for decades. The ILWU's misconduct adversely impacted the functioning of Terminal 6 at the Port of Portland, the Portland area's sole container facility through which a substantial amount of goods in interstate and international commerce flow. This disruption has caused serious economic impact to the region.

In response to the ILWU's misconduct, both ICTSI and the Port filed unfair labor practice charges against the ILWU under Section 8(b)(4)(B) of the Act. Region 19 found merit to these charges, issued a complaint alleging that the ILWU committed numerous ULPs and, in addition, sought injunctive relief in the United States District Court for the District of Oregon under Section 10(l) of the Act. *See Hooks v. ILWU*, Case No. 3:12-cv-01088-SI. On June 22, 2011, United States District Judge Michael Simon deferred ruling on Region 19's petition for a temporary restraining order against the ILWU and instead entered an order appointing the ex-Governor of the State of Oregon, Ted Kulongoski, as a special master with authority to engage in settlement discussions with the parties. After approximately seven days of settlement discussions, the parties were unable to reach agreement. On July 2, 2012, the parties' discussions continued into the early morning hours of July 3, 2012 in advance of a court hearing before Judge Simon at 9:00 a.m. later that morning.

After the negotiations with ILWU failed early in the morning of July 3, 2012, ICTSI, the Port and IBEW engaged in verbal discussions in an effort to lessen the labor unrest caused by the ILWU at Terminal 6 and permit the free flow of goods through the Terminal. Thus, the three parties verbally agreed, without the participation of the ILWU, that the Port would temporarily authorize ICTSI to permit the Local 8-represented

employees to continue to perform the Disputed Work until a decision was reached by the Board in the Section 10(k) proceeding. While counsel for ICTSI understood from the late-night discussions that this authorization would continue if the Board decided that it did not possess jurisdiction to determine the matter under Section 10(k), counsel for both the Port and the IBEW failed to indicate their assent to this at the hearing. Thus, after counsel for ICTSI stated his understanding of the parties' verbal agreement, counsel for the Port clarified that the Port would "need to talk about what impact the 10(k) proceedings" would have on the Port's "modification of its current arrangement with ICTSI." (Ex. A to Motion, Transcript of July 3, 2012 Hearing, p. 9.) Counsel for the Port further stated: "So that may be a slightly different take on things. But at least until the 10(k) is resolved, the Port is willing to permit ICTSI to assign this work to the longshoremen." (*Id.*) For his part, the attorney for the IBEW indicated only that the IBEW would follow the decision in the Section 10(k) hearing. (*Id.*)

Subsequent to the July 3, 2012 hearing, the Port, the IBEW and ICTSI entered into a written settlement entitled "Agreements Regarding Work Assignment Dispute at Port of Portland Terminal 6" (the "Interim Agreements").² An executed copy of this document is attached hereto as Exhibit A. The effect of the Interim Agreements is that the Port has authorized ICTSI to temporarily assign the Disputed Work to ICTSI's Local

² In its Motion, the ILWU claims that the transcript of the July 3 court hearing demonstrates that the parties agreed that the Disputed Work would be permanently assigned to the ILWU in the event the NLRB ruled it did not have jurisdiction to resolve the work assignment issue in this 10(k) proceeding. But the July 3 transcript demonstrates that the Port did not agree that the ILWU would be permanently assigned the work if the NLRB decided it did not have jurisdiction. *See* statements by Mr. Foster, Ex. A to Motion, p. 9. However, regardless of the hearing record, the executed Interim Agreements are the final expression of the parties' agreement regarding temporary assignment of the Disputed Work.

8-represented employees so that, among other things, (i) the current labor unrest at Terminal 6 can be avoided; (ii) physical confrontations between the Port's IBEW employees and ICTSI's ILWU employees over the Disputed Work can be avoided; and (iii) the flow of commerce can continue without serious disruption. The arrangement is temporary. The Port's authorization to permit ICTSI to assign the Disputed Work to Local 8 members lasts only until the NLRB makes a 10(k) determination or until the Port withdraws its authorization, whichever comes earlier. Neither the Port nor the IBEW has agreed that the Disputed Work may be assigned to the ILWU in the event the NLRB rules that it is without jurisdiction to resolve the current jurisdictional dispute. However, ICTSI, the Port and the IBEW have each agreed in the Interim Agreements to honor the NLRB's decision on the merits concerning assignment of the Disputed Work. The only party that has not agreed to do so is the ILWU.

III. DISCUSSION

Local 8 fails to offer any cogent explanation of why any purported temporary agreement between ICTSI, the Port and the IBEW possesses any relevance to the Board's determination of the current jurisdictional dispute under Section 10(k). The Interim Agreement was entered into solely as a means to avoid a continuation of the labor unrest caused by the ILWU at Terminal 6 regarding the Disputed Work and to get the wheels of commerce moving again. The terms of the Interim Agreement are uncomplicated. The Port authorized ICTSI to temporarily assign the Disputed Work to Local 8 pending resolution of the Section 10(k) hearing and further agreed not to consider ICTSI's assignment of said work to be a violation of the Lease between the Port and ICTSI. In doing so, the Port did not waive in any way any of its rights under the Lease. For its part, the IBEW agreed that it would not file grievances against the Port due to the Port's actions to instruct IBEW members not to perform the Disputed Work on a temporary

basis. These Agreements were made in the face of coercive actions by the ILWU, whose members physically displaced the Port's IBEW-represented electricians from performing the Disputed Work in clear violation of ICTSI management's orders.³

As stated above, both ICTSI and the Port filed unfair labor practice charges against the ILWU. The Regional Director found merit to the charges and filed a lengthy unfair labor practice complaint which is currently being heard by Administrative Law Judge Schmidt. The District Court issued a temporary restraining order and a preliminary injunction restraining the ILWU from further violations of the law. Notwithstanding the above, operations at Terminal 6 continue to be disrupted by the ILWU's actions and innocent third parties have been injured and continue to be injured.

Rather than attempting to improve conditions at Terminal 6, the ILWU, by its present motion, engages in a cynical effort to use the Interim Agreements of the Port, the IBEW and ICTSI against the parties in order to further its goal of wresting control of the Disputed Work from the IBEW-represented employees of the Port outside of the orderly and well-established Section 10(k) process. This effort should not succeed.

IV. CONCLUSION

Local 8's motion should be denied.

DATED this 30th day of July, 2012.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ Michael T. Garone
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³ The NLRB attorney characterized the interim agreement as a product of coercion by the ILWU. (Ex. A to Motion, Transcript of July 3, 2012 Hearing, pp. 10-12.)

Portland, Oregon 97204
Of Attorneys for ICTSI Oregon, Inc.

EXHIBIT A

**INTERIM AGREEMENTS REGARDING WORK ASSIGNMENT DISPUTE
AT PORT OF PORTLAND TERMINAL 6**

Effective July 3, 2012

The Port of Portland ("Port"), ICTSI Oregon, Inc. ("ICTSI"), the District Council of Trade Unions ("DCTU") and IBEW, Local 48 ("IBEW") (collectively "the Parties") have entered into this Agreement to:

- Avoid continuing labor unrest at Terminal 6 regarding work assignment issues;
- Minimize the risk of any confrontation or altercation between members of the ILWU and the IBEW over work assignment issues;
- Permit the NLRB's pending 10(k) process concerning disputed work at Terminal 6 to proceed to a conclusion;
- Avoid placing ICTSI in an adverse position to the PMA regarding the assignment of work to the ILWU pending the NLRB's resolution of the pending 10(k) proceeding; and
- Encourage and promote the free flow of commerce through the Port of Portland.

Agreement Between Port - DCTU - IBEW

1. Between June 5-7, 2012, the IBEW filed grievances against the Port alleging a violation of Scope of Agreement, Article I (Recognition), Section 1.01, and past practice. The grievances alleged that the Port allowed ICTSI's ILWU employees to perform the plugging, unplugging, and monitoring of refrigerated containers on the dock at Terminal 6 (the "Disputed Work").
2. The Port, the DCTU and the IBEW entered into a June 13, 2012 Settlement Agreement concerning these grievances. That Settlement Agreement remains in effect. The parties further agree that this Interim Agreement will not be considered a violation of the Settlement Agreement.
3. The DCTU, IBEW and the Port agree that, until a final resolution of the NLRB's 10(k) proceeding, the Port may instruct the Port's IBEW employees not to perform the Disputed Work. Until resolution of 10(k), such instruction will not be the subject of any further grievance or work action by the IBEW, and that the Port's IBEW employees will honor the instruction.
4. The Port will ensure that the DCTU-IBEW employees affected by the Port's instruction not to perform the Disputed Work will receive other work assignments sufficient to make up for any lost hours resulting from lack of refrigerated container work assignments.

5. The DCTU and IBEW agree that they will abide by the final decision of the NLRB in the pending 10(k) proceeding.

Agreement Between Port – ICTSI

6. Based on the DCTU and IBEW agreement set out in paragraphs 2-4 above, and for the reasons expressed at the beginning of this document, it is the present intention of the Port that, until the final resolution of the NLRB's 10(k) proceeding concerning the Disputed Work, the Port will permit ICTSI to assign to ICTSI's ILWU Local 8 employees the Disputed Work. The parties understand, however, that the Port may at its sole discretion and for whatever reason terminate this Interim Agreement earlier prior to the final resolution of the NLRB's 10(k) proceeding on five days written notice to ICTSI, DCTU and the IBEW.

7. The Port and ICTSI agree that the Disputed Work is within the historic scope of work of the Port's DCTU-IBEW employees and that such work was reserved by the Port under Article 2.8, Article 3.23 and other provisions of the Port-ICTSI Terminal 6 Lease. For the reasons expressed at the beginning of this document, and in reliance on the agreements set out above between the Port, DCTU and IBEW, the Port authorizes ICTSI to assign to ICTSI ILWU Local 8 employees the Disputed Work. ICTSI may continue to assign the Disputed Work to ICTSI's ILWU Local 8 employees until the final resolution of the 10(k) proceeding or until written notification to ICTSI that the Port is withdrawing this authorization, whichever occurs first. To the extent that ICTSI assigns the Disputed Work to its ILWU Local 8 employees during a period of time when the Port has given permission to ICTSI under Paragraph 5 above, ICTSI shall have no liability to the Port relating to said assignment under Article 2.8, Article 12, Article 16 or any other article or provision of the Port-ICTSI Terminal 6 Lease.

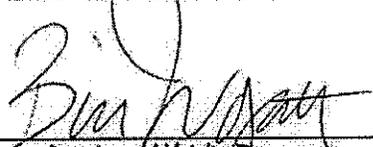
8. The Port's authorization to permit ICTSI to assign the Disputed Work until such time as the NLRB makes its Section 10(k) determination or until the Port withdraws said authorization, whichever comes earlier, does not constitute a waiver of any of the Port's rights under the Port-ICTSI Terminal 6 Lease, including, but not limited to, its rights under said Lease to reserve, control and assign crane electrical and other maintenance and repair work as described in Article 3.23 of the Terminal 6 Lease.

9. The Port and ICTSI agree that they will abide by the final decision of the NLRB in the pending 10(k) proceeding. Should the final resolution of the NLRB 10(k) proceeding result in the disputed work being assigned to ICTSI's ILWU Local 8 employees, the Port and ICTSI will enter into a Memorandum of Understanding to document the parties' agreement that the disputed work will be the responsibility of ICTSI under the Terminal 6 Lease.

10. Nothing contained herein gives or shall be construed to give or provide any benefit, direct, indirect, or otherwise to third persons or legal entities, including but not limited to, the International Longshore and Warehouse Union or any of its affiliated local unions.

Signature page follows

PORT OF PORTLAND

 7/26/12
By: BILL WYATT
Its: EXECUTIVE DIRECTOR

ICTSI OREGON, INC.

By: _____
Its: _____

THE DISTRICT COUNCIL
OF TRADE UNIONS

By: _____
Its: _____

IBEW LOCAL 48

By: _____
Its: _____

PORT OF PORTLAND

ICTSI OREGON, INC.

By: _____
Its: _____

ELVIS GANDA
By: Elvis Ganda
Its: CEO

THE DISTRICT COUNCIL
OF TRADE UNIONS

IBEW LOCAL 48
* In Relations to port/IBEW
Agreement only
By: Cliff Davis
Its: Business Manager

Bob Carroll
By: Bob Carroll
Its: ICTU President

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 30th day of July, 2012, I electronically filed the foregoing RESPONSE TO ILWU LOCAL 8'S MOTION TO REOPEN THE RECORD TO ALLOW ADMISSION OF NEWLY ACQUIRED EVIDENCE with the National Labor Relations Board with the eFiling system.

I further certify that on the 30th day of July, 2012, I caused to be served a copy of the foregoing document by electronic mail to the following:

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