

**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 MOTION FOR RECONSIDERATION

Pursuant to Section 102.48(d)(1) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), Pacific Maritime Association (“PMA”) respectfully takes the extraordinary step of moving for reconsideration of the decision of the Board of August 13, 2012 insofar as it summarily denies PMA’s motion to intervene and quash the notice of hearing. *Int’l Brotherhood of Electrical Workers, Local 48*, 358 NLRB No. 102 (2012). Quite simply, “the Board got it wrong.” The Board overlooked a direct statutory requirement that, to have reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred, there must be two competing groups of statutory employees vying for the work.

The analysis is not convoluted. In short, this case involves the Board stating that it had statutory jurisdiction to consider the matter because there is a statutory employer (ICTSI)

involved. We have no quarrel with that proposition. But, the Board sidestepped the plain language of Section 8(b)(4)(D) by neglecting to consider whether both groups of competing employees were employees of an employer as defined by the National Labor Relations Act (“NLRA” or “Act”). The employees awarded the work, represented by the IBEW, Local 48, are employees of a public-sector entity, the Port of Portland. They are not statutory employees within the meaning of 29 U.S.C. § 152(3), as shown below.

PMA has sought all along, with requests to both the Regional Director and the Board, to intervene in this dispute to fully present the argument that the Board lacks statutory authority to issue a Section 10(k) award where public-sector workers are seeking the work. PMA requested, ultimately in vein, to intervene and present evidence and argument on this issue. The Board summarily denied PMA’s appeal on the motion to intervene because “the record and briefs herein adequately present the issues before the Board and the positions of the parties.” Slip op. at 2, n.4. The fact that the Board failed to recognize its jurisdictional limits in the August 13, 2012 decision confirms that no other party “adequately present[ed]” this argument, and it highlights why PMA should have been allowed to intervene.

Section 8(b)(4)(D) is only invoked where two groups of statutory employees, as defined by Section 2(3) of the Act, are seeking the same work:

[F]orcing 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, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

29 U.S.C. § 158(d)(4)(D) (emphasis added).

Under the NLRA, the term “employee” is expressly defined to exclude employees of any government or public-sector entity, which includes employees of the Port of Portland:

The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, **but shall not include any individual employed** as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or **by any other person who is not an employer as herein defined.**

29 U.S.C. § 152(3) (emphasis added).

The Act makes clear that “employer” does not include “any State or political subdivision thereof[.]” 29 U.S.C. § 152(2). *See also IBEW Local Union No. 3 (Eugene Iovine, Inc.)*, 219 NLRB 528, 530 (1975) (holding that Board lacks jurisdiction over state government entities). It is beyond dispute that the Port of Portland – the entity that the Board decision repeatedly states is the employer of the IBEW-represented employees awarded the work – 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.

The cases the Board cites in *IBEW, Local 48* do not address this fundamental issue – whether the Board has jurisdiction under Section 8(b)(4)(D) to award work to public-sector employees. Both *Plumbers Local 195 (Gulf Oil)*, 275 NLRB 484 (1985) and *Longshoremen ILA Local 1911 (Cargo Handlers)*, 236 NLRB 1439 (1978) turn on whether “any employer” is the

object of a union's unlawful conduct, regardless of whether that employer controls or directs the work at issue. Those simply cases do not address the argument PMA is making. Whether ICTSI, a statutory employer, has the power to control the assignment of the work, is a distinct question from whether the Board may resolve a jurisdictional dispute involving 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. The statutory prerequisites under Section 8(b)(4)(D) are not met.

PMA has previously 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. The Board got it wrong on August 13, 2012 by holding that it may assert jurisdiction under the Act even though the IBEW workers are not statutory employees. The Board did not cite a single case – and there is none – holding that the Board can issue a 10(k) award where one group of workers claiming the disputed work is employed by a state government entity. The fact that ICTSI is a statutory employer simply is not enough to confer jurisdiction over this dispute.

Finally, following the Board's decision on August 13, 2012, PMA's need to intervene in this matter was made even more obvious. Just two days after the Section 10(k) decision, PMA and its member companies received simultaneous demand letters from ICTSI, the Port of Portland, and the ILWU. *See* Affidavit of Steve Hennessey (attached). ICTSI threatened to bring a whole host of legal claims against PMA should PMA and its member companies fail to comply with ICTSI's legal position on the validity and scope of the Board's Section 10(k) decision. *See* Aff., Exhibit 1. The Port of Portland similarly targeted PMA and its members for

further legal action. *See* Aff., Exhibit 2. At the same time, the ILWU threatened to assert its jurisdictional rights and lodge contractual grievances in perpetuity against PMA member carriers that fails to side with the ILWU's position, thereby raising the real prospect that PMA member companies will be forced to "double pay" for the work at issue. *See* Aff., Exhibits 3-6. Based on this new, post-decision development, the Board has all the confirmation it needs to find that PMA is an interested party; indeed, PMA and its members are "between a rock and a hard place." *See Camay Drilling Co.*, 239 NLRB 997, 998 (1978).

In summation, and for all the reasons stated above and in its prior briefs, PMA respectfully asks that the Board recognize the clear error in its August 13, 2012 decision.

Submitted this 20th day of August 2012

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