

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

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, ILWU LOCAL 8
and ILWU LOCAL 40,

Respondents

and

ICTSI OF OREGON, INC., *and* PORT OF
PORTLAND,

Charging Parties

Cases 19-CC-82533, 19-CC-82744, et al.

**RESPONDENTS' RESPONSE TO MOTION TO SEVER AND ABEY
AND PARTIALLY POSTPONE BRIEFING**

For the reasons stated below, Respondents respectfully request that the Board abey adjudication of the General Counsel's claims under ***both*** §§ 8(b)(4)(B) and (D) pending resolution of the Board's appeal of the Federal Court ruling vacating the underlying § 10(k) award and deny the General Counsel's motion to sever its § 8(b)(4)(D) claim from its § 8(b)(4)(B) claim because it would be inefficient to separately litigate the claims due to the strong degree of factual overlap between both claims. Alternatively, if the Board grants the General Counsel's motion to sever and abey only the § 8(b)(4)(D) claim, Respondents respectfully request that the Board deny his motion to postpone briefing on the § 8(b)(4)(D) claim because Respondents have already fully briefed their exceptions on this claim and would be prejudiced by a potentially multi-year extension of time for the General Counsel and Charging Parties to respond to their arguments.

On June 17, 2013, the District Court of Oregon vacated the Board's § 10(k) decision awarding disputed work to public-sector employees on the grounds that the Board's decision was *ultra vires* against the clear mandates of the Act because § 10(k) work assignments require a dispute between two groups of *private-sector* employees.

On August 28, 2013, Administrative Law Judge Schmidt issued a 52-page decision finding that Respondents violated both Sections of the Act, despite the vacated § 10(k) award. Notably, many of Judge Schmidt's factual findings applied with equal force to his analysis under both sections. In particular, the overlapping findings primarily turn on the legitimacy, interpretation, and significance of the lease agreement between Charging Parties Port of Portland and ICTSI, Oregon Inc. and the 2008 Letter of Understanding ("LOU") between the Pacific Maritime Association and the ILWU. Specifically, the following findings by the Judge Schmidt are at issue in both claims:

- Whether the terms of the lease demonstrate that the Port had the right of control over the reefer work;
- Whether the lease requires the lessee to adhere to traditional work assignments that had previously been in effect at Terminal 6;
- Whether Respondents have a contractual basis for pursuing monetary damages against the carriers;
- Whether the Port is the primary employer, and not a third party;
- Whether the parties to the PCLCD were required to receive authorization from the Port before entering the 2008 LOU.

Moreover, Judge Schmidt considered evidence from the § 10(k) decision, which underlies the General Counsel's § 8(b)(4)(D) claim, in reaching his findings for both Sections of the Act. *Decision of ALJ William J. Schmidt*, JD(SF)-36-13 (Aug. 28, 2013) at 4 n.5.

On October 30, 2013, Respondents filed Exceptions to Judge Schmidt's decision. Many of Respondents' 28 Exceptions apply with equal force to both the § 8(b)(4)(B) and (D) claims. On January 6, 2014, over two months since Respondents fully briefed their Exceptions on both claims, the General Counsel filed a motion to sever and abey adjudication of and to postpone briefing on the § 8(b)(4)(D) claims pending resolution of the Board's appeal of the District Court's order vacating the Board's § 10(k) decision in *Pacific Maritime Association v. NLRB*, No. 3:12-ccv-02179 (D. Ore.). Nonetheless, the General Counsel requests that adjudication of the § 8(b)(4)(B) claim not be postponed.¹ Thus, under the General Counsel's approach, the Board will have to evaluate and issue rulings on many of the same factual findings twice.

Furthermore, despite the fact that Respondents have fully briefed their arguments on both claims, under the General Counsel's approach, he and the Charging Parties would have years to formulate and refine their arguments in opposition to Respondents' exceptions. Such is highly prejudicial to the ILWU and must be avoided.

In sum, Respondents' respond to the General Counsel's motion as follows:

(1) In light of the Board's appeal of the Federal Court order vacating the § 10(k) award, it is appropriate to stay adjudication of the General Counsel's § 8(b)(4)(D) claim for judicial efficiency and to avoid inconsistent rulings.

(2) However, separate adjudication of the §§ 8(b)(4)(B) and (D) claims would be an inefficient use of the Board's resources in that it would, in essence, require the Board to

¹ Notably, the authorities cited by the General Counsel in support of their motion only concern decisions to abey decision – not to sever or postpone briefing.

adjudicate the same factual findings twice. The General Counsel decided to consolidate complaints brought under both Sections of the Act – it cannot at this late stage walk that decision back.

(3) Alternatively, if the Board grants the General Counsel’s motion to sever the § 8(b)(4)(D) claim, it should deny its request to postpone briefing on the § 8(b)(4)(D) claim. Respondents have already briefed their exceptions to Judge Schmidt’s findings relating to this claim. To allow the General Counsel and Charging Parties what could be years to prepare and refine their arguments on this claim is highly prejudicial to Respondents and, simply put, contrary to principles of fairness.

Thus, Respondents respectfully request that the Board grant the General Counsel’s motion *in part* by abeying adjudication of *both* the §§ 8(b)(4)(B) and (D) claims and deny the motion insofar as it seeks to sever the § 8(b)(4)(D) claim from the § 8(b)(4)(B) claim and to partially postpone briefing.

Respectfully submitted,

Dated: January 8, 2014

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA, 94109. I hereby certify that on **January 8, 2014**, I caused the foregoing document(s):

**RESPONDENTS' RESPONSE TO MOTION TO SEVER AND ABEY
AND PARTIALLY POSTPONE BRIEFING**

to be filed electronically with the National Labor Relations Board, and a true and correct copy of the same was served on all interested parties in this action as follows:

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I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **January 8, 2014**, at San Francisco, California.



Nicole Bridges