

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

In the Matter of: Case 19-CC-82533

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 8, Case 19-CC-82744

and Case 19-CD-82461

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 40 Case 19-CC-87504

and Case 19-CD-87505

and

ICTSI OREGON, INC.

and

PORT OF PORTLAND

**CHARGING PARTY PORT OF PORTLAND'S ANSWERING BRIEF IN OPPOSITION  
TO EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Charging Party Port of Portland (the "Port") submits this brief in answer to the exceptions to the Administrative Law Judge's Decision filed by the International Longshore Warehouse Union, and its Locals 8 and 40 (collectively, "ILWU"). ILWU has abandoned any attempt to dispute that it threatened to shut down the Port's tenant, ICTSI of Oregon, Inc. ("ICTSI"); that it engaged in work stoppages and slowdowns, work to rule and other gimmicks; and that it induced carriers to refrain from calling on Terminal 6, all with the intent of forcing the Port to transfer work to ICTSI, which would employ ILWU members to do the work, taking it away from Port employees who had been performing the work for almost forty years. Notwithstanding the undisputed fact that no ILWU member has performed this work at the Port of Portland for decades, ILWU nonetheless claims its actions are lawful "work preservation" efforts. Properly considered, these arguments fail.

### **I. STATEMENT OF THE CASE**

In June, 2012, the Port filed a charge against ILWU, Case 19-CC-82744, alleging that ILWU had violated 29 U.S.C. § 158(b)(4)(B) ("§8(b)(4)(b)"). That charge was consolidated with similar charges filed by ICTSI, and brought on for hearing before Administrative Law Judge William L. Schmidt. Over 12 days of trial in July and August, 2012, Judge Schmidt heard, and fully considered, all proper evidence and arguments offered by the parties. While the case was under consideration, the Board issued its decision in the related 10(k) proceeding. Judge Schmidt considered the Board's 10(k) ruling as well as the record evidence submitted in that case. ALJ Schmidt issued his decision on August 28, 2013 (the "ALJ Dec'n."). Judge Schmidt considered, and rejected, ILWU's work preservation claim. ILWU's exceptions followed.

## II. STATEMENT OF FACTS

ILWU implicitly accepts Judge Schmidt's conclusions about the continued harassment, filing of grievances, gimmicks, slowdowns, work stoppages, coercion of carriers, and other efforts by ILWU to coerce the transfer of the disputed work from Port employees to ICTSI employees. See Respondents ILWU's Brief in Support of Exceptions to the Decision of the Administrative Law Judge (hereinafter, "ILWU Brf."), pp. 51-53 (excepting only as to the ALJ's findings regarding June 6, 2012, work stoppage, and as to Local 40). In light of these concessions by ILWU, the Port will not repeat the extensive facts underlying the ALJ's well-founded conclusion that ILWU engaged in an extensive campaign of express coercion. Rather, the Port will focus solely on those facts relevant to the only defense offered by ILWU, that it was engaged in a "work preservation" effort to defend work it had never performed.<sup>1</sup>

### A. The Port of Portland.

The Port owns marine terminals, including Terminal 6 which began operation in 1974. 10(k) Tr. 40. The Port has long had a collective bargaining relationship with the District Council of Trade Unions, an umbrella organization of several trade unions including the IBEW. Hearing Transcript, p. 971<sup>2</sup>. Maintaining good relations with the DCTU is a high priority for the Port. Tr. 1003. DCTU represented employees, specifically IBEW Local 48 represented electricians, have performed maintenance and repair tasks at Terminal 6 since that facility commenced

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<sup>1</sup> On February 20, 2014, the Board granted General Counsel's motion to sever and hold in abeyance the allegations related to ILWU's violations of § 8(b)(4)(D) of the Act. The Port notes that the argument it makes herein regarding ILWU's § 8(b)(4)(B) violations -- that ILWU may not maintain a "work preservation" defense to its otherwise admitted violations of the Act -- will apply with equal vigor to ILWU's violations of § 8(b)(4)(D).

<sup>2</sup> The transcript of the unfair labor practice hearing is cited as "Tr. \_\_\_" The transcript of the 10(k) hearing will be cited as "10(k) Tr. \_\_\_."

operations in 1974. Tr. 971. Specifically, the electricians perform, along with their other duties, the work at issue in this proceeding: the plugging, unplugging and monitoring of refrigerated containers at Terminal 6. Tr. 1673-1674 (hereinafter, the “Disputed Work”). This work assignment is memorialized in the collective bargaining agreement between the DCTU and the Port which covers all “maintenance assignments which have been historically and consistently performed by employees covered under this agreement.” GC Exh. 26, p. 1. Indeed, the collective bargaining agreement between the Port and the DCTU specifically covers “any marine cargo handling facility leased by the Port to an independent operator to the extent the Port retains responsibility for maintenance or repair of any such leased facility.” GC Exh. 26, pp. 1-2. Thus, there is no dispute in this proceeding that IBEW electricians have historically and consistently performed the Disputed Work since 1974<sup>3</sup> through the hearing. Tr. 993.

Between 1974 and 1993, the Port employed longshore labor at Terminal 6. The Port and Locals 8 and 40 of ILWU last entered into a collective bargaining agreement in 1984. GC Exh. 30. In that collective bargaining agreement, ILWU expressly agreed that “all practices regarding jurisdictional lines with other labor organizations shall be observed.” GC Exh. 30, p. 3, Section 5(d). Consistent with the 1984 Agreement and the historic work jurisdiction at Terminal 6, the practice of assigning the Disputed Work to the Port’s electricians continued through 1993, even while the Port employed longshoremen.

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<sup>3</sup> In the summer of 2012, ILWU mechanics began physically usurping the Disputed Work contrary to the directives of their employer. Tr. 762-777, *passim*. Rather than risk physical confrontations and the potential to shut down all ongoing operations at Terminal 6, the Port temporarily authorized ICSTI to perform the Disputed Work until such a time as the Board issued its Section 10(k) decision. IBEW Local 48 Ex. 1. Other than this interim response to unlawful coercion, the Port’s employees had performed this work for almost forty years.

In 1993 the Port entered into a management contract with Marine Terminals Corporation, later known as Ports America (“MTC”). Under this arrangement, the Port retained status as port operator but MTC employed the longshore labor at Terminal 6. Nonetheless, the Port continued to employ and assign IBEW electricians to perform the Disputed Work. 10(k) Tr. 40-41.

**B. The Port Leases Terminal 6 to ICTSI**

Beginning in 2006, the Port began evaluating a change in the fundamental manner in which it operated Terminal 6. Tr. 976. Ultimately, the Port concluded that its continued operation of Terminal 6 was unsustainable. Tr. 981. With the assistance of Morgan Stanley, the Port prepared and ultimately issued a Request for Qualifications (“RFQ”) to identify parties that could ultimately operate Terminal 6. GC Exh. 27.

The RFQ specifically called out that the Port directly employed DCTU members, including electricians. Id., p. 18. The Port included this specific admonition because it was “important for management of the Port to honor historic labor contracts.” 10(k) Tr. 47.

As part of that process, the Port issued a draft Lease agreement. GC Exh. 28 (the “Draft Lease”). The Draft Lease defined “DCTU Work” as “the work to be undertaken by the Port at the terminal by the DCTU Employees under the DCTU Agreement.” Id., p. 7. The Draft Lease called for the lessee to acknowledge “that the DCTU Work is subject to the DCTU’s jurisdiction under the DCTU Agreement.” GC Exh. 28, p. 33. Section 3.2(c) of the Draft Lease obligated the lessee to comply with Section 3.23(a) through (d). Id., p. 36. Section 3.23(a) of the Draft lease obligated the Port to make DCTU Employees available to lessee for the provision of DCTU Work and the lessee was required to accept the Port’s utilization of DCTU Employees for that work. Id.

The Port prepared the Draft Lease solely to benefit the Port. Tr. 992-993. The language regarding the DCTU Work to be provided by the Port was specifically intended to “memorialize

[the Port's] collective bargaining work jurisdictions that [it] had in place at the time." *Id.* Indeed, the Port's preservation of DCTU Work for its employees was presented by the Port "as a given, just sort of like the acreage of the terminal is x." Tr. 1005. While the Port's initial efforts to change the operation of Terminal 6 stalled in 2008 because of the world-wide financial crisis, Tr. 985-986, the Port subsequently began discussions with one of the companies that had responded to the RFQ -- ICTSI.

ICTSI and the Port met and discussed the financial terms of the Draft Lease. Tr. 988. During these negotiations, the Port maintained that it intended to preserve the jurisdiction of its other labor unions at Terminal 6. Tr. 994. Indeed, the Port's position in this regard was presented as "a non-negotiable component of the lease." 10(k) Tr. 54. Thus, there was no substantive negotiation over the Port's position that historic jurisdictional lines at Terminal 6 would be maintained. Tr. 994.

After long negotiations on other issues, a final lease was agreed to between the Port and ICTSI, and executed on May 12, 2010. GC Exh. 22. The lease was approved by the Port Commission at a public meeting on the same day. GC Exh. 38. Indeed, during the Port's consideration of the lease, one of the Port Commissioners, Bruce Holte, then Secretary-Treasurer of Local 8, acknowledged a "potential but not actual" conflict of interest, but expressed his intent to vote on the lease. Holte specifically asked "if the lease references and recognizes the pertinent portions of the 1984 Collective Bargaining Agreement between the ILWU and the Port. *Id.*, p. 4. He was assured that it did. *Id.*

### **C. Relevant Provisions of the Lease**

The relevant portions of the Draft Lease were carried forward into the final lease (the "Terminal 6 Lease") unchanged, albeit with some edits made to the section and paragraphs.

Compare GC Exh. 22 and GC Exh. 28. Thus, Section 2.8 of the Terminal 6 Lease specifically acknowledges:

The Lessee acknowledges that the DCTU Work is subject to the DCTU's jurisdiction under the DCTU Agreement. For so long as the DCTU Agreement remains in effect with respect to the Terminal, 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.

GL Exh. 22, p. 40 (underlining in original). Under the Terminal 6 Lease, ICTSI pays the Port for various services the Port provides; this includes DCTU Work such as the Disputed Work. Tr. 248.

Thus, under the Terminal 6 Lease which serves as the basis for ICTSI to operate Terminal 6 at all, ICTSI is not permitted to perform work that is defined as DCTU Work. 10(k) Tr. 58. The Port had not, as of the time of the hearing, released ICTSI in any manner from its obligations to refrain from performing this work. 10(k) Tr. 60.

#### **D. The Port Controls the Disputed Work**

Simply put, the evidence of the actual performance of the Disputed Work demonstrated that it had been directed and controlled by the Port for nearly forty years. David Slater is Port's general foreman over the electricians. Tr. 82, 1017. As he testified, the electricians perform work described by a Port job description, which specifically calls out the plugging, unplugging and monitoring of reefers as part of their job duties. GC Exh. 99. Mr. Slater testified that the hiring of electricians was controlled solely by the Port. Tr. 1020. If a new electrician was needed, Port managers interviewed the applicants. Port managers made the final hiring decision. Tr. 920-921, 1020-2021. No ICTSI personnel were involved in the hiring process. Tr. 168-169,

581, 921, 1021. Only the Port assigned work to the electricians; Slater met with electricians each morning and assigned the work for the day. Tr. 918-919. While two electricians were normally assigned to the Disputed Work, if there is little such work to perform, both are assigned to perform other electrical work at Terminal 6 as needed. Tr. 905-907. ICTSI played no role in the supervision or assignment of this work. Tr. 581, 237, 922, 949, 1029.

The basic terms and conditions of the electricians' employment were covered exclusively by the DCTU Contract. Tr. 837. Port management handled all discipline and discharge issues. Tr. 835. When necessary, it is the Port's Human Resources Department that was involved in such decisions. Tr. 1021-1023. ICTSI had no role in this process. Tr. 169, 581, 1023. The scheduling and vacation requests for the electricians were handled solely by Port management. Tr. 837. ICTSI had no involvement in those decisions. Business records regarding the Disputed Work were maintained by the Port. Tr. 1028.

Not only was ICTSI not involved in the assignment, scheduling, or control of the electricians' work, neither were the oceangoing sea transit carriers who transported the reefer containers at issue. ILWU's lead representative at the hearing admitted that carriers were not involved in the hiring of electricians, in the setting of the terms and conditions of their employment, or in whatever grievances they may file. Tr. 1561.

#### **E. Industry Practice Regarding the Disputed Work**

Prior to the 2008 revision of the "Pacific Clerks and Longshore Contract Documents" ("PCLCD"), many Pacific coast port facilities utilized non-ILWU employees to perform maintenance and repair work. 10(k) Tr. 585-586. The 2008 PCLCD addressed these issues and specifically "red circled" those facilities with pre-existing non-ILWU relationships and agreed that they were outside the work jurisdiction granted under the PCLCD. 10(k) Tr. 369, 588-589. Non-ILWU personnel performed the plugging, unplugging and monitoring of refrigerated

containers at most of the “red circled” ports listed in the PCLCD. 10(k) Tr. 407-410. Rich Marzano<sup>4</sup> admitted that it was possible that non-ILWU labor performed the disputed work on the *majority* of containers moving through West Coast ports. Tr. 2079. Portland’s Terminal 6 was not included in the “red circled” facilities because MTC had no collective bargaining agreements with any labor organization other than ILWU in 2008. 10(k) Tr. 451. Again, MTC did not require a “red circle” because it did not employ any non-ILWU employees the electricians performing the Disputed Work were employed by the Port. 10(k) Tr. 40-41.

### III. ARGUMENT

ILWU concedes that it engaged in the coercion found by the ALJ. ILWU defends against those findings, claiming that it was a lawful “work preservation” attempt. ILWU concedes that it must demonstrate **both** that it: (1) had the objective of preserving work traditionally performed by employees represented by the union, and (2) directed its efforts at the employer which has control over the work in dispute. ILWU Brf., p. 20. ILWU fails both prongs.

#### **A. The Disputed Work has Not Traditionally Been Performed by ILWU Members.**

ILWU makes no attempt to actually prove as a factual matter that the plugging, unplugging and monitoring of reefers is work traditionally done by ILWU members at the Port. Rather, ILWU asserts that its entitlement to the Disputed Work arises entirely as a matter of law, based on the ILWU’s misinterpretation of two Supreme Court cases, both now decades old, and the vague provisions of a collective bargaining agreement to which the Port is not a party, purporting to define a single “coastwise” bargaining unit. The ILWU’s erroneous legal

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<sup>4</sup> Marzano is the Coast Director of Contract Administration and Arbitration for the Pacific Maritime Association, ILWU’s ally in these proceedings.

arguments cannot avoid proven facts. The undisputed hearing evidence established that Port electricians, not ILWU members, have traditionally performed this work at Terminal 6.

**1. The history and extent to which reefer plug, unplug and monitoring work is 'red circled' and performed by others outside ILWU's bargaining unit means it is not "traditionally" performed by ILWU members.**

ILWU claims that reefer work is generally within the single "coastwise" bargaining unit addressed in the PCLCD<sup>5</sup>, ILWU Brf., at 2 -- but ILWU witnesses explained that, prior to 2008, much of the maintenance and repair work at container terminals on the West Coast was being performed by non-ILWU members. In the 2008 bargaining between the PMA and ILWU, the parties eventually agreed to

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.

Respondents' Ex. 1, p. 218 (emphasis added). However, this jurisdictional "assignment" only applied outside the facilities "red-circled" where the employers' pre-existing assignment of this work to other unions was recognized. As witnesses from ILWU's ally PMA admitted, it is possible that a majority of the container traffic on the West Coast goes through such "red-circled" facilities where the work was performed by other than ILWU members. Tr. 2079.

Thus, even if the Board was going to consider work assignments at ports other than Portland, the facts pertaining to this purported "coastwise" unit are fatal to ILWU's claim.

For a valid work preservation defense, the work at issue must be "deemed to mean work that the unit employees have generally or for the most part performed." *Southern Cal. Pipe Trades Council*, 207 NLRB 711, 724 (1973). Work is not "traditionally" performed by

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<sup>5</sup> While expressly acknowledging that the Port was "neither a member of PMA nor subject to the terms of the PCLCD." ILWU Brf., at 6

longshore workers if sometimes it was performed by longshore labor, and sometimes it was not performed by longshore labor. Moreover, not only was this work not traditionally performed by longshore workers, it is not exclusively within the longshore unit even today pursuant to the “red-circled” exceptions in the current PCLCD. The 2008 PCLCD and the applicable Letter of Understanding, Resp. Ex. 1, pp. 218-22, are not a work preservation agreement but a work acquisition agreement: ILWU sought the “assignment” of certain work it had not uniformly performed as a quid quo pro for its loss of other work resulting from mechanization.

If these undisputed facts by themselves were not enough to preclude ILWU’s claims, consideration of ILWU’s explanation for the failure to “red-circle” Terminal 6 seals the issue. According to ILWU, the only reason Terminal 6 was not “red-circled” was because the Port was not a PMA member nor subject to the PCLCD. ILWU Brf., p. 6. In other words, the only reason that Terminal 6 was not red-circled, such that the work would remain out of the longshore bargaining unit, is that at the time of the 2008 PCLCD, the work at Terminal 6 was recognized by everyone as already outside the longshore bargaining unit.

The result here is further supported by the holding in *Pac. Mar. Assn.*, 256 NLRB 769 (1981). There, the ALJ carefully recounted the history by which longshoremen began, in **some** ports, to claim the maintenance and repair of containers and chassis. 256 NLRB at 781. The specific ILWU local involved there, Local 13, however, made no claim on that work until the execution of the 1978 version of the ILWU - PMA contract. *Id.* at 782. The ALJ thus made the only logical conclusion:

Under all these circumstances, I find that, through the contract with PMA, ILWU local 13 was attempting to acquire new work and not attempting to preserve work traditionally performed by employees it represented.

*Id.* The Board did not disturb Judge Taplitz' analysis on this question, 256 NLRB at 770, n. 6, but found no violation of the Act on an entirely different basis: that the previous version of Section 1.8 of the PCLCD (which "grandfathered" pre-1978 assignment of such work to non-longshoremen) was ambiguous and there was no evidence of any intent to administer it in an unlawful way. *Id.* Such ambiguity has been resolved: the 2008 Letter of Understanding expressly "replace[d] the 1978 past practice exception." Resp. Ex. 1, p. 221. The intent to apply it in an unlawful way is undenied. ILWU Brf. at 51-53.

This case is not about an attempt to preserve traditional bargaining work. It is about an attempt to acquire work that sometimes at some ports unlike Portland is in the unit, and sometimes at some ports such as Portland, is not in that unit.

**2. ILWU errs to rely on *ILA I* and *ILA II*.**

ILWU relies primarily on two decisions from the United States Supreme Court, *NLRB vs. ILA*, 447 U.S. 490 (1980) ("*ILA I*"), and *NLRB vs. ILA*, 473 U.S. 61 (1985) ("*ILA II*"). Such reliance is misplaced. Initially, ILWU errs to rely on these decisions' now almost 30-year old description of the longshore industry to prove, factually, that its members traditionally perform the work at issue. Simply put, *ILA I* and *ILA II* concerned work that, objectively, had been the very foundational activity of longshoremen: the replacement of the item by item loading of cargo onto ships with the stuffing and unstuffing of containers which held that cargo. In contrast, for all the reasons outlined above, this case does not involve work traditionally performed by longshoremen but only work they sought to acquire. The earlier Supreme Court opinions, in a different time involving different facts, are no substitute for the undenied evidentiary record developed in this case. ILWU cannot rely on cases involving very different facts as a substitute for evidence.

**3. ILWU attempts to apply a collective bargaining agreement to which the Port is not a party.**

The ILWU's arguments rest solely upon the assertion that it has a right to the Disputed Work by virtue of the jurisdictional grant under the 2008 PCLCD -- its collective bargaining agreement with the PMA. However, the Port is not a member of the PMA, the PMA had no power to bind the Port to the PCLCD, and the PMA and ILWU had no right to agree among themselves that the Disputed Work should be appropriated from the Port. The work was not PMA's to give away, nor was it the ILWU's right to perform. ICTSI, which is a signatory to the PCLCD, does not employ the workers who perform the Disputed Work and is, by contract with the Port, obliged to accept the Disputed Work from the Port. In the Terminal 6 Lease, the Port unquestionably retained this work for the benefit of itself and its employees. Thus, regardless of the terms of the PCLCD, ICTSI simply did not have the legal ability to perform the Disputed Work or to assign the work to members of ILWU. The work was not ICTSI's to assign. The provisions of the PCLCD that ILWU argues govern ICTSI are of no particular relevance -- they do not govern the Port's right to control and assign the Disputed Work.

**B. The Port Controls the Disputed Work, Not ICTSI.**

There is no dispute but that ILWU coerced ICTSI and the oceangoing carriers in an attempt to bully the Port into giving up the Disputed Work and transferring it to ICTSI who would presumably use ILWU labor to perform the work. The fact that the Port controls the Disputed Work, not ICTSI, renders ILWU's coercion unlawful.

**1. The Port controls the Disputed Work as a matter of fact.**

There is no serious dispute that the Port and its personnel direct the electricians' work in all material regards. Please see section II(D), above. ILWU made a half-hearted effort to demonstrate that ICTSI, or the carriers, controlled the work. To that end, ILWU argued that

carrier control is proven by the carriers' ability to specify that the temperatures of refrigerated units be maintained at a certain level, and their ability to request delivery times and other treatment of the containers. These facts provide no support to the ILWU. The carriers merely prescribe the conditions under which the product in the containers must be maintained. The carriers do not prescribe who must perform the Disputed Work or what union should represent those workers. Indeed, under ILWU's analysis it is not the carriers who 'control' this work but the carriers' *customers*. This must be so, if ILWU's analysis were correct, because it is the party shipping refrigerated goods that truly sets the conditions for the refrigerated containers. Plainly, neither the carriers nor their customers control who performs the Disputed Work. ILWU's arguments fail as a matter of fact.

**2. The Port's ongoing control of the Disputed Work was and is a nonnegotiable element of the Terminal 6 Lease**

The Terminal 6 Lease does not empower ICTSI to perform the Disputed Work. That work was reserved by the Port to itself and its electricians. As was discussed earlier, it was a non-negotiable aspect of the Terminal 6 Lease that the work historically performed by the Port's DCTU employees was reserved to the Port and would continue to be performed by those Port employees. The purpose was to preserve historic work jurisdiction among the various unions that had been involved at Terminal 6. As one witness put it, this continued work by DCTU members was "a given." Tr. at 10005.

The situation at Terminal 6 is not like the facts at issue in the cases relied upon by ILWU where parties entered into a contract in an attempt to circumvent the union's jurisdiction. *Cf. IBEW Local 501 (Atlas Constr. Co.)*, 216 NLRB 417 (1975); *enf'd* 566 F.2d 348 (D.C. Cir. 1977). An employer is not neutral "if it actively and knowingly contracted away its control by initiating the very restrictions which ultimately gave rise to the union's demands," or if the

employer had “control of the work at issue, but of its own volition, withheld work from the union.” *Id.* The Board continues to follow these principles. *International Brothers of Teamsters, Local 917 (Peerless Importers, Inc.)*, 349 NLRB 1057, 1059-60 (2007) (employer remains neutral when it “did not engage in affirmative conduct that would render it an ‘offending’ employer”). The record simply does not allow any suggestion that ICTSI initiated the restrictions in Section 2.8 or 3.23(a) of the Terminal 6 Lease. Here, ICTSI’s ability to perform any work at Terminal 6 was dependent upon another party: the Port, anxious to preserve its good working relationship with its DCTU employees. Because ICTSI never had the authority to assign the electricians’ work to anyone, ICTSI could not, of its own volition, have withheld that Disputed Work. *United Food and Commercial Workers, Local No. 367 (Quality Food Centers, Inc.)*, 333 NLRB 771 (2001). Simply put, the Disputed Work has never been ICTSI’s work to assign to or withhold from anyone. The work is controlled by the Port. ILWU’s ‘work preservation’ defense fails.

**3. ILWU’s own actions acknowledge that the Port controls the Disputed Work.**

In its exceptions, ILWU does not contest the ALJ’s findings regarding the threats made by its representative, Leal Sundet. Given that ILWU no longer contests the nature of those threats, the Port will not belabor their illegality. However, those threats should be considered because they demonstrate the falsity of ILWU’s current claims; the ILWU has known, all along, that it is the Port that controls the Disputed Work. The ALJ found, amply supported by evidence in the record, that Sundet fully understood that ICTSI would breach its lease by refusing to accept performance of the Disputed Work by the Port and appropriating that work to itself for the benefit of ICTSI’s ILWU employees. In addition to threatening ICTSI with a “bigger bullet,” Sundet pressed ICTSI to breach the Terminal 6 Lease because he believed that the Port would

then be forced to renegotiate the lease's terms. Tr. 1495-96. ILWU has known all along who controls the Disputed Work: it is the Port.

**C. The ALJ Correctly Found the June 6 Work Stoppage to be Unlawful.**

The Port concurs in, and adopts, the arguments of charging party ICTSI regarding these exceptions by ILWU. In any event, whatever objections may be had to the ALJ's findings regarding a single work stoppage are immaterial, in light of the extensive -- and, undisputed by ILWU -- record of other work stoppages, slow-downs, gimmicks, grievances, and other efforts to coerce a neutral employer to assign work that it did not control.

**D. The ALJ Correctly Found that Local 40 Violated the Act.**

ILWU claims that "the record is completely devoid of any evidence that Local 40" violated the Act. ILWU Brf., at 53. ILWU's claim is, once again, flatly factually incorrect. The ALJ repeatedly found that Local 40 personnel violated the Act, either directly or in concert with other ILWU actors. *See, e.g.* ALJ Dec'n p. 29, ll. 4-6 and 37-47; p. 34, ll. 27-39; p. 36, ll. 21-36; p. 39, ll. 15-18 and 20-43; and p. 40, ll. 19-30. ILWU makes no effort whatsoever to prove that these findings are not supported by substantial evidence; ILWU simply ignores them. Section IV of the ILWU brief should be rejected out of hand.

**E. The ALJ Properly Exercised his Discretion to Decline to Reopen the Record.**

ILWU acknowledges, as it must, that the ALJ has "considerable discretion" in determining whether to reopen the record after the close of a hearing. ILWU Brf., at 53 (quoting *N.L.R.B. v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 601 (9th Cir. (1979), *cert den.* 445 U.S. 915 (1980)). ILWU nonetheless contends the ALJ erred to deny its motion to submit additional evidence after the close of the hearing. ILWU is wrong.

**1. The ILWU Applies the Wrong Standard.**

The ILWU, obviously aware that it cannot meet the Board's standard for motions to reopen, as set forth in Section 102.48(d)(1) of the Board's Rules and Regulations, argues that that standard is not applicable when the matter is still pending before the ALJ. The ILWU is plainly wrong.

Section 102.35(a)(8) of the Board's Rules and Regulations permits the filing of a motion to reopen the record after the close of the trial but before issuance of the ALJ's decision. The NLRB Division of Judges Bench Book simply could not be more explicit as to the legal standards by which such a motion is considered:

The standards for ruling on such motions are set out in decisions addressing the Board's similar authority under Board's Rules, Section 102.48(d)(1).

NLRB Division of Judges Bench Book Sec. 11-900 (emphasis added).

The Board's test requires first that the motion address "newly discovered" evidence, which must have existed "at the time of the trial." For instance, in *Allis-Chalmers, Corp.*, 286 NLRB 219, 219 fn. 1 (1987) the Board refused to reopen the record to admit into evidence a post-hearing bankruptcy petition filed by the employer, offered as further evidence of its poor financial condition. *See also ILWU (Holt Cargo Systems, Inc.)*, 309 NLRB 1283 (1992) (denying employer's motion to reopen record to include a post-arbitration brief and letter dated after the close of the hearing, and after the ALJ's decision, on the ground that the evidence was not "newly discovered" within the meaning of Sec. 102.48(d)(1)); *Labor Ready, Inc.*, 330 NLRB 1024 (2000) ("to the extent that some of the logs the Respondent seeks to introduce cover periods after the instant hearing, they do not fall within the category of newly discovered evidence").

Under the correct standard, the ILWU must make a threshold showing that its “newly discovered” evidence was “in existence at the time of trial.” But as the ILWU admits, all the evidence it sought to admit “post-date the ULP hearing.” ILWU Brf., at 55. Given that concession, the motion must be denied under well-established Board law. *Allis-Chalmers Corp.*, *supra*; *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46, 46 n. 1 (1998) (“Newly discovered evidence is evidence which was in existence at the time of the hearing....”) (citation and internal quotation marks omitted).

The ILWU incorrectly argues that *Norton Health Care*, 350 NLRB 648 (2007), and *Inland Container Corp.*, 273 NLRB 1856 (1985), show that an ALJ may reopen the record to admit evidence arising after the close of the hearing. Both cases concerned evidence *existing at the time of the hearing*, but which was not discovered until after trial. *Norton Health Care, Inc.*, 350 NLRB at 648 (“newly discovered” evidence concerned whether a lactation consultant position existed at the time of the compliance hearing); *Inland Container Corp.*, 273 NLRB at 1856 (“newly discovered” evidence concerned the respondent employer’s hiring policy at the time of hearing). Thus, neither case contradicts the well-established principle that the “newly discovered” evidence must have been in existence at the time of trial.<sup>6</sup> *Allis-Chalmers Corp.*, *supra*; *Fitel/Lucent Technologies, Inc.*, *supra*.

The rule set forth in *Allis-Chalmers* and its progeny prevents parties to Board proceedings from using events occurring after the hearing as an excuse to repeatedly return to the ALJ to reopen the record. The Board’s interest in securing finality of the administrative record is

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<sup>6</sup> *Marsh, Jordan Co.*, 80 NLRB 343 (1948), also cited by the ILWU, was a representation case where the record was reopened before an election. Regardless, that decision, as well as *Int’l Harvester Co.*, 236 NLRB 712, 714 n. 4 (1978), also cited by the Union, antedate *Allis-Chalmers Corp.*, and *Fitel/Lucent Technologies*.

so strong that, even as to evidence existing at the time of trial, the movant must show it was “excusably ignorant” of that evidence until after the record closed. *Fitel/Lucent Technologies, Inc., supra; Kerry, Inc.*, 358 NLRB No. 113 (2012) (finding that although memorandum union belatedly discovered “was in existence at the time of the hearing, ... the Union has not established that its ignorance of the memorandum was excusable”).

Here the ILWU seeks to admit evidence of post-hearing developments. Under well-settled Board law, it cannot do so.

## **2. The ILWU Failed to Act with Reasonable Diligence.**

As the Board stated in *Fitel/Lucent Technologies, Inc.*, the second requirement for a motion to reopen the record is that the movant “acted with reasonable diligence to uncover and introduce the evidence.” *Fitel/Lucent Technologies, Inc., supra* (emphasis added). See *Point Park University*, 344 NLRB 275 (2005) (in technical refusal-to-bargain case, employer failed to act with reasonable diligence in moving to reopen the record where it obtained evidence over 2 months before filing motion).

Here, ILWU’s June 2013 motion sought to reopen the record to admit several documents that it has had in its possession since 2012, which ILWU had in its possession for three to nine months. ILWU Ex.s 59, 62, 63. The ILWU makes no showing that these documents are “newly” discovered or that it acted with reasonable diligence in moving to admit them. As a result, the ALJ was right to deny ILWU’s motion on this ground alone; it certainly was no abuse of discretion to do so.

ILWU’s exception on this basis is wholly without merit.

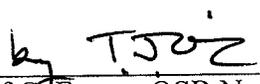
## **IV. CONCLUSION**

ILWU does not deny that it engaged in strikes, slow-downs, threats, and coercion in an attempt to obtain for its members the Disputed Work, work that had been done for almost forty

years by employees represented by a different union. On its face, ILWU's campaign of coercion was an exercise in work acquisition, not work preservation. When viewed under correct legal principles, this common sense conclusion is plainly correct. ILWU's exceptions should be rejected, in their entirety.

DATED: February 24, 2014.

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**CERTIFICATE OF SERVICE**

I, Debbie Dern, certify that at all times mentioned herein, I was and am a resident of the state of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 3600 One Union Square, 600 University Street, Seattle, Washington 98101.

On February 24, 2014, I caused a copy of the foregoing document to be filed electronically with the National Labor Relations Board - Executive Secretary - and served upon the following individual(s) in the manner indicated below:

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Executed on February 24, 2014, at Seattle, Washington.

  
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