

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, AFL-CIO,

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 8, AFL-
CIO,

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 40, AFL-
CIO,

and

ICTSI OREGON, INC.,

and

PORT OF PORTLAND.

Case No. 19-CC-082533

Case No. 19-CC-082744

Case No. 19-CD-082461

Case No. 19-CC-087504

Case No. 19-CD-087505

ICTSI OREGON, INC.'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS

Michael T. Garone
Thomas T. Triplett
Schwabe, Williamson & Wyatt
1211 SW Fifth Avenue, Suite 1900
Portland, Oregon 97204
Telephone: 503-222-9981
Facsimile: 503-796-2900

Peter Hurtgen
Curley, Hessinger, and Johnsrud LLP
2000 Market Street
Suite 2850
Philadelphia, PA 19103-3231
Phone: 267.479.0460
Fax: 267.256.5263

Attorneys for ICTSI Oregon, Inc.

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I. INTRODUCTION

The exceptions filed by Respondents ILWU International and its constituent locals, Local 8 and Local 40 (collectively “ILWU”), are notable more for what is omitted than for what is included. Thus, the ILWU did not except to Administrative Law Judge William Schmidt’s numerous factual findings (1) that the ILWU engaged in a course of threats and coercive conduct directed at ICTSI; (2) that ICTSI did not initiate the restrictions in its lease with the Port of Portland (“the Port”) on ICTSI’s authority to control the work of plugging, unplugging and monitoring of refrigerated containers (“reefers”) on the dock at Terminal 6 (“the disputed work”); or (3) that the Port is the sole entity that directs and manages on a day-to-day basis the performance by Port electricians of the disputed work. Having failed to contest these crucial facts, which were fully supported by the record, the ILWU cannot prevail and the Board should affirm in its entirety the decision of Judge Schmidt.

The ILWU essentially accepts Judge Schmidt’s findings regarding its threats and coercive conduct in this case, failing to contest, among other facts, the following:

(1) ILWU Coast Committeeman Leal Sundet made a variety of serious threats to ICTSI Oregon, Inc.’s (“ICTSI”) Chief Executive Officer Elvis Ganda on May 21, 2012, about the negative effects on ICTSI’s operations that would result if ICTSI did not “prefer” at an upcoming Section 10(k) hearing that the ILWU perform the disputed work;

(2) Sundet threatened to shut down ICTSI’s operations during the Section 10(k) hearing on May 24, 2012, and, after the hearing, further threatened ICTSI that he would send ICTSI’s two major customers, Hanjin and Hapag Lloyd, “packing” unless ICTSI violated its lease with the Port and assigned the disputed work to ILWU members;

(3) Local 8 President Jeff Smith similarly threatened Ganda, on May 25, 2012, that, unless ICTSI assigned the disputed work to Local 8 members, the ILWU would put ICTSI

out of business and run ICTSI's largest customer, Hanjin, out of Portland; and

(4) the ILWU induced and encouraged numerous slowdowns and work stoppages at Terminal 6 between June 1 and June 10, 2012, by various means, including, but not limited to, the deliberate slow operation of trucks and container cranes, the refusal to refer qualified workers from the ILWU hiring hall, the refusal by crane operators to operate their cranes, safety gimmicks, intentionally taking equipment out of service for non-existent problems, and blocking the movement of ICTSI reach stacker equipment.

By not excepting to these and other factual findings made by ALJ Schmidt, the ILWU admitted that the conduct of its members and officers occurred as alleged by the General Counsel ("GC") and that it is responsible for that conduct. Rather than disowning its conduct which the ALJ properly found was secondary in nature, the ILWU now belatedly embraces the conduct, arguing that it constituted lawful primary activity.

The ILWU's argument in this regard is based upon its oft-rejected claim that either ICTSI or the ocean carriers, not the Port, possessed the "right to control" the disputed work. The ILWU's claim in this regard has so far been expressly rejected by the Board in its Section 10(k) decision, *IBEW Local 48 (ICTSI Oregon, Inc.)*, 358 NLRB No. 102, 2012 NLRB LEXIS 499, *16 (Aug. 13, 2012) ("Because ICTSI has no authority to control the disputed work, the [ILWU-PMA contract] is not relevant; it applies only to maintenance and repair work directed or controlled by a PMA-member employer")¹, the federal court for the District of Oregon, *Hooks ex rel. NLRB v. Int'l Longshore & Warehouse Union*, 905 F. Supp. 2d 1198, 1211 (D. Or. 2012) (the district court "determined that the Port of Portland

¹ The fact that Judge Mosman vacated the Board's Section 10(k) decision based on his erroneous ruling that the Board lacked jurisdiction does not detract from the substantive correctness of the Board's legal conclusion that the Port controlled the disputed work, a decision that should be followed here.

controlled the reefer work” and “not the carriers”); and the Ninth Circuit Court of Appeals, *Hooks ex rel. NLRB v. Int’l Longshore & Warehouse Union*, 2013 U.S. App. LEXIS 19969, *1 (9th Cir. Sept. 30, 2013) (“The Port expressly retained the right to control the disputed work when it leased terminal operations to ICTSI Oregon, Inc. in 2010.”).

Despite the fact that its claim that the Port lacked the right to control the disputed work has been uniformly rejected by every tribunal that has considered it, the ILWU repeats it over and over again here. However, in the procedural context of this case, the ILWU’s failure to except to certain of ALJ Schmidt’s factual findings relevant to the control issue eviscerates the ILWU’s claim. For example, ALJ Schmidt properly found that the Port’s initial offer to engage in a lease of Terminal 6 “contained provisions requiring any potential lessee to honor the historical division of labor maintained by the Port at T6, a requirement that is at the core of this dispute.” (Decision, p. 8, ll. 4-6 (emphasis added).) The ILWU has not excepted to this factual finding of ALJ Schmidt and thus accepts it. ALJ Schmidt further found and concluded as follows:

Finally, a few of Respondents’ witnesses claimed that the lease protections for the DCTU’s historical work were a subterfuge designed to avoid the PCLCD section 1 requirement that all maintenance and repair work including the dockside reefer work at Portland be assigned to ILWU workers. The record contains absolutely no support for a claim of this sort. To the contrary, the record shows that the Port established those protections in early drafts of the lease published during the RFQ period that occurred well in advance of its direct negotiations with ICTSI. Simply put, there is no evidentiary basis for a conclusion that the DCTU provisions in the T6 lease agreement were deliberately hatched by ICTSI in order to avoid the assigning of the dockside reefer work to the ILWU represented employees.

(Decision, p. 45, ll. 24-32 (emphasis added).) The ILWU has not excepted to these findings and conclusions and accepts them as well. As a result, there can be no question that ICTSI did not initiate the Port’s reservation of control over the disputed work and agreed to it only because it was a condition imposed by the Port on any entity, including ICTSI, which was

interested in leasing Terminal 6.

The ILWU's failure to except to this finding of the ALJ is crucial because well-established Board precedent establishes that ICTSI, which was never granted the power to control the disputed work because of the Port's insistence to the contrary, is an unoffending neutral party entitled to the Act's protections against secondary activity. *See, e.g., Electrical Workers, Local 501 (Atlas Construction Co.)*, 216 NLRB 417 (1975) (an employer is an unoffending neutral unless 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 "was, in fact, given control of the work at issue, but, *of its own volition*, withheld the work from the union" (emphasis in original)), *aff'd Int'l Brotherhood of Electrical Workers, Local Union 501 v. NLRB*, 566 F.2d 348, 353 (D.C. Cir. 1977) (deferring to the Board's expertise in determining the standards under which an employer will be deemed "unoffending," the court upheld the Board's decision that, where the employer did not initiate the restrictions which the union contended violated the labor agreement, the employer is a neutral under Section 8(b)(4)(b), 29 U.S.C. § 158(b)(4)(B)).

The undisputed facts regarding the manner in which the disputed work is performed at Terminal 6 also establish the utter lack of merit of the ILWU's claim that ICTSI and/or the ocean carriers, not the Port, controls the performance of that work. The ILWU did not contest during hearing and does not contest now that, "[f]or nearly four decades well-trained, highly skilled tradesmen who are represented by an IBEW local union have performed the dockside reefer work at T6." (Decision, p. 5, ll. 23-24.)

Nor has the ILWU contested the undeniable facts that the disputed work performed by the Port's electricians is not directed in any way by ICTSI or by any entity other than the Port, including the ocean carriers. Rather, the evidence at hearing was uncontradicted that

(1) the Port's electricians are supervised only by Port management officials (Tr. 581, 822, 837, 922, 949, 1016-1017, 1029); (2) the Port's electricians work under a job description drafted by the Port (Tr. 1019-1020; GC Ex. 29.); (3) only Port management officials are involved in the hiring, discipline, or firing of the Port electricians (Tr. 168-169, 581, 835, 920-921, 1020-1023.); (4) only Port management officials assign or direct the work of the electricians (Tr. 905-906, 918-919.); (5) only Port management officials make decisions about granting time off to electricians or regarding layoffs (Tr. 837, 1023-1025); (6) only Port management officials handle and decide grievances filed by the Port electricians (Tr. 1025-1026); and (7) the terms and conditions of the Port electricians' employment are solely established by the Port's collective bargaining agreement with the District Council of Trade Unions ("DCTU") and not by the Pacific Coast Longshore Contract Document ("PCLCD") between the ILWU and the Pacific Maritime Association ("PMA"). (Tr. 837.)

The ILWU has thus failed to contest the critical facts in this case: (1) that ICTSI did not initiate the restrictions on its right to control the disputed work and that such restrictions were instead initiated by the Port; (2) that the Port is the sole entity that controls the performance of that work; and (3) that the ILWU embarked on a concerted and organized course of threats, slowdowns, work stoppages, safety gimmicks, and other conduct calculated to induce ICTSI to pressure the Port so that the Port would release its grip on the work and permit ICTSI to control it.

Instead of contesting these facts, the ILWU contends that the Port, which owns Terminal 6, somehow has no right as the property owner to condition its lease of the terminal to ICTSI on its reservation of the disputed work, work that Port employees represented by the DCTU and its constituent union, the International Brotherhood of Electrical Workers ("IBEW") have performed since the inception of Terminal 6 in 1974. To support this

astounding contention in derogation of the Port's undeniable property rights, the ILWU relies on the argument that the ocean carriers allegedly possess the right to control the disputed work due to their ownership of the containers and ability to bypass Terminal 6. However, as recognized by the Ninth Circuit Court of Appeals in its affirmance of the Section 10(l) injunction issued in aid of this proceeding, the "ILWU's argument regarding the shipping carriers' ability to bypass the Port conflates the carriers' control over their containers with the legal question of whether they have the "right to control' the assignment of the work" at this port." *Hooks*, 2013 U.S. App. LEXIS 19969 at *3 (quoting *NLRB v. Enterprise Ass'n of Pipefitters of New York & Vicinity, Local Union No. 638*, 429 U.S. 507 (1977)).

The ILWU repeats this fundamental error on numerous occasions in its exceptions, ignoring the Port's reservation of its right to control the disputed work as well as the Port's exercise of that right over the last 38 years. The Board should reject the ILWU's exceptions in their entirety and affirm ALJ Schmidt's "thorough" and well-reasoned opinion. *Hooks*, 2013 U.S. App. LEXIS 19969 at *3.

II. STATEMENT OF FACTS

A. The History of Terminal 6 and the Port's Obligation to the IBEW.

The Port is a port authority organized under the laws of the State of Oregon. The Port owns several marine terminals, including Terminal 2, Terminal 4, Terminal 5 and Terminal 6. (Tr. 971.)² The Port began operations at Terminal 6, a container facility wholly owned by the Port, in 1974. (10(k) Tr. 40.) The Port has a collective bargaining relationship with the DCTU, which is an umbrella organization comprised of several affiliated unions, including the IBEW, as well as unions representing carpenters, plumbers, painters, operating engineers

² The transcript of the Section 10(k) hearing will be cited herein as "10(k) Tr." Exhibits admitted at the Section 10(k) hearing will be cited as "10(k) Ex." The transcript of the unfair labor practice hearing will be cited herein as "Tr." Exhibits admitted at the unfair labor practice hearing will be cited herein as "Ex."

and boilermakers. (Tr. 971; GC Ex. 26, p. 22.)

The DCTU-represented employees of the Port perform maintenance and repair functions at the Port's various marine facilities, including Terminal 6. (Tr. 971.) The Port oversees this work from a central maintenance facility. (Tr. 1725.) The IBEW electricians have performed various maintenance and repair tasks at Terminal 6 since the terminal commenced operations in 1974. The electricians perform general electrical maintenance and repair work on terminal facilities, for example, on lighting fixtures and electrical distribution systems, which includes the reefer banks. (GC Ex. 29.) The electricians also perform electrical work on the Port-owned cranes located at Terminal 6 and, importantly for this case, they also perform the plugging, unplugging and monitoring of refrigerated containers on the dock. (Tr. 1673-1674.)

The collective bargaining agreement between the DCTU and the Port states that the agreement "shall cover all * * * maintenance assignments which have been historically and consistently performed by employees covered under this Agreement." (GC Ex. 26, p. 1.) The agreement covers "all marine cargo handling facilities owned and operated by the Port" as well as any such facilities leased and operated by the Port. The Port-DCTU agreement also covers "any marine cargo handling facilities leased by the Port to an independent operator to the extent the Port retains the responsibility for the maintenance or repair of any such leased facility." (GC Ex. 26, pp. 1-2.)

There can be no question in this case that the Port retained in its lease with ICTSI responsibility for the maintenance and repair of the facilities at Terminal 6. Similarly, there can be no question that IBEW electricians have historically and consistently performed the plugging, unplugging and monitoring of refrigerated containers on the dock at Terminal 6 as part of their maintenance and repair duties since 1974. Thus, there can be no question, and

no party disputed before the ALJ, that the Port is under a contractual obligation to the DCTU to insure that the electricians continue to perform for the life of the DCTU agreement the maintenance and repair work they have historically and consistently performed, including but not limited to, the disputed work. (Tr. 993.)

B. The Port's Efforts to Lease Terminal 6.

In 2006, the Port's Executive Director, Bill Wyatt, asked the Port's Marine and Industrial Director, Sam Ruda, to take a "fresh strategic look" at the Port's container business line and, in particular, at the business model being utilized by the Port at Terminal 6. (10(k) Tr. 44; Tr. 976.) At the time, the Port was the only port on the West Coast which operated its own container terminal. All other West Coast ports had moved to a lease model. (Tr. 979.) Ruda was the leader of the process by which the operation of Terminal 6 was eventually leased to a private company, ICTSI. (10(k) Tr. 52; Tr. 977.)

The initial phase of the process involved talking to other port authorities across the country to obtain information about different lease structures utilized by these ports. (Tr. 978.) As a result of this process, the Port determined that its continued operation of Terminal 6 was unsustainable. (Tr. 981.) After much internal study, the Port issued a Request for Qualifications ("RFQ") to identify potential parties interested in entering into a concession agreement with the Port. A concession agreement is a long-term lease, which involves significant upfront payments by the concessionaire. (10(k) Tr. 44-45, 49; Tr. 979-980.)

The RFQ was issued on January 28, 2008 and solicited expressions of interest from interested parties across the globe no later than March 31, 2008. (Tr. 46, 982.) The RFQ notified all potentially interested parties that, while the Port's current labor broker at Terminal 6, Marine Terminals Corporation ("MTC") employed ILWU-represented labor, the Port also directly employed trade union members, including electricians, pursuant to its

contractual relationship with the DCTU. (GC Ex. 27, p. 18.) The RFQ indicated that this division of labor had been in place at Terminal 6 since 1974. (*Id.*) According to Ruda, this language was placed in the RFQ because it was “very important for management of the Port to honor [its] historic labor contracts,” which included its collective bargaining agreement with the DCTU. (10(k) Tr. 47.)

During the RFQ process, there was significant interest from both U.S.-based and internationally-based companies in taking over operations of Terminal 6. (10(k) Tr. 48.) The Port received responses from 12 companies. (Tr. 985.) One of the companies expressing interest and submitting its qualifications was ICTSI. (10(k) Tr. 48.)

After receiving expressions of interest in response to the RFQ, the Port proceeded to “whittle down” or “vet” the interested parties. (Tr. 985.) As part of this effort, meetings were conducted with several of the prospects. (*Id.*) The intention was for the Port to request final and binding proposals from the remaining interested parties, which would include proposed pricing terms. (*Id.*) In connection with the Port’s interest in receiving final and binding bids from each of the remaining interested parties, the Port made available to the interested parties on or about August 29, 2008 a draft concession agreement. (Tr. 989; GC Ex. 28.) This document was drafted by the Port. (Tr. 1004.)

Section 3.2(c) of the draft concession agreement stated:

Except as specifically provided herein, the Lessee shall, at all times during the Term, (i) be responsible for all aspects of the Terminal Operations, *provided* that, for so long as the DCTU Agreement remains in effect, the Lessee shall comply with the provisions of Sections 3.23(a) through (d)
* * *

(GC Ex. 28, p. 36 (italics and underlining in original.) Section 3.23(a) of the draft concession agreement required that “[t]he Port shall, for so long as the DCTU Agreement remains in effect with respect to the Terminal, make available to the Lessee the DCTU

Employees for the provision of the DCTU Work.” (GC Ex. 28, p. 51.) Section 3.23(a) further required that “[t]he Lessee shall accept the Port’s utilization of the DCTU Employees with respect to the provision of the DCTU Work * * *.” (*Id.*) The term “DCTU Work” was defined in the draft concession agreement as “the work to be undertaken by the Port at the Terminal by the DCTU Employees under the DCTU Agreement.” (GC Ex. 28, p. 7.) The term “DCTU Employees” was defined as “the employees of the Port subject to the DCTU Agreement.” (*Id.*) Under Section 3.7(a)(i), the Port reserved the right to enter the lease premises during the term of the lease to, among other items, “perform the DCTU Work in Section 3.23(a).” (GC Ex. 28, p. 40.) Under Section 3.23(d), the Lessee’s contractual obligation to “utilize the DCTU Employees with respect to the provision of the DCTU Work” ceased only “[i]n the event the DCTU Agreement is not in effect with respect to the Terminal * * *.” (GC Ex. 28, p. 52.) The draft concession agreement also stated at Section 2.5(i) that:

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, the Lessee shall comply with the terms of the DCTU Agreement and shall not perform, or except as permitted hereunder, cause to be performed, at the Terminal any DCTU Work. The Lessee shall be responsible for any claims, including any labor claims, that arise from a violation of this Section 2.5(i).

(GC Ex. 28, p. 33 (emphasis added).)

The language of the draft concession agreement reserving the DCTU Work to be performed by DCTU-represented employees of the Port was drafted by the Port solely for the Port’s benefit. (Tr. 992-993.) The purpose of the language was “to memorialize [the Port’s] collective bargaining work jurisdictions that [it] had in place at the time” and to specifically make clear that the DCTU Employees would continue to perform all work covered under the

DCTU Agreement. (Tr. 991-992.) According to Ruda, the Port's lead negotiator, the provisions regarding the division of labor were presented by the Port "as a given, just sort of like the acreage of the terminal is x." (Tr. 1005.)

In late 2008, the global crisis occasioned by the Lehman Brothers and Bear Stearns bankruptcies had an immediate impact on global shipping and dampened the appetite for a concession-type arrangement regarding a port facility. (10(k) Tr. 49; Tr. 985-986.) This event reduced the price that interested parties were willing to pay to the Port for a concession-type arrangement. Due to these extreme financial conditions and effect on pricing, the Port suspended the concession process. (10(k) Tr. 49; Tr. 986.)

Because ICTSI was one of a few companies that the Port was working with during the concession process, the Port conducted "a debrief conference call" with ICTSI just before Christmas 2008. (Tr. 986-987.) During that call, ICTSI expressed its interest in Terminal 6 under a traditional maritime lease model with a shorter term and a reduced upfront payment. (Tr. 987-988.) In March of 2009, representatives of the Port and ICTSI met in Portland to discuss whether such an arrangement was feasible. The parties focused their discussions on the financial terms of such an arrangement. (Tr. 988.)

The parties continued their negotiations over the next thirteen months. (10(k) Tr. 52-53.) During these negotiations, the Port retained the same principle that it had followed during the concession stage of the process, that the respective jurisdictions of the unions at Terminal 6 would be preserved. (Tr. 994.) Put another way, the Port had an "overarching" position regarding the lease that "historic work jurisdictions would be maintained" when the "new terminal operator took over the facility." (10(k) Tr. 53.) The Port's position was formulated with guidance from its legal counsel and was "a nonnegotiable component of the lease." (10(k) Tr. 54.) There was no substantive negotiation over the Port's nonnegotiable

proposal that historic jurisdictional lines at Terminal 6 would be maintained. (Tr. 994.)

The above-referenced facts were adopted by Judge Schmidt in his decision.

(Decision, p. 7, ll. 34-41; p. 8, ll. 1-17.) The ILWU has not excepted to these findings.

Accordingly, in light of this uncontradicted evidence, ALJ Schmidt properly concluded “that, when the Port leased its T6 container facility to ICTSI in May 2010, it reserved the right to perform certain work itself, including, among other tasks, the dockside reefer work in accord with the lengthy historical practice at that terminal.” (Decision, p. 6, ll. 8-11.)

“Importantly,” the ALJ noted that the Port’s reservation in this regard was present in its earliest draft proposal for a lease of Terminal 6 which it forwarded to all interested parties, including ICTSI, in September 2008. (Decision, p. 8, ll. 4-6.) Accordingly, the ALJ found “no evidentiary basis” for a conclusion that ICTSI initiated or “deliberately hatched” the Port’s lease protections for the DCTU’s historical work force as a means to avoid assigning the disputed work to ILWU members. (Decision, p. 45, pp. 18-20.) As stated above, the ILWU has not excepted to these findings or conclusions.

C. The Approval of the Lease Agreement

The lease document was completed in or about April of 2010. (Tr. 994.) On May 12, 2010, representatives of ICTSI and the Port signed the lease. (GC Ex. 22, p. 119 (hereafter “the Lease”).) The Lease was approved on the same day by the Port Commission at a public meeting. (10(k) Tr. 61.) Bruce Holte, Secretary-Treasurer of Local 8 and a Port Commissioner voted in favor of the Lease. Local 8 President Jeff Smith and ILWU Coast Committeeman Leal Sundet spoke in favor of the Lease at the public meeting. (10(k) Tr. 61, 63.) ICTSI became a member of the PMA “in or about June 2010 after the lease was signed and approved * * *.” (Decision, p. 9, ll. 1-2 (emphasis added).)

D. Relevant Provisions of the Lease Agreement

The language contained in the draft concession agreement quoted above at pages 9 and 10 was carried forward unchanged in the final executed Lease. For example, the relevant definitional sections of the Lease are identical to those contained in the draft concession agreement. *Compare* GC Ex. 22, p. 6 and GC Ex. 28, p. 7. Section 3.2(c) of the Lease, which gave ICTSI operational control of Terminal 6 with the exception of the DCTU Work, is identical to Section 3.2(c) of the draft concession agreement. *Compare* GC Ex. 22, p. 42 and GC Ex. 28, p. 36. The language of Section 3.23(a) relating to the Lessee's obligation to accept the Port's provision of the DCTU Work by DCTU Employees is also identical. *Compare* GC Ex. 22, p. 58 and GC Ex. 28, p. 51. As is the language in the lease permitting the Port to enter the premises for the purpose of having Port employees perform the DCTU Work. GC Ex. 22, p. 40 and GC Ex. 28, p. 45.

Serious ramifications can occur under the Lease if ICTSI were to fail to comply with the lease provisions regarding the DCTU Employees' performance of the DCTU Work.

Thus, Section 2.8 of the Lease states:

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, 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.

(GC Ex. 22, p. 40 (italics added, underlining in original).)³ Additionally, to the extent that any third party, including the DCTU, were to make claim against the Port for

³ This language is essentially the same as the language contained in Section 2.5(i) of the draft concession agreement. *Compare* GC Ex. 22, p. 40 and GC Ex. 28, p. 33.

nonperformance of the DCTU Work, ICTSI would be required to defend and indemnify the Port for any loss occasioned thereby to the extent that the loss arose from “any failure by the Lessee * * * to comply with, observe, or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement * * *.” (GC Ex. 22, p. 91.)⁴ And perhaps even more importantly, the Port retains the power under the Lease to claim that any failures by ICTSI to comply with Sections 2.8 or 3.23 of the Lease constitute an Event of Default, which if not timely cured, would justify termination of the Lease. (GC Ex. 22, pp. 101-103.)⁵ The Port also retains the right under the Lease to seek specific performance or sue for damages for an Event of Default by ICTSI. (GC Ex. 22, pp. 103-104.)⁶

Under the Lease, ICTSI pays the Port an annual sum for the privilege of operating the Port’s Terminal. ICTSI also pays the Port under the Lease for the various services that the Port provides, which involves work performed by the DCTU Employees as well as work performed by others such as the security guards represented by a different local of the ILWU. ICTSI pays the Port on a monthly basis for the DCTU Work which includes electrical work on the Port-owned cranes at Terminal 6, general maintenance and repair work on the Terminal 6 premises owned by the Port, and the plugging, unplugging and monitoring of reefers. (10(k) Tr. 57-58; Tr. 248.) Payment by ICTSI to the Port for these services is not directly passed on to ICTSI’s customers, the ocean carriers, as these costs are generally considered overhead and the carriers are charged based upon container moves. (Tr. 367,

⁴ This indemnity provision, Section 12.1(a), is essentially the same as the indemnity provision, Section 12.1(a), contained in the draft concession agreement. *Compare* GC Ex. 22, p. 91 and GC Ex. 28, p. 77).

⁵ The draft concession agreement contained similar language regarding lease termination. *See* GC Ex. 28, Section 16.1(b)(i), p. 91.

⁶ The draft concession agreement contained similar language regarding specific performance and damage remedies for breach by the lessee. *See* GC Ex. 28, Section 16.1(b)(vii) and (viii), p. 92.

601-602.) However, commencing on its takeover of the terminal, ICTSI billed the carriers for the disputed work that it ordered from the Port as an ancillary service under the terminal use contracts between the Port and the carriers that were assigned by the Port to ICTSI. (Tr. 1261-1265.) Under the Lease, ICTSI is not permitted to itself perform work that is defined as DCTU Work, including the disputed work. (10(k) Tr. 58.) The Port has not released ICTSI from its obligations to refrain from performing this work. (10(k) Tr. 60.)

E. The Nature of the Disputed Work

ALJ Schmidt thoroughly described the nature of the disputed work. (Decision, p. 9, ll. 6-41; p. 10, ll. 1-36.) The ILWU has not excepted to these findings. The salient uncontradicted fact stated by ALJ Schmidt is as follows:

Since 1974, or going back through all the time the Port operated T6 directly and with the aid of its contract stevedore MTC/PA, the Port-employed electricians performed the work of plugging and unplugging the reefers as well as regularly monitoring the reefers to insure that the proper temperature and ventilation settings were maintained throughout its stay at T6.

(Decision, p. 9, ll. 23-27.)

It is similarly uncontradicted that this long-standing and consistent practice was continued when ICTSI began operating the terminal on February 6, 2011. (Decision, p. 11, ll. 29-32.) Although, on February 10, 2011, the ILWU notified ICTSI that it claimed the work, ICTSI's CEO, Elvis Ganda, explained in a February 15, 2011 letter to the ILWU that the Port insisted that the disputed work continue to be performed by the Port's electricians and that ICTSI had no right to control this work according to the terms of its lease with the Port. (Decision, p. 16, ll. 27-42; p. 17, ll. 1-35.) After receiving this letter, the ILWU took no further action to claim the work until it filed contractual grievances against ICTSI some 13 months later, in March of 2012. (Decision, p. 18, ll. 30-36.) There is no evidence in the record that the two PMA-member companies that call on Terminal 6, Hanjin and Hapag-

Lloyd, objected in any way to the Port electricians' continued performance of the disputed work between February 2011, when ICTSI took over operation of the terminal, and June 2012, when the present dispute arose.

F. The Port Controls the Performance of the Disputed Work

The evidence at hearing was overwhelming that the disputed work performed by the Port's electricians is not directed by ICTSI or any entity other than the Port, including the ocean carriers. The ILWU makes no serious effort to claim otherwise in its exceptions.

There are approximately fourteen Port electricians assigned to Terminal 6. (Tr. 821.) They perform various maintenance functions including facility maintenance and support, electrical work on the Port's cranes and the disputed work. (Tr. 821-822, 917.) The electricians are rotated by the Port among different jobs at Terminal 6 and may even at times be assigned by the Port to other terminals. (Tr. 822.) David Slater, a licensed electrician and licensed electrical supervisor, is the Port's general foreman over the electricians. (Tr. 822, 1017.) Ron Wigger, the Port's mechanical and electrical superintendent, is Slater's direct supervisor. (Tr. 1016-1017.) Although Wigger oversees the electrical department, he is not permitted to assign or direct the work of electricians because he is not a licensed electrician. (Tr. 1019.) Under state law, only a licensed electrician like Slater can direct the work of other electricians. (Tr. 1026.)

The Port's electricians work pursuant to a job description, partially drafted by Wigger. (Tr. 1019-1020; GC Ex. 29.) This description lists the check-in, plugging, unplugging and monitoring of reefers as part of the electricians' job duties. (GC Ex. 29.)

The hiring of electricians is controlled solely by the Port. If Wigger wants to hire an electrician, he submits a requisition form, which must be approved by high-level Port management. (Tr. 1020.) If the requisition is approved, a team of Port managers interview

the applicants. These managers make the final hiring decision. (Tr. 920-921, 1020-1021.)

No one from ICTSI is involved in the hiring process. (Tr. 168-169, 581, 921, 1021.)

The Port is the only entity that can assign work to the electricians. Slater meets with the electricians each morning at the electrical shop at Terminal 6 and lays out the daily work assignments. (Tr. 918-919.) Two electricians are normally assigned by the Port to the reefer area in the container yard. One is assigned as a back-up who may be called upon to assist in the performance of the reefer work if needed, such as when multiple trucks arrive in the yard at once. (Tr. 905-906.) Otherwise, the back-up is employed performing preventative and other maintenance work in the container yard or elsewhere at Terminal 6. When there is little reefer work to perform, the electricians assigned to the reefer area perform other electrical work at the terminal as needed. (Tr. 906-907.) Slater directs and supervises the work of the electricians. (Tr. 822.) ICTSI plays no role in the supervision of their work and makes no work assignments. (Tr. 581, 837, 922, 949, 1029.)

The terms and conditions of the electrician's employment are set by the Port's collective bargaining agreement with the DCTU. (Tr. 837.) Slater and Wigger handle discipline and discharge issues. (Tr. 835.) Disciplinary decisions are made with the involvement of the Port's human resources department and upper management. (Tr. 1021-1023.) ICTSI has no role in the disciplinary process. (Tr. 169, 581, 1023.)

Requests for time off by electricians are decided by Port supervisor, Slater. (Tr. 837.) The Port makes all decisions regarding the layoff of electricians according to the terms of the Port's contract with the DCTU. (Tr. 1024-1025.) The Port handles and decides all grievances filed by electricians pursuant to the grievance procedure set forth in that contract. ICTSI has no involvement in these decisions. (Tr. 1023-1026.) Business records filled out by Port electricians, such as reefer check-in sheets and monthly logs are retained in the Port's

electrical shop at Terminal 6 for a year and are then transferred to an off-site building leased by the Port. (Tr. 1028.) They are not provided to ICTSI in the normal course of business.

Just as ICTSI has no right to assign work to the Port's electricians or control the performance of their work, neither do the ocean carriers. Leal Sundet admitted that the ocean carriers are not involved in the hiring of electricians, in the setting of the terms and conditions of their employment or in grievances that they may file. (Tr. 1561.) Similarly, Rich Marzano, the Coast Director of Contract Administration and Arbitration for the PMA, testified that no PMA member, including the ocean carriers, have responsibility or authority for setting labor relations policies that affect the Port electricians. (Tr. 2047-2048.)⁷

G. The Agreement Between the ILWU and the PMA

The ILWU emphasizes in its exceptions that the PMA agreed with it that the disputed work belongs to ILWU members. However, the ILWU ignores several relevant facts. First, it ignores the fact that PMA initially defended ICTSI's position that ICTSI did not control the disputed work and was not in violation of the PCLCD by failing to assign that work to its ILWU mechanics. (10(k) Tr. 164; 10(k) Tr. 417; Tr. 259-260.) The PCLCD applies only to "employees who are employed by the members of the Association to perform work covered herein." (Resp. Ex. 1, p. 2.) Under Section 1.11 of the PCLCD, the right to control determines whether particular work is covered by the agreement. (*Id.*) The PMA's initial position was consistent with the fact that the Port's contract stevedore, MTC/PA, a PMA member, operated Terminal 6 for 18 years between 1993 and 2011 pursuant to the terms of

⁷ Ignoring the fact that the carriers do not supervise or direct the Port-employed electricians or have any involvement in their labor relations, the ILWU relies on the fact that the carriers determine the temperature and ventilation settings for the reefers and may also direct that reefers in need of repair be sent to TMC, a company which employs ILWU labor. (Exceptions, p. 28.) This involvement in determining a result does not involve control over the means and methods of achieving that result. Thus, as electrician Hines testified, his work is not supervised in any way by the ocean carriers. (Tr. 822-25.)

the PCLCD, and did not assign the disputed work to its ILWU employees. (Decision, p. 6, ll. 39-42.)

Second, the ILWU ignores that, in reversing its initial decision to support ICTSI, the PMA essentially disregarded the Port's lease with ICTSI as irrelevant. Thus, Marzano, the sole employer representative at the specially scheduled Coast Labor Relations Committee ("CLRC") meeting held on May 23, 2012 at which PMA and the ILWU reached agreement regarding the disputed work, testified that the CLRC could only consider the PCLCD and no other documents, including the Lease. (10(k) Tr. 404; Tr. 2002-2003.) Marzano testified: "[I]n addressing at the CLRC level, we could only look at the application of the [PCLCD] and couldn't consider the lease or anything else. It was only the contract that was being considered. So we did not consider the control of the work." (10(k) Tr. 403.) Marzano further testified that the PMA follows "the four-corner's rule" and cannot consider any outside agreements when administering the PCLCD. (Tr. 2003.) PMA lawyer Amidon and ILWU Coast Committeeman Sundet agreed that arbitrators under the PCLCD are not permitted to look outside the four corners of that document and therefore have no authority to consider a lease agreement. (Tr. 1305-1306, 1606.)

Third, the ILWU downplays the fact that the work of plugging, unplugging and monitoring of refrigerated containers is performed by non-ILWU members at numerous other West Coast container terminals. Prior to the 2008 PCLCD, all terminals where there was a pre-1978 past practice of using non-ILWU employees to perform maintenance and repair work were authorized to continue those practices. (10(k) Tr. 369, 582.) Prior to 2008, many different companies, some of which were non-union, performed maintenance and repair of reefers, including the disputed work, at various West Coast terminals. (10(k) Tr. 585-586.) In 2008, the PMA and the ILWU specifically codified past practices at these terminals by

“red-circling” them. (10(k) Tr. 369, 588-589.) Numerous West Coast container terminals were red-circled so that there would be no question that non-ILWU labor could perform maintenance and repair duties, including the disputed work. (Resp. Ex. 1, pp. 218-221.)

Non-ILWU personnel represented by various unions perform the plugging, unplugging and monitoring of reefers at most of the red-circled terminals listed in the PCLCD. (10(k) Tr. 407-410.) While Marzano testified that he “believed” that the ILWU performed the disputed work at most West Coast container terminals, he admitted that five of the six red-circled container terminals at Long Beach, which does “a tremendous amount of volume,” are ones where the work is done by non-ILWU labor. (Tr. 1994, 2074-2075.) Marzano was unable to testify that ILWU members performed the disputed work on the majority of containers moving through West Coast terminals. In fact, he admitted that it was possible that non-ILWU labor did so. (Tr. 2079.) According to Marzano, the only reason that Terminal 6 was not red-circled in 2008 was because the company that managed the terminal for the Port at that time, MTC/PA, did not have a labor agreement with any union other than the ILWU. (10(k) Tr. 451.)

H. The ILWU’s Campaign of Coercion Against ICTSI

As stated above, the ILWU has not excepted to ALJ Schmidt’s numerous factual findings regarding the campaign of threats, showdowns, work stoppages and other coercive actions committed by the ILWU in the wake of ICTSI’s inability to assign the disputed work to ILWU members. As a result, all of ALJ Schmidt’s factual findings contained in his decision from page 21, line 16 through page 31, line 7 should be accepted by the Board on review. Similarly, all of the factual findings of ALJ Schmidt contained from page 32, line 24 through page 40, line 41 must also be accepted.

The only allegation of misconduct that the ILWU appears to contest in its exceptions

relates to paragraph 6(m) of the unfair labor practice complaint. *See* Respondents ILWU's Exceptions to the Decision of the Administrative Law Judge ("Exceptions"), p. 3 (excepting to factual conclusions set forth on page 31 of the ALJ's decision and at page 32, lines 1 through 18, finding that "Local 8 mechanics engaged in an unlawful work stoppage on June 6, 2012 after being fired for attempting to comply with the CLRC mandate"). However, in the discussion of this exception, the ILWU does not contest the ALJ's recitation of the facts. Rather than contesting the evidence of what happened on June 6, 2012, the ILWU makes legal arguments it did not make to the ALJ relating to deferral to arbitration. (Exceptions, pp. 52-53.) Thus, even regarding this subparagraph of the complaint, the ALJ's factual findings on pages 31 and 32 of the decision should be accepted by the Board on review.

III. DISCUSSION

A. ICTSI Is a Neutral and Not a Primary Employer Because It Has No Right to Control the Disputed Work

Failing to contest the ample evidence of coercion presented by the record, the ILWU instead hides behind an erroneous legal theory: that it was permitted to engage in such conduct because ICTSI was not a secondary employer, but was rather a "primary employer" against whom this conduct was permissible. According to the ILWU, its conduct was primary because it was in furtherance of an agreement with PMA to preserve bargaining unit work. (Exceptions, p. 20.) However, in making this unfounded contention, the ILWU concedes, as it must, that the lawfulness of a work preservation agreement depends, not only on a work preservation purpose, but on the agreement being directed at work which the targeted employer has the right to control. (*Id.*)

The ILWU is thus forced to make the specious contention in its brief that ICTSI possesses such a right to control. This contention ignores the language of ICTSI's lease with the Port as well as long-standing NLRB and judicial precedent holding that pressure directed

against an employer that does not possess the power to accede to the union's demands is prohibited by § 8(b)(4)(B) because that employer is not the primary employer.

The Board's rule that § 8(b)(4)(B) is violated where the pressured or struck employer is in no position to deliver the work to the union because the work is controlled by others dates back to at least 1958 when the Board decided the case of *Clifton Deangulo*, 121 NLRB 676 (1958). In that case, a plumbing subcontractor was engaged to install certain pre-manufactured heating and cooling units. *Id.* at 678-679. The union claimed that its collective bargaining agreement with the subcontractor preserved for its members the work of manufacturing these units and the union's members refused to handle and install them. *Id.* at 680. Finding that a proscribed object of the union was to induce the subcontractor to breach its contract with the company that engaged it to perform the installation work, the Board rejected the union's contention that the subcontractor was the "primary employer" and that "the union was seeking merely to exercise a valid contractual right to which [the subcontractor] had voluntarily agreed in advance * * *." *Id.* at 684. Concluding that the union was engaged in a secondary boycott, the Board ruled that the subcontractor had "given to union members all work within the Union's jurisdiction which it had been awarded on the project. It was powerless, of course, to give them additional work which it had not obtained and which, in fact, had been preserved by the very contractor through whom it had derived its own standing as an employer on the job." *Id.* at 685-686.

The "right to control" test as set forth in *Clifton Deangulo* has been followed by the Board for over 55 years. "Where the pressured employer cannot himself accede to the union's wishes" because it does not have the right to control the demanded work, "the [union's] pressure is secondary because it is undertaken for its effect elsewhere," *i.e.*, to induce the employer to bring pressure on an independent third party. *Local 438, United*

Pipefitters (George Koch Sons, Inc.), 201 NLRB 59, 63, *enf'd George Koch Sons, Inc. v. NLRB*, 490 F.2d 323 (4th Cir. 1973). *See also Local 97, Int'l Brotherhood of Teamsters (Peerless Importers, Inc.)*, 349 NLRB 1057, 1059 (2007) (the same).

However, in determining the scope of work that a particular employer has the right to control, the Board does not look “solely at the pressured employer’s ‘contract right to control’ the work at issue at the time of the pressure to determine whether the pressure was primary or secondary.” *Local 438*, 201 NLRB at 64. Instead, the Board must “study not only the situation the pressured employer finds himself in but also how he came to be in that position.” *Id.* Thus, if the Board concludes “that the employer is not truly an ‘unoffending employer’ who merits the Act’s protections, we shall find no violation in a union’s pressures * * *, even though a purely mechanical or surface look at the case might present the appearance of a parallel situation.” *Id.* (footnotes omitted).

In *Electrical Workers, Local 501 (Atlas Construction Company)*, 216 NLRB 417 (1975), the Board summarized its prior holdings regarding when an employer that possesses no contractual right to control the work sought by the union might lose its status as an “unoffending employer” entitled to protection against secondary activity. The Board stated that:

In the past, we have indicated that an employer could not be considered ‘unoffending,’ and therefore neutral, if it actively and knowingly contracted away its control by *initiating* the very restrictions which ultimately gave rise to the union’s demands, *Painters District Council No. 20, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO (Uni-Coat Spray Painting, Inc.)*, 185 NLRB 930, 932 (1970), or if the coerced employer was, in fact, given control of the work at issue but, *of its own volition*, withheld the work from the union, *Pipefitters Local No. 120, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Mechanical Contractors’ Association of Cleveland, Inc.)*, 168 NLRB 991, 992 (1967). In both cases, the coerced employer’s forfeiture of neutral status was based on some *affirmative* conduct which the employer could reasonably conclude would conflict with his collective-bargaining

obligations, coupled with the *absence* of any demand for such conduct by an independent third party such as a general contractor or project owner.

Id. (emphasis in original).

In *Atlas Construction*, the Board found that the pressured employers, Santella and Rice, “did not actively seek to have the general contractor, Atlas Construction, withhold the operation of the temporary power supply from their employees. Such work was never offered them by Atlas, whose decision was completely unrelated to their own desires or obligations.” *Id.* The Board thus concluded that the union’s pressure on Santella and Rice, who were unoffending neutrals, was “undertaken for its effect elsewhere inasmuch as Santella and Rice were incapable of awarding to [the union’s] members work that had been retained by the general contractor, work never theirs to assign in the first instance.” *Id.* at 418. In so holding, the Board expressly rejected the Administrative Law Judge’s view that Santella and Rice “simply did not try hard enough to secure the operation of the temporary power supply from Atlas at the negotiation stage of the subcontracts involved.” *Id.* The Board further stated that, “to attempt to define the parameters of ‘unoffending employer’ based solely on an expenditure of effort on the part of the employer seeking the Act’s protection seems realistically futile, as well as administratively unmanageable.” *Id.*

In enforcing the Board’s order, the D.C. Circuit Court of Appeals deferred to the Board’s expertise in defining an “unoffending employer” and concurred “in the Board’s judgment that scrutiny of the good faith of the contract negotiation process would lead to a legal and administrative morass.” *Int’l Brotherhood of Electrical Workers, Local Union No. 501 v. NLRB*, 566 F.2d 348, 353 (D.C. Cir. 1977). *See also Local 917, Int’l Brotherhood of Teamsters v. NLRB*, 577 F.3d 70 (2d Cir. 2009) (where there was no indication that the neutral employer “affirmatively sought a provision yielding” the disputed work, the Union’s claim that it “did not negotiate with sufficient effort, foresight and resourcefulness to

preserve the Union's work" was rejected and the employer was held to be an unoffending employer).

The Board's jurisprudence regarding the "right to control" test was expressly endorsed by the United States Supreme Court in *NLRB v. Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York and Vicinity, Local Union No. 638*, 429 U.S. 507 (1977) ("*Pipefitters*"). In *Pipefitters*, the union contended that the Board's right to control test was "erroneous as a matter of law" as a result of the Court's decision in *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967) ("*National Woodwork*"). The Court rejected this argument. Tracing the origins and development of the Board's right to control jurisprudence both before and after *National Woodwork*, the Court concluded that the Board's "reading and application of the statute involved in this case, however, are long established, have remained undisturbed by Congress, and fall well within that category of situations in which the courts should defer to the agency's understanding of the statute which it administers." *Id.* at 527-528.

The Court in *Pipefitters* thus upheld the Board's conclusion that the pressured subcontractor, Hudik, was an unoffending employer that was protected by § 8(b)(4)(B) from coercion by the union with which it had a long-standing collective bargaining agreement. The general contractor, Austin, awarded a contract to Hudik to perform heating, ventilation and air conditioning work on a new building. *Id.* at 511. The contract between Austin and Hudik called for Hudik to install certain climate control units, the internal piping of which was to be cut and threaded by the manufacturer of the units. *Id.* at 511-512. However, the collective bargaining agreement between the union and Hudik required that such cutting and threading work be performed by members of Hudik's union. *Id.* at 512.

In affirming the Board's conclusion that, under the circumstances, Hudik was an

unoffending neutral employer, the Court first summarily dispensed with the contention that an employer can never be deemed a neutral when it “is struck by his own employees for the purpose of requiring him to do what he has lawfully contracted to do to benefit those employees * * *.” *Id.* at 514 (emphasis in original). In finding that “this approach is untenable under the Act and our cases construing it,” the Court concluded that a lawful work-preservation clause will not immunize coercion directed against an employer when that employer does not have the right to control the disputed work. *Id.* at 515, 520-521.

Reviewing the facts of the case, the Court determined that the “union sought to acquire work that it never had and that its employer had no power to give it, namely, the piping work on units specified by any contractor or developer who prefers and uses prepped units.” *Id.* at 528. Thus, the “union’s tactical objects necessarily included influencing Austin,” the general contractor with which the union had no contract. *Id.* Finding that “it was incontrovertible that the work at this site could not be secured by pressure on Hudik alone and that the union’s work objectives could not be attained without exerting pressure on Austin as well,” the Court held that “the union’s objectives were not confined to the employment relationship with Hudik, but included the object of influencing Austin in a manner prohibited by Section 8(b)(4)(B).” *Id.* at 530-531. *See also NLRB v. Int’l Union of Operating Engineers*, 400 U.S. 297, 304 (1971) (placing pressure on neutrals for the “specific, overt purpose of forcing them to put pressure” on the primary employer violates § 8(b)(4)(B)); *NLRB v. Denver Bldg. and Constr. Trades Council*, 341 U.S. 675, 688 (1951) (when the only way a union can attain its object is to force a neutral employer to terminate its contract with the primary employer, a secondary boycott is established).

Application of the well-established legal authority discussed above leads to only one valid conclusion, that reached by ALJ Schmidt: that ICTSI is an unoffending neutral

protected by § 8(b)(4)(B). (Decision, p. 43, ll. 1-48; p. 44, ll. 1-14.) The evidence is uncontradicted that the Port, as the owner of Terminal 6, conditioned the leasing of its property on any potential lessee's agreement that maintenance and repair work at the facility, including the disputed work, would continue to be performed by the Port's DCTU-represented employees.

There is no evidence in this case that ICTSI "actively and knowingly" contracted away its control over the disputed work by "initiating the very restrictions which ultimately gave rise to the union's demands." *Atlas Construction*, 216 NLRB at 417 (emphasis in original). Nor is there any evidence that ICTSI was "given control of the work at issue but, of its own volition, withheld the work from the union." *Id.* (emphasis in original). In fact, the evidence is to the contrary. ICTSI never was given control of the disputed work, which was expressly reserved by the Port pursuant to a non-negotiable demand that was included in the Port's initial lease proposal to all interested parties, not just ICTSI.

In order to forfeit neutral status under the Board's decision in *Atlas Construction*, there must be "some affirmative conduct which the employer could reasonably conclude would conflict with his collective-bargaining obligations, coupled with the absence of a demand for such conduct by an independent third party such as a general contractor or project owner." *Id.* (emphasis in original).⁸ Here, neither condition is met. When ICTSI entered into the lease in May 2010, it was not a party to a labor agreement with the ILWU and therefore had no conflicting obligations. But, in any event, it took no affirmative action to bind itself to any restrictive covenants regarding the disputed work. Those covenants were demanding by the Port as a condition of the lease and their presence in the lease is simply a

⁸ A union bears a heavy burden of proof to establish that an entity has forfeited its status as a neutral for purposes of § 8(b)(4)(B). *SEIU, Local 525 (General Maintenance Service Co., Inc.)*, 329 NLRB 638, 639 (1999).

result of the Port's insistence on their inclusion.⁹ Thus, ICTSI was "powerless" to give the ILWU "additional work which it had not obtained" because this work "had been preserved" by the Port, through which ICTSI "derived its own standing as an employer on the job." *Clifton Deangulo*, 121 NLRB at 685-686.

Without any evidence that ICTSI initiated the Port's reservation of the disputed work in the lease, the ILWU makes baseless arguments that the DCTU contract is vague and that the Port's conduct indicates that "the lease did not mandate that ICTSI permit IBEW to perform the reefer work on the dock." (Exceptions, p. 8.) Although the scope of work provision of the DCTU contract, like the scope of work provision in the PCLCD, does not specifically mention the disputed work, it unambiguously covers such work by its reference to work that the DCTU "historically and consistently performed" at Terminal 6. Since the ILWU concedes that the disputed work was historically and consistently performed by the Port's IBEW-represented electricians for 38 years, it is ludicrous to claim that the DCTU contract is somehow unclear.

Nor does any alleged "conduct" by Port officials establish that the lease did not prohibit ICTSI from performing the disputed work. (Exceptions, pp. 8-10) The express

⁹ The ILWU implies that ICTSI's plan to become a PMA member after it signed the lease possesses some significance. (Exceptions, p. 14.) It does not. Aside from the fact that there is no authority that an employer which does not initiate the complained-about restrictions on its right to control certain work loses neutral status simply because it fails to anticipate future contractual obligations, ICTSI denies that it should have reasonably anticipated that Local 8 was entitled to the disputed work. Because the PCLCD applies only to the employees of PMA members and because the Port is not a PMA member, ICTSI would reasonably believe that the PCLCD had no application to work controlled by the Port and performed by the Port's electricians. (Resp. Ex. 1, Section 1, p. 2; 10(k) Tr. 395-403.) Additionally, the Port represented in the Lease at Section 3.17 that it had an effective and ongoing agreement with the ILWU under which the ILWU agreed that it respected all existing jurisdictional lines at Terminal 6, in essence creating a "red-circle" for Terminal 6. (GC Ex. 22, p. 52.) ICTSI was justified in believing that the ILWU would honor its obligations under this agreement with the Port.

language of Section 2.8 of the lease prohibits ICTSI from performing, or causing others to perform, the DCTU work which, as stated above, clearly includes the disputed work. (GC Ex. 28, p. 33.) How inconclusive and conflicting testimony regarding conversations between Sundet for the ILWU and Ruda from the Port about the disputed work can change or revoke this express language is nowhere explained by the ILWU. In reality, the ILWU's alleged contacts with the Port demonstrate that it knew exactly who the primary employer was. The primary employer is the employer that can resolve the labor dispute and meet the union's demands. In this case, Sundet testified that he had been discussing the possibility of obtaining the disputed work from the Port since the "early to mid-2000's." (10(k) Tr. 585-587.) According to Sundet, those discussions continued over several years. (10(k) Tr. 591-604.) When Sundet became aware that the Port was planning to lease Terminal 6, he continued his attempts to obtain the disputed work from the Port. (Tr. 1471-1481.) However, according to Sundet, Ruda told him that the Port was worried it "might have problems with [the] IBEW." (Tr. 1474.) And, as recognized by the ALJ, Sundet continued to go to the Port to satisfy the ILWU's claims when ICTSI's CEO, Elvis Ganda, informed Sundet in May of 2012 that ICTSI was powerless to assign the work. (Decision, p. 23, ll. 20-36.) Sundet's entreaties to the Port, even if credited, demonstrate that he knew that he would need the Port's agreement to obtain the disputed DCTU work for the ILWU.

Nor does the ILWU explain why language in amendments to the Port's terminal use agreement with Hapag Lloyd envisioning the possibility that the disputed work might someday be "removed" from DCTU jurisdiction has any relevance. (Exceptions, pp. 9-10.) These contract amendments expressly recognized that the disputed work was covered by the DCTU contract and would continue to be performed by the Port's electricians. The amendment signed in January 2011 was signed after ICTSI entered into its lease with the

Port and demonstrates Hapag Lloyd's knowledge and agreement that the disputed work would continue to be performed by the Port's electricians after April 1, 2011, which was after ICTSI began terminal operations. (Resp. Ex. 26, p. 2.) Nothing in these documents demonstrates that the Port ever gave permission to ICTSI to perform the DCTU work or that Hapag objected to the continued performance of the disputed work by the Port's electricians.

The ILWU's argument that the assignment of the Port's terminal use agreements with Hapag Lloyd and Hanjin to ICTSI in February 2011 divested the Port of its authority to reserve the performance of the disputed work for its IBEW-represented electricians is similarly without legal support. In fact, the ILWU cites no legal authority for its argument because none exists. *See* Exceptions, pp. 10-14, 30-34 (in arguing that the Port relinquished the authority to perform the disputed work, the ILWU cites no legal precedent). The Port's decision to assign its carrier contracts to ICTSI was not meant to upset the clearly stated requirement in the lease that the Port's DCTU-represented employees continue to perform all work they had historically performed at Terminal 6, including the disputed work. As stated by Ruda, maintenance of the existing labor jurisdictions at the terminal was an "overarching" position of the Port. (10(k) Tr. 53.) While the Port's contractual obligation to provide throughput and other ancillary services to the carriers was assigned to ICTSI, the issue of which labor force would perform the disputed work was unaffected by the assignments. Thus, ALJ Schmidt correctly concluded that "Respondents have pointed to nothing in these terminal use contracts that would warrant the conclusion that the carriers [sic] mere ownership interest in the containers enabled them to define for the terminal operator what work group could perform what function dockside." Decision, p. 45, ll. 18-22.

The ILWU's argument is also contrary to well-established tenets of property law. It cannot be disputed that an owner of real property such as the Port can, as one of its "bundle

of rights,” use its property in any lawful manner that it sees fit. Similarly, the Port is free to place whatever lawful conditions it wishes on the lease of its property. Here, the Port elected to lease its property to ICTSI on the nonnegotiable condition that ICTSI take no action to evade the Port’s collective bargaining agreement with the DCTU. This provision of the lease, which no party asserts is unlawful, prevents ICTSI from requiring its employees to plug and unplug containers into the Port-owned reefer receptacles. As a result, ICTSI is without the right to perform such work on the terminal and, if it chooses to do so, it is unquestionably subject to expulsion from the property.

The Board has previously recognized that lease restrictions may deny to an employer the right to control certain work. Thus, in *United Food and Commercial Workers Union Local No. 367 (Quality Food Centers, Inc.)*, 333 NLRB 771, 772 (2001), the Board ruled that the charging party, Quality Food Centers (“QFC”), did not have the right to control the work at issue because, under its lease agreement with the actual target of the union’s pressure, it had “no power or authority * * * to assign to its employees the work in controversy.” Because QFC had “not improperly surrendered control to avoid its contractual obligations to the union,” it retained its status as a neutral party. *Id.* The same can be said for ICTSI here.

B. The Carriers Also Do Not Have the Right to Control the Disputed Work

Being unable to demonstrate that ICTSI controls the performance of the disputed work, the ILWU is relegated to making the belated argument that the PMA ocean carriers do so. However, even if that were the case, which it is not, the PMA carriers’ asserted control of the work does not excuse the secondary pressures exerted by the ILWU against ICTSI and Judge Schmidt’s finding of § 8(b)(4)(B) violations directed against ICTSI is entitled to affirmance. The ILWU’s unfounded assertion of control by the PMA carriers is thus relevant only to those portions of Judge Schmidt’s decision finding that ILWU pressure directed

against the carriers in the form of contractual grievances violates § 8(b)(4)(B).

But even with regards to this portion of the ALJ's decision, the ILWU's theory fails because it is based upon a fundamental misreading of both the facts and the law. As recognized by the Ninth Circuit Court of Appeals in its affirmance of the § 10(l) injunction in this case, as a factual matter, the ILWU "conflates the carriers' control over their containers with the legal question of whether they have the "right to control" the assignment of the work' at this port." *Hooks*, 2013 U.S. App. LEXIS 19969 at *3 (quoting *Pipefitters*, 429 U.S. at 537). Thus, the ILWU points to evidence indicating that the carriers make operational decisions about the temperature and vent settings of their containers and regarding whether the containers are in need of maintenance while they are present at Terminal 6. (Exceptions, p. 28.) While such evidence indicates that the carriers may determine what they want done with their containers, for example, that they are to go to a particular port on a particular vessel at a particular temperature, it fails to establish that the carriers control the means or manner of the Port electricians' performance of the disputed work. In fact, the evidence establishes that only the Port has the power to assign and direct the performance of this work or authority over labor relations with the electricians who perform it. *See infra*, pp. 16-18.

Being unable to establish that the carriers control the disputed work as a factual matter, the ILWU makes grandiose claims for various cases from the 1980's that involved the work of off-dock stuffing and unstuffing of containers and not with the loading and unloading of containers onto vessels on the dock. Unlike the instant case, these cases involved the loss of traditional longshore jobs due to mechanization.

For example, the ILWU cites *NLRB v. International Longshoremen's Association*, 473 U.S. 61, 74 n. 12 (1985) (*ILA II*), and misleadingly quotes a footnote in which the Court

stated that “the ALJ, Board and Court of Appeals have unanimously concluded that the longshoremen employers, marine shipping companies, have the ‘right to control’ container loading and unloading work by virtue of their ownership or leasing control of the containers.” (Exceptions, p. 35.) What Respondents fail to disclose is that the Court was referring to prior factual conclusions about a different type of work based upon a specific evidentiary record in the case before it.

An examination of that record reveals that the work at issue in the *ILA II* case involved loading and unloading of cargo in and out of the containers within 50 miles of the dock, so-called “stuffing and unstuffing,” not the loading and unloading of the containers onto a vessel. See *International Longshoremen’s Association (Dolphin Forwarding, Inc.)*, 266 NLRB 230 (1983). As found by the ALJ in the *ILA* case, carriers “sometimes use[d] their own employees” to perform this work while, at other times, they released the containers they owned or leased to other companies for stuffing and unstuffing. *Id.* at 232. In the current case, there is no evidence that the carriers have ever used their own employees to perform the disputed work. Thus, the quote from the Supreme Court is based on an evidentiary record regarding a different job function regarding which the carriers possessed significant control at the time over who loaded cargo in and out of the containers.

As a result, Judge Simon, in granting a Section 10(l) injunction in this case, properly refused to give weight to the footnote in *ILA II*, concluding that “[t]his Court cannot rely on a statement in a 25-year old case that was made on the basis of different facts and different contracts to determine that the Carriers here have the right to control the reefer work at Terminal 6 today.” *Hooks ex rel. NLRB*, 905 F. Supp. 2d at 1211. Similarly, the Ninth Circuit also appropriately declined to give weight to the footnote, concluding that, “[a]s the district court correctly noted, the passing comment does not alone support the factual

conclusion that these carriers have the right to control this work at this port at this time.”

Hooks ex rel. NLRB, 2013 U.S. App. LEXIS 19969 at *8, n. 2.

For similar reasons, the ILWU’s reliance on the Board’s decision in *Longshoremen ILWU (California Cartage)*, 278 NLRB 220, 221-224 (1986), is misplaced. As with the *ILA II* case, the Board in *California Cartage* dealt with the stuffing and unstuffing of containers off the dock, not the loading and unloading of containers onto a vessel on the dock. *See id.* at 222 (“the work in dispute is the initial loading and unloading of cargo within 50 miles of a port into and out of containers”). The agreement between the ILWU and PMA in that case required the ocean carriers to either establish “their own container freight stations on or adjacent to the docks within the work jurisdiction of the ILWU” or to use contractors which employed ILWU members to perform the stuffing and unstuffing work. *Id.* at 221. As a result, the carriers, which owned or leased the containers, had the right to control the identity of the work force performing the stuffing and unstuffing work. *Id.* at 223. They could have used their own employees to perform the work or hired a contractor to perform the work.

This is a far cry from the present case in which the Port, as owner of Terminal 6, has leased the terminal to a terminal operator, ICTSI, which is required to utilize the Port’s electricians to perform the disputed work. The carriers are not privileged to come onto the Port’s property, or ICTSI’s leasehold, to perform the disputed work with their own employees, nor are they privileged to dictate to the Port or to ICTSI regarding the identity of the individuals who are to perform the disputed work. Under these circumstances, Judge Schmidt was correct in determining that neither ICTSI nor the carriers controlled the assignment of the work at issue. Like *ILA II*, the Board’s decision in *California Cartage* is inapposite and tells us nothing about control over the disputed work in this case.

When all is said and done, the ILWU’s claim that the carriers control the disputed

work boils down to its contention that the carriers have tried to convince the Port and ICTSI that the work must be assigned to the ILWU and that the carriers might bypass Terminal 6 if their directives are not followed. (Exceptions, p. 33-34, 39-40). However, the Port's refusal to reassign the disputed work and the carriers' continued calls on Terminal 6 despite the Port's refusal belie the ILWU's assertion that the carriers possess any right to control.

C. The ILWU Lacks a Valid Work Preservation Purpose and Instead Seeks to Acquire Work It Never Performed at Terminal 6

In an effort to distract from the fact that ICTSI did not initiate the restrictive covenants in the Lease relating to the disputed work which were demanded by the Port as non-negotiable items and does not have the right to control the performance of that work, the ILWU focuses much of its argument on the contention that its actions are somehow privileged because it purportedly had a work preservation objective. However, in *NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 504 (1980) ("*ILA I*"), the Supreme Court held that a lawful work preservation agreement "must pass two tests," first, the agreement "must have as its objective the preservation of work traditionally performed by employees represented by the union," and second, "the contracting employer must have the power to give the employees the work in question—the so-called 'right of control' test * * *." Because the "right of control" test is clearly not met here because of the Port's reservation of the disputed work in the Lease, no amount of claimed intent to preserve work can serve to immunize the ILWU's coercive actions from the application of § 8(b)(4)(B). See *Pipefitters*, 429 U.S. at 521 (although "a work-preservation provision may be valid in its intendment and valid in its application in other contexts, efforts to apply the provision so as to influence" an employer that does not have the right to control the work at issue are prohibited by § 8(b)(4)(B)).

However, even though the existence of a work preservation purpose is irrelevant when the pressured employer has no right to control the disputed work, ICTSI disputes the

contention in this case that the ILWU has acted with a work preservation purpose. It is uncontradicted that ILWU members have not previously performed the disputed work at Terminal 6. Rather, from the inception of the terminal's operation in 1974, the Port's electricians have performed the work. As a practical matter, it is difficult, if not impossible, to conclude that a union acts with a work preservation intent when its members have never performed the particular work at issue. See, e.g., *Int'l Bhd. of Electrical Workers, Local 48 (Kinder Morgan Terminals)*, 357 NLRB No. 182, 2011 NLRB LEXIS 793 (Dec. 21, 2011) (“when as here a union is claiming work for employees who have not previously performed it, the objective is not work preservation, but work acquisition”); *Sheet Metal Workers Local 27 (Thomas Roofing)*, 321 NLRB 540 (1996) (where bargaining unit employees never performed the disputed work, there was no work preservation purpose).

To avoid this commonsense conclusion, the ILWU again focuses its attention on the *ILA* cases and their progeny, cases which, unlike this case, dealt with a union's attempt to recover jobs that were lost by technological changes through the assertion of jurisdiction over jobs that were the functional equivalent of those lost. Thus, in *ILA I*, the Court made clear in the first sentence of its opinion that the question before it was whether certain provisions of the *ILA*'s collective-bargaining agreement “which were adopted in response to the technological innovation of containerized shipping are a lawful work preservation agreement.” *ILA I*, 447 U.S. at 493 (emphasis added).

In deciding this issue, the Court described containerization as “a technological innovation which has had such a profound effect on [the east coast shipping] industry that it has frequently been termed the ‘container revolution’.” *Id.* at 494. The advent of containerization meant that the “traditional work of longshoreman,” the loading and unloading of cargo “piece by piece” at the dock, was displaced because containerization

allowed the cargo to be loaded into a container instead, either at or away from the dock. *Id.* at 495, 502. This technological change “drastically reduced” the amount of work available to longshoreman and “threatened” their jobs. *Id.* at 496.

Contrary to the ILWU’s assertion here, the Court in *ILA I* did not hold that an inquiry into whether the union had previously performed the work at issue was irrelevant to the issue of whether the union had a work preservation intent. (Exceptions, p. 21.) Rather, the Court held that, in some cases, “the process of identifying the work at issue will require no subtle analysis” and the issue of work preservation intent will be determined by whether the union members “had always done” the work at issue. *Id.* at 505. However, in cases in which the employees’ traditional work is displaced by technological innovation, such innovation “may change the method of doing the work,” so that a mere inquiry into which employees perform the changed work is inadequate. *Id.* Thus, the Court stated:

Identification of the work at issue in a complex case of technological displacement requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance.

Id. at 507. The Court further stated that, in such complex cases, “the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work, and examine the relationship between the work as it existed before the innovation and as the agreement proposes to preserve it.” *Id.*

Thus, where the work after the innovation is “the functional equivalent” of the work that the bargaining unit employees had historically performed, attempts to recover that work could be considered attempts at work preservation. *Id.* at 511.

The ILWU’s attempt to “shoehorn” the *ILA* cases into this case should be rejected. First, this is not a case in which technological innovation has changed the method of doing

the disputed work so that an inquiry into who has historically performed the work at Terminal 6 is inadequate. The evidence was uncontradicted that the disputed work has been performed by the Port's electricians since the inception of the terminal in 1974. There is no evidence of changes in the way that the work has been performed since that time. The reefer work at issue is not the result of technological change and it is not the "functional equivalent" of anything. Thus, the very rationale for application of the *ILA* cases is lacking.

The ILWU's attempt to claim otherwise fails. While the ILWU is fearful of losing jobs to future technological changes and has agreed with PMA that maintenance of future "mechanized and robotic-operated" cargo handling equipment is the functional equivalent of traditional ILWU jobs, such technological changes have not yet come to pass and have no application to the facts of this case. *See* Resp. Ex. 1, p. 9, Section 1.72 (stating that unidentified developments in "robotics and other technologies will replace a certain number of equipment operators and other traditional longshore classifications" (emphasis added)). In fact, no evidence was presented that ILWU members have lost any jobs at Terminal 6 or at any other West Coast location due to mechanization since the advent of containerization and the inapposite decisions in the *ILA* cases.¹⁰ Respondents' claim regarding technological change is simply a "red herring."¹¹

¹⁰ In making its "mechanization and automation" claims in its Exceptions, the ILWU simply speculates about what the future might hold and offers no citation to any record evidence to support its speculation. (Exceptions, pp. 23-24.)

¹¹ As with the *ILA* cases, *Bermuda Container Line Ltd. v. Int'l Longshoremen's Ass'n*, 192 F.3d 250 (2nd Cir. 1999), does not assist the ILWU. In that case, the court upheld an arbitration award in favor of the union finding that the employer violated a no sub-contracting provision in the CBA by its decision to relocate its operations to a non-union facility. There was no question that the employer, unlike ICTSI, had the right to control the work at issue. In ruling that the arbitration award did not violate Section 8(e) of the Act, 29 U.S.C. § 158(e), the court found that the arbitration award was based on an interpretation of a "Containerization Agreement" between the union and the multi-employer association to which the employer belonged. *Id.* at 257. This Agreement was reached to preserve for

Accordingly, Judge Schmidt properly afforded weight to the fact that ILWU members had not previously performed the disputed work at Terminal 6. (Decision, p. 42, ll. 16-19.) This emphasis on Terminal 6 is supported by the treatment afforded the disputed work by the ILWU and PMA at other West Coast terminals. Thus, at many such terminals, the plugging, unplugging, and monitoring of reefers is performed by non-ILWU members represented by other unions. (10(k) Tr. 407-410; Tr. 1994, 2074-2075.) PMA representative, Marzano, conceded it was very possible that a majority of all refrigerated containers moving through West Coast terminals are plugged, unplugged and monitored by non-ILWU personnel. (Tr. 2079.) Thus, the record demonstrates, not “blanket” ILWU coverage of the plugging, unplugging and monitoring of reefers on West Coast docks, but a “terminal by terminal” approach, inconsistent with the ILWU’s alleged “work preservation” intent.

Once the phony veil of “work preservation” is lifted, it becomes apparent that the ILWU simply used ICTSI’s takeover of operations at Terminal 6 in February 2011 as an excuse to acquire work it never performed and grab it from the Port’s electricians, who had a clear contractual right to the work. However, where, as here, a union’s claim over work it has never performed has the effect of extending its collective bargaining agreement to “reach outside the contractual bargaining unit,” the union does not present a colorable work preservation claim. See *Quality Food Centers, Inc.*, 333 NLRB at 772 (quoting *Service Employees Local 32B-32J v. NLRB*, 68 F.3d 490, 495 (D.C. Cir. 1995)). Rather, under those circumstances, the Union is engaged in secondary activity.

Thus, Judge Schmidt was correct when he concluded that the ILWU possessed “no valid contractual underpinning for [its] work preservation claims * * *.” (Decision, p. 42, ll. 21-23.) As stated by Judge Schmidt, [t]he Port, which clearly controlled the work at the

union members traditional work that had previously been lost by containerization and was therefore held to have a valid work preservation intent. *Id.* at 253, n.1.

time, was not a member of the PMA nor was its consent to the LOU arrangement sought and obtained by any other means.” (Decision, p. 29, ll. 39-40.) Thus, there was “no legally cognizable authority” by which the ILWU or the PMA could make a contractual arrangement forcing the Port to relinquish the disputed work. (Decision, p. 29, ll. 37-39.)¹² The bottom line is that the ILWU is seeking to use the language of its agreement with the PMA to reach out and monopolize jobs that have historically been performed by members of another union, when there is absolutely no evidence that the jobs of the ILWU members are threatened in any way. There is simply no valid work preservation purpose present here.

D. Briefing on the § 8(b)(4)(D) Charge Has Been Properly Deferred

Judge Schmidt found that the ILWU violated § 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D), by “filing, maintaining, and prosecuting grievances or lawsuits or threatening to engage in such conduct” against the PMA-ocean carriers “in order to force or require the Port to assign” the disputed work to members of Local 8 rather than to members of the IBEW. (Decision, p. 49, ll. 41-46; p. 50, ll. 1-2.) Judge Schmidt further concluded that this identical conduct violated § 8(b)(4)(B) because it was undertaken by the ILWU to force the carriers to cease doing business with the Port (Decision, p. 49, ll. 33-39.), a conclusion that, on the facts of this case, is amply supported by Board precedent. *See, e.g. Newspaper & Mail Deliverers’ Union of N.Y. (New York Post)*, 337 NLRB 608, 609 (2002) (union violated § 8 (b)(4)(B) by pursuing arbitration for the purpose of having the employer cease doing business with another); *Service Employees (Nevins Realty Corp.)*, 313 NLRB 392 (1993) (the same).¹³

¹² Judge Schmidt correctly buttressed his conclusion in this regard by pointing to the ILWU’s efforts to convince the Port to relinquish the work. (Decision, p. 29, ll. 41-42; p. 30, ll. 1-4.) In fact, the ILWU’s ally in this matter, the PMA, also attempted to convince the Port to release its grip on the work. (Tr. 2104-05.)

¹³ In its decision upholding § 10 (l) injunction in this case, the Ninth Circuit expressly recognized that the ILWU’s prosecution of the carrier complaints violated § 8 (b)(4)(B). *Hooks ex rel. NLRB*, 2013 U.S. App. LEXIS 19969 at **5-6.

Failing to devote any space in its exceptions to ALJ Schmidt's conclusion regarding § 8(b)(4)(B), Respondents contend that the conclusion regarding § 8(b)(4)(D) must be set aside based upon a district court order vacating the underlying Section 10(k) award in this case as being outside the Board's jurisdiction. (Exceptions, p. 43.) The district court's decision has been appealed to the Ninth Circuit Court. Because the Board has granted the General Counsel's motion to sever the § 8(b)(4)(D) allegations in this case pending the Ninth Circuit's decision, ICTSI will, according to the Board's order, defer briefing on the § 8(b)(4)(D) allegations until after the Ninth Circuit rules.

E. The Ocean Carriers Do Not Subcontract the Disputed Work

The ILWU contends that it has the legal right to pursue grievances against PMA ocean carriers such as Hanjin and Hapag Lloyd under the rationale of *Associated General Contractors of America, Inc. v. I.U.O.E, Local 701*, 529 F.2d 1395 (9th. Cir. 1976) (“AGC”), because the carriers allegedly subcontract the disputed work to ICTSI. (Exceptions, pp. 46-47.) Whether applied in the context of the § 8(b)(4)(B) claims in this case or the § 8(b)(4)(D) claims, the ILWU's contentions are baseless, as has already been recognized by ALJ Schmidt, District Court Judge Simon and the Ninth Circuit Court of Appeals. *See* Decision, p. 48, ll. 4-5, 23-24 (finding the *AGC* case and other similar cases “factually distinguishable from the situation here” because they “all involve subcontracting practices in the construction industry,” ALJ Schmidt concluded that, “[w]hatever else may be said of the arrangement at T6, it does not involve subcontracting on a container-by-container basis.”); *Hooks ex rel. NLRB*, 905 F. Supp. 2d at 1209 (“Simply put, Respondents have failed to establish that their lost work opportunity grievances against the Carriers on based on a plausible breach-of-contract theory similar to the unions' breach-of-contract claims in the *AGC* line of cases.”); *Hooks ex rel. NLRB*, 2013 U.S. App. LEXIS 19969 at *4, n. 2 (“We also agree with Judge

Simon and ALJ Schmidt that the line of cases beginning with [*AGC*] is inapposite” because “[t]hose cases concern subcontracting practices in the construction industry, in which different contractual relationships are permitted than are applicable here,” citing the NLRA’s exemption of “construction industry contracts from prohibition on agreements not to subcontract”). The ILWU ignores these prior holdings, which should be followed here.

But even if the ILWU’s contention that the *AGC* lines of cases is controlling had not already been rejected three times, it still lacks credibility. The ILWU’s contention that the carriers are “general contractors” and that ICTSI and/or the Port are “subcontractors” is based on a strained interpretation of those terms and defies common sense by transforming any entity seeking to have a service performed for it into a general contractor.

The term “general contractor” is defined as follows: “One who contracts for the completion of an entire project, including purchasing all materials, hiring and paying subcontractors, and coordinating all the work.” *Black’s Law Dictionary* (8th ed. 2004). A “subcontractor” is defined as follows: “One who is awarded a portion of an existing contract by a contractor, esp. a general contractor.” *Id.* Thus, a general contractor has the power to perform and control all of the services required by the builder with its own employees, if it so chooses. Conversely, it has the power and right to control the choice of subcontractors to perform portions of the required services.

However, in this case, the carriers have no power to enter Terminal 6 and have the disputed work performed by its own employees. Nor do they have the right to dictate to either the Port or ICTSI which labor force is to be used.¹⁴ Certainly the carrier contracts themselves do not state that the ocean carrier is a general contractor and that the Port and/or ICTSI is a subcontractor. For example, all the Hanjin contract states is that Hanjin contracts

¹⁴ Sundet for the ILWU admitted he was unaware of any situation in which an ocean carrier controlled the identity of the labor force employed by the terminal operator. (Tr. 1589.)

with the Port or its assignee, ICTSI, for ICTSI to provide certain services at certain prices or, if no price is stated, at the tariff rate. *See, e.g.,* Resp. Ex. 6. This integrated contract contains no language stating that Hanjin has the right to designate the identity of the labor force providing the required services or to control that labor force in any way. The Hapag Lloyd contract similarly contains no such limitations on the terminal operator.¹⁵

Thus, the conclusions reached by ALJ Schmidt, Judge Simon, and the Ninth Circuit that the *AGC* lines of cases is not relevant are unquestionably correct. In those cases, the general contractor against whom the union's grievances were directed had the right to control the work. For example, in *Local Union 33, UBC (Blount Bros.)*, 289 NLRB 1482 (1988), the construction general contractor had the right to perform the work with its own union-represented employees but instead subcontracted it to another construction contractor which assigned the work to its own employees represented by another union. Because the general contractor controlled who performed the work, the Board concluded that it was not a neutral. *Id.* at 1484. However, at the same time, the Board recognized that prosecution of grievances against employers who "never had control of the work," would violate the law. *Id.* This is precisely the case here. *See Longshoremen ILWU Local 32 (Weyerhaeuser)*, 271 NLRB 759 (1984) (finding ILWU's attempt to enforce an arbitration award against an employer which did not control assignment of the disputed work constituted "both an unlawful effort to undermine the Board's Section 10(k) award, which was contrary to [the ILWU's] interests, as well as prohibited economic coercion of [the employer which did not control the work]"), *enforced*, 773 F.2d 759 (9th Cir. 1985); *Longshoremen ILWU Local 7 (Georgia Pacific)*, 273 NLRB 363, 366 (1983) (finding ILWU grievance claiming in-lieu-of pay for failure to assign

¹⁵ In fact, the Hapag Lloyd contract specifically indicates the carrier's knowledge and consent that the disputed work is performed by DCTU-represented electricians. (Resp. Exs. 9, 26.)

work the employer did not control was an unlawful “economic device”), *modified on other grounds*, 291 NLRB 89 (1988), *review denied*, 892 F.2d 130 (D.C. Cir. 1989).

F. The Issue of Deferral to Arbitration Is Not Properly Before the Board

The ILWU argues for the first time on Board review that ALJ Schmidt should have deferred to an arbitration award issued by PMA arbitrator Jan Holmes regarding the orchestrated refusal of ILWU mechanics to obey ICTSI directives to cease performing the disputed work on June 6, 2012. (Exceptions, pp. 51-52.) Having failed to raise deferral to arbitration in its answer to the Complaint, during the hearing, or even in its post-hearing brief to the ALJ, the ILWU is barred from raising the issue for the first time in its exceptions. *See, e.g., Bourne’s Transportation*, 256 NLRB 281 n. 3 (1981) (where respondent did not raise deferral to arbitration under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), in its answer or otherwise at hearing, its raising of the defense in its exceptions was untimely); *Cutten Supermarket*, 220 NLRB 507, 509 (where deferral was not raised in the respondent’s answer at hearing, raising of the issue for the first time in its post-hearing brief to the ALJ was untimely); *MacDonald Engineering Co.*, 202 NLRB 748 (1973) (where respondent did not “specifically assert that the Administrative Law Judge should have deferred” and where factual issues regarding the propriety of deferral were therefore not reached, the Board found the record insufficient to justify deferral).

But even if *arguendo* the issue of deferral was timely raised by the ILWU, it is not appropriately applied in favor of the ILWU here. First, although Arbitrator Holmes found that the ILWU did not violate Section 11 of the PCLCD, which prohibits work stoppages, she also ruled that the Union “has the obligation to provide skilled mechanics as needed by the employer on the job” and that “[t]he men will work as directed.” (GC Ex. 13, p. 3.) She also ordered that “[t]he ILWU Local 8 officers and members shall refrain from directing its

members outside of the direction of ICTSI.” (*Id.*) Thus, deferral does not benefit the ILWU because the ALJ’s decision that its conduct constituted coercion of ICTSI under § 8(b)(4)(B) was consistent with the Arbitrator’s award.

Deferral in favor the ILWU is also inappropriate because, to the extent the Arbitrator’s decision was based on her conclusion, without consideration of the lease, that ICTSI was required to assign work to the ILWU over which ICTSI had no right of control, such a decision is “palpably wrong” and is therefore “repugnant” to the purposes of the Act. *Olin Corp.*, 268 NLRB 573, 574 (1984). Additionally, the Board has previously held that deferral is inappropriate when § 8(b)(4)(B) violations are involved. *See, e.g., Ironworkers Pacific-Northwest Council (Hoffman Construction)*, 292 NLRB 562, 577-78 (1989). The ILWU’s belated “deferral argument should be rejected.”¹⁶

G. Respondent Has Not Excepted to Factual Findings Regarding Local 40

The ILWU’s contention that Local 40 bears no responsibility because it “did not engage in any job actions or slowdowns” or otherwise disrupt ICTSI’s operations at Terminal 6 is baseless. (Exceptions, p. 53.) Judge Schmidt made numerous factual findings regarding Local 40’s direct involvement. *See* Decision, p. 28, ll. 37-46; p. 29, ll. 1-46; p. 30, ll. 1-8 (describing incidents in which “the officials of Local 40 became overtly involved in supporting Local 8’s efforts to secure the dockside reefer work by job actions”). *See also* Decision, p. 34, ll. 28-39; p. 36, ll. 21-36 (further describing Local 40’s involvement in job

¹⁶ Additionally, for deferral to be warranted, the arbitrator must have “clearly decided the issue on which it is later urged that the Board should give deference.” *Banyard v. NLRB*, 505 F.2d 342, 347 (D.C. Cir. 194). “The ‘clearly decided’ requirement means that the arbitrator’s decision must specifically deal with” the statutory issue. *Stephenson v. NLRB*, 550 F.2d 535, 538 n. 4 (9th Cir. 1977). Where the arbitrator’s decision is “ambiguous as to the resolution of the statutory issue,” deferral is inappropriate. *NLRB v. General Warehouse Corp.*, 643 F.2d 965, 969 (3rd Cir. 1981).

actions). The ILWU has not excepted to these factual findings and cannot now contest them. *See* NLRB Rules and Regulations, § 102.46(g) (matters not included in exceptions may not “be thereafter urged before the Board”).

H. The Denial of Respondents’ Motion to Reopen the Record Was Proper

The ILWU has excepted to Judge Schmidt’s denial of its Motion to Reopen the Record but fails to identify “that part of the administrative law judge’s decision as to which objection is made” or to “designate by precise citation of page the portions of the record relied on.” NLRB Rules and Regulations, § 102.46(b)(1). In addition, the ILWU’s brief in support of its exceptions contains no argument explaining why the specific evidence it sought to present months after the close of hearing was relevant to the issues of this case. (Exceptions, pp. 53-55.) Under these circumstances, this exception should not be considered.

However, even if these defects are excused, the ILWU has not established that the ALJ’s denial of its motion was erroneous. First, an ALJ’s authority under § 102.35(a)(8) of the Board’s Rules and Regulations to reopen the record after close of trial but before decision is governed by legal standards “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. Those Board decisions hold that evidence that did not exist at the time of trial because it relates to events that occurred after the close of hearing is not considered “newly discovered” under § 102.48(d)(1) and is hence an insufficient ground to justify reopening of the record. *See, e.g., Planned Bldg. Servs.*, 347 NLRB 670, 670 fn. 2 (2006); *Labor Ready, Inc.*, 330 NLRB 1024 (2000); *ILWU, Local 1291 (Holt Cargo Systems, Inc.)*, 309 NLRB 1283, 1283 (1992); *Allis-Chalmers, Corp.*, 286 NLRB 219, 219 fn. 1 (1987).

Here, the ILWU concedes that all of the documents that it seeks to admit at this time “were created by federal courts and by the Charging Parties ICTSI, the Port of Portland, and

the PMA Carriers, months after the close of the hearing on August 29, 2012.” (Respondent ILWU’s Motion to ALJ Schmidt to Reopen the Record, p. 5 (emphasis added)). Such evidence does not qualify as “newly discovered evidence” under § 102.48(d)(1) and is not the proper subject of a motion to reopen the record.

Aside from the fact that they were created after the close of the hearing, the proffered documents do not even relate to events that are part of the GC’s allegations in this case. Rather, the documents relate to events that occurred well after the close of the hearing. For example, while the allegations of the Complaint exclusively involve work stoppages, slowdowns, safety gimmicks and other specific conduct committed by ILWU officers and members between June 1 and June 10, 2012 and to the filing of certain grievances and other coercive actions directed against the ocean carriers in August 2012, the evidence being submitted now does not relate to or even mention these incidents.

Nor do the documents relate to the legal relationships between the Port, ICTSI, and/or the ocean carriers as they existed during the relevant time period, between June and August of 2012. Rather, the proffered evidence relates to unrelated events and issues such as unsuccessful efforts by ICTSI and the ocean carriers to enter into terminal use contracts in place of those that were previously assigned by the Port to ICTSI, which expired on December 31, 2012. The ILWU concedes that ICTSI and the ocean carriers have not yet reached agreement on new terminal use contracts. (Respondents’ Motion, p. 11.) The documents being submitted are thus irrelevant to the factual and legal issues that were exhaustively presented to the Administrative Law Judge in this case. Additionally, the documents being submitted by the ILWU constitute inadmissible hearsay, are oftentimes incomplete, and are submitted without any context.

The ILWU concedes in its exceptions that administrative law judges have

“considerable discretion in the grant or denial of a motion to reopen.” See Exceptions, p. 53 (quoting *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 601 (9th Cir. 1979)). The ILWU offers nothing to establish that Judge Schmidt abused that discretion in any way in his carefully considered order denying its belated motion to reopen the record.

IV. CONCLUSION

For the reasons set forth above, the ILWU’s exceptions should be rejected in their entirety.

DATED this 24th day of February, 2014.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ Michael T. Garone

Michael T. Garone, OSB No. 802341
Thomas T. Triplett, OSB No. 651256
Schwabe, Williamson & Wyatt P.C.
1211 SW Fifth Avenue, Suite 1900
Portland, Oregon 97204
Of Attorneys for ICTSI Oregon, Inc.

CURLEY, HESSINGER, AND JOHNSRUD LLP

By: /s/ Peter Hurtgen

Peter Hurtgen
Curley, Hessinger, and Johnsrud LLP
2000 Market Street, Suite 2850
Philadelphia, Pennsylvania 19103-3231
Of Attorneys for ICTSI Oregon, Inc.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 24th day of February, 2014, I electronically filed the foregoing **ICTSI OREGON, INC.'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS** with the National Labor Relations Board with the eFiling system.

I further certify that on the 24th day of February, 2014, I caused to be served a copy of the foregoing document by electronic mail to the following:

E-File:

National Labor Relations Board
Office of Executive Secretary
1099 14th Street, NW
Washington, DC 20570

E-Mail:

Mara-Louise Anzalone
Lisa J. Dunn
Counsel for the Acting General Counsel
National Labor Relations Board, Subregion 36
601 SW 2nd Avenue, Suite 910
Portland, OR 97204-3170
E-mail: mara-louise.anzalone@nlrb.gov
lisa.dunn@nlrb.gov

Norman Malbin, Esq.
IBEW, Local 48
15937 NE Airport Way
Portland, OR 97230-5948
E-mail: Norman@ibew48.com

Kirsten Donovan
Director of Contract Administration
ILWU
1188 Franklin Street, Fl. 4
San Francisco, CA 94109-6800
E-mail: Kirsten.donovan@ilwu.org

Robert H. Lavitt, Esq.
Schwerin Campbell Barnard Iglitzin & Lavitt
LLP
18 W. Mercer Street, Suite 400
Seattle, WA 98119-3971
E-mail: lavitt@worklaw.com

Robert Remar, Esq.
Eleanor Morton, Esq.
Leonard Carder, LLP
1188 Franklin Street, Suite 201
San Francisco, CA 94109
E-mail: rremar@leonardcarder.com
emorton@leonardcarder.com

Kathy A. Peck, Esq.
Williams, Zografos & Peck
P. O. Box 547
Lake Oswego, OR 97034
E-mail: kpeck@wzplaborlaw.com

Timothy J. O'Connell, Esq.
Randolph C. Foster, Esq.
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1229
E-mail: tjoconnell@stoel.com
refoster@stoel.com

/s/ Michael T. Garone
Michael T. Garone, OSB No. 802341
Of Attorneys for ICTSI Oregon, Inc.