

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

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 48

Charged Party

and

ICTSI OREGON, INC.,

Charging Party

and

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, LOCAL 8,

Involved

Party.

**Case 19-CD-080738**

**ICTSI'S MEMORANDUM IN OPPOSITION TO  
PMA'S MOTION FOR RECONSIDERATION**

ICTSI Oregon, Inc. ("ICTSI"), through its counsel of record, hereby submits this opposition to non-party Pacific Maritime Association's Motion for Reconsideration ("Motion"), filed August 20, 2012. PMA's motion is without merit and should be denied. Rather than demonstrating "extraordinary circumstances" for reconsidering the Board's well-reasoned decision, PMA has shown only its disregard for the Board's authority and process.

**I. PMA LACKS STANDING**

In moving for reconsideration, PMA invokes Section 102.48(d)(1) of the Board's Rules and Regulations, which provides, in pertinent part, that "[a] party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration \* \* \* after the Board decision or order." 29 C.F.R. 102.48(d)(1) (emphasis added). PMA is not a party to this proceeding, and therefore lacks standing to bring this motion.

At the 10(k) hearing, the Hearing Officer denied PMA's motion to intervene, finding that PMA's interests "would be adequately represented by the existing parties to the hearing," including the ILWU.<sup>1</sup> *Electrical Workers Local 48 (ICTSI Oregon, Inc.)*, 358 NLRB No. 102, slip op. at p. 2 fn. 4 (Aug. 13, 2012). PMA sought "special permission to appeal" to the Board from the denial of its motion to intervene, but the Board *denied* PMA such permission, reasoning that "the record and briefs herein adequately present the issues before the Board and the positions of the parties." *Id.*

PMA, a non-party, cannot seek reconsideration of that order. *See, e.g., Wal-Mart Stores*, 348 NLRB 833 fn. 3 (2006) ("UFCW Local 120's motion for reconsideration of the Board's decision to sever is denied on the basis that Local 120 lacks standing, the Board having previously denied its motion to intervene in this proceeding.").

## II. PMA'S MOTION FAILS ON THE MERITS

Even assuming for the sake of argument that PMA has standing to seek reconsideration of the Board's 10(k) decision, PMA's arguments are without merit.

"Section 102.48(d)(1) of the Board's Rules permits a party in 'extraordinary circumstances' to move for reconsideration of a Board Order." *New York Center for Rehabilitation Care*, 346 NLRB 447 (2006). Section 102.48(d)(1) provides that the motion for reconsideration must "state with particularity the material error claimed[.]" PMA's arguments fall far short of this high standard.

PMA merely seeks to relitigate issues that the Board carefully considered in its 10(k) award, and in doing so, PMA recycles arguments previously made by the ILWU, a party to the proceeding, as well as by PMA itself, in its unsuccessful effort to intervene. Repetition of

---

<sup>1</sup> The PMA misleadingly argues that it "sought all along" to fully present the argument that the Board lacked authority because the Port's electricians were public employees. (Motion, p. 2.) However, this argument appears nowhere in the Port's motion to intervene filed with the Regional Director at the 10(k) hearing. Nor did PMA's lawyer make this argument to the hearing officer when he was permitted to present an oral argument in support of PMA's motion to intervene. (Tr. 6-9.) PMA first made its belated argument nearly two weeks after the Section 10(k) hearing concluded.

previously asserted arguments does not provide grounds for reconsideration. Merely expressing disagreement with the Board's findings "clearly is not a ground for reconsideration." *Douglas Autotech Corp.*, 2011 NLRB LEXIS 772, \*6 (Dec. 30, 2011). *See also Wal-Mart Stores*, 348 NLRB at 833 (finding movant did not have standing to seek reconsideration and, "[i]n any event, the motion [for reconsideration] raises nothing not previously considered").

At page one of the Motion, PMA makes a specious claim that the Board "overlooked" its argument 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." *See also* Motion at p. 2 (claiming the Board "neglect[ed] to consider whether both groups of competing employees were employees of [a statutory employer]"). The Board did not "overlook" or "neglect" this issue. Instead, the Board considered the argument and expressly rejected it:

We find without merit ILWU's contention that there is no violation of Section 8(B)(4)(D) because the dispute concerns the assignment of work by public employer Port [of Portland] to its own employees, who are excluded from coverage by the Act. Although ICTSI does not directly employ the employees who are performing the disputed work, the Board need have jurisdiction only over the employer that is the target of a respondent union's unlawful conduct. *See, e.g., Plumbers Local 195 (Gulf Oil)*, 275 NLRB 484 (1985), and *Longshoreman ILA Local 1911 (Cargo Handlers)*, 236 NLRB 1439 (1978).

*Electrical Workers Local 48 (ICTSI Oregon, Inc.)*, 358 NLRB No. 102, slip op. at 3.

Repeating arguments that the Board has already "considered and rejected" does not demonstrate extraordinary circumstances warranting reconsideration under Section 102.48(d)(1). *Douglas Autotech Corp.*, 2011 NLRB LEXIS 772 at \*6. *See also Fred Meyer Stores, Inc.*, 2011 NLRB LEXIS 89, \*1 fn. 2 (2011) (denying motion to reconsider, where movant's claim "was considered and rejected by the Board in the proceedings below").

PMA further argues that it would have done a better job than the ILWU of advancing this issue if the PMA had been granted permission to intervene. *See* Motion, p. 2 (arguing that the

Board's 10(k) award demonstrates that PMA's position was not adequately presented and "highlights why PMA should have been allowed to intervene"). However, PMA's request for reconsideration does not present any legal authority or argument that was not previously cited to, or considered by, the Board.

As the Board's 10(k) award makes clear, the ILWU advanced the same argument that PMA now claims the Board overlooked and/or neglected. See ILWU's Post-Hearing Brief, dated June 13, 2012, pp. 16-19 (arguing that because the Port of Portland is a political subdivision of the State of Oregon, it is not a statutory employer and, therefore, "the Board could never find a violation of Section 8(b)(4)(D) in this case"). Further, in support of this argument, the ILWU cited the same legal authority relied upon by PMA in its motion for reconsideration, including *IBEW Local Union No. 3 (Eugene Iovine, Inc.)*, 219 NLRB 528 (1975), and *Hale by Hale v. Port of Portland*, 783 P.2d 506, 511 (Or. 1989). See ILWU's Post-Hearing Brief at pp. 17-18.

The only other cases cited by PMA in its motion for reconsideration were either cited by the Board in its 10(k) award (*Gulf Oil and Cargo Handlers*) or were "previously cited" by PMA itself (*Local 326, Int'l Broth. of Teamsters*, 194 NLRB 594 (1971)). (Motion, p. 4.) PMA, therefore, is not advancing any new, overlooked or neglected issue or legal authority. It is merely claiming, as it states "quite simply" in its motion, that the Board "got it wrong." (Motion, p.1.) As the Board has made clear, merely expressing disagreement with the Board's findings "clearly is not a ground for reconsideration." *Douglas Autotech Corp.*, 2011 NLRB LEXIS 77 at \*6. Where, as here, the argument made in support of a motion for reconsideration has already been "considered and rejected," the Board should summarily refuse to revisit its

decision, as the movant has suffered no prejudice. *Fred Meyer Stores, Inc.*, 2011 NLRB LEXIS 89 at \*1, fn. 2.

Indeed, there is no question that the Board properly interpreted precedent and rejected application of *Local 326*, a decision that PMA erroneously claims “controls here.” (Motion, p. 4.) In that case, in a two-page opinion, the Board held, in the context of a single employer, that there was no jurisdiction because the person performing the disputed work was an independent contractor and not an employee. Here, there were two employers, the Port of Portland and ICTSI. The IBEW threatened to picket ICTSI if it deployed ILWU members to perform historic work of the IBEW. The Board panel certainly did not err in unanimously concluding that *Gulf Oil and Cargo Handlers* demonstrated that “the Board need have jurisdiction only over the employer that is the target of a respondent union’s unlawful conduct.” *Electrical Workers Local 48 (ICTSI Oregon, Inc.)*, 358 NLRB No. 102, slip op. at 3. PMA’s attempt to distinguish these cases – making essentially the same argument that the ILWU made in its Post-Hearing Brief – fails. Given that the Board need have jurisdiction only over the employer that is the target of a respondent union’s unlawful conduct, whether the employees awarded the work are employed by a statutory employer is immaterial. *See also Longshoremen Locals 8 and 40 (Port of Portland)*, 233 NLRB 459 (1977) (the Board, without discussion, entertained 10(k) jurisdiction when ILWU engaged in a slowdown and threatened to picket unless work historically performed by Port Services employees was assigned to ILWU).

Finally, PMA’s reliance on correspondence exchanged *after* the Board issued its 10(k) award – initiated by a threat by the ILWU to PMA members and a corresponding threat by the PMA to ICTSI – is unavailing. The correspondence attached to PMA’s motion, ostensibly showing its need or right to intervene, merely establishes PMA’s lack of respect for the Board’s authority and process. The correspondence reflects that PMA, apparently acting in concert with ILWU, intends to ignore, at least for the present, the decision of the Board in this case.

Certainly, resistance to the Board's authority and process cannot be deemed a justification for the allowance of a motion for reconsideration under Section 102.48 of the Board's rules.

Aside from its failure to demonstrate that the correspondence constitutes an "extraordinary circumstance" sufficient to justify reconsideration, PMA also fails to place the correspondence in its proper context. Thus, PMA initiated the correspondence at issue by threatening ICTSI the day after the Board issued its 10(k) decision. *See* Declaration of Michael T. Garone, Exhibit 1. The Board issued its 10(k) award on August 13, 2012. By letter dated August 14, 2012, which PMA curiously omits from its motion, PMA's President and CEO, James C. McKenna, threatened ICTSI with sanctions or expulsion from PMA if ICTSI refused to award the disputed work to ILWU. *Id.* In response to that threat, ICTSI stated its intention to respect the Board's 10(k) award and to pursue its legal rights in the event that PMA retaliated against ICTSI for following the Board's decision. *See* Exhibit 1 to PMA's Motion (August 15, 2012 letter from ICTSI's undersigned counsel to PMA's counsel).

Similarly, the Port of Portland's counsel, Randolph Foster, wrote to PMA on August 15, 2012, *in response* to an article, dated August 14, 2012, wherein Mr. McKenna suggested that PMA did not intend to comply with the Board's 10(k) award. *See* Exhibit 2 to PMA's Motion (August 15, 2012 email from Foster to PMA's counsel, with attachment). In his email, Mr. Foster merely indicated that the Port of Portland intended to comply with the Board's award, requested assurances that PMA would do the same, and reserved the Port's right to take legal action to protect its interests.

Apparently believing that the Board's 10(k) award is irrelevant (or advisory), PMA argues in its motion that ICTSI *threatened PMA* by stating that it would "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." (Motion, p. 4 (emphasis added)). However, the letters from ICTSI and the Port are not, as characterized by

PMA, "demand letters." (Motion, p. 4.) Instead, they essentially advise PMA that ICTSI and the Port intend to honor the Board's 10(k) award, and that they expect PMA to do the same.<sup>2</sup>

While the PMA may have preferred a different outcome in the 10(k) process at issue, its desire to avoid continuing ILWU coercion is not a basis for reconsideration. The harm PMA fears can be easily avoided if the ILWU complies with, and the PMA respects, the Board's well-reasoned 10(k) award.

### III. CONCLUSION

For the reasons stated above, ICTSI respectfully requests that the Board expeditiously deny PMA's Motion for Reconsideration. Indeed, expedition is critical in bringing this unfortunate matter, impacting scores of companies, and the fragile economies of Oregon and Southwest Washington, to an immediate conclusion.

Respectfully submitted this 27th day of August 2012.

SCHWABE, WILLIAMSON & WYATT



---

Michael T. Garone  
Attorneys for ICTSI Oregon, Inc.

---

<sup>2</sup> From May 23, 2012, the day before the Section 10(k) hearing, PMA and the ILWU have taken the same position: the disputed work should be performed by ILWU-represented employees.

**CERTIFICATE OF SERVICE**

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

Ronald K. Hooks  
Regional Director  
National Labor Relations Board Region 19  
915 2nd Avenue, Room 2948 Seattle, WA 98174-1078  
**E-mail: [ronald.hooks@nlrb.gov](mailto:ronald.hooks@nlrb.gov)**

Linda L. Davidson  
Officer in Charge  
National Labor Relations Board Subregion 36  
601 SW Second Avenue, Suite 1910 Portland, OR 97201-3170  
**E-mail: [linda.davidson@nlrb.gov](mailto:linda.davidson@nlrb.gov)**

Norman Malbin, Esq.  
IBEW, Local 48  
15937 NE Airport Way  
Portland, OR 97230-4958  
**E-mail: [norman@ibew48.com](mailto:norman@ibew48.com)**

Cliff Davis  
IBEW, Local 48  
15937 NE Airport Way  
Portland, OR 97230-4958  
**E-mail: [busmgr@ibew48.com](mailto:busmgr@ibew48.com)**

Charles I. Cohen  
Clifford D. Sethness  
John F. Ring  
Morgan, Lewis & Bockius LLP  
300 S. Grand Ave., 22nd fl.  
Los Angeles, CA. 90071  
**E-mail: [csethness@morganlewis.com](mailto:csethness@morganlewis.com)**

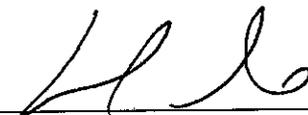
Eleanor Morton, Esq. Leonard Carder, LLP  
1188 Franklin Street, Suite 201  
San Francisco, CA 94109  
**E-mail: [emorton@leonardcarder.com](mailto:emorton@leonardcarder.com)**

Jeff Smith  
ILWU, Local 8  
2435 NW Front Avenue Portland, OR 97209  
**E-mail: [ilwu8@integra.net](mailto:ilwu8@integra.net)**

Kathy Peck  
Williams Zografos Peck  
334 Third Street  
Lake Oswego, OR 97034  
**E-mail: [kpeck@wzplaborlaw.com](mailto:kpeck@wzplaborlaw.com)**

Randolph C. Foster  
Stoel Rives LLP  
900 SW Fifth Avenue, Suite 2600  
Portland, OR 97204  
**E-mail: [rcfoster@stoel.com](mailto:rcfoster@stoel.com)**

Dated August 27, 2012.

  
\_\_\_\_\_  
Michael T. Garone  
Attorneys for ICTSI Oregon, Inc.