UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, ILWU LOCAL 8 AND ILWU LOCAL 40, and ICTSI OF OREGON, INC., and PORT OF PORTLAND,	Cases: 19-CC-082533 19-CD-082461 19-CC-087504 19-CD-087505 19-CC-082744

RESPONDENTS ILWU'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to § 102.46 of the Board's Rules and Regulations, Respondents ILWU International and its Locals 8 and 40 (collectively, "Respondents" or "ILWU") submit the following brief in support of their exceptions to the Administrative Law Judge's Decision, dated August 28, 2013, including exceptions to his underlying partial denial of Respondents' motion to reopen the record.

STATEMENT OF THE CASE

This case arises from a dispute at Terminal 6 of the Port of Portland (the "Port") concerning the work of plugging, unplugging, and monitoring refrigerated shipping containers ("reefer work"). The ILWU and the Pacific Maritime Association ("PMA"), the multi-employer bargaining association representing employers at all West Coast ports who hire ILWU longshoremen, both contend that their collective bargaining agreement—the ILWU-PMA Pacific Coast Longshore & Clerks' Agreement ("PCL&CA")—requires ICTSI Oregon, Inc. ("ICTSI"), the operator of Terminal 6 and a PMA member company, to assign the disputed reefer work to ILWU longshore mechanics. ICTSI, the Port, and the International Brotherhood of Electrical Workers Local 48 ("IBEW") contend that other contracts—including the Terminal 6 lease agreement between the Port and ICTSI—require the disputed reefer work to be assigned to Port electricians represented by IBEW.

In June 2012, ICTSI and the Port filed several unfair labor practice charges against ILWU. On August 13, 2012, in a related ULP proceeding, the Board issued a § 10(k) decision awarding the disputed reefer work to Port electricians. *See International Brotherhood of Electrical Workers, Local 48 (ICTSI, Oregon, Inc.),* 358 NLRB No. 102 (2012). Following this decision, ICTSI filed two additional charges against Respondents. A consolidated complaint was issued on all of these charges and a hearing on the complaint was held before Administrative Law Judge William L. Schmidt ("ALJ").

After the close of the hearing but before the ALJ issued a decision, the Federal District Court for the District of Oregon vacated the Board's § 10(k) decision on the ground that the

Board lacked statutory jurisdiction to issue an award because the Port's IBEW-represented electricians are not private-sector "employees" as defined in § 8(b)(4)(D) of the Act, which requires conflicting jurisdiction claims between groups of statutory employees. *PMA v. NLRB*, 3:12-cv-02179-MO (D. Or. June 17, 2013). Thereafter, the ILWU filed a motion with the ALJ to reopen the record to admit into evidence: (1) the court order vacating the § 10(k) award, (2) the recent circuit court decisions in *Noel Canning v NLRB*, 705 F.3d 490 (D.C. Cir. 2013), and *NLRB v. New Vista Nursing and Rehabilitation*, --- F.3d ---, 2013 WL 2099742 (3d Cir. 2013), and (3) newly discovered evidence of carrier and ICTSI having exercised control over the reefer work through negotiations for renewal of their stevedoring services contracts, which occurred after the close of the ALJ trial. The ALJ took official notice of the court rulings but refused to receive the new evidence notwithstanding its high probative value.

On August 28, 2013, the ALJ issued a final decision on the merits in which he found that the Port has the "right of control" over the disputed reefer work, and that ICTSI and the PMA carriers are "neutrals" who lack control over the handling of their own containers. (ALJD 43:27-32, 45:7-22)[1] From this erroneous finding flowed his ultimate conclusions that Respondents lack a valid work preservation claim and violated § 8(b)(4)(B) by engaging in unlawful "secondary" activity. (*Id.* at 42:9-45:22) Additionally, the ALJ erred by relying on the now-vacated § 10(k) award, and the ILWU's alleged noncompliance with its terms, in finding that Respondents violated § 8(b)(4)(D). (*Id.* at 47:20-49:2) As set forth more fully below, the ALJ's decision is contrary to the governing law and record evidence, and flies in the face of longstanding principles at the heart of coastwise bargaining relationships in the U.S. longshore industry.

STATEMENT OF FACTS

A. <u>The Parties and the 75-Year-Old Coastwise Longshore Unit</u>

The ILWU and PMA are parties to a single, coastwise collective bargaining agreement, known as the PCL&CA. The PCL&CA is comprised of two documents—the Pacific Coast

[1] "(ALJD)" references the ALJ's final decision on the merits.

Clerks Contract Document, which governs marine clerks, and the Pacific Coast Longshore Contract Document, which covers longshoremen, including longshore mechanics employed by PMA member companies. ("PCLCD," Resp Ex. 1; Tr. 1286)[2] The ILWU represents longshoremen and longshore mechanics working in all major ports on the West Coast of the United States pursuant to the PCLCD. (Resp Ex. 1, Preamble and § 1 provisions) PMA is a membership organization consisting of approximately 70 stevedoring companies, terminal operators, maintenance and repair contractors, and steamship carriers/shipping lines[3] operating at the approximately thirty ports on the West Coast. (*Id.*; Tr. 1282-83)

PMA companies in the ILWU longshore bargaining unit, which are directly subject to the PCLCD, include steamship lines or carriers who transport their containers into and out of West Coast marine terminals, including Terminal 6 in the Port of Portland. (Tr. 1283) Among the PMA carriers calling at Terminal 6 are Hanjin Shipping Lines, LCC ("Hanjin") and Hapag Lloyd, Inc ("Hapag"), which are ICTSI's two largest customers and represent 98 percent of its business at Terminal 6. (Tr. 179, 1283-84) In addition to being PMA members, carrier companies also predominate PMA's internal governance, collective bargaining with ILWU, periodic administration of the PCLCA, and decision-making in connection with general labor relations, including the terms and conditions of employment for ILWU longshoremen. (Tr. 1285, 1411-12, 1434, 1437-38; Resp Ex. 9, pp. 5-7) It is beyond dispute that the carriers are economically the driving force behind this industry. (Tr. 1285)

The Port of Portland is not a member of PMA and is not a party to the PCL&CA. (Tr. 1285) The IBEW, which represents public-sector electricians employed by the Port under a CBA with the Port, is also not a party to the PCL&CA. (Tr. 275; GC Ex. 26) Under the CBA between the Port and IBEW, known as the "District Council of Trade Unions Agreement" ("DCTU Agreement"), IBEW-represented electricians performed the dockside reefer work for

[2] "(Tr.)" references the transcript for the hearing held before the ALJ.
[3] The carriers in this case – Hanjin, Hapag-Lloyd, COSCO, K-Line, etc -- are referred to in the record interchangeably as "carriers," "shipping lines," "steamship lines" and "shipping companies." These terms mean the same thing as used in this brief as well.

several decades during the time when the Port directly operated Terminal 6 and handled the carriers' containers and reefers under Stevedoring Services contracts between the Port and the carriers. (Tr. 971-72, 1838-39; Resp Ex. 6).

ICTSI is a marine terminal operator and cargo handling company. (Tr. 59) In 2011, ICTSI entered into a 25-year lease with the Port to operate Terminal 6. (Tr. 59; GC Ex. 22) Although ICTSI is not a party to the DCTU agreement, the Terminal 6 lease provides that ICTSI may not "undertake any action that would cause the Port to be in violation of the terms of the DCTU Agreement." (GC Ex. 22, p. 40) Shortly after ICTSI entered into the Terminal 6 lease, it joined PMA. (Tr. 1157-58) As a member of PMA, ICTSI became bound by the PCLCD. (*Id.*; Resp Ex. 10; Tr. 1294, 1650-51) When it began operating Terminal 6 on February 12, 2011, ICTSI used IBEW electricians to perform reefer work on Terminal 6; in the ensuing year, ILWU filed contract grievances, followed by the alleged job actions under the PCLCD. (Tr. 257, 1007; Joint Exs. 1-2)

B. <u>ILWU Jurisdiction Over Maintenance and Repair Work Under the PCLCD</u>

Since the beginning of the ILWU longshore bargaining unit, ILWU longshoremen have performed the maintenance and repair ("M&R") of cargo-handling equipment. (Tr. 1443-44) Over the decades, technology has modified longshore work and made M&R an increasingly important component. (Tr. 1576-78, 1997) ILWU and PMA have reached historic accords to allow the employers to take advantage of technological innovation while simultaneously protecting the longshore work opportunity and job security by assigning all modified and newly created work to the coastwise bargaining unit, including maintenance and repair work performed on longshore equipment, such as containers, which replace longshore labor. *See, e.g., ILWU Local 13 (California Cartage)*, 278 NLRB 220, 222 (1986); *Pac. Mar. Ass'n*, 256 NLRB 769, 769 (1981); *ILWU Local No. 50*, 244 NLRB 275 (1979); *ILWU Local 10 (Howard Terminal)*, 147 NLRB 359, 360-61 (1964); *ILWU Local No. 19 (Albin Stevedore Co.)*, 144 NLRB 1443, 1448 (1963); *Vance, J. Duane (Longshoremen & Warehousemen, Local 19)*, 137 NLRB 119 (1962).

Section 1 of the PCLCD, entitled "Scope of This Contract Document and Assignment of Work to Longshoremen," contains detailed provisions describing the nature and scope of the work that ILWU-represented employees are contractually entitled to perform under the Agreement. (Resp Ex. 1, § 1) Section 1.7 requires PMA-member companies to assign to the ILWU "the maintenance and repair of *containers of any kind* and of chassis, and the movement incidental to such maintenance and repair. (*Id.* § 1.7 (emphasis added)) Section 1.71 reiterates this point, stating "[t]his Contract Document shall apply to the maintenance and repair of all stevedore cargo handling equipment." (*Id.* § 1.7; *see also Pac. Mar. Ass'n*, 256 NLRB 769, 769 (1981) (addressing sections 1.7 and 1.71 when first adopted). The contract further provides that employers "shall assign work in accordance with Section 1 provisions and as may be directed by the CLRC [Coast Labor Relations Committee] or an arbitration award, which the Employers shall defend in any legal proceeding. (*Id.* § 1.76)

In the 2008 PCLCD, the parties entered an agreement to "end[] the subcontracting of all maintenance and repair work except at those locations where a PMA member company had an existing collective bargaining agreement with another labor organization to perform that work." (ALJD 15:19-21; Resp. Ex. 1 § 1.72; Tr. 1997) As correctly found by the ALJ:

> In exchange for this concession from the PMA that the ILWU thought would stem the erosion of maintenance and repair jobs for the workers it represented, the ILWU agreed to cooperate with the introduction of additional mechanical and robotic equipment at West Coast terminals designed to improve efficiency even though these technological advances would inevitably displace some ILWU equipment operators.

(ALJD 15:22-26) The details of this agreement are set forth in a Letter of Understanding ("LOU") that is part of the PCLCD:

> During the course of the 2008 PCL&CA negotiations, the parties discussed the assignment of maintenance and repair work to the ILWU coastwise bargaining unit to offset the introduction of new technologies and robotics that will necessarily displace/erode traditional longshore work and workers.... The scope of ILWU work shall include … maintenance and repair … of all present and forthcoming technological equipment related to the operation of stevedore cargo handling equipment and its electronics in all West Coast ports except for those, and only those, specific marine terminal facilities listed as "red circled" below…

(Resp Ex. 1, pp. 218-222; Tr. 1984) Terminal 6 in the Port was not red-circled because at the time of the 2008 contract negotiations, the Port controlled the work as the terminal operator and was neither a member of PMA nor subject to the terms of the PCLCD. (Tr. 1450-51) The red circle exception applied only to PMA member companies who had direct CBAs with other unions. (Tr. 1449-50, 1985-86) [4]

C. <u>Terminal 6 Operations Under the Direct Control of the Port Until 2011</u>

From 1974 up until 2011, the Port itself ran the container operations at Terminal 6. (Tr. 67-68) During this time, the Port entered into various Stevedore Service and Use Agreements (also known as "Terminal Use Agreements") directly with the carriers for the receipt and handling by the Port of the carriers' containers at Terminal 6; the Port and its Terminal 6 had no right or access to handle the carriers' containers except through theses Stevedore Service contracts. (Tr. 974-75, 1665; *see, e.g.,* Resp Ex. 6) In order to provide terminal services pursuant to these agreements, the Port owned cargo-handling equipment and employed the ILWU and IBEW workforces. (Tr. 1421-22, 1427)

From 1993 until February 2011, the Port continued to operate Terminal 6 but retained labor broker Marine Terminals Corporation, later succeeded by a company called "Ports America" ("MTC/PA"), to manage stevedoring operations at Terminal 6. (Tr. 70-71, 1650) Unlike the Port, MTC/PA was a PMA member company. (Resp Ex. 7, p. 4) Therefore, MTC/PA employed ILWU-represented employees to perform longshore and marine clerk labor at Terminal 6 pursuant to the terms of the PCL&CA. (Tr. 973-74) However, as the terminal operator, the Port remained in charge of marketing the terminal, entering and maintaining Stevedore Service contracts with the carriers, and employing workers to perform M&R work at

[4] The ALJ found that "Sundet either could not or would not explain the complete exclusion of the Portland terminals from the LOU's red-circling process." (ALJD 15:36-37) However, this finding is belied by the hearing transcript, which confirms that Sundet clearly explained that there are no red-circled facilities in Portland "[b]ecause no PMA member in Portland had a contract with another union, a direct contract with any other union to do maintenance work." (Tr. 1451:1-3)

Terminal 6. (Tr. 974-75, 1650)

Throughout the time that the Port directly operated Terminal 6, including the period in which MTC/PA provided stevedoring management services, Port electricians represented by IBEW performed the disputed dockside reefer work. (Tr. 165) Meanwhile, ILWU longshore mechanics performed the same reefer work aboard the ships docked at Terminal 6. (Tr. 164, 351) In fact, each and every aspect of terminal operations at Terminal 6 was performed by ILWU from start to finish with the sole exception of the dockside reefer work. (ALJD 5:27-37)

D. <u>The Port's Agreement to Transfer Control of Terminal Operations to ICTSI</u>

In or around 2006, the Port began taking steps to privatize the operation of Terminal 6 by soliciting proposals from private terminal operators. (Tr. 976-82, 1470-71; GC Ex. 27) ILWU representatives met with the Port on numerous occasions to discuss the Port's actions and, specifically, the ILWU's claim to the reefer work on the dock at Terminal 6. (Tr. 1471) Port managers repeatedly assured ILWU representatives that if ILWU secured the reefer work through arbitration under the PCLCD following the transition to privatization, then the Port would not interfere with that determination. (Tr. 1468-81) The ALJ ignored these facts in his decision.

In order to obtain the ILWU's support for its privatization plans, the Port facilitated a meeting between the ILWU and ICTSI's new CEO, Elvis Ganda. (Tr. 1489) With Port management representatives present, ILWU Coast Committeeman Leal Sundet and ILWU Local 8 President Jeff Smith met with Ganda at the Port offices. (Tr. 1489) Sundet expressly stated that the ILWU intended to continue to pursue its right to perform the disputed reefer work on the dock at Terminal 6 under the PCLCD. (Tr. 1490) Ganda did not say anything in response. (*Id.*)

On May 12, 2010, the Port Commission approved a 25-year lease to ICTSI. (GC Ex. 22, p. 119) In addition, the Port relinquished control of terminal operations, leased or sold its cargo handling equipment to ICTSI (with the exception of the stationary cranes), signed over all of its carrier contracts to ICTSI, and became a landlord. (Tr. 71, 327-28, 975, 1653-54; GC Ex. 22; Resp Exs. 4, 24) ICTSI, not the Port, became answerable to the carrier companies for

maintaining the carriers' reefers and the cargo inside. (*Id.*) Of critical significance, the Port did not reserve with the carriers any control or qualifications over the handling of the carriers' containers and reefers, or any other terms set out in the Stevedore Services contract. (Tr. 1229, 1653-56; Resp. Ex. 24)

1. <u>The Lease's Vague Provisions Concerning the Disputed Reefer Work</u>

The Port-ICTSI lease contains the following clauses pertinent to this case:

> Section 2.8 For so long as the DCTU Agreement remains in effect with respect to the Terminal, the Lessee shall not (i) perform, or except as permitted hereunder, cause to be performed, at the Terminal any DCTU Work or (ii) undertake any other action that would cause the Port to be in violation of the terms of the DCTU Agreement. The Lessee shall be responsible for any claims, including any labor claims, that arise from the Lessee's failure to comply with this Section 2.8.
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> …
>
> Section 3.23 (a) The Port shall … make available to the Lessee [ICTSI] the DCTU for the provision of the DCTU Work. The Lessee shall accept the Port's utilization of the DCTU Employees with respect to the provision of the DCTU Work and shall, in accordance with Section 3.23(d), accept work performed by the DCTU Employees at such time as the Lessee determines that such work complies with the provisions of this Agreement (including the Operating Standards) and applicable law. The Port shall have responsibility for the conduct of the DCTU Employees in performing the DCTU Work.

(GC Ex. 22, pp. 40, 58) Failure to comply with these terms would result in ICTSI having to pay the Port for lost work claims brought by IBEW. (Tr. 317)

2. <u>Port Conduct Indicating the Lease Did Not Mandate that ICTSI Permit IBEW to Perform the Reefer Work on the Dock</u>

The lease defines the "DCTU Work" by referring to the Port's DTCU Agreement. (GC Ex. 22, p. 6) The DCTU Agreement vaguely defines the work as that which the DCTU has "historically and consistently" performed, generally consisting of facilities maintenance. (GC Ex. 26, p. 1) According to the only witness with personal knowledge of the lease negotiations, Port Chief Commercial Officer Nathaniel Ruda, it was his "understanding" that the Port intended for the "DCTU Work" in the lease to include the plugging, unplugging and monitoring of reefers

on the dock. (Tr. 996).[5] However, Ruda later admitted that there were no discussions concerning reefer work during the lease negotiations. (Tr. 1678:24-1679:6) Consequently, notwithstanding the known controversy concerning the assignment of reefer work at Terminal 6, the lease agreement never clearly addresses this issue.

Ruda's claimed "understanding" of the lease restrictions on reefer work also flies in the face of his and the Port's own prior and contemporaneous conduct. He admitted that he had several conversations with ILWU Coast Committeeman Sundet in the period of the lease negotiations concerning ILWU's claim to the work and the plan to secure it through future arbitration under the PCL&CA. (Tr. 1694-1697). In an effort to explain such discussions, Ruda testified that he believed that if ILWU arbitrated its claim over the reefer work, that this "would be the start of getting all the uncertainty around this, a long established issue, hopefully clarified and addressed." (Tr. 1699:6-8) This explanation, however, only underscores the truth—that the terms of the lease in and of themselves do not resolve this "uncertainty."

Most importantly, during the negotiations of the lease and after it was signed, the Port negotiated various rate discounts with some of the PMA carriers based on the possibility of the reefer work shifting from the IBEW bargaining unit to the ILWU Longshore unit. In particular, on February 1, 2009, the Port and PMA carrier Hapag-Lloyd executed Amendment No. 5 to the

[5] Tellingly, the General Counsel and Charging Parties failed to call any corroborating witnesses concerning the lease negotiations, such as the individual who negotiated the lease on behalf of ICTSI. This warrants adverse inferences concerning the veracity and reliability of Ruda's lone and uncorroborated assertion that the lease supposedly prohibits ICTSI from performing any reefer work or by other means having the work performed by the ILWU Longshore bargaining unit. This is especially so considering that the alleged meaning of the lease constitutes the central evidence and legal theory for the Complaint against Respondents. *See The Earthgrains Co. & Bakery, Confectionery & Tobacco Workers Int'l Union, Local 343, Afl-Cio*, 351 NLRB 733, 738 (2007) ("When a party has relevant evidence within its control that is not produced, that failure may support an inference that the evidence would be unfavorable to the party."); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (same); *see also Seafarers' Int'l Union*, 244 NLRB 641, 642 (1979) (recognizing Board's authority to draw adverse inference, not drawn by ALJ below, based on Respondent's failure to introduce evidence in its possession).

Stevedore Service and Use Agreement, specifying:

> Notwithstanding the foregoing if at any time during the waiver period the reefer monitoring responsibility at the Port's marine terminals is removed from District Council of Trade Unions', DCTU, jurisdiction and placed under the International Longshore Workers Union, ILWU, jurisdiction, the waiver of reefer monitoring fees under this Section 1 shall terminate and shall have no further force or effect.

(Resp Ex. 9; Tr. 1681-82)

Again in April, 2011, approximately one year after entering the lease agreement, the Port executed a similar Amendment to the Hapag-Lloyd Stevedore Service and Use Agreement. This amendment gave additional discounted rates to the PMA carrier based on the possibility of reefer work shifting from IBEW to the ILWU for the period of January 1, 2011 to December 31, 2012. (Resp Ex. 26, p. 2) Other PMA Carriers have received similar discounts. (TR 1685:10-22). Significantly, Ruda was utterly unable to explain how such provisions could be negotiated if the lease clearly barred reefer work from being performed by the ILWU unit:

> Q: Okay. I understand that testimony relative to the waiver of fees, but if the reefer plugging and unplugging and monitoring was clear in the lease --
> A: Uh-huh.
> Q: -- why did the Port enter into an agreement with Hapag-Lloyd that talked about the potential shift of jurisdiction?
> A: I don't know.

(Tr. 1690:2-9; *see also* Tr. 1284:15-20) Ruda and opposing parties' failure to explain such critical ambiguities concerning the terms of the lease suggests that the terms were left purposefully vague to allow the reefer work to be shifted to ILWU without the Port incurring any liability. The ALJ Decision ignores all of the above, critical facts.

3. <u>The Port's Assignment of its Carrier Stevedoring Contracts to ICTSI</u>

Under its terms, the lease was subject to a 90 day review and "closing period," ending August 12, 2010. (Tr. 1113, 1125-26) On the date of the "closing period," the Port and ICTSI executed a separate Agreement whereby the Port assigned to the company all of its stevedoring contracts with the PMA carriers. (Tr. 1153-54; Resp Ex. 4)

In or around February 2011, the Port sent letters to the various PMA carriers informing

them of the assignment of all contractual responsibilities to ICTSI. (Resp Ex. 24; Tr. 1653) The letter stated: "All responsibility of the Port under the Agreements will be signed over to ICTSI." (*Id.*; Tr. 1654) When ICTSI took over operations of Terminal 6 on February 12, 2011, the Port ceased any and all direct contractual relationships with the carriers—"our contractual relationship ended," according to Ruda, the main witness for the Port. (Tr. 1652-53)

The Stevedore Service contracts that the Port assigned to ICTSI specifically list reefer work as one of the services covered therein. (*See, e.g.*, Resp Ex. 6, at "Exhibit B-2") Accordingly, ICTSI now charges the carriers for all labor costs covered by the stevedoring agreements, <u>including the monies it pays to the Port for the employment of IBEW electricians to perform reefer work.</u> (Tr. 371-73)

Importantly, when the carrier contracts were assigned from the Port to ICTSI, the carriers never entered any separate agreement with the Port or ICTST authorizing the reefer work—one of the services covered under the carrier contracts—to remain with the Port. (TR 1229:3-25) Nor did the Port or ICTSI have any discussions with the carriers concerning their interest or intent to reserve for the Port the performance of plugging, unplugging and monitoring of reefers owned and leased by the carriers. (Tr. 1656) In other words, the PMA carriers never agreed verbally or in writing to permit the Port to "reserve" for itself work related to the carriers' own reefers. As acknowledged by Ruda of the Port, it is ICTSI who is responsible to the carriers for servicing their reefers because "it's in their custody." (Tr. 1658:9-23) The Port no longer had such responsibilities going forward. (Tr. 1661-62)[6]

Thus, by not "reserving" with the carriers under their Stevedore Services contracts any right to continue to perform the reefer work, the Port no longer had this work to "reserve" under its lease with ICTSI. This is because the source for the Port having the right to service the

[6] The truth of these dispositive facts is made clearer by the evidence of the ensuing contract negotiations between ICTSI and the carriers concerning the terms for the continuation of their Stevedore Service contracts, which expired on December 31, 2012. This evidence consists of various emails and contract proposals between ICTSI and the carriers, which explicitly cover the disputed reefer work. Equally significant, the evidence also includes emails from the Port, disclaiming any role or say in such contract negotiations. ILWU presented such evidence to ALJ through its Motion to Reopen Record, which ALJ denied at to such evidence. We show further below in the main text that the ALJ legally erred by excluding this critical evidence from the record before issuing his decision.

carriers' reefers in the first place derived from its stevedoring contracts with the carriers. (R # 6). Once the Port gave this up and assigned its carrier contracts to ICTSI, it had nothing to "reserve" thereafter under the lease.

The Port's right to control or service the carriers' reefers is not an inherent aspect of its status as property owner and landlord over Port facilities. Rather, it is derived only by the Stevedore Services contracts with the carriers, which have allowed the Port to handle the carriers' containers and reefers.

There would be no reefers at Terminal 6 without the carrier contracts. The carriers, not the Port, determine the location and terms for releasing their containers for handling at Terminal 6, per the Stevedore Services contracts, which the carriers had historically negotiated with the Port. From the standpoint of the carriers, once the Port removed itself from the carrier contracts, by assigning them to ICTSI, the carriers could and did expect ICTSI to handle its reefers per their direction without any say-so by the Port. (Resp Exs. 27-31; GC Exs. 3-9). Likewise, while the Port may purport, through its lease, to require ICTSI to allow for IBEW electricians to work on the carriers' reefers, this imposes no contractual or legal limits directly on the carriers' independent right of control over their own reefers, especially since the carriers are not parties to the lease and have never agreed to such terms. And ICTSI, in turn, enjoys the control it has over the reefers, along with the carriers, by virtue of its Stevedore Service contracts directly with the carriers, which contracts have excluded the Port as a party since they were assigned to ICTSI in early 2010. The simple illustrations below show, in overview, the carriers' ultimate right of control over their own containers and reefers throughout the West Coast (Illustration #1) and how ICTSI, rather than the Port acquired much of this right of control when, after February 11, 2012, it began performing the stevedoring work at T-6, pursuant to the Stevedore Service contracts (Illustration #2):

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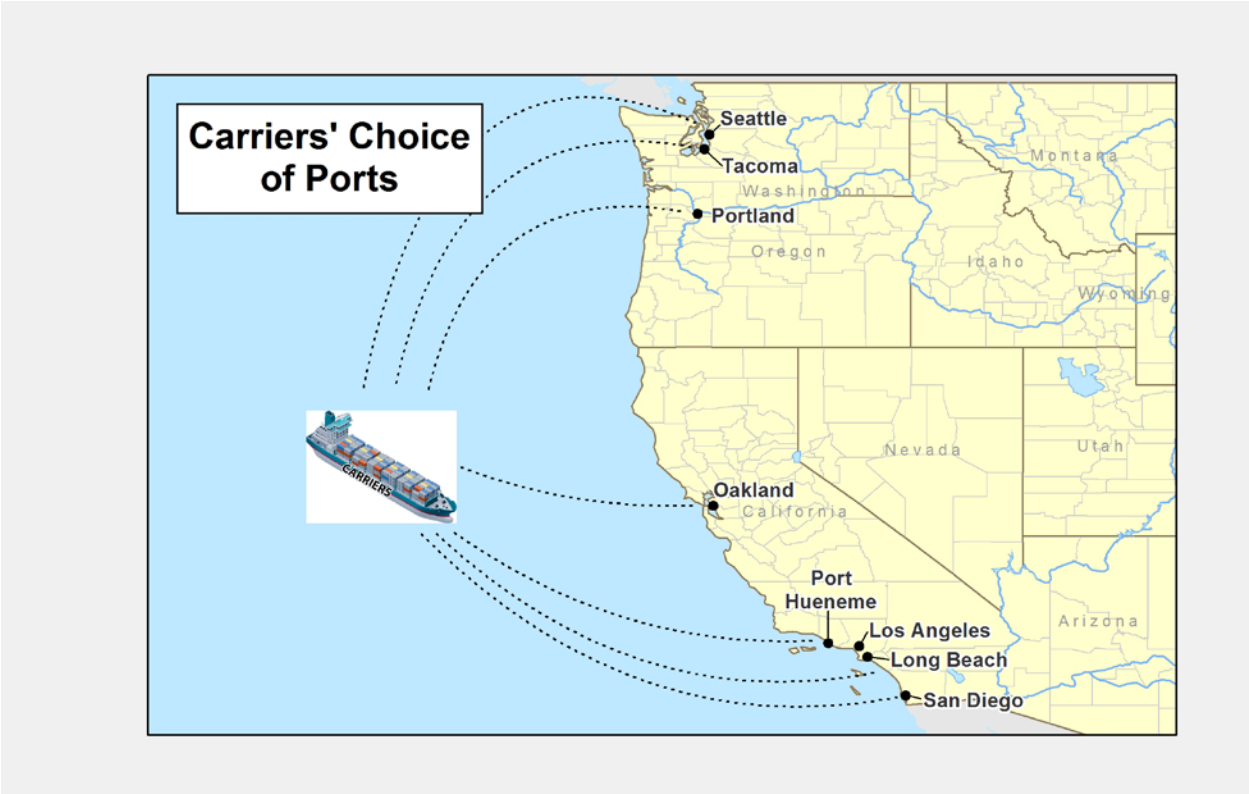

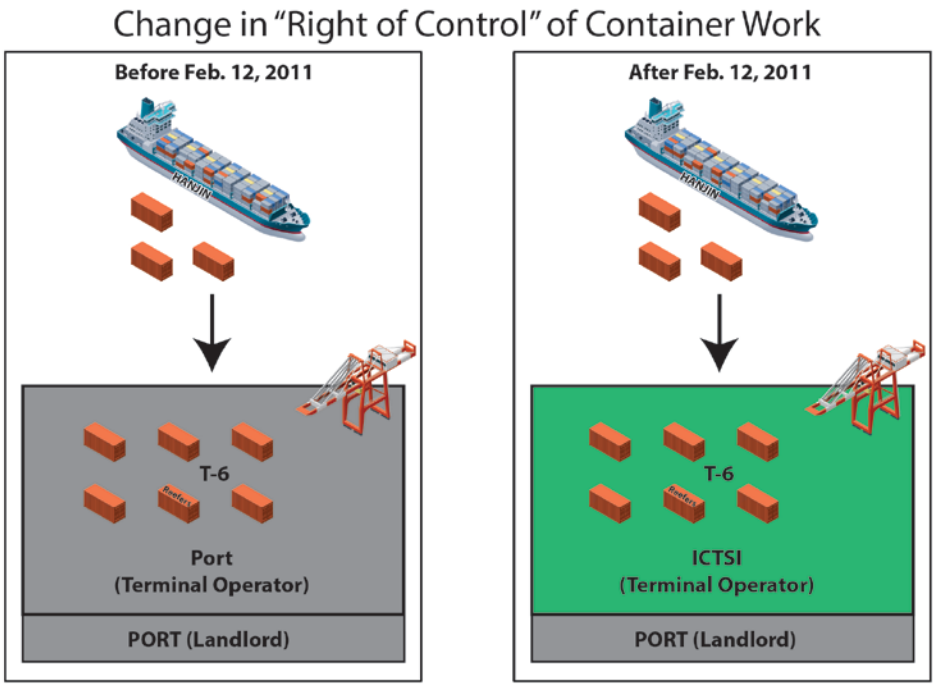

Illustration # 2 (above), in particular, accurately shows that the reefer work and other container-handling work derive directly from the carriers, under their Stevedore Service agreements; that the Port did this work before February 11, 2012, only because of its direct

business relationships with the carriers under the Stevedore Service contracts; and that after February 11, 2012, when ICTSI began terminal operations as the replacement for the Port under the Stevedore Service contracts, only ICTSI, and not the Port, had any prospective, direct business relationships with the carriers under the Stevedore Service contracts that allows the company to handle the containers and reefers at the pleasure of the carriers.[7]

Furthermore, the longshore industry has long recognized and operated under the basic understanding that the carriers enjoy ultimate control over the handling, and, therefore, the assignment of maintenance and repair work of such equipment, and that this control supersedes that of terminal operators and stevedore companies. (Resp. Ex. 13 (Coast Arb Award, dated January 23, 1989, ruling that the "employer" for purposes of applying past practice exception for M&R work is the carrier, and not the terminal operator or the stevedore contractor, because it is the carrier who has "the final responsibility for observing the terms of the [terminal] Lease and the terms of the ILWU-PMA Agreement"); Resp. Ex. 14 (Area Arb Award, dated Sept. 2005, noting that both the PMA employers and union agree that the carrier controls the reefer work (*id.* at pp. 3, 5) and that prior arbitrators have "established that…the carrier is the contractor and the stevedore or terminal operator is the sub-contractor"(*id.* at 6)).

E. <u>ICTSI Becomes a Member of PMA and Bound to the PCL&CA</u>

ICTSI had intended from the start to join PMA and become bound by the PCL&CA. According to Ganda, it was not just a "plan" but a "decision" to join PMA, which he knew about as early as May 10 or 11, 2010, at the time he signed the lease. (Tr. 1160-61) Therefore, days after the lease was signed, ICTSI requested and submitted an application to join PMA and become bound by the terms of the PCL&CA. (Resp Ex. 5; Tr. 1160) In response to a question on the application about whether "ICTSI or any affiliate [was] bound to any labor agreement(s)," ICTSI circled "No." (Resp Ex. 5) Soon thereafter, PMA accepted ICTSI's application and

[7] Again, while the General Counsel and Charging Parties argue that the lease somehow "reserved" to the Port the reefer work, the carriers never authorized this, (Tr. 1229:3-25; 1656), and the Port removed itself completely from any business relationship with carriers, who are the source for the release of their own containers at T-6 under the Stevedore Service contracts (Tr. 1658:9-23; 1661-62).

ICTSI became bound by the coastwise agreement. (*Id.*; Tr. 1958-59; Resp Ex. 1, PCLCD § 1.82 [stating that an "employer in a port covered by this Contract Document who joins the [Pacific Maritime] Association subsequent to the execution hereof and who is not a party to any conflicting longshore agreement becomes a party to this Contract Document."])

F. <u>Port Electricians Perform Reefer Work After ICTSI Begins Operating Terminal 6</u>

On February 12, 2011, ICTSI began operating Terminal 6 with the Port electricians continuing to perform the disputed reefer work. (Tr. 157, 257, 1007) ICTSI hired the same terminal manager who had previously run Terminal 6 for MTC/PA—Jim Mullen. Mullen was already familiar with the ILWU's position that Terminal 6 was not a red-circled facility and that it had a contractual claim under the PCLCD to perform the reefer work there. (Tr. 307) When Local 8 sent a letter February 10, 2011 to ICTSI setting forth its claim for the reefer work under the PCLCD, the company sent a reply denying ILWU's claim to the disputed work. (Tr. 362; ICTSI Exs. 1 & 2)

G. <u>Joint Coast LRC and the Area Arbitrator Find ICTSI in Violation of the PCLCD</u>

At the direction of Jim McKenna, PMA President, Richard Marzano, PMA's Director of Contract Administration and Arbitration, reviewed the matter and determined that the ILWU had a contractual right to perform the work under Section 1 of the PCLCD. (Tr. 1999-2000) He consulted with all of the members of PMA's Coast Steering Committee, the body of industry representatives chosen by PMA's elected Board of Directors to direct PMA's coastwide labor policy. (*Id.*) They unanimously agreed that the work belonged to the ILWU under the PCLCD. (Tr. 1998-2003) The members of the Coast Steering Committee, dominated by the carriers (including Hanjin), voted unanimously in favor of the ILWU contract claim.[8] (*See* Tr. 1954,

[8] The PMA Coast Steering Committee includes the following individuals from respective carrier companies—Roy Amalfitano (Evergreen Shipping Agency), Larry Bennett (Hanjin Shipping Co), Kevin Dietsch (Horizon Lines, LLC), Ronald Forest (Matson Navigation Company), and Robert Stephens (American president Lines, Ltd.). ("PMA Annual Report," Resp. Ex. 2, pp. 6-7). Additionally, Mike Radak of Hanjin, is one of nine Board members on PMA's Board of Directors. (Id. at 5) Radak sent on behalf of Hanjin several emails to ICTSI and the Port demanding that they assign the reefer work to ILWU. (GC Exs. 3-6, 10; Resp. Exs. 30) The other PMA Board members include the following from other carrier companies –Frank Baragona (CMA, GGM (America) LLC), Matthew Cox (Matson Navigation Company, Inc.), William Hamlin (Horizon Lines, LLC), Christina von

2003) Marzano testified: "I recall specifically Hanjin, Hanjin's representative raising the point or making the issue that it was of concern to him that terminal operators will enter into lease agreements. And port authorities, which are writing these leases, are dictating to terminal operators and member companies who the workforce can or will be." (Tr. 2003)

On May 23, 2012, ILWU and PMA convened a meeting of the Coast Labor Relations Committee ("CLRC"), the highest decision-making labor-management committee under the coastwise ILWU-PMA collective bargaining agreement. (Tr. 1950; Resp. Ex. 10) Their decisions bind PMA and every member employer, including ICTSI. (Tr. 1983) The CRLC ruled that the work belonged to the ILWU and ordered ICTSI to assign the work to the ILWU and to defend ILWU's right to perform the work under § 1.76 of the PCLCD. (Resp Ex. 10)

At an area arbitration held on June 4, 2012, Jim Mullen announced that ICTSI would not comply with the ruling awarding the work to the ILWU. (Tr. 299) Area Arbitrator Jan Holmes held that ICTSI failed to observe the mandate of the CLRC. (GC Ex. 12) On June 6, 2012, the CLRC held that ICTSI remained in violation of the PCL&CA as well as its initial CLRC ruling and an arbitration award issued by the Area Arbitrator. (Resp Ex. 11)

Beginning on June 6, 2012, all the PMA carriers who have containers handled at Terminal 6 sent e-mails and letters to ICTSI and the Port ordering that the ILWU bargaining unit perform the reefer work as to their own containers. (Resp. Exs. 27, 29-31; GC Exs. 3-9) Remarkably, ICTSI as well as the Port refused all such directives and demands of the PMA carriers on the grounds that the lease between the Port and ICTSI was controlling. (Resp. Ex. 28). However, as noted, the carriers are not parties to the lease and the Port, and ICTSI, never obtained the carriers' approval for IBEW to perform the reefer work in the face of carrier objections. Some of the carriers responded to refusal to comply with their directives that the reefer work be assigned to ILWU by bypassing Terminal 6 altogether for a certain period of time. (Tr. 331)

Kannewurff (Kawasaki Kisen Kaisha Ltd.), William F. Payne (NYK Line), Frank Pisano (TraPac, Inc.), Anthony Scioscia (Maersk Inc.), Nathaniel Seeds (APL Limited). (Resp. Ex. 2, p. 5)

H. Section 10(k) Ruling and ILWU Contract Grievances Against the PMA Carriers

On August 13, 2012, the Board issued a § 10(k) ruling in *International Brotherhood of Electrical Workers, Local 48 (ICTSI, Oregon, Inc.)*, 358 NLRB No. 102 (2012), awarding the disputed reefer work to IBEW electricians. The carriers were not parties to this proceeding. Moreover, the Board denied PMA its motion to intervene to participate as an interested party.[9] On August 15, 2012, Respondents ILWU and Local 8 issued grievance letters to Hanjin Shipping Lines, K Line, Hapagg Lloyd, COSCO and other carriers, all of whom are members of the PMA and directly subject to the terms of the PCL&CA with ILWU. (Joint Exs. 1, 6-9) The crux of Respondents' grievances is that the PMA carriers breached provisions of the PCL&CA that require them to "preserve" and not subcontract out bargaining unit work, including the "reefer work," to non-bargaining unit personnel, such as occurred at Terminal 6. (*Id.*). The grievances against the carriers were enjoined from further processing under a § 10(l) injunction issued by the district court in Oregon.[10]

On June 17, 2013, the United States District Court for the District of Oregon ruled in *Pacific Maritime Association v. NLRB*, 3:12-cv-02179-MO, that the Board acted ultra vires and contrary to the clear mandates of the Act when it issued the § 10(k) determination herein, which underlies the General Counsel's § 8(b)(4)(D) allegations in the instant ULP proceeding. Specifically, the District Court agreed with PMA's assertion that the Board was plainly without

[9] This denial was contrary to established Board law, allowing PMA to participate in Board proceedings affecting the ILWU-PMA bargaining unit and PCLCA "in the interests of fairness and with the view towards a more complete record and resolution of the dispute." *International Woodworkers of America (Port Gardner Timber Co.)*, 214 NLRB 843, n.1 (1974). The exclusion of PMA from the underlying § 10(k) left it with no option but to file its lawsuit against the Board, which resulted in the vacating of the § 10(k) award on grounds it was ultra vires because the work dispute falls outside the Board's jurisdiction under § 8(b)(4)(D). *See, infra.*

[10] In a short memorandum, the Ninth Circuit affirmed in part and vacated in part the district court's §10(l) injunction order prohibiting ILWU from processing contract grievances against the Carriers and ICTSI concerning the disputed reefer work in this case. *Hooks ex rel. NLRB v. ILWU*, 12-36068, 2013 WL 5422527 (9th Cir. Sept. 30, 2013). However, it is well-established that § 10(l) rulings are not binding on the Board because the issues litigated in an injunction proceeding are different from those litigated before the Board. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 681-82 (1951); *Somerset & Valley Rehab. & Nursing Ctr.*, 358 NLRB No. 146, at *4 n.12 (Sept. 26, 2012); *Dowd v. Int'l Longshoremen's Ass'n*, 975 F.2d 779, 782-83 (11th Cir. 1991). Therefore, the Ninth Circuit's decision does not constitute binding precedent or law of the case as to the ultimate merits of this action. *See, Somerset*, 358 NLRB at *4 n.12.

jurisdiction to adjudicate the matter, as one of the two employee groups vying for the work at issue -- the IBEW Electricians employed by the Port of Portland -- is composed of public-sector employees who are expressly excluded from the Act's coverage.

QUESTIONS PRESENTED

ILWU's exceptions to the ALJ's Decision present the following questions:

I. Whether the ALJ erred in concluding that Respondents lack a valid work preservation objective because they have never previously performed the disputed reefer work at Terminal 6? (See Exception Nos. 5, 17)

II. Whether the ALJ erred in concluding that Respondents lack a valid work preservation objective because the PMA Carriers and ICTSI supposedly lack the right of control over the reefer work performed on the Carriers' own containers? (See Exception Nos. 1-4, 6-16, 18)

III. Whether the ALJ erred in concluding that Respondents have engaged in secondary conduct in violation of § 8(b)(4)(B) of the Act? (See Exception Nos. 22-25)

IV. Whether the ALJ erred in concluding that Respondents have engaged in conduct in violation of § 8(b)(4)(D) of the Act? (See Exception No. 26)

V. Whether the ALJ erred in finding that Local 8 mechanics engaged in unlawful work stoppages at Terminal 6 after being fired by ICTSI ? (See Exception No. 19)

VI. Whether the ALJ erred in finding that Local 40 made threats and prosecuted grievances against the carriers in violation of the Act in the absence of any evidence demonstrating such misconduct ? (See Exception Nos. 22-26)

VII. Whether the ALJ erred in relying on the Board's § 10(k) award, which had been vacated by the U.S. District Court of Oregon before the ALJ issued his Decision? (See Exceptions No. 20)

VIII. Whether the ALJ erred in relying on the Board's § 10(k) award because it is ultra vires and outside the Board's jurisdiction because the work dispute was not between two groups of private sector, statutory "employees" within the meaning of § 8(b)(4)(D)? (See Exception No. 20)

IX. Whether the ALJ erred in disregarding established law holding that a § 10(k) award does not preclude contract grievances against general contractors, such as the PMA carriers here, for subcontracting out bargaining unit work in violation of their direct contractual obligations ? (See Exception No. 21)

X. Whether the Board's underlying § 10(k) decision is null and void for lack of a proper quorum due to the unconstitutional recess appointments of certain Board members?

XI. Whether the ALJ erred in refusing to reopen the record to consider highly probative evidence before issuing a decision? (See Exceptions Nos. 27-28)

ARGUMENT

I. ALJ Erred in Concluding That Respondents Engaged in Unlawful Secondary Activity in Violation of Section 8(b)(4) of the Act

"Section 8(b)(4), stripped to its relevant essentials, provides that it shall be an unfair labor practice for a union (i) to induce an employee to refuse to work or (ii) to threaten, coerce or restrain any person, if an object of the behavior described in (i) or (ii) is '(B) forcing or requiring any person to cease doing business with any other person…Provided that nothing in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.'" *Prod. Workers Union of Chicago & Vicinity, Local 707 v. NLRB*, 793 F.2d 323, 327 (D.C. Cir. 1986). This "secondary boycott provision," was "designed to prohibit only pressure brought to bear on 'a third person who is *wholly unconcerned* in the disagreement.'" *Id.* at 328 (citing 93 Cong. Rec. 4198 (1947) (remarks of Senator Taft on Section 8(b)(4)). The Supreme Court has repeatedly described Congress' purpose in enacting § 8(b)(4) as protecting "unoffending employers," "the helpless victims of quarrels that do not concern them at all." *See*,

e.g., *Edward J. Debartolo Corp. v. NLRB*, 463 U.S. 147 (1983); *ILA v. Allied Int'l, Inc.*, 456 U.S. 212, 223 n.20, 225 (1982); *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 692 (1951); *see also Prod. Workers*, 793 F.2d at 329-30 ("the caselaw has universally and unambiguously held that Congress intended § 8(b)(4) to protect only neutral parties—and not even all neutrals—from coercion in disputes not their own"). Thus, "the [Board] and the judiciary have construed the statute more narrowly" to ensure that its proscriptions do not extend beyond that intended by Congress. *NLRB v. Enterprise Ass'n*, 429 U.S. 507, 510 (1977); *cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568, 576 (1988) (warning that because 8(b)4) addresses expressive activity, its provisions must be narrowly construed so as not to run afoul of the First Amendment).

Additionally, the Board has long recognized that "unions and employers are entitled to negotiate contracts that 'preserve' unit work by way of no-subcontracting or similar clauses, <u>even if the enforcement of such agreements may cause the contracting employer to cease doing business with someone else.</u>" *The New York Presbyterian Hospital*, 354 NLRB No. 5, slip op. at 13 (Apr. 29, 2009) (ALJ Decision adopted by the Board) (emphasis in original); *Associated General Contractors*, 280 NLRB 698, 701 (1986). This was made clear by the Supreme Court in *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 635 (1967). Consistent with this principle, the Court has held that enforcement of a lawful work preservation agreement is primary activity that does not violate § 8(b)(4)(B). *NLRB v. Int'l Longshoremen's Ass'n ("ILA II")*, 473 U.S. 61, 81-82 (1985). In order for a work preservation agreement to be lawful, it must (1) have as its objective the preservation of work traditionally performed by employees represented by the union, and (2) be directed at work which the contracting employer has the power to give to the employees—commonly known as the "right to control" test. *Longshoremen ILWU (California Cartage)*, 278 NLRB 220, 222 (1986); *National Woodwork*, 386 U.S. at 644-45; *Enterprise Ass'n*, 429 U.S. at 520-21. Both prongs for work preservation are well established here.

A. **ALJ Failed to Properly Assess the Union's Work Preservation Objective and Fell Into the Same "Analytical Trap" Expressly Rejected by the Supreme Court**

Under the first prong of the work preservation analysis, the relevant inquiry is whether the ILWU's objective is preservation of work traditionally performed by employees represented by the union. The ALJ concluded that "Respondents lack a valid work preservation claim with respect to the dockside reefer work because it has never been a function performed by the employees they represent at T6." (ALJD 42:16-19) This reasoning reflects a fundamental misunderstanding of the work preservation doctrine and runs counter to established Supreme Court precedent. Specifically, by focusing on the fact that the disputed reefer work previously had been performed by IBEW electricians instead of ILWU, the ALJ Decision falls into the same "analytical trap" for which the Board was faulted by the Supreme Court in the *ILA* cases. *ILA II*, 473 U.S. at 82 (citing *ILA I*, 447 U.S. at 504) ("the Board correctly identified as erroneous the ALJ's focus on the effect of the Rules on the work of employees outside the bargaining unit, but then fell in the same analytical trap")

In those cases, the Supreme Court explained that "the Board's analysis had proceeded from [the] erroneous premise" that a work preservation clause would be unlawful if it covered work performed by others and not previously performed by the contracting union. *ILA II*, 473 U.S. at 78 (citing *ILA I*, 447 U.S. at 507, 509). The Court observed:

> The Board concluded that the Rules were an illegal attempt to reach out and acquire work that was not within the union's traditional work jurisdiction and which its members had never performed. We agree with the Court of Appeals that this approach to defining the work at issue was incorrect as a matter of law.

ILA I, 447 U.S. at 506-07. According to the *ILA* Court, identifying the work at issue "require[s] a broader view, taking into account the transformation of several interrelated industries or types of work." *Id.* at 507; *see also Becker Elec. Co. v. Int'l Bd. of Elec. Workers, Local Union No. 212 AFL-CIO* ("*Becker*"), 927 F.2d 895, 898-99 (6th Cir. 1991). The Court explained that this analysis turns on "the historical and functional relationship between [the work sought to be preserved] and traditional longshore work." *ILA I*, 447 at 510; *see also American Trucking*

Ass'n, Inc. v. NLRB ("*American Trucking*"), 734 F.2d 966, 978 (4th Cir. 1984) (finding valid work preservation where work sought to be preserved was "functionally related to" traditional longshore work). Therefore, "as is surely clear after *ILA I*, the fact that longshoremen have never previously performed work at the exact same location does not prevent the work sought from being the functional equivalent of work the longshoremen have performed." *California Cartage Co. v. NLRB*, 822 F.2d 1203, 1207 (D.C. Cir. 1987), *partially enforcing on this ground*, 278 NLRB 220 (1986).

Importantly, the *ILA* Court also made clear that "the effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant." *ILA II*, 473 U.S. at 78 (quoting *ILA I*, 447 U.S. at 507 n.22). "So long as the union had no forbidden secondary purpose to disrupt the business relations of a neutral employer, such effects are incidental to primary activity." *Id.* at 79 (internal citation omitted). In other words, the focus of the inquiry must be on the objective of the contracting union. *Id.* In *ILA II*, the Supreme Court ruled, in agreement with the Board and appellate court, that the longshore work assignment provisions "were motivated entirely by the longshoremen's understandable desire to preserve jobs against 'the steadily dwindling volume' of cargo work at the pier." *Id.* According to the Court, this constituted a "clear primary objective." *Id.*

Under the *ILA* principles, the ALJ clearly erred in concluding that ILWU lacks a valid work preservation objective. ILWU's alleged job actions against ICTSI, even if proved, and the Union's contract grievances against ICTSI and the PMA carriers simply seek to enforce the work preservation provisions in § 1.7 of the PCLCD. They provide the assignment to ILWU workers of all maintenance and repair work, which includes reefer work, in exchange for the introduction of robotics which will necessarily reduce longshore work opportunity in the coastwise longshore unit. (*See* Resp. Ex. 1 § 1.72) Further, it is beyond dispute that ILWU-represented employees are at risk of displacement (or have had their work displaced) due to ongoing technological advancements and that the ILWU's objective in negotiating this agreement with PMA was to

make up for such losses by preserving the functional equivalent of their traditional longshore work. (Tr. 1576-78, 1997; *see also* ALJD 15:22-26)

Additionally, the ALJ's decision fails to take into account the unique and "unusual" features of the single coastwise bargaining unit[11] in evaluating whether the maintenance and repair agreement satisfies a lawful, work preservation objective. In particular, as the Second Circuit explained in *Bermuda Container Line LTD v. ILA*, 192 F.3d 250, 257 (2d Cir. 1999), an agreement to preserve work for longshore workers in a coastwise, multi-employer, multi-port bargaining unit must take into account the potential displacement of work caused by technological development at other Ports and within the coastwise unit as a whole. In *Bermuda Container*, a carrier member of a multi-employer bargaining association, who engaged a member stevedoring company to load and unload its cargo at the Port of New York that used ILA-represented longshore workers, attempted to move to the Port of Salem and hire non-union workers to perform the longshore work. *Id.* The Second Circuit concluded that

> [BCL'S] proposed move to Salem would deplete the number of longshore jobs available to ILA workers in the port of New York and divert them to non-union labor in Salem. This effect would directly hurt existing members of the bargaining unit, and the Container Agreement by prohibiting [BCL's] proposed move preserves work within the primary employment relationship.

Id. Likewise, here, the increasing mechanization and automation of terminals in ports coast-wide will displace jobs in the Port of Portland and elsewhere because, as terminals become increasingly efficient due to mechanization, they will obtain an increasing volume of cargo, thereby displacing not only the workers at the particular terminal or port, who are directly affected by increased efficiency, but also the workers at terminals and ports coast-wide, who are

[11] As the D.C. Circuit has noted:

> This bargaining unit was unusual in two respects. First, it included steamship lines even though they generally subcontract all longshore work to stevedoring firms and terminal operators because the steamship lines were "intimately associated with the employment of longshore labor." Id. at 1017. Second, the unit encompassed many different employers. It may have been that virtually all direct or indirect employers of longshoremen on the West Coast belonged to the listed associations and thus none fell outside the unit.FN4 The Board defined the unit so broadly because of the strength shown by the employers jointly negotiating and administering labor agreements through those associations.

California Cartage Co. v. N.L.R.B., 822 F.2d at 1206.

indirectly affected by the increased efficiency as more cargo is diverted to the more efficient terminals. Accordingly, the ILWU's grievances against the carriers are "motivated entirely by the longshoremen's understandable desire to preserve jobs against 'the steadily dwindling volume' of cargo work" in the face of encroaching robotics and other labor saving devices being introduced by the PMA Carriers themselves. *ILA II*, 473 U.S. at 79. The Supreme Court has already held that this constitutes a valid, primary work preservation objective. *Id.*

The ALJ's decision also fails to recognize the legal significance of the PMA's and the carriers' asserted position that the Union is rightly seeking to enforce a valid contract claim. (Tr. 1998-2003)[12] In upholding the legality of similar ILWU-PMA work preservations arrangements, the Board has on many occasions placed considerable evidentiary weight on the PMA Employers' insistence that the disputed work falls under traditional longshore work and under the control of PMA employers (i.e. the carriers who own and control the release and handling of their containers). *See, e.g.*, *California Cartage*, 278 NLRB 220 (1986); *ILWU Local No. 50*, 244 NLRB 275 (1979); *Vance, J. Duane (Longshoremen & Warehousemen, Local 19)*, 137 NLRB 119, 124-25 (1962). In fact, the Ninth Circuit has found legal error and reversed the Board for failure to accord sufficient weight to the PMA position and the PMA-ILWU joint interpretation of their contract. *NLRB v. ILWU Local No. 50*, 504 F.2d 1209, 1215-17 (9th Cir. 1974) (remanding to Board § 8(b)(4)(D) decision where it failed to accord the governing weight warranted for PMA's support of ILWU interpretation of work assignment provisions as upheld by the longshore arbitrator).

The ALJ decision also mistakenly assumes that the presence of secondary effects from the Unions' conduct here necessarily means the conduct has secondary objectives, "undertaken for its effect elsewhere," when the law provides otherwise. *See NLRB v. Local 825, Int'l Union*

[12] While the record transcript contains extensive evidence from PMA witnesses Marzano and Amidon that the PMA and the carriers openly support the ILWU's work preservation claim as a primary labor dispute under the PCLCA, this is reinforced with particular articulation in the letter of November 28, 2012, from PMA counsel asserting that the PMA carriers control the reefer work and that the work is traditional longshore bargaining unit work. For the reasons detailed, infra, it was error for the ALJ to refuse to admit the PMA counsel's letter into the record before issuing his decision.

of Operating Eng'rs, 400 U.S. 297, 3030 (1971) (under § 8(b)(4)(B), "primary activity is protected even though it may seriously affect neutral third parties"); *Freight, Construction, General Drivers Union, Local 287 (Buck's Butane)*, 186 NLRB 187, 195 (1970) ("Whatever secondary effects are here involved are necessarily subordinate to the right to strike and picket for clearly primary purposes.").

The ALJ's failure to follow the principles set forth in the *ILA* cases and properly assess the Union's objective of primary work preservation constitutes legal error. A proper examination of the relevant considerations, including the ongoing technological displacement of traditional longshore work, the unique features of the coastwise bargaining unit, and the PMA's own position in support of ILWU, make clear that Respondents have a lawful, primary work preservation objective.

B. <u>The Reefer Work Constitutes Traditional Longshore Work</u>

Although the ALJ Decision does not directly address this issue, it implicitly treats the reefer work as falling well within traditional longshore work patterns -- "Yet this particular work task takes place smack in the middle of a complex stevedoring operation traditionally performed by longshore workers and marine clerks represented by ILWU local unions, an industrial labor organization concerned with technological advances that imperil the livelihood of their members." (ALJD at 5). Manifestly, the longshore maintenance worker who plugs in and monitors refrigerated containers and other modern stevedore equipment performs the "functional equivalent" of traditional longshore work, which consists of the movement of and safe-caring of marine cargo on the docks. *See ILA I*, 447 U.S. at 507-11.

What is more, there is no dispute that ILWU longshore workers have performed and continue to perform the very same work aboard the vessel at Terminal 6 as well as at the majority of facilities on the West Coast. (Tr. 164, 351, 1443-44). The numerous arbitration awards in the record show that reefer work has long been part of ILWU jurisdiction under the PCLCA and performed by ILWU longshore workers, including by order of arbitrators through the years. (See, Resp. Ex. 10 (CLRC ruling that disputed reefer work constitutes maintenance &

repair work covered by PCLCD § 1.7 – dated 5/23/2012); Resp. Ex. 11 (CLRC ruling reaffirming that ILWU entitled to disputed reefer work under PCLCD § 1.7 maintenance and repair work provisions – dated 6/6/2012); Resp. Ex. 14 (Area Arb Award ruling that dockside reefer repair work belongs to ILWU – dated 9/21/2005); Resp. Ex. 16 (Coast Arb Award ruling that plugging/unplugging of vessel reefers berthed at non red-circled facilities is ILWU mechanics work – dated 9/16/2011); Resp. Ex. 17 (Coast Arb Award ruling that plugging/unplugging of reefers on client carrier vessels is ILWU mechanics work – dated 6/3/2011). Moreover, PMA employers coast-wide have long maintained that on-dock reefer work belongs to the ILWU workforce under master agreement since reefers were introduced onto the docks. (Tr. 1466)

The courts have looked to Longshore and Harbor Worker Compensation Act ("LHWCA"), 33 U.S.C. § 903(a) jurisprudence in determining whether particular work preservation claims in the longshore industry concern jobs involving traditional longshore "work patterns," which would be primary and lawful, or entirely unrelated, acquisitioned work, which would be secondary and unlawful. In *ILA v. NLRB*, 613 F.2d 890, 910 (D.C. Cir. 1979) (J. Skelly Wright), *aff'd* 447 U.S. 490 (1980), the court found stripping of containers to involve traditional longshore "work patterns" to make lawful a work preservation claim under the NLRA, partially based on determinations of traditional longshore work under the LHWCA, citing *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 53 (2d Cir. 1976), *aff'd sub nom. Ne. Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 269-70 (1977) (Congress in its 1972 LWHCA Amendments expanded the definition of longshore work to include jobs created by containerization, explaining that "the container is a modern substitute for the hold of the vessel.") Most recently, the court in *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp.*, 718 F.3d 384, 396 (5th Cir. 2013) (en banc)(concurrence, joined by seven members of the twelve judge majority) held that "container repair" work falls under the LHWCA when in "the direct chain of unloading a ship" and where its nonperformance "would halt the entire loading process," relying on Supreme Court authority that workers who maintain and repair stevedore

equipment perform "the type of duties that longshoremen perform." 718 F.3d at 396-97 (omitting citations and quotations). Finally for this issue, the fact that ILWU longshoremen have not performed on-dock, as opposed to on-ship, reefer work specifically at T-6 does not preclude finding that it falls within traditional longshore work for purposes of the work preservation doctrine. See, *California Cartage Co. v. NLRB*, 822 F.2d at 1207 ("But, as is surely clear after *ILA I*, the fact that longshoremen have never previously performed work at the exact same location does not prevent the work sought from being the functional equivalent of work the longshoremen have performed.")

C. ALJ Erred In Finding that the Carriers and ICTSI Are "Neutral" Employers Who Lack the "Right of Control" Over the Disputed Reefer Work

The ALJ's decision rests on the legally and factually invalid premise that the PMA carriers lack the right of control over the disputed reefer work performed on their own containers. This is, to use the ALJ's term, the "Achilles heel" of his decision -- upon correctly recognizing that the PMA carriers, and thereby, ICTSI as well, have right of control over the reefer work, there can be no violation of § 8(b)(4)(B).

1. ALJ's Decision is Contrary to the Overwhelming and Undisputed Evidence Establishing Carrier Control Over the Disputed Work

The record is replete with testimony and documentary evidence unequivocally establishing that the PMA carriers are the primary employers who have direct and comprehensive control over the reefer work performed on their own containers at Terminal 6. The evidence showing such control is undisputed and comes mostly from witnesses called by General Counsel, ICTSI, and the Port.

First and foremost, it is undisputed that the Carriers own or lease all the reefers at Terminal 6 and that the Port does not own any reefers or other containers. (Tr. 1651) Richard Marzano, PMA Coast Director of Contract Administration and Arbitration, succinctly testified that the Carriers exercise direct and comprehensive control over the work performed on their own reefers:

Q BY MS. MORTON: Mr. Marzano, do the carriers control what happens with

> regard to the handling of their reefers?
> JUDGE SCHMIDT: Answer that yes or no.
> THE WITNESS: Yes.
> JUDGE SCHMIDT: Now follow up.
> MS. MORTON: Okay, thank you.
> JUDGE SCHMIDT: With a word that begins with an H.
> Q BY MS. MORTON: How so? How do you mean? How do they control that work?
> JUDGE SCHMIDT: Yes.
> MS. MORTON: Thank you.
> THE WITNESS: As I stated earlier, the carriers are the drivers. Everything begins with the carriers. They determine not only where they're going to go, but how their equipment is to be handled, what is to be done with their equipment. Is it to be loaded, is it not to be loaded. The carriers offer instructions and directions to the terminal operators specifically as to what they want done.
> And the terminal operators, without getting into the terms of the contracts that they have, the terminal operators do what the carriers say. The carriers -- it's their container. It's the steamship lines' equipment, containers, so they are giving instructions to the terminal operators on what to do. Now, the carriers also know that they have an obligation to make sure what happens under Section 1 of the contract. They can't tell somebody to violate the agreement. But they do give instructions and they do control what happens to the equipment. It's theirs.

(Tr. 2028-29) This testimony is corroborated by David Hines, an IBEW electrician who has performed the reefer work for eleven years. Hines confirmed that the carriers dictate whether reefer work will be performed on a particular container and the manner in which such work is to be performed:

> Q. Okay. So just so that I'm clear, the -- is it correct to say that the carriers control the handling and maintenance of the reefers by giving you directives about how they want these reefers handled?
> A. They send out the information of the temperature and the vent. And then if they want them repaired, or they want the temperatures changed, yes.

(Tr. 888) According to Hines, virtually all of the decisions concerning the performance of reefer work is subject to the direction and control of the Carriers. (Tr. 800-18, 865-902) The testimony of Local 40 Secretary-Treasurer Dane Jones was in full accord. (Tr. 1764-75) The Carriers' own emails to the ILWU clerks further demonstrate that they directly control the handling of their own containers at Terminal 6. (Resp Exs. 32-45)

The record also establishes, as noted, that before ICTSI began operations in February

2011, the Port performed all terminal services for the PMA carriers only pursuant to the Stevedore Service Agreements between the Port and the carriers. (Tr. 1651-52) These contracts cover reefer work as a service item to be performed for the carriers but excluded from the "throughput" charges. (Resp Ex. 6, at "Exhibit B-2" (identifying "[r]eefer monitoring; plug/unplug" as among the services provided under Hanjin's Terminal Service Agreement with the Port)).

The testimony of Nathaniel Ruda, the Port's Chief Commercial Officer and witness for Petitioner, further confirms that reefer work is a service provided pursuant to the Terminal Use Agreements and that this service is paid for by the customer Carriers:

> JUDGE SCHMIDT: Which one are we looking at now?
> MS. DONOVAN: This is the -- this is Respondent's 6.
> JUDGE SCHMIDT: Okay.
> Q. BY MS. DONOVAN: And if you go to the very end of the document, three pages toward the end, it's titled, "Exhibit B-2, Container throughput services - basic."
> A. Uh-huh.
> Q. Are you there?
> A. Yeah.
> JUDGE SCHMIDT: What page are we on?
> MS. DONOVAN: It doesn't have a page, it's Exhibit B-2, it's the third to the last page at the end --
> JUDGE SCHMIDT: Oh, okay.
> MS. DONOVAN: -- of the document.
> JUDGE SCHMIDT: All right. I got you.
> Q. BY MS. DONOVAN: Can you explain to me what throughput services means?
> A. Yeah, I believe I can. I did not negotiate the document but I know what it is. And throughput is basically a way of describing or applying rates and charges to a container move at the Terminal. I think at the Port of Portland, the way we customarily approach this was that a throughput move, which translates to a dollars per box or dollar per move, is generally two moves. An example would be off the ship, out the gate, into the gate, onto the ship.
> Q. If you turn to the next page, it say -- there's a section entitled, "Services items specifically excluded from throughput" --
> A. Uh-huh.
> Q. -- the significance of these exclusions is that they're essentially provided for free, correct?
> A. I'm not sure if that's accurate. If it's excluded from the throughput rate, I'm assuming that the throughput rate is referring to the throughput rate as stipulated in the contract. If something is not specifically articulated in the contract, it could be a service that the Terminal is providing, but it would revert to the tariff or it

> could be -- things I just see on here, pilotage, pilotage is not a service that the Port provides; the pilots have their own tariff, so it could be somebody else.

(Tr. 1667-69)

> Q. BY MS. DONOVAN: So, the significance of it being in – of something being included on this list, like number 40 [sic; should read "number 4" as stated R #6, Ex. B-2 thereto] for monitoring, plugging and unplugging, it's not that it wasn't a service being provided, it has to do with how it's being paid?
> A. That's correct. And specifically, it is -- is the payment or the rate articulated in the agreement or is it articulated in some other body, like a port tariff.
> Q. Okay.
> A. And the Port does have a published tariff, Tariff Number 8.
> Q. Okay. Today, how is the service of the subject reefer work paid, you know, the disputed work? How is the reefer plugging and unplugging and monitoring paid today?
> A. I'm actually not sure.
> Q. Okay. Are the carriers paying the Port for this service?
> A. Today we are not receiving remuneration from the carriers for plugging and unplugging or monitoring.
> Q. Okay. Before, before ICTSI took over Terminal operations at Terminal 6, how was this service being paid for?
> A. It was either called out in our tariff or enumerated in these terminal use agreements.
> Q. And the carrier was paying the Port directly?
> A. When we were operating with the Terminal, the Port collected the revenue.
> Q. Okay.

(Tr. 1670-71)

The evidence also conclusively establishes that when the Port assigned all the Terminal Service Agreements to ICTSI, it terminated all responsibilities to and severed its contractual relationship with the PMA carriers. (Tr. 1652-53) Both the Port and ICTSI concede this point. In the letters sent by the Port to the carriers notifying them of this assignment, the Port unambiguously states that "all responsibilities of the Port under the agreement will be assumed by ICTSI as provided in the Assignment." (Resp Ex. 24) Ruda testified as follows regarding these notices:

> Q. Assignment. You're correct. So in this letter you notified in this case K-Line that the agreements that the Port had with the carriers would be assigned over to ICTSI.
> A. That's correct.
> Q. And in the letter if you look at the second paragraph at the second sentence it

> says what it says. You might want to read it. It talks about the Port basically ending its responsibilities and ICTSI taking over, correct?
> A. That's correct.
> Q. And it says, "All responsibilities of the Port under the agreement will be assigned over to ICTSI," correct?
> A. That's correct.
> Q. Did a letter like this go to all the different carriers that you were dealing with -- that you had these agreements with at the time?
> A. I can't recall specifically, but I would assume that if we're sending a letter to K-Line we probably did the same thing for all of our contractual relationships at Terminal 6.
> Q. So likely to include Costco, Hanjin --
> A. Yes.
> Q. -- "K" --
> A. Very likely.
> Q. -- Hapag-Lloyd?
> A. That's correct.
> Q. Before you assigned these agreements over to ICTSI did you ask the carriers for permission to do that?
> A. We didn't ask permission. We notified that we were doing so….

(Tr. 1653-54) Ruda's testimony also confirms that with the assignment to ICTSI, the Port relinquished control and responsibility over *all* the services covered by those agreements, with no exception being made for reefer work:

> Q. During this process where the -- these agreements were being assigned over to ICTSI, did you enter into any kind of agreement that was memorialized by a document with the carrier stating that the carriers agreed for the Port to continue doing reefer work after the agreements were assigned over to ICTSI?
> A. Let me make sure I understand your question. Are you asking me if we entered into separate agreements?
> Q. If there was any agreement between the carrier and the Port and any document indicating such that the Port would continue to do the reefer work that's in dispute here after assignment of the lease.
> A. Yeah. I understand your question. I don't recall any discussions with the carriers about the reefer work nor do I recall any contractual memorialization on matters to that effect.

(Tr. 1656) In other words, there was no agreement with the PMA carriers allowing the Port or ICTSI to restrict the assignment of reefer work to IBEW electricians.

James Mullen, the Terminal Manager for ICTSI at Terminal 6 and a witness for the General Counsel, also confirmed that the Port severed its ties with the Carriers and that ICTSI

became solely responsible to the Carriers for all the services set forth in the Terminal Use Agreements. He testified:

> Q. BY MR. REMAR: Tell me what commercial or operational contracts that you know of that the Port of Portland has with any of the PMA member carriers concerning their containers.
> A. None.
> Q. You know that for a fact that there's none?
> A. Specifically to the Terminal 6 container operations they assigned their -- the Port of Portland assigned its carrier contracts to ICTSI as part of the lease agreement. And so we assume the obligations and responsibilities of those contracts upon commencement.
> Q. All of them?
> A. All of them related to the container operations at Terminal 6.
> Q. Including the handling of the containers at Terminal 6; is that right?
> A. Yes.
> Q. And including the maintenance and repair of that, correct?
> A. I don't -- I can't think of any specific language in our contracts which speak to the maintenance and repair of their equipment as to -- I just think -- I just don't remember any sections or provisions of the contract that other than – you know, that have specific language other than the one Hapag agreement that I mentioned.
> Q. It's true that Hanjin -- I'll just take them one at a time. That Hanjin believes that you're responsible for the maintenance and repair -- excuse me, that you, ICTSI are responsible for the plugging and unplugging of their containers at Terminal 6, correct?
> MS. ANZALONE: Objection, foundation.
> Q. BY MR. REMAR: Isn't that true?
> MS. ANZALONE: This witness doesn't know what Hanjin believes.
> MR. REMAR: Yes, he does. And we have it in the record.
> JUDGE SCHMIDT: Well, he may answer. Go ahead. Overruled.
> THE WITNESS: I think they have an expectation that while the container is in the facility ICTSI is going to somehow ensure that specifically their reefer containers are properly handled.

(Tr. 327-328) Significantly, Mullen testified that ICTSI controls, as part of its general operational responsibilities to the carriers, the reefer work performed aboard the vessels. (Tr. 351) Mullen also admitted that in doing the dockside reefer work, the Port is performing a function of the terminal operator for ICTSI, stating "I'd be hard-pressed to say no." (Tr. 356)

After taking over the carrier contracts, ICTSI, like the Port, provided terminal services at the request of the Carriers, who are ICTSI's direct customers. The testimony of ICTSI's CEO Elvis Ganda makes this clear:

> Q. Yeah. But my question is this. It says, "Hanjin agrees to pay all applicable port charges." Does -- under the assignment then, doesn't it mean that the term port should be replaced by the term ICTSI?
> A. What this is speaking to --
> Q. That's not how it works?
> A. Well, the agreement is assigned to ICTSI, but this is referring to the Port's charges, which are both within this agreement as well as the port tariff.
> Q. Okay. But -- and it says for services provided at Hanjin's request. So are those -- does that -- is this now --now that it's assigned to ICTSI, are the services that are being provided at Hanjin's request services performed by the Port or services performed by ICTSI, or both maybe?
> A. It could be both --
> Q. Okay.
> A. -- depend- -- the services that they -- you have your terminal services, which would be anything that the customer needs, whether it's an inspection or reefer plugging and unplugging.
> Q. Right.
> A. But that service is provided by the Port.
> Q. Okay.
> A. So services are services that the customer may need or require or request.
> Q. I see. And the customer meaning the carrier Hanjin in this case.
> A. The ocean carrier.
> Q. Is that right, Hanjin?
> A. Hanjin is an ocean carrier, correct.

(Tr. 1180-81) Thus, the carriers control and direct the performance of reefer work under the Terminal Use Agreement and by virtue of owning the containers and serving as ICTSI's "customer."

The record also contains an abundance of evidence showing that the carriers repeatedly asserted their control over their reefers and directed ICTSI and the Port not to interfere in its assigning the work to ILWU longshoremen and its own independent contractual obligations under the PCLCD. (Resp Exs. 27-31; GC Exs. 3-9) For example, Hanjin sent the Port a letter stating, in pertinent part:

> Take notice from Hanjin Shipping American, LLC. that you are REQUIRED to use ILWU labor to plug, unplug and monitor reefers at T6. We demand that you comply with this requirement effective immediately and continuously to bring us into compliance with the collective bargaining agreement. This is not a request and not open for discussion.

(Resp Ex. 27; *see also* GC Ex. 4) In a subsequent letter to the Port, Hanjin reinterated its

demand that the Port "not interfere with [Hanjin's] collective-bargaining relationship with the ILWU." (Resp Ex. 29; *see also* GC Ex. 5 (Hanjin asserted: "how could ICTSI sign a lease agreement with [the Port] knowing full well that you would be in conflict with the master bargaining agreement between PMA and ILWU?") Similar emails were sent by the other carriers to the Port and ICTSI. (GC Exs. 7-9) Throughout this dispute, the carriers have consistently maintained their position that as signatories to the collective bargaining agreement between PMA and ILWU, they are obligated to use ILWU labor for the disputed work. (Resp Exs. 27-31; GC Exs. 4-5, 8-9)

As discussed above, the evidence also establishes that the carriers have the power to accede to the Union's demands by having their ships bypass the Port of Portland altogether, displaying ultimate and plenary control over the reefer work. Hanjin threatened to "make alternative plans" if the Port did not comply with its directive. (GC Ex. 3) According to Mullen, the carriers eventually made their threatened alternative plans by bypassing Terminal 6 altogether when their orders as to the work on their own reefers were not obeyed. (Tr. 331) Ganda also admitted that the carriers have remedies for ICTSI and the Port's noncompliance because "[t]hey can deliver [their containers] wherever they want to deliver them." (Tr. 1235).

The ALJ's decision completely ignores this overwhelming evidence confirming carrier control. Moreover, the decision fails to cite any contrary evidence other than the Port's lease, which—at the very most—merely reflects the Port's desire to control the work, and not its right to do so. Thus, in addition to misapplying the governing law and ignoring the broader context in which this labor dispute arises, the ALJ's conclusion that carriers lack the right of control goes against the overwhelming, if not undisputed, evidence and therefore must be reversed.

2. <u>ALJ's Decision Utterly Disregards Court and Board Rulings that Carriers in the Longshore Industry Have the Right To Control the Work Performed On Their Own Containers</u>

Both the Supreme Court and the Board have expressly held that carriers possess the right to control the work performed on their own containers. Quite astonishingly, the ALJ's Decision

departs from these prior holdings without so much as mentioning, much less following, these well-established precedents.

In *NLRB v. International Longshoremen's Association (American Trucking Association) ("ILA II")*, the Supreme Court noted with approval that "the ALJ, Board, and Court of Appeals have unanimously concluded that the longshoremen's employers, marine shipping companies, have the 'right to control' container loading and unloading by virtue of their ownership or leasing control of the containers." 473 U.S. 61, 74 n.12 (1985); *see also ILA I*, 447 U.S. 490, 512 n.27 (1980) (recognizing that carriers have the right to control the stuffing and stripping of certain types of cargo from their own containers). On remand from the Supreme Court, the Board, in *International Longshoremen's Association*, 266 NLRB 230 (1983), *sub. nom. American Trucking Ass'n, Inc. v. NLRB*, 734 F.2d 966, 977-78 (1984), *aff'd in pert. part, ILA II*, 473 U.S. 61 (1985), affirmed the ALJ's finding that signatory members of the multi-employer association had the right to control the container work because they owned or leased the containers and could prescribe the conditions for the release of these containers to non-members.

Following *ILA II*, the Board in *Longshoremen ILWU (California Cartage)*, 278 NLRB 220 (1986), specifically ruled that the PMA carriers (also known as "steamship companies") have plenary control over the handling of containers they own or lease in West Coast ports to render lawful their contractual obligation under the PCLCD to ensure that their containers are stuffed and unstuffed only by ILWU labor:

> The containers are owned or leased by the steamship companies. Those companies control the use of the containers. The steamship companies typically provide for the initial loading and unloading of the containers by contracting with container freight stations for the performance of this work. The steamship companies refer their customers to the container freight stations and charge the shippers a tariff rate that includes the cost of containerization.

Id. at 223. Significantly, the Board noted that *ILA II* had found "that the signatory employers [i.e., the steamship carrier lines] could control the assignment of this work by prescribing the

conditions for the release of their containers to nonmember [employers]." *Id.* at 224, *enforced in pert. part by California Cartage, Co. v. NLRB*, 822 F.2d 1203, 1206 (D.C. Cir. 1987).

The instant matter involves exactly the same PMA Carriers, the same CBA (the PCL&CA), the same ILWU longshore union, the same West Coast longshore bargaining unit, and the same types of container-handling operations as presented in the *ILWU (California Cartage)* cases where PMA carrier control was confirmed. The record evidence defies any serious dispute that the PMA carriers continue to have plenary control over their own reefers as held in the *ILA* and *ILWU (California Cartage)* cases. The ALJ's failure to acknowledge and follow this established case law constitutes legal error.

3. ALJ Erred in Conducting a Mechanical "Right of Control" Analysis and Failing To Consider the Surrounding Circumstances

The ALJ correctly cites the legal principle that the determination of whether conduct is primary or secondary is not "a mechanical one." (ALJD 41:34 (citing *Local Union No. 438, United Pipe Fitters (George Koch Sons, Inc.*), 201 NLRB 59, 63 (1973), *enf'd*, 490 F.2d 323 (4th Cir. 1973)). The Board must not look "solely at the pressured employers' 'contract right to control' the work at issue at the time of the pressure, but rather consider "all the surrounding circumstances" to evaluate "not only the situation the pressured employer finds himself in but also how he came to be in that situation." (ALJD 41:24-41 (citing *George Koch Sons*, 201 NLRB at 63). However, the ALJ's decision violates these precepts by focusing exclusively on the Port's lease and finding the Port in control of the disputed work solely by virtue of that document. By failing to consider the circumstances surrounding the disputed reefer work, the ALJ reached a conclusion that is inherently illogical and contrary to longstanding industry practice and realities.

In particular, the ALJ interprets the lease as purporting to "reserve" to the Port the "right" to have its electricians continue to do the reefer work without considering how the Port came to have and keep the reefer work in the first place. The record confirms, and the parties do not dispute, that the Port had historically performed the reefer work only because it obtained such

work from the carriers pursuant to the Stevedore Service Agreements. (Tr. 974-75, 1665; Resp. Ex. 6) Under these contracts, the carriers paid the Port for the performance of reefer work and dictated when and on what terms to release their containers to the Port. (Tr. 1667-71) In fact, the Stevedore Service Agreements are the only contracts in the entire record that expressly refer to the work of plugging, unplugging, and monitoring reefers. (Resp Ex. 6, at "Exhibit B-2") Simply put, the disputed reefer work would not exist *but for* the carriers' releasing their containers at Terminal 6 pursuant to these Agreements. Therefore, the Port's "right of control" over reefer work is strictly limited to and governed by the amount of control the carriers elect to give them under the carrier contracts.

The record shows that the Port completely terminated all business relationships and contracts with the PMA carriers when it assigned the Stevedore Service contracts to ICTSI and ceased being the terminal operator. (Resp Ex. 24; Tr. 1653-54) Importantly, when the Port terminated its contracts with the carriers, it did not reserve *with the carriers* the right to continue performing work on their containers, including reefer work. (Tr. 1656) The Port made a clean and total break from the carriers and relegated itself to a mere landlord of the port facilities. As a result, now when the carriers call on Terminal 6, they release their containers to ICTSI and not the Port. The Port no longer receives any container work, including reefer work, from the carriers. (Tr. 327-28, 1180-81)

Given these undisputed facts, the ALJ's finding that the Port reserved the right to control the reefer work after ending its relationship with the carriers is simply nonsensical. Upon terminating its Stevedore Services contract with the carriers, the Port no longer had any work to "reserve" because it lost any ongoing "right to control" or perform any work on the carriers' containers without their permission. It defies logic to suggest that the Port can unilaterally, without carrier agreement, somehow keep for itself the reefer work it had historically performed for the carriers while at the same time relinquishing all of its business dealings with and contractual obligations to the carriers. Unsurprisingly, there is not a shred of evidence in the record to support the ALJ's implicit finding that the Port had the authority to sever the reefer

work from the Stevedore Service Agreements that provide for it and the carriers that pay for and control it.

The ALJ further erred in relying on language in the lease as evidence of the Port's control. According to the ALJ, "the Port obviously continued to treat the subject as one over which it retained full control when it entered the T6 lease with ICTSI in 2010 with provisions that maintained the historical work jurisdiction of the DCTU union." (ALJD 43:6-8) However, that the lease reflects the Port's intent to "reserve" the reefer work does not mean that the Port had the right or the ability to do so, especially when the PMA carriers are not party to the lease and never otherwise agreed to this purported "reservation." Since the reefers—and consequently the reefer work—derive from the carriers, any Port reservation of rights to work on the carriers' reefers requires their approval, which is absent here. Because the Port no longer held the "right to control" the disputed reefer work when it terminated its contracts with the carriers, the lease is not and cannot be the source or basis for establishing Port control *vis a vis* the carriers.

4. ALJ's Finding of Port "Right of Control" Ignores the Fundamental Realities of the Coastwise ILWU-PMA Collective Bargaining Relationship

The ALJ's decision flies in the face of the very premise upon which the coastwise ILWU-PMA collective bargaining relationship rests, *i.e.*, that the ILWU longshoremen are employed collectively and indivisibly as one workforce in a single bargaining unit for all signatory employers under a single CBA. Specifically, the ALJ suggests that certain members of PMA who do not directly employ longshoremen are neutral, secondary employers with respect to certain longshore employees. However, as recognized by the D.C. Circuit in *California Cartage*, 822 F.2d 1203, 1209 n.10, the Board has expressly rejected this contention, explaining that carriers:

> have a direct and vital interest in the terms and conditions of employment for longshoremen. The history of labor relations in that industry has been fraught with extraordinary problems, which have extended beyond the customary employer-employee relationship. As the Board pointed out in 1938 [when the ILWU bargaining unit determination was made], the statute defines the term "employer" to include any person acting as an agent for an employer "directly or

> indirectly."…In this particular industry the community of interest of the participating employers is unmistakable.

ILWU Local 13 (California Cartage), 208 NLRB 997 (1974). Based on this rationale, the Board held that "all members of PMA are, with respect to the ILWU, primary employers for the purposes of collective bargaining in the established unit of longshoremen and marine clerks." *Id.* The Board later modified its ruling in *Cal Cartage*, based on the teachings of the *ILA* cases, to conclude that the carriers also have plenary control over their own containers and the work performed on them. 278 NLRB 220. The ALJ erred by critically ignoring the historical context in which the ILWU bargaining unit arose and the realities of the longshore industry that necessitate having a single coastwise bargaining unit.

5. ALJ's Decision That the Carriers Cannot Accede to the Union's Demands Is Contradicted by His Own Factual Findings

The ALJ's Decision correctly recognizes that the crux of the right-of-control test is to determine whether the pressured employer can accede to the union's demands. (ALJD 41:43-47) As explained by the Board: "where the pressured employer cannot himself accede to the [union's] wishes, the union's pressure is secondary because it is undertaken for its effect elsewhere." *Local Union No. 438, United Pipe Fitters (George Koch Sons, Inc.*), 201 NLRB 59, 63 (1973), *enf'd*, 490 F.2d 323 (4th Cir. 1973.

Here, the ALJ's own factual findings establish that the carriers can, and actually for some time did, accede to the ILWU's work claims. Specifically, the ALJ found that: (1) the carriers own or lease all of the reefers and purchase the services performed on their own containers (ALJD 45); (2) the Port is dependent for its economic vitality on the willingness of the carriers to use the stevedore services provided at Terminal 6 (ALJD 48); and (3) the carriers possess and have exercised the power to withhold the release of containers at Terminal 6. (ALJD 48). As Judge J. Skelley Wright observed in the D.C. Circuit *ILA I* opinion: "[i]t is difficult to imagine a more forceful demonstration of control." *ILA v. NLRB*, 613 F.2d 890, 910 (D.C. Cir. 1979), *aff'd* 447 U.S. 490 (1980); *see also ILA and its Local 1291 (Holt Cargo)*, 1996 WL 625508, at *3

(N.L.R.B.G.C.) (1996) ("carriers like Maersk generally have the right to control the assignment of work since, by virtue of their ownership and/or long-term leasehold interest in the containers, they have the authority to prescribe the conditions of the containers' release").

Importantly, the ALJ's decision fails to recognize that the carriers' decision to bypass the Port for a time and have its containers serviced by ILWU labor at another West Coast port served to accede to the Union's demand that the work be performed by the longshore bargaining unit. Here, there is clear and undisputed evidence showing that the carriers can themselves accede to the Union's demands by using ILWU labor for their reefer work. The ALJ erred by overlooking this "primary effect" in his right of control analysis.

D. ALJ Erred in Concluding that Port Consent Is Required to Enforce the PCLDC

The ALJ Decision makes the erroneous, legal conclusion that Port "consent" is required for ILWU and PMA to enforce the provisions of the PCLCD, including, in particular, the red-circle exceptions to ILWU mechanic jurisdiction. (ALJD 16, 42, 44) According to the ALJ, the lack of Port "consent" is the "Achilles heel affecting the outcome of this case." (ALJD 42:21) However, the ALJ's analysis misapplies the law governing multiemployer bargaining units and relies on the mistaken premise that the Port permanently controls the reefer work independent of the carriers and ICTSI.

As the ALJ correctly noted, a multiemployer bargaining agency, such as PMA, rests on voluntary consent of the signatory parties. *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 412 (1982); *Greenhoot, Inc.*, 205 NLRB 250, 251 (1973). Thus, employers do not become a part of a multiemployer bargaining unit unless they "expressly confer on a joint bargaining agent the power to bind them in negotiations." *Greenhoot*, 205 NLRB at 251. Likewise, an employer has the power to voluntarily withdraw from such units after the existing agreement has expired and prior to negotiating the next agreement. *Bonanno Linen*, 454 U.S. at 412; *Jaflo, Inc.*, 327 NLRB 88, 90 (1998).

Based on these principles, the ALJ concluded that Port consent is required to enforce the

PCLCD. (ALJD 42:32-40) However, this conclusion turns these legal principles on their head. Since the Port never joined PMA, the above rules regarding multiemployer bargaining units do not apply to the Port at all and certainly do not provide the Port with any legal authority in relation to PMA and the parties to the PCLCD. Nor is the Port a party to the PCLCD or bound by its terms. Indeed, this is one of the very reasons why the Port is not the primary employer here—it is simply a third party that is completely excluded from the contractual rights and obligations arising from the PCLCD. Therefore, under the principles of voluntary, multiemployer agency, relied on by the ALJ, the ILWU and PMA need not obtain the consent of the Port in order to enforce the terms of their own collective bargaining agreement.[13] .

Indeed, the rules governing voluntary, multiemployer bargaining units actually bolster the ILWU's work preservation claim. Unlike the Port, both the carriers and ICTSI have voluntarily agreed to be a part of PMA and "expressly conferred on [PMA] the power to bind them in negotiations." *Greenhoot*, 205 NLRB at 251. (ALJD 14:22-23 (recognizing that ICTSI "chose to become bound directly to the existing PMA/ILWU agreement when it applied for and became a member of the PMA")). *See Jaflo, Inc.*, 327 NLRB at 90 (1998) (stating that members of multiemployer bargaining units are bound by whatever agreement is reached between the group and a union); *Custom Colors Contractors*, 226 NLRB 851, 852-53 (1976) (once an employer has "indicated . . . [its] intention to be bound in collective bargaining by group rather than individual action[,] . . . the individual employer must accept the results of the multiemployer negotiations, and cannot at his pleasure renounce his commitment to be bound by the group action").

[13] This is not contradicted by the fact that the Port may have possessed control of the disputed reefer work back in 2008, when it operated T-6 under direct contracts with the carriers and when much of the contract provisions concerning maintenance work was negotiated. *See* ALJD 42:39-40 (relying on assumed Port control of reefer work as a basis for requiring the Port's consent to enforce the PCLCD). As discussed above, the Port had that control only by virtue of the carriers' assignment of that work to the Port pursuant to Stevedore Services Agreements. The ultimate authority to determine who performs the reefer work has always rested with the carriers, who possess the power to stop releasing their containers at Terminal 6 and eliminate the reefer work altogether. *ILA v. NLRB*, 613 F.2d 890, 910 (D.C. Cir. 1979), *aff'd* 447 U.S. 490 (1980) (holding that carriers' have the right of control by virtue of their authority to refuse to release their containers or to dictate terms for release). The carriers are not beholden to anyone for that control. Thus, the carriers were well within their right to enter a work preservation agreement with the ILWU regarding their own container work without obtaining the Port's consent

As a PMA member bound by the PCLCD, ICTSI cannot execute separate agreements that are independent of and contrary to the terms set forth in the PCLCD. *See Bonanno Linen*, 454 U.S. at 415 ("[T]he Board has held that the execution of separate agreements that would permit either the union or the employer to escape the binding effect of an agreement resulting from group bargaining is a refusal to bargain and an unfair labor practice on the part of both the union and any employer executing such an agreement." (citing *Teamsters Union Local No. 378 (Olympia Automobile Dealers Assn.)*, 243 NLRB 1086 (1979))); *accord, e.g., Retail Associates, Inc.*, 120 NLRB 388 (1958). This would effectively defeat the primary purpose of multiemployer bargaining units, which is to "promot[e] labor peace through strengthened collective bargaining." *Bonanno Linen*, 454 U.S. at 413.

Moreover, the *ILA* cases and their progeny make clear that the impact of work preservation agreements on third parties who may be adversely affected by those agreements is irrelevant as a matter of law. *ILA II*, 473 U.S. at 79 (citing *ILA I*, 447 U.S. at 507 n.22). As explained in the *California Cartage* case, "that the effect of the [agreement] is to put [a third party] out of business and give the ILWU a stranglehold over the shipping industry is of no significance." 822 F.2d at 1207. Were it otherwise, the *ILA* cases and progeny would have required the longshore industry throughout America to obtain the "consent" of all the businesses affected and displaced by the container rules.[14] Therefore, the ALJ committed legal error by concluding that the PCLCD's provisions assigning reefer work to ILWU longshore workers is unenforceable for lack of Port "consent."

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[14] Here, the robotics work preservation agreement in the 2008 PCLCD does not come close to harming Port business in the way the container rules from the mid-20th Century actually displaced entire businesses such as freight handlers, warehouses and container freight stations, as detailed in *Cal Cartage* and the *ILA* cases. It merely requires PMA members (here, the carriers and ICTSI) to assign to ILWU mechanics the disputed reefer work, which is a tiny fraction of Port operations. In fact, it actually promotes the Port's stated objective of privatizing its terminal operations and get out of the stevedoring business altogether.

II. The ALJ Erred in Finding § 8(b)(4)(D) ViolationS Because the Board's § 10(k) Award Is Invalid and There Is No Real Conflict with the §10(k) Ruling

A. District Court Has Vacated the § 10(k) Ruling

On June 17, 2013, the District Court of Oregon issued an order in *Pacific Maritime Association v. NLRB*, 3:12-cv-02179-MO, vacating the Board's § 10(k) award in *IBEW Local 48 (ICTSI)*, 358 NLRB No. 102 (2012), which had purported to assign the disputed work herein to public-sector Port electricians. The court held that the Board in *IBEW* had acted *ultra vires* against the clear mandates of the NLRA (29 U.S.C. §§ 151 *et seq.*) because § 10(k) work assignments require a dispute as defined in § 8(b)(4)(D) between two groups of *private-sector* "employees," which Port electricians are not. The court ruling immediately renders the Board's § 10(k) *void ab initio.*[15]

Since the Section 10(k) award serves as the legal predicate for the General Counsel's allegations of violations of Section 8(b)(4)(D) of the Act, its vacation by the court has direct and material impact on the factual record and legal findings to be made in the instant ULP proceeding. Specifically, the voiding of the Section 10(k) award requires dismissal of the Section 8(b)(4)(D) allegations.

It is well established that union "coercion" to secure work jurisdiction before the issuance of a Section 10(k) award does not violate Section 8(b)(4)(D). *E.g., Longshoremen ILWU Local 7 (Georgia Pacific)*, 281 NLRB 89, 93-94 (1988). Likewise, union "coercion" to secure work that falls outside the parameters of a prior Section 10(k) award does not violate Section 8(b)(4)(D). *National Association of Broadcast Employees*, 255 NLRB 372 (1981)(union grievance filed two years after § 10(k) award and concerning issues not clearly addressed in the award does not violate Section 8(b)(4)(D)). This is because the existence of a Section 10(k) award serves as the

[15] The District Court's order vacating the §10(k) decision is effective as of June 17, 2013. Pursuant to Fed. R. Civ. P. 62, a judgment takes effect unless and until the Court orders a stay. *See also NLRB v. Westphal*, 859 F.2d 818 (9th Cir. 1988); *Donovan v. Fall River Foundry Co., Inc.*, 696 F.2d 524 (7th Cir. 1982); *In re Capital West Investors*, 180 B.R. 240 (N.D. Cal. 1995). Here, the District Court has not stayed judgment and, thus, the §10(k) decision has been vacated and may not form the basis for finding a violation of § 8(b)(4)(D), as the Ninth Circuit explicitly held in its review of the § 10(l) preliminary injunction in the instant matter. *Hooks ex rel. NLRB v. ILWU*, Case No. 12-36068, 2013 WL 5422527 (9th Cir. Sept. 30, 2013)(vacating part of § 10(l) injunction herein that rests on the vacated § 10(k) award because the vacatur is in effect pending the Board's appeal in *PMA v. NLRB*, *supra*).

factual and legal predicate for the finding of Section 8(b)(4)(D) violations. *Id*. The absence of a work assignment award precludes a violation of Section 8(b)(4)(D). *E.g., Foley-Wisner & Becker v. NLRB*, 682 F.2d 770, 774-75, *supplemented*, 695 F.2d 424 (9th Cir. 1982)(a Board order quashing notice of a s 10(k) hearing does dispose of the matter as far as the NLRB is concerned," and consequently, "[t]he aggrieved employer's remedy has been inescapably and finally extinguished by the Board's action.")

Because the § 10(k) award serves as the factual and legal predicate for the General Counsel's § 8(b)(4)(D) allegations, the ALJ's findings regarding these claims fail. *ILWU Local 151 (Port Townsend)*, 294 NLRB 674, 675 (1989) (vacating § 10(k) award requires dismissal of related charges); *cf. Longshoremen ILWU Local 7 (Georgia Pacific)*, 281 NLRB 89, 93-94 (1988) (no violation of § 8(b)(4)(D) before § 10(k) award issues). The Board has specifically held that where it vacates a prior Section 10(k) award due, for example, to a change in the law, this requires the dismissal of the related Section 8(b)(4)(D) charges. *ILWU Local 151 (Port Townsend Paper Corp.)*, 294 NLRB at 675. Similarly, the Board has noted approvingly that courts have terminated Section 10(l) injunctions, which were bottomed on alleged violations of Section 8(b)(4)(D), where the Board later quashed the underlying Section 10(k) proceeding. *E.g., Local Union No. 418 Sheet Metal Workers*, 227 NLRB 300(1976)("In view of the quashing of the notice of hearing, the 10(l) injunction was dissolved on May 14, 1974.") In sum, the district court's vacating of the underlying § 10(k) decision in this matter necessarily precludes a finding of a violation of § 8(b)(4)(D) based on alleged union conduct in conflict with the vacated § 10(k) award.

B. <u>The § 10(k) Ruling is Ultra Vires and Outside the Board's Jurisdiction</u>

The Oregon District Court's decision in *PMA v NLRB*, Case No. 3:12-cv-02179-MO, correctly held that the Board lacked jurisdiction to issue its § 10(k) determination herein because the IBEW-represented employees are public-sector workers rather than statutory "employees"

within the meaning of § 8(b)(4)(D) and the Act.[16] It is undisputed that the Port is a subdivision of the State of Oregon, and therefore is a public entity. Or. Rev. Stat. §§ 778.110; 174.116(2)(hh), 198.605; *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"). Public entities are excluded from the definition of "employer" under the NLRA. 29 U.S.C. § 152(2). As such, the Port's employees—including including the IBEW electricians currently performing the work in dispute here—are not "employees" under the NLRA. *Children's Hospital of Michigan*, 299 NLRB 430, 432 (1990) ("To be a statutory employee under the NLRA, one must be employed by a statutory employer").

Section 8(b)(4)(D) prohibits "coercive" union conduct that has an object of "forcing 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." (Emphasis added). This plain, statutory text specifies that the work dispute must be between two groups of statutory "employees" covered by the Act. *ILWU, Local 62-B v. NLRB*, 781 F.2d919, 923 (D.C. Cir. 1986)(key is Board jurisdiction is whether "the dispute is between two *employee* groups.")(emphasis added).[17] The Board has specifically held that it lacks jurisdiction to rule on a work dispute between a group of statutory "employees" and a group which does not include statutory "employees". *See, Local Union No. 3, IBEW (Eugene Iovine*,

[16] *See, e.g.*, §2(2, 3) of the Act (defining "employer" and "employee" under the Act to only cover private sector employment affecting commerce, and specifically excluding employees of states and their political subdivisions). Section 2(2), in turn, specifically provides that "the term 'employer'. . . shall not include . . . any State or political subdivision thereof." 29 U.S.C. § 152(2) (emphasis added). As the Board has succinctly explained, "[t]o be a statutory employee under the NLRA, one must be employed by a statutory employer." *Children's Hosp. of Mich.*, 299 NLRB 430, 432 (1990).

[17] The legislative history of § 8(b)(4)(D) indicates that Congress rejected an initial version that defined covered jurisdictional disputes between two groups of union "members" in favor of the final text specifying statutory "employees." *See, S. 1126, 80th Cong., 1st Session*, p. 113. A congressional attempt was made in 1949 to amend § 8(b)(4)(D) to have it apply to "disputes between two or more labor organizations" to broaden its scope so that "[t]he disputant groups need not be 'employees' of the same or of any employer." *S. 249, Hearings Jan.31, Feb. 1, 2, 3*, 1949, p. 25. This effort also failed and the statutory term "employees" was not altered or removed.

Inc.), 219 NLRB 528, 529 (1975)(finding no jurisdiction to resolve work dispute involving a public employer); *Local 236, International Brotherhood of Teamsters*, 194 NLRB 594 (1971)(quashing notice of § 10(k) hearing because one of the two competing work groups consisted of an independent contractor and a supervisor who are not statutory "employees," and thus "no dispute exists within the meaning of Section 10(k) of the Act."); *see, also, Local 3, Int'l Bhd. of Elec. Workers*, 244 NLRB 357 (1979)(finding no violation of § 8(e) and § 8(b)(4)(A) where otherwsie unlawful "hot cargo" agreement was with state subdivision rather than statutory "employer"), and Because the IBEW electricians are not statutory "employees" but rather public sector employees, employed by the Port, which is not a statutory "employer" under the Act, the Board lacked jurisdiction to issue the underlying § 10(k) herein. Consequently, since the § 10(k) award is *ultra vires*, it cannot serve as a basis for finding violations of § 8(b)(4)(D).

C. Constitutional Deficiencies Render Null and Void the Board's Underlying § 10(k) Decision, Precluding a Violation of § 8(b)(4)(D)

In the recent cases of *Noel Canning v NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, and *NLRB v. New Vista Nursing and Rehabilitation*,--- F.3d ----, 195 L.R.R.M. 2781, 2013 WL 2099742 (3rd Cir. 2013), the courts held that the Board lacks statutory authority to adjudicate cases under the Act because since early 2011, it has lacked a proper, lawful quorum of Board members due to the unconstitutional recess appointments of certain Board members. This not only renders null and void the Board's § 10(k) determination, but also removes the legal authority of the Board, including the General Counsel and the ALJ, to adjudicate this case.

D. The ALJ Disregarded Established Law Holding that a § 10(k) Award Does Not Preclude a Contract Grievance Against General Contractors, Like the Carriers, For Subcontracting Unit Work In Violation Of Their Direct Contractual Obligations Under the CBA

The ALJ's conclusion that the § 10(k) award precludes Respondents from processing contract grievances against PMA carriers for subcontracting the reefer work to non-bargaining unit personnel (i.e., IBEW electricians employed by the Port) violates governing law. The Ninth Circuit was the first to establish the rule that a losing union in a § 10(k) case involving

subcontractors may thereafter lawfully pursue breach of contract grievances against the general contractor for breach of the CBA to which the general is also a party. *Associated Gen. Contractors of Am., Inc. v. IUOE, Local 701*, 529 F.2d 1395, 1397-98 (9th Cir. 1976), *cert. denied*, 429 U.S. 822 (1976) (hereafter , "AGC"). This rule has been followed by the courts and the Board. *See Miron v. I.U.O.E., Local 139*, 44 F.3d 558, 567 (7th Cir. 1995); *Hutter v. I.U.O.E., Local 139*, 862 F.2d 641, 645 (7th Cir. 1988); *Sheet Metal Workers Intern. Ass'n Local Union No. 27, AFL-CIO*, 673 F. Supp. 2d 313 (D.N.J. 2009); *Moore-Duncan v. Sheet Metal Workers' Int'l Ass'n, Local 27*, 624 F. Supp. 2d 367 (D.N.J. 2008); S. *Cal. Dist. Council of Laborers v. Berry Const. Inc.*, No. CV 90-2392-RMT(KX), 1991 WL 487235 (C.D. Cal. June 24, 1991) ("However, the NLRB [§ 10(k)] decision does not preclude the Laborers Union from asserting its contractual remedies for breach of contract."); *Associated Gen. Contractors of Mass., Inc. v. Boston Dist. Council of Carpenters*, 599 F. Supp. 1560 (D. Mass 1985); *Sheet Metal Workers, Local 27 (E.P. Donnelly)*, 357 NLRB No. 131 (2011); *Local Union 33, United Bhd. of Carpenters (Associated Gen. Contractors of Mass., Inc.)*, 289 NLRB 1482 (1988); *Operative Plasterers & Cement Masons Local 530 (Eurotech Construction Corp.)*, 2005 WL 545227 (N.L.R.B.G.C.) (2005).

In *AGC*, a fact pattern virtually identical to the present matter, the general contractor, *Western-Pacific Piledriving Corp.*, was a member of a multi-employer bargaining association (AGC) and signatory to a master collective-bargaining agreement with respondent IOEU Local 701. 529 F.2d at 1396. The general contractor had subcontracted out concrete pumping work in Oregon to Pump-Con, Inc., which was a member of a different multi-employer association, Northwest, which had a CBA with the Teamsters union. *Id.* In a § 10(k) proceeding, the Board awarded the work to the Teamsters employed by the subcontractor and all other companies signatory to the Northwest-Teamsters master agreement. *Id.* Thereafter, respondent Local 701 pursued contract grievances against AGC members alleging that the subcontracting to non-unit personnel violated their CBA. *Id.* AGC sued to enjoin the grievance process on the grounds that it was preempted by the § 10(k) award, giving the disputed work to the Teamsters employed by

AGC's subcontractors. *Id.* at 1396-97.

Denying the injunction, the *AGC* court distinguished these facts from the more common jurisdictional dispute cases, which "all involve a single employer caught between the conflicting demands of two or more unions." *Id.* at 1397. The Ninth Circuit ruled that grievances against the general contractors, who had their own contractual obligations with the respondent union, did not create irreconcilable conflicts with the underlying § 10(k) award. *Id.* at 1397-98. The court made the critical observation that under the § 10(k) award, "there is no legal obligation upon an AGC member to contract with a member of Northwest," explaining:

> By refraining from doing so, and contracting with the subcontractor who is a party to the AGC-local 701 agreement, the AGC member avoids any breach of the contract with Local 701. Nothing in the NLRB decision purports to prevent AGC members from complying with the AGC-local 701 agreement. All that the board held is that if an AGC member does breach the AGC-local 701 agreement by subcontracting with a member of Northwest, the Teamsters will get the work. It is the making of such a subcontract which breaches the AGC-local 701 contract.

Id. at 1398. The court noted that while the respondent's grievance could not directly force the reassignment of the disputed work, "this does not mean that Local 701 cannot get damages for the breach." *Id.* Accordingly, the Ninth Circuit reversed the District Court's order enjoining prosecution of the contract grievance against general contractors for subcontracting the disputed work to non-bargaining unit personnel in violation of the general contractors' own CBA with the respondent union, finding no conflict with Board's § 10(k) award. *Id.*

The Seventh Circuit's decisions in *Hutter v. I.U.O.E., Local 139*, 862 F.2d 641, 645 (7th Cir. 1988) and *Miron v. I.U.O.E., Local 139*, 44 F.3d 558, 567 (7th Cir. 1995) are in accord.

Applying *AGC*, the district court in *Moore-Duncan v. Sheet Metal Workers*, 624 F. Supp. 2d at 375-76, denied a § 10(l) injunction against grievances as to a general contractor for failure to establish a substantial and nonfrivolous legal theory. The court's analysis is especially apt:

> Under Petitioner's reasoning, any time the Board assigns disputed work to one party, all of the employer's related contractual obligations disappear. An employer could assume contractual obligations it had no intention of performing, and to the possible detriment of others, only to be absolved of those obligations under the guise of a 10(k) jurisdictional dispute decision of the Board.

> Petitioner's argument taken to its logical conclusion would eviscerate project labor agreements such as the PLA at issue here, giving contractors a license to sign on to projects with no intention of performing their contractual obligations. . . . Accordingly, for the reasons set forth above, the Board has failed to convince this Court, by a substantial and nonfrivolous legal theory, that the Sheet Metal Action constitutes an unfair labor practice.

Id. 624 F.Supp.2d at 375-76; *accord Miron*, 44 F.3d at 566 ("A § 10(k) award is not designed to serve as a safe haven for those who breach union signatory subcontracting clauses."); *see also Sea-Land Service, Inc. (Pacific Div.) v. International Longshoremen's and Warehousemen's Union, Locals 13, 63, and 94*, 939 F.2d 866, 873 (9th Cir. 1991) ("The NLRB, at least in its jurisdictional dispute-resolution capacity, is simply not an arbiter of collective bargaining agreement disputes. To allow the NLRB to supersede arbitration awards beyond what is needed to resolve the specific jurisdictional dispute at issue would undermine Congress's intent regarding the role of arbitration."); *USCP–WESCO, Inc. v. NLRB*, 827 F.2d 581 (9th Cir. 1987) (affirming Board dismissal of 10(k) proceedings for lack of a proper "jurisdictional dispute" where Union merely prosecutes contract grievance alleging improper subcontracting of bargaining unit work -- "the interaction of sections 8(b)(4)(D) and 10(k) is an effort to protect employers trapped between two competing unions, not a provision intended to authorize the Board to arbitrate disputes between an employer and a union.")

The rulings in *Longshoremen ILWU Local 7 (Georgia-Pacific)*, 273 NLRB 363, 366 (1984) and *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, 271 NLRB 759 (1984), *enf'd.* 773 F.2d 1012 (9th Cir. 1985) are not to the contrary. The Board's more recent decision in *Local Union 33, United Bhd. of Carpenters (Associated Gen. Contractors of Mass., Inc.)*, 289 NLRB 1482 (1988), explicitly distinguished these earlier ILWU cases on the grounds that in those earlier ILWU cases, the general contractor had control over the disputed work but did not have a collective-bargaining relationship or agreement with the ILWU. *Id.* at 1484 n.10. The Board observed that "the present case is factually and analytically distinguishable" because "Blount [the general contractor] did have such control, but decided to subcontract the work, and Local 33

did have a contractual relationship with Blount." *Id.*

Here, the circumstances are exactly like those in *Local Union 33, Carpenters (Associated General Contractors of Massachusetts, Inc.)*, where the Board found the union's grievances against the general contractor to be lawful and primary. Specifically, the general contractors here, as in *Local Union 33, Carpenters*, are long-established signatories to the union collective-bargaining agreement and have, in their capacity as general contractors, control over the work performed on the containers which they own or lease.

The ALJ erroneously found the *AGC* line of cases inapposite because Terminal 6 "is dependent for its economic vitality on the willingness of the carriers in the shipping industry to use the stevedore services provided at T6." (ALJD 48:17-20) According to the ALJ, importing the rule applied in the construction cases to this situation would effectively nullify the § 10(k) award because the carrier grievances "would likely"—for economic reasons—compel the Port and ICTSI to alter their T6 lease to permit ILWU workers to perform the disputed work. (ALJD 48:26-36) This reasoning fails for two reasons.

First, the ALJ's conclusion rests on pure speculation about how the carriers would likely act in response to the grievances and how the Port and ICTSI would then act in response to any pressure from the carriers. The issue of whether the § 10(k) determination bars Respondents from pursuing its contractual remedies against the carriers is fundamentally a legal question and cannot possibly turn on pure conjecture about the parties' economic motivations and behavior.

Moreover, even assuming the speculated "resulting pressure" were true, this has no legal value. The rationale set forth in the *AGC* line of cases does not rest on the premise that the pursuit of contract remedies against the general contractor will never affect the behavior of the subcontractor involved in the § 10(k). Rather, the reasoning in those cases is based on the inherent and critical distinction between a non-jurisdictional contract grievance and a jurisdictional § 10(k) proceeding. *See Hutter*, 862 F.2d at 644-45; *Moore-Duncan*, 624 F.Supp.2d at 375-76. That distinction is no less prominent or significant in the instant case. The grievances against the PMA carriers, who have their own contractual obligations to ILWU, do

not create irreconcilable conflicts with the underlying § 10(k) because the § 10(k) award does not, nor could it, require the PMA carriers to continue calling on Terminal 6 or to release its containers to ICTSI or the Port. *See AGC*, 529 F.2d at 1398. Additionally, as recognized in *Hutter*, the NLRB's task and frame of reference at the § 10(k) hearing is far different from the arbitrator's. 862 F.2d at 645. "The Board had to determine the relative merit of the [ILWU's] claim to the [reefer] work when compared with the claims of another union, not the merits of the ILWU's claim against [the carriers]." *Id.* Furthermore, under the ALJ's reasoning, the Board could effectively adjudicate a contract dispute between the carriers and ILWU by absolving the carriers of their related contractual obligations. This violates the well-established rule that, as a matter of law, the Board "has no power to adjudicate contractual disputes." *NLRB v. Hyde*, 339 F.2d 568, 572 (9th Cir. 1964); *United Steelworkers v. Am. Int'l Aluminum Corp.* 334 F.2d 147, 152 (5th Cir. 1964).

Accordingly, the *AGC* line of cases make lawful the ILWU grievances against the carriers. The ALJ's ruling to the contrary constitutes legal error.

III. ALJ Erred in Finding that Local 8 Officers and Members Engaged in an Unlawful Work Stoppage on June 6 After Being Fired By ICTSI

It is undisputed that on May 23, 2012, the CLRC issued a ruling finding that the disputed reefer work belongs to the ILWU and ordering ICTSI to assign that work to ILWU-represented workers. (Resp Ex. 10) On June 4, 2012, the Area Arbitrator found that ICTSI was in violation of the CLRC's directive and ordered the immediate assignment of the work to ILWU Local 8. (GC Ex. 12) In an effort to comply with these mandates, on June 6, 2012, Local 8 mechanics went to the reefer area of the container yard at Terminal 6 to perform the dockside reefer work. (Tr. 226) ICTSI responded by firing all of the mechanics who attempted to perform reefer work in the yard. (*Id.*) That same day, the Area Arbitrator conducted a hearing to consider this alleged job action, during which ICTSI, PMA, and ILWU had a full opportunity to present witnesses, arguments and evidence. (GC Ex. 13) Following the hearing, the Arbitrator issued a decision finding that "ILWU Local 8, its officers and members are not guilty of creating a work

stoppage or engaging in job action." (*Id.* at 3) In reaching this conclusion, the Arbitrator stated that "[t]he Union should not be put in a place where they have to 'gain implementation' of work that is rightfully theirs." (*Id.*) However, the ALJ rejected this finding and concluded that Respondents' June 6, 2012 conduct constituted an unlawful work stoppage in violation of § 8(b)(4)(B) of the Act. (ALJD 31:9-19, 32:16-20, 46:1-17) This determination is improper for a couple reasons.

First, the ALJ's decision violates the well-established "national labor policy that strongly favors deferring to arbitral decisions." *Smurfit-Stone Container Corp.*, 344 NLRB 658, 658 (2005) (citing Steelworkers trilogy: *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960)). This policy is "firmly founded in Congressional command." *Id.* (citing *Gateway Coal Co. v. UMW*, 414 U.S. 368, 377 (1974). According to the Board, it "has embraced that strong policy" and "will defer to an arbitration award when the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act." *Id.* (citing *Olin Corp.*, 268 NLRB 578, 579 (1984) and *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955)). The ALJ's decision does not identify, nor does there exist, any basis for finding the arbitrator's decision to be procedurally improper or otherwise "repugnant to the purposes of the Act." Accordingly, the ALJ's failure to defer to that decision was improper.

Secondly, any alleged work stoppage is the direct and immediate result of ICTSI's refusal to abide by the binding CLRC directive and its subsequent firing of all the Local-8 mechanics who properly tried to follow that mandate. *See Sheet Metal Workers Local Union 420 v. Kinney Air Conditioning Co.*, 756 F.2d 744 (9th Cir. 1985) (citing *Gen. Drivers, Local No. 89 v. Riss&Co.*, 372 U.S. 517, 519 (1963) (holding that joint panel awards [such as CLRC rulings] are "entitled to same degree of deference as those entered by arbitrators"). Local 8 mechanics did not engage in any misconduct by attempting to perform the work determined to be theirs by the CLRC and Area Arbitrator. Moreover, it is manifestly unjust to allow an employer to fire its

employees and then blame them for creating a work stoppage. ICTSI must bear the consequences of its own decision to fire the mechanics. The ALJ therefore erred in finding an unlawful work stoppage based on this incident.

IV. The Record Is Completely Devoid of Any Evidence Showing that Local 40 Made Threats or Prosecuted Carriers Grievances In Violation of the Act

Local 40 is an autonomous entity that is separate and distinct from Local 8 and the International. (Tr. 406-07, 1759) Nevertheless, the ALJ's decision lumps Local 40 in with the ILWU International and Local 8, finding them all equally responsible for everything any one of them has allegedly done here. (ALJD 49) However, there is absolutely no evidence in the record establishing that Local 40, its members, or its agents ever threatened or engaged in any job actions or slowdowns or otherwise disrupted ICTSI's operations at Terminal 6. (Tr. 737-738) Nor is there any evidence that Local 40 ever filed or prosecuted any grievances, or threatened to engage in such conduct, against the carriers or ICTSI concerning the reefer work. Therefore, the ALJ's findings to the contrary must be reversed. (ALJD 49:14-50:2)

V. ALJ Erred in Refusing to Reopen the Record to Consider Highly Probative, New Evidence Before Issuing His Decision.

The ALJ has an express obligation "to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce," 29 C.F.R. § 102.35(a), including by way of reopening the record pursuant to § 102.35(a)(8). *See N.L.R.B. v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 601 (9th Cir 1979), *cert. denied*, 445 U.S. 915 (1980) (recognizing that ALJs have "considerable discretion in the grant or denial of a motion to reopen."); *NLRB v. The Staten Island Hotel Ltd. P'ship*, 101 F.3d 858, 861 (2d Cr. 1996) (holding that it was within ALJ's discretion to reopen the hearing *sua sponte* to resolve ambiguities in the record). Prior to the issuance of the ALJ's decision, Respondents moved to reopen the record for consideration of new, material evidence concerning the central issue in this case—namely, the exercise of control over the disputed reefer work by the PMA carriers and ICTSI. Notwithstanding the probity of this new evidence, the ALJ refused to receive the evidence based on his rigid application of the wrong legal standard.

First, the ALJ erroneously relied on the "newly discovered evidence" standard that applies to requests to reopen the record *after* the issuance of a Board decision under § 102.48(d)(1) of the Board's Rules and Regulations. That section provides, in pertinent part, that "[o]nly newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing." 29 C.F.R. 102.48(d)(1). This heightened standard is not applicable where, as here, the request to reopen is made while the matter is still pending before the ALJ for decision. *See Sunland Constr. Co., Inc.*, 15-CA-1092, 1991 WL 1283102, at n.8 (N.L.R.B. Div. of Judges June 24, 1991) (rejecting objection based on § 102.48's newly discovered evidence rule because that rule does not apply where there has been no Board or ALJ decision); *see also* § 102.35(a) (omitting any reference to "newly discovered evidence" or any of the other restrictions found in § 102.48(d)(1)). Indeed, the ALJ himself acknowledges that "a rule similar to that found in Sec. 102.48(d) applicable to judges would make no sense." (Order at 4, fn. 3) Nonetheless, the ALJ proceeded to exclude all of Respondents' proposed exhibits on the ground that they did not constitute "newly discovered evidence" under § 102.48(d)(1). The ALJ's strict reliance on this standard constitutes legal error.

Moreover, by assuming the record may never be reopened to admit evidence arising after the close of the hearing, the ALJ ignored the numerous cases demonstrating that the Board has reopened the record to admit such evidence. *See, e.g., Norton Health Care Inc. d/b/a Norton Audubon Hosp. & Norton Suburban Hosp.*,350 NLRB 648, 649 (2007) (reopening record after ALJ decision to consider evidence of statements made after compliance hearing that showed job opening existed prior to hearing); *Inland Container Corp.*, 273 NLRB 1856, 1856-57 (1985) (reopening record after Board decision to consider interrogatory answer provided in a court proceeding after Board hearing); *Int'l Harvester Co.*, 236 NLRB 712, 714 n.4 (1978) (reopening record after Board decision to consider evidence of branch sales and closings that *postdate* first hearing); *Marsh, Jordan, Co.*, 80 NLRB 343, 343 (1948) (granting request to reopen record after Board decision to hear new evidence concerning organizational changes that occurred *after*

original hearing). Here, while the documents post-date the ULP hearing, they shed evidentiary light on the facts as they existed at the time of the hearing and inform the analysis of the key legal issues in this case. Further, Respondents' motion was timely and no one was prejudiced by any purported delay because the opposing parties had secured a § 10(l) injunction. Under these circumstances, an ALJ was legally required to reopen the record because admission of the new evidence is "in promotion of the policies of the Act and in the public interest" and denial "would exalt technicality over substance." *See Int'l Bhd. of Elec. Workers, AFL-CIO, Local 648 (Foothill Elec. Corp.)*, 182 NLRB 66 (1970), *enforced* 440 F.2d 1184 (6th Cir. 1971). The rejected evidence also has highly probative value for the reasons detailed in the Union's motion to the ALJ.[18]

CONCLUSION

For all of the foregoing reasons, Respondents' exceptions to the decision and order of the ALJ should be sustained by the Board and the decision reversed and remanded.

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Respectfully submitted,
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[18] The suggestion in the ALJ's Order that the subsequent carrier negotiations were somehow tainted by the purported slowdowns finds no support in the record and reflects a misunderstanding about the nature of contract negotiations between ICTSI and the carriers. Moreover, the suggestion actually underscores that the carriers and ICTSI do indeed have "right of control" to negotiate the terms for performance of reefer work without the involvement or say of the Port.