

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

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.

Cases 19-CC-082533  
19-CD-082461  
19-CC-087504  
19-CD-087505

and

PORT OF PORTLAND

Case 19-CC-082744

**COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENTS'  
EXCEPTIONS REGARDING § 8(b)(4)(B) ALLEGATIONS**

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## TABLE OF CONTENTS

I.	OVERVIEW .....	2
II.	PROCEDURAL BACKGROUND .....	4
	A. The ULP Proceedings .....	4
	B. The First District Court Injunction .....	5
	C. The Board’s 10(k) Award .....	6
	D. The Second District Court Injunction .....	7
III.	THE RECORD EVIDENCE .....	7
	A. The Terminal 6 Operation .....	7
	B. The Lease Agreement Between the Port and ICTSI .....	10
	C. The Port’s Nonnegotiable Position on the Port Electricians .....	12
	D. The Port’s Post-Lease Exercise of Control over the Disputed Work and Respondents’ Acknowledgment of that Control .....	14
	E. The ILWU/PMA Contractual History .....	14
IV.	THE APPLICABLE BOARD LAW .....	16
	A. The “Right of Control” Doctrine .....	16
	B. The Work Preservation Doctrine .....	18
	1. <u>“Work Traditionally Performed”</u> .....	18
	2. <u>Right to Assign the Work in Question</u> .....	20
	3. <u>Containerization and “Fairly Claimable” Work</u> .....	20
	C. Lost Neutrality .....	21
V.	RESPONDENTS’ EXCEPTIONS .....	23

<b>VI.</b>	<b>THE ALJD WAS CORRECTLY DECIDED .....</b>	<b>25</b>
	<b>A. The ALJ Properly Found that the Port Controls the Disputed Work (Exceptions 1, 2, 13) .....</b>	<b>26</b>
	<b>B. The ALJ Properly Rejected Respondents' Arguments that ICTSI and the Carriers are Primary Employers Under the Act (Exceptions 15-18) .....</b>	<b>27</b>
	<b>C. The ALJ Properly Found that the Port Has Never Relinquished Its Control over the Disputed Work (Exceptions 6-12, 14) .....</b>	<b>31</b>
	<b>D. The ALJ Properly Found that Respondents Failed to Raise a Valid Work Preservation Defense (Exceptions 4, 5) .....</b>	<b>34</b>
	<b>E. The ALJ Properly Found that Local 40 Engaged In Unlawful Conduct (Exception 24).....</b>	<b>36</b>
	<b>F. The ALJ Properly Denied Respondents' Effort to Re-open the Record (Exceptions 27, 28) .....</b>	<b>37</b>
	<b>G. The Board Should Reject Respondents' Belated Deferral Argument Not Raised Before the ALJ .....</b>	<b>37</b>
	<b>H. The ALJ Properly Rejected Respondents' Arguments Based on the <i>Noel Canning</i> Decision .....</b>	<b>38</b>
<b>VII.</b>	<b>CONCLUSION .....</b>	<b>39</b>

## TABLE OF AUTHORITIES

<i>U.S. v. Allocco</i> , 305 F.2d 704 (2d Cir. 1962) .....	39
<i>NLRB v. Ass’n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tub, Ice Machine Gen. Pipefitters of New York &amp; Vicinity, Union Local No. 638</i> , 429 U.S. 507 (1977) .....	17, 19, 20, 24, n.14, 27, 30
<i>Associated Gen. Contractors of Cal., Inc.</i> , 514 F.2d 433 (9th Cir. 1975) .....	17
<i>Bermuda Container Line, Ltd v. Int’l Longshoremen’s Union</i> , 192 F.3d 250 (2d Cir. 1999) .....	35
<i>Carpet Layers Local 419 v. NLRB</i> , 467 F.2d 392 (D.C. Cir. 1972), <i>enf’d</i> 52 Fed Appx. 357 (9th Cir. 2003) .....	16, 23
<i>Carpet, Linoleum, etc. Local No. 419</i> , 190 NLRB 143 (1971) .....	23
<i>NLRB v. Denver Building and Construction Trades Council</i> , 341 U.S. 675 (1951) .....	16
<i>Enterprise Ass’n of Pipefitters, Local 638 (The Austin Company, Inc.)</i> , 204 NLRB 760, (1973) .....	24, n.14
<i>Evans v. Stephens</i> , 387 F.3d 1220 (11th Cir. 2004) ( <i>en banc</i> ), <i>cert. denied</i> 544 U.S. 942 (2005) .....	39
<i>Food &amp; Commercial Workers Local 367 (Quality Food)</i> , 333 NLRB 771 (2001) .....	19
<i>Greenhoot, Inc.</i> , 205 NLRB 250 (1973) .....	36
<i>Hooks ex rel. NLRB v. Int’l Longshore &amp; Warehouse Union</i> , 905 F. Supp. 2d 1198, 1211 (D. Ore. 2012) .....	5, 26, n. 16, 31
<i>Hooks ex rel. NLRB v. Int’l Longshore &amp; Warehouse Union</i> , 2013 U.S. App. LEXIS 19969, slip op. (9th Cir. Sep. 30, 2013) .....	5, 26, n. 16, 30, 31
<i>Intl. Bhd. of Teamsters (A.C.E. Transportation Co.)</i> , 120 NLRB 1103 (1958) .....	16, n.13
<i>Int’l Bhd of Teamsters Local 560 (Curtin-Matheson Scientific)</i> , 248 NLRB 1212 (1980) .....	23

<i>Int'l Bhd of Teamsters, Local 917, (Peerless Importers, Inc.),</i> 349 NLRB 1057 (2007), <i>enf'd in part, rev'd in part</i> 577 F.3d 70 (2d Cir. 2009) .....	16, 20, 22
<i>International Brotherhood of Electrical Workers, Local 48 and</i> <i>ICTSI Oregon, Inc. and Int'l Longshoremen's Union, Local 8,</i> <i>AFL-CIO, 358 NLRB No. 102 (Aug. 13, 2012) .....</i>	6, 26, n.16
<i>International Brotherhood of Electrical Workers, Local 501</i> <i>(Atlas Co.), 216 NLRB 417 (1975) .....</i>	16, 22, 34
<i>NLRB v. Int'l Longshoremen's Ass'n, 447 U.S. 490 (1980) .....</i>	17, 18, 35
<i>NLRB v. Int'l Longshoremen's Ass'n, 473 U.S. 61 (1985) .....</i>	20, 30, 35
<i>International Longshoremen's Ass'n (Dolphin Forwarding, Inc.),</i> 266 NLRB 230 (1983) .....	31
<i>Iron Workers Pacific Northwest (Hoffman Construction),</i> 292 NLRB 562, 577-78 (1989), <i>enf'd</i> 913 F.2d 1470 (9th Cir. 1990).....	38
<i>Local Union No. 438, United Pipe Fitters (George Koch</i> <i>Sons, Inc.), 201 NLRB 59 enf'd 490 F.2d 323 (4th Cir. 1973) .....</i>	17, 21
<i>Longshoremen International Longshoremen's Union (California Cartage),</i> 278 NLRB 220 (1986) .....	30
<i>Longshoremen Local 1291 (Holt Cargo Systems),</i> 309 NLRB 1250 (1992) .....	34
<i>MacDonald Engineering Co., 202 NLRB 748 (1973).....</i>	38
<i>Machinists District 190 Local 1414 (SSA Terminals, LLC),</i> 344 NLRB 1018 (2005), <i>aff'd</i> 253 Fed. Appx. 625 (9th Cir. 2007).....	34
<i>Mine Workers (Boich Mining), 301 NLRB 872 (1991).....</i>	22
<i>National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967) .....</i>	19, 21, 26, 27
<i>Newspaper &amp; Mail Deliverers (Hudson News),</i> 298 NLRB 564 (1990) .....	19
<i>Newspaper &amp; Mail Deliverers (Gannett Co.),</i> 271 NLRB 60 (1984) .....	23

<i>NLRB v. New Vista Nursing &amp; Rehabilitation</i> , 2013 WL 2099742, --- F.3d -- (3d Cir. May 16, 2013) .....	38
<i>Noel Canning v NLRB</i> , 705 F.3d 490 (D.C. Cir. 2013), <i>cert. granted</i> 81 U.S.L.W. 3695 (U.S. Jun. 24, 2013) (No. 12-1281) .....	38
<i>NLRB v. Operating Eng’rs Local 825 (Burns &amp; Roe)</i> , 400 U.S. 297 (1971) .....	17, 18
<i>Painters District Counsel No. 20 (Uni-Coat Spray Painting, Inc.)</i> , 185 NLRB 930 (1970) .....	22, 34
<i>Service Employees Int’l Union, Local 32B-32J</i> ( <i>Nevins Realty Corp.</i> ), 313 NLRB 392 (1993) .....	19, 20, 35
<i>Service Employees Int’l Union, Local 525 (Lerner Enterprises)</i> , 329 NLRB 638 (1999) .....	16, 17, 22-23
<i>Sheet Metal Workers Local 27</i> , 321 NLRB 540 (1996).....	35
<i>Sheet Metal Workers, Local 80 (Limbach Co.)</i> , 305 NLRB 312 (1991), <i>enf’d in relevant</i> <i>part</i> 989 F.2d 515 (D.C. Cir. 1993) .....	23
<i>Simplex Wire</i> , 285 NLRB 834 (1987) .....	22
<i>Spielberg Mfg. Co.</i> , 112 NLRB 1080 (1955).....	38
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), <i>enf’d</i> 188 F.2d 362 (3d Cir. 1951) .....	27
<i>Sub-Acute Rehabilitation Center at Kearny, LLC d/b/a</i> <i>Belgrove Post Acute Care Center</i> , 359 NLRB No. 77 (2013).....	39
<i>Teamsters Local 578 (USCP-Wesco)</i> , 280 NLRB 818 (1986), <i>aff’d</i> 827 F.2d 581 (9th Cir. 1987) .....	35
<i>Universal Lubricants, LLC</i> , 359 NLRB No. 157 (Jul. 16, 2013) .....	39
<i>Vulcan Materials Co. v. United Steelworkers</i> , 430 F.2d 446 (5th Cir.1970), <i>cert. denied</i> 401 U.S. 963 (1971) .....	21
<i>U.S. v. Woodley</i> , 751 F.2d 1008 (9th Cir. 1985).....	39

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (Board), Counsel for the General Counsel submits this Answering Brief to the Exceptions<sup>2</sup> filed by Respondent International Longshore and Warehouse Union

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<sup>1</sup> Pursuant to the Board's Order dated February 20, 2014, severing and abeying the § 8(b)(4)(D) allegations in these proceedings, Counsel for the General Counsel specifically reserves its arguments on Respondents' exceptions regarding such allegations.

<sup>2</sup> On October 30, 2013, Respondents filed 28 individual exceptions, none of which refer to specific portions of the transcript testimony as required by 102.46(b)(1) of the Board's Rules and Regulations.

“Respondent ILWU” or “International”), and its Locals 8 and 40 (“Local 8” and “Local 40”) (collectively, “Respondents”) to the decision of Administrative Law Judge (“ALJ”) William L. Schmidt, which issued on August 28, 2013. (See Decision of ALJ William L. Schmidt, dated August 28, 2013) (the “ALJD”).<sup>3</sup> As discussed in more detail below, the ALJ’s findings are appropriate, proper, and amply and fully supported by the credible record evidence in all respects. Respondents’ exceptions amount to a dog-and-pony production that certainly entertains, but just as certainly leaves fully intact the reasoning and rationale of the ALJ’s decision. For the reasons set forth below, the Board should sustain the ALJ’s findings of fact, conclusions of law, proposed remedy and recommended order, and specifically find that Respondents have each violated § 8(b)(4)(i), (ii)(B) of the Act as alleged.

## **I. OVERVIEW**

As noted by the ALJ, this case concerns a “highly complex and very technical labor dispute” regarding the assignment of a “relatively simple work task” at Terminal 6 of the Port of Portland (the “Port”). (ALJD 5:22-23) As the ALJ found and Respondents do not contest, for nearly four decades prior to the summer of 2012, this work – monitoring, plugging and unplugging refrigerated containers or “reefers” (the “disputed work” or “reefer work”) – was performed by Port employees represented by Intervenor International Brotherhood of Electrical Workers Local 48 (“IBEW Local 48”) (the “Port electricians”). (ALJD 5:23-24)

Also uncontested by Respondents are the ALJ’s findings that, beginning in the early summer of 2012, officials of each Respondent sought to have the reefer work

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<sup>3</sup> JD (SF)-36-13. References to the ALJ’s decision will be referred to as “ALJD” followed by the appropriate page number(s) and, where applicable, followed by a colon and the particular line number(s).

assigned to members of Local 8 by bringing pressure to bear on other companies doing business at Terminal 6. Specifically, Respondents' officials threatened to drive terminal operator Charging Party ICTSI Oregon, Inc. ("ICTSI") out of business unless it "preferred" Respondent Local 8 in an upcoming Board 10(k) hearing (see ALJD 21-23), and even threatened *at the 10(k) hearing itself* to "shut down ICTSI" and "send [its largest customers] packing." (ALJD 23:40-47; 24:1-37)

Nor do Respondents dispute that they:

- directed members of Locals 8 and 40 employed by ICTSI and another Terminal 6 employer to pilfer the disputed work by performing it against ICTSI's direct orders, while the Board's 10(k) determination was under consideration;<sup>4</sup>
- induced and ordered their members to engage in work slowdowns in support of Local 8's claim for the disputed work, including staging terminal-wide coffee breaks, blocking equipment, safety gimmicking and operating equipment slowly;<sup>5</sup>
- induced and ordered an orchestrated shut-down of Terminal 6 on several occasions in June 2012, involving self-assignment of the disputed work, forced discharges and claimed mechanical failures;<sup>6</sup>
- caused a work stoppage by refusing to refer qualified workers from Local 8's hiring hall to ICTSI;<sup>7</sup> and
- by their officers and officials, threatened ICTSI with unspecified reprisals if the disputed work were not assigned to Local 8 employees.<sup>8</sup>

(See ALJD:25-30)

Furthermore, Respondents stipulated at hearing that Locals 8 and 40 filed and maintained numerous grievances against neutral ICTSI regarding the disputed work,

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<sup>4</sup> ALJD 26:10-40.

<sup>5</sup> ALJD 25:6-8; 27:40-44; 28:1-32; 30:28-42; 31:1-7; 35-38.

<sup>6</sup> ALJD 31-35.

<sup>7</sup> ALJD 27:1-12.

<sup>8</sup> ALJD 27:14-38.

maintained a federal district court action seeking enforcement of an arbitration award regarding the work, and explicitly threatened the Port's largest customers with lost-work monetary claims. (GC 39 ¶¶ 6-11, 13-17)

Respondents' efforts to coerce ICTSI and the carriers were coordinated and concerted. The record reveals substantial contact and coordination between officials of the International, Local 8 and Local 40 officials regarding the T6 reefer work dispute (Tr. 1541, 1543-44, 1550-55, 1562, 1887, 1898-99) According to testimony by International and Local 40 officials themselves, Local 40 played a crucial role in the self-assignment effort in that Local 40 members directed reefers to Local 8 members to be plugged and unplugged, instead of to the Port electricians. (Tr. 1565, 1889) Local 40 officials supported Local 8's position on the disputed work, both in arbitrations and at the ULP hearing itself. (Tr. 1555, 1902-03)

## **II. PROCEDURAL BACKGROUND**

### **A. The ULP Proceedings**

The hearing in this case was held in Portland, Oregon over the course of twelve days between July 31, and August 29, 2012. At hearing, 14 witnesses<sup>9</sup> testified for Counsel for the General Counsel, creating a comprehensive record of Respondents' myriad unfair labor practices, including an explication of the roles of the Port (as primary) versus ICTSI and the Terminal 6 carriers (as neutrals). Respondents presented four witnesses; two were their own officers and two were representatives of the Pacific Maritime Association ("PMA"). Respondents recalled two of General Counsel's witnesses, but called no employee witnesses.

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<sup>9</sup> The General Counsel's witnesses included nine current or former ICTSI managers, two current Port of Portland managers, and three current Port of Portland electricians.

Rather than denying the alleged conduct, Respondents have instead posited a series of constructs which, if accepted, excuse Respondents' conduct as lawful, work preservation activity. Ultimately, this ambitious effort comes up short. As Respondents' own witnesses conceded, Respondents' grab for new work amounted to targeting parties who had no control over assigning it; in other words, a textbook secondary boycott violation.

### **B. The First District Court Injunction**

On July 19, 2012, Judge Michael H. Simon of the District of Oregon issued a Revised Order Granting Preliminary Injunction (the "First Injunction"), enjoining Respondents from engaging in unlawful secondary boycott activities under the Act, pending adjudication by the Board of the instant unfair labor practice charges against Respondents. The district court's issuance of an injunction was premised on Judge Simon's conclusion that "the Port of Portland controlled the reefer work" and "not the carriers"). *See Hooks ex rel. NLRB v. Int'l Longshore & Warehouse Union*, 905 F. Supp.2d 1198, 1211 (D. Ore. 2012). The § 8(b)(4)(B) portion of this injunction would later be upheld by the Ninth Circuit Court of Appeals, which found that "[t]he Port expressly retained the right to control the disputed work when it leased terminal operations to ICTSI Oregon, Inc. in 2010"). *See Hooks ex rel. NLRB v. Int'l Longshore & Warehouse Union*, 2013 U.S. App. LEXIS 19969, slip op. at \* 1 (9th Cir. Sep. 30, 2013).

### C. The Board's 10(k) Award

Shortly following the issuance of the First Injunction and while the hearing in this matter before ALJ Schmidt was underway, the Board issued its 10(k) Award finding that the Port electricians, and not Respondent Local 8's members, were in fact entitled to perform the disputed work, and that the entity with the right to assign the disputed work was the Port ("10(k) Award"). See *International Brotherhood of Electrical Workers, Local 48 and ICTSI Oregon, Inc. and Int'l Longshoremen's Union, Local 8, AFL-CIO*, 358 NLRB No. 102, slip op. (Aug. 13, 2012). In awarding the work to the Port electricians, the Board relied on the fact that the Port electricians, and not Respondent Local 8 members, had been performing the work since Terminal 6 operations commenced in 1974.<sup>10</sup> *Id.*, slip op. at \* 1. In addition, the Board explicitly rejected Respondent's "work preservation argument":

We also reject ILWU's argument that there is no valid jurisdictional dispute because ILWU has a work preservation claim to the work. IBEW-represented electricians have been performing the disputed work since 1974. Where, as here, a union is claiming work for employees who have not previously performed it, the objective is not work preservation, but work acquisition.

*Id.*, slip op. at \* 3. Significantly, Respondents, by their exceptions, do not point the Board to any record evidence in this proceeding that contradicts the evidence adduced in the 10(k) proceeding on the past performance of the disputed work or the right to

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<sup>10</sup> Following long-standing Board law in making its 10(k) Award, the Board also explicitly considered the factor of "employer preference," concluding that:

[b]ecause the Port is the employer in control of the work in dispute and its employees are performing that work, we look to its past practice and preference in assigning the work.

*Id.*, slip op. at 4.

control its assignment.

#### **D. The Second District Court Injunction**

It is undisputed that Respondents continued their unlawful conduct by, *inter alia*, refusing to withdraw their outstanding grievances and litigation, and issuing written letters to the Port's largest carrier-customers threatening to prosecute lost work opportunity grievances against them should Port electricians perform the disputed work on their containers at Terminal 6. Based on this conduct, Judge Simon issued an additional injunction on November 21, 2012. See *Hooks ex rel. NLRB v. Int'l Longshore & Warehouse Union*, 905 F.Supp.2d 1198, 1212-14 (D. Ore. 2012).

### **III. THE RECORD EVIDENCE**

A detailed recitation of the relevant record evidence is set forth in ALJ Schmidt's comprehensive, 52-page ALJD. For ease of reference, what follows is a summary of the facts underlying the legal issues of right-to-control and work preservation raised by Respondents' exceptions.

#### **A. The Terminal 6 Operation**

As noted by the ALJD, the Port electricians have historically performed the disputed "reefer" work in the midst of a complicated stevedoring operation otherwise manned by longshore workers (represented by Local 8) and marine clerks (represented by Local 40). (ALJD 5:27-30) While Respondents, by their exceptions, insist that the carriers that call on Terminal 6, and not the Port, actually "control" the reefer work for purposes of evaluating their status as primary versus neutral employers under the Act, they do not actually take issue with the ALJ's finding that the terms and conditions of the Port electricians are, in fact, controlled by the Port alone, subject to its collective-

bargaining agreement with the IBEW. (See ALJD 42:1-7) Indeed, this finding was based on extensive record evidence, including the unrebutted testimony of three Port electricians and two Port managers. (See Tr. 169, 243-46, 366, 249, 808-08, 822-25, 834-37, 863, 871-73, 887, 890, 896, 918-22, 948-49, 1017-29, 1558, 1560-61, 1607; 1673-74, 1725, 1885-87; 2046-50; 10(k) Tr. 280; GC Ex 23, 24, 25, 29) Even Respondents' own witness ILWU Coast Committeeman Leal Sundet, admitted that neither ICTSI nor the carriers have any direct control over the Port electricians. (Tr. 1558, 1561) Likewise, the carriers' own in-house attorney testified that the carriers, who own or lease the containers on which the disputed work is performed, "have a customer relationship with the terminal operator [ICTSI]." (Tr. 1281; 1322)

Most significantly, the unrebutted record evidence demonstrates that neither the carriers nor ICTSI has the ability to assign the disputed work. As explained in detail below, ICTSI is bound by a lease with the Port of Portland (the "Lease") that specifically reserves to the Port control over the work in question. Moreover, by Respondents' own admission, prior to the execution of that Lease, they had been attempting to obtain the disputed work *from the Port* for several years since the "early to mid-2000s." (10(k) Tr. 585-87, 591-604)

While the carriers obviously own (or lease) the containers, as customers of the Port (and subsequently customers of ICTSI), this ownership affords them, at best, "control" over designating the temperature and ventilation settings for their reefers and may direct their reefers to a designated repair company. (Tr. 888) The carriers are subject to contractual arrangements (known as Stevedoring Services Agreements or "carrier contracts") that set out the terms on which they may call on T6. (See, e.g., R 6)

However, there is “nothing in these agreements that would warrant the conclusion that the carriers’ mere ownership interest in the containers enabled them to define for the terminal operator what work group could perform what function dockside.” (ALJD 45:18-20) Indeed, as the ALJ further found, there was no attempt (until Respondents began threatening the carriers with grievances), on their part to interfere with the decision as to which group performed the disputed reefer work. (*Id.* at 10-18) Indeed, documentary evidence adduced by Respondents themselves indicate that certain of the carriers, in their dealings with the Port, have implicitly acknowledged their lack of ability to assign the work by negotiating a discount in the rates the Port charges them in the event that the disputed work were ever to be assigned to the ILWU. (See Tr. 1681-82, 1685)

Most significantly, the unrebutted testimony from the carriers’ representatives themselves was that their only recourse to affect the work assignment was bring pressure to bear on ICTSI and/or the Port. (Tr. 2050-53) The Port witnesses concurred; as Ruda explained, were a carrier to request the assignment of the reefer work to non-DCTU employees, the Port would refuse, “because [its] position would be that the member carrier doesn’t direct the jurisdiction of the work, *i.e.*, they’re not in a position to direct that work.” (Tr. 1704-05) As such, Respondents “pressured ICTSI and the carriers in order to achieve effects ‘elsewhere,’” namely, the Port. (ALJD 43:45-47, 44:1-6) This is evidenced by the multiple emails sent by carriers to both ICTSI and the Port demanding that they revise the terms of their Lease agreement to assign the work to Local 8’s members. (See GC Ex 4, 5, 8-10; R 27)

## **B. The Lease Agreement Between the Port and ICTSI**

It is undisputed that, in 2011, the Port adopted a privatization model that involved its leasing Terminal 6 to ICTSI as a stevedoring management company. (See ALJD 7:34-41, 8:29; see also Tr. 976, 978-81; 10(k) Tr. 44) Under the terms of the Port's Lease with ICTSI, the latter is required to acknowledge the Port's collective bargaining agreement with IBEW Local 48 covering the work of the Port electricians. (GC Ex 22 at 6) Respondents do not except to this characterization of the Lease document by the ALJ, nor with his conclusion that it contains specific provisions "designed to retain the historical work jurisdiction of the craft workers long employed by the Port under its collective-bargaining agreement with the DCTU."<sup>11</sup> (See ALJD 8:31-33; 18:4-22)

The unrebutted evidence overwhelmingly establishes that the Port's purpose in drafting Sections 2.8 and 3.23 was to preserve the specific work that the Port electricians had historically performed at Terminal 6, including the disputed work. (Tr. 999) As the Port's Chief Commercial Officer Ruda explained, the majority of the Terminal 6 work covered by the DCTU Agreement is that of the Port electricians, including the disputed work,<sup>12</sup> and "we knew very clearly what we were referring to and what we were not referring to when we specified DCTU [W]ork." (Tr. 164; 1675-76)

As noted by the ALJ, the final, signed Lease document itself leaves little doubt that, at an ICTSI-operated Terminal 6, the DCTU-represented employees would continue to perform the work they had historically performed at the terminal. (ALJD 8:31-35; GC

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<sup>11</sup> "DCTU" refers to the District Council of Trade Unions, a group of affiliated trade unions, including IBEW Local 48, that represents various trades including carpenters, plumbers and painters; along with these workers, the Port electricians are referred to in the Lease as the "DCTU Employees" employed by the Port at T6. (ALJD 7:1-7; Tr. 971; GC 26 at 22)

<sup>12</sup> In addition to the disputed work, the Port electricians, since 1974, have performed various other maintenance and repair tasks at T6, including maintenance and repair work on the terminal's electrical systems and cranes. (Tr. 1673-74; GC 29)

Ex 22 at 40, 58; Tr. 994-95) Section 3.23(a) of the Lease explicitly states that the “Port shall have responsibility for the conduct of the DCTU Employees in performing the DCTU Work.” (GC Ex 22 at 58) Section 3.23(a) further states:

The 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. The Lessee shall accept the Port’s utilization of the DCTU Employees for the provision of the DCTU Work and shall, in accordance with Section 3.23(d) accept work performed by the DCTU Employees at such time as the Lessee determines that such work complies with the provisions of this Agreement (including the Operating Standards) and applicable law.

*(Id.)*

The contractual language clearly reflects the Port’s obligation to honor the DCTU Agreement during the term of the Lease, stating that, ICTSI is “responsible for all aspects of the Port’s operations; provided that, for so long as the DCTU Agreement remains in effect, [ICTSI] shall comply with the provisions of Sections 3.23(a) through (d) . . .” (GC Ex 22 at 42), and only “[i]n the event the DCTU Agreement is not in effect with respect to the Terminal” will ICTSI, under § 3.23(e)(ii), “not be required to utilize the DCTU Employees with respect to the DCTU provision of the DCTU Work . . .” (GC Ex 22 at 59-60)

Another section of the Lease, § 2.8, makes it clear that ICTSI may not itself assign the disputed work to any non-DCTU employees:

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 at 40) (emphasis added).

The Lease permits the Port several means of enforcing these provisions. First, the Port retains the right to enter Terminal 6 at all reasonable times to ensure compliance with the Lease and "to perform the DCTU Work . . . ." (GC Ex 22 at 45) Second, the Lease requires ICTSI to indemnify the Port in the event of a breach by ICTSI that results in a claim against the Port by a third party. Third, the Lease specifically reserves to the Port the right to terminate based on ICTSI's failure to comply with § 2.8 and § 3.23. (GC Ex 22 at 91, 101-03)

Because the Lease assigns responsibility for operating Terminal 6 to ICTSI, it also provides for the Port to assign all of its carrier contracts to ICTSI. (ALJD 8:27-29) As noted by the ALJ, the Lease was approved by Local 8's own Secretary-Treasurer, Bruce Holte, who served as a Port Commissioner at the time. (ALJD 16:45-46)

### **C. The Port's Nonnegotiable Position on the Port Electricians**

Significantly, Respondents do not except to the ALJ's findings that the Port – not ICTSI – was responsible for reserving the disputed work for the Port employees. Indeed, as the ALJ noted, Respondents adduced no evidence at hearing that the Lease terms operated as a "subterfuge" by ICTSI to avoid assigning reefer work to Local 8. (ALJD 8:31-35; see *also* Tr. 1306-07) Specifically, the ALJ found that, as early as 2007, the Port had prepared a draft Lease agreement that "contained numerous provisions requiring any potential Lessee to honor the historical division of labor maintained by the Port at T6." (ALJD 8:2-6; GC Ex 28; Tr. 989-90; 1004) The unrebutted record evidence

indicates that this language was drafted by the Port for its own benefit and that of no other party, for the purpose of specifically preserving the disputed work as the Port's, to be assigned to workers represented by IBEW Local 48 during the period of any Lease. (See GC Ex 28 at 51; Tr. 991-93)

Indeed, as found by the ALJ, "the Port had always insisted that its own employees represented by Local 48 perform the dockside reefer work." (ALJD 43:45-47, 44:1) This critical fact is amply supported by the record evidence. As early as January 2007, the Port issued an RFQ notifying all potentially interested Leasees that it directly employed trade union members at Terminal 6, including electricians, pursuant to its relationship with the DCTU. (GC Ex 27 at 18.) As the Port's Chief Commercial Officer Nathaniel "Sam" Ruda explained, this language was placed in the RFQ because the Port was trying to accurately represent to potential bidders how Terminal 6 operated and specifically what labor obligations the Port had. (Tr. 984; 10(k) Tr. 47)

Moreover, the record evidence amply supports the ALJ's conclusion that, when the Port entered into the Lease with ICTSI, it "obviously continued to treat the subject [of the reefer work] as one over which it retained full control." (ALJ 43:6-8) In fact, during the 13 months that the Port engaged in bilateral negotiations with ICTSI, the Port took a consistent, "overarching" position that it intended to preserve the existing jurisdiction of the unions with which it had collective bargaining relationships at Terminal 6 and included the same language in its proposal to ICTSI that it had included in its draft concession agreement. (Tr. 988, 993-94, 1004-05; 10(k) Tr. 50-51, 53) As Ruda testified, this language was again drafted by the Port to serve its own interest, not that of ICTSI, and was presented to ICTSI as "a given" and non-negotiable. Not surprisingly, the parties

did not engage in any substantive back-and-forth over this “non-negotiable component of the [L]ease.” (Tr. 995-96, 1005; 10(k) Tr. 53-54).

**D. The Port’s Post-Lease Exercise of Control over the Disputed Work and Respondents’ Acknowledgment of that Control**

Following ICTSI’s commencement of operations at T6, the Port electricians continued performing the reefer work under the Port’s direction and control, as contemplated in the Lease. (ALJD 11:29-32) During this period, Respondents by their conduct implicitly acknowledged that the Port had retained control over the disputed work under the Lease. Especially telling in this regard is the uncontradicted evidence that, after Respondent ILWU Coast Committeeman Leal Sundet unsuccessfully attempted to “shake down” ICTSI’s CEO days before the 10(k) hearing in this matter, he informed the ICTSI executive that he would “talk to the Port and we’ll see if we can’t get it to where it’s all right for you to pick us in this 10(k) process, and then all this can go away.” (ALJD 23:26-28) Sundet then admittedly tried to talk a Port executive into giving up the Port’s rights under the Lease. (Tr. 1498-1500)

**E. The ILWU/PMA Contractual History**

Respondents’ claim to the disputed work is premised on “internal interpretations in recent years of provisions in the coastwise PMA/ILWU collective bargaining agreement applicable to West Coast ports” which recognize the disputed work as being within the ILWU’s jurisdiction. (ALJD 6:3-6) Specifically, the PCLCD contains provisions Respondents claim entitle their members to perform the disputed work; specifically, Respondents point to portions of this contract document that require PMA member companies to assign to the ILWU “the maintenance and repair of containers of any kind” and further requires that these companies “assign work. . .as may be directed

by the [Coast Labor Relations Committee] or an arbitration award, which the Employers shall defend in any legal proceeding”). (See R 1 § 1.7, § 1.76)

This contractual language, according to Respondents, reflects an accord between the PMA and ILWU allowing the PMA employers to take advantage of technological innovation while affording Respondents protection and job security “by assigning all modified and newly created work to the coastwise bargaining unit, including maintenance and repair work performed on longshore equipment, such as containers, which replace longshore labor.” (Resp. Br. at 4)

In fact, the record evidence indicates that the work of plugging, unplugging and monitoring of reefers has historically been performed by *non-ILWU workers* on the West Coast. At hearing, PMA’s own representative testified that it was in fact possible that non-ILWU members actually perform the majority of such work at West Coast terminals. (Tr. 2079) Indeed, the 2008 PCLCD specifically grandfathered such practices by “red-circling” the container terminals at which it took place. (10(k) Tr. 369, 585-89; R 1 at 218-21) Notably, T6 was not “red circled” during this process because the Port, which controlled the T6 reefer work, was not a PMA member at the time. (ALJD 15:36-47; 16:1-8; Tr. 307)

Indeed, as Respondents concede, at no relevant time was the Port a member of PMA or otherwise bound by the PCLCD. (ALJD 13:19-22; Resp. Br. at 3; Tr. 1285) Respondents further concede that ICTSI was not a member of the PMA at the time it entered the Lease, but only became a member “in or about June 2010 after the lease was signed and approved. . .” (ALJD 9:1-2)

#### IV. THE APPLICABLE BOARD LAW

When enacting § 8(b)(4)(B) in 1947, Congress sought to shield neutrals<sup>13</sup> from “pressures in contraversies not their own,” on the basis that, *inter alia*, these entities were often powerless to comply with the union’s demands. (ALJD 40:46-47, 41:1-2, *citing NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951); see also *Service Employees International Union, Local 525 (Lerner Enterprises)*, 329 NLRB 638, 639-40 (1999) (*citing Carpet Layers Local 419 v. NLRB*, 467 F.2d 392 (D.C. Cir. 1972) *enforced.*, 52 Fed. Appx. 357 (9th Cir. 2003)).

##### A. The “Right of Control” Doctrine

To identify neutrals, the Board relies on its “right of control” doctrine. As the ALJ succinctly noted, the Board’s right of control test:

presumes that an employer is a neutral entitled to the protection afforded under Section 8(b)(4)(B) if “when faced with a coercive demand from its union, (it) is powerless to accede to such a demand except by bringing some form of pressure on an independent third party.”

(ALJD 41:43-47, *citing International Brotherhood of Electrical Workers, Local 501 (Atlas Co.)*, 216 NLRB 417 (1975)); see also *Int’l Bhd. of Teamsters, Local 917, (Peerless Importers, Inc.)*, 349 NLRB 1057 (2007), *enf’d in part, rev’d in part* 577 F.3d 70 (2d Cir. 2009).

Thus, when a union pressures an employer which does not have the right to control the disputed work, it is reasonable to infer that the union has a secondary

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<sup>13</sup> The term “neutral” is the Board’s term of art applicable to the employer “who is not involved in a labor dispute with his immediate employees over ... issues directly affecting the terms and conditions of employment of his own employees ... [and] is not in a position legally to grant the union’s organization or economic demands.” *Int’l Bhd. of Teamsters (A.C.E. Transportation Co.)*, 120 NLRB 1103, 1108-09 (1958).

*objective, that is, to influence the employer that does have the right to control. NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 504 (1980). As the Board has explained, the secondary nature of the union's conduct is revealed in such a situation precisely because "the pressured employer cannot himself accede to the union's wishes" and, thus, the union's pressure is by definition "undertaken for its effect elsewhere." *Local Union No. 438, United Pipe Fitters (George Koch Sons, Inc.)*, 201 NLRB 59, 63, *enf'd* 490 F.2d 323 (4th Cir. 1973). As the Board and the Supreme Court have made clear, such is the case regardless of whether the union claims to be enforcing a valid collective bargaining agreement with the neutral. *NLRB v. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tub, Ice Machine Gen. Pipefitters of New York & Vicinity, Union Local No. 638 ("Enterprise Ass'n")*, 429 U.S. 507, 531 (1977).

It is well settled that the statutory language, "cease doing business" is liberally construed; for a violation to be found, it is not required that the object be the total termination of business between the neutral and primary employers. *Serv. Employees Int'l Union (Lerner Ent.)*, 329 NLRB at 675. Where enmeshing a neutral is the goal, a "cease doing business" objective will be found where a union attempts "to cause a significant change in a secondary person's method of doing business." *Associated Gen. Contractors of Cal., Inc.*, 514 F.2d 433, 437 n.6 (citation omitted). Thus, in *Operating Eng'rs Local 825 (Burns & Roe)*, the Supreme Court found that conduct designed to pressure the neutral to change its work assignment policies "was unmistakably and flagrantly secondary." 400 U.S. at 304.

## **B. The Work Preservation Doctrine**

As noted above, a union that pressures neutral employers to force a primary employer to change a work assignment in the union's favor, improperly aims to force the neutrals to “cease doing business” (i.e., cause the primary to alter its operations). (See ALJD 46:34-39, *citing NLRB v. Operating Engineers Local 825*, 400 U.S. 297, 304-05 (1971)) A standard defense in such cases that the union’s conduct is aimed at “work preservation.” The Supreme Court set forth the two-part requirement for this defense in *NLRB v. Longshoremen*, 447 U.S. 490 (1980) (“*ILA I*”), finding that, in order to be lawful, a work preservation agreement:

must pass two tests: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question – the so-called “right of control” test,. . . .

*Id.* at 504.

### 1. “Work Traditionally Performed”

As the Supreme Court declared in *ILA I*, “[i]n applying the work preservation doctrine, the first and most basic question is: What is the “work” that the agreement seeks to preserve?” *NLRB v. Int’l Longshoremen’s Ass’n*, 447 U.S. 490, 505 (1980) (“*ILA I*”). In examining the “work traditionally performed” prong of this test, the Court specifically admonished the Board that it “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.” *Id.* at 507 (footnote omitted).

The Board and the courts have consistently applied these standards. Under the first test set forth in the *ILA I* decision, the Board will reject a work preservation defense

unless the work the union seeks to preserve is work that has been “traditionally done” or is “fairly claimable by” the employees of the targeted employer. See, e.g., *Service Employees International Union, Local 32B-32J (Nevins Realty Corp.)*, 313 NLRB 392, 399-400 (1993) (rejecting work preservation argument as “an impermissible attempt to acquire work that had been performed outside the bargaining unit). As the Board has stated, “[i]t is unit work, not union work, that may be preserved.” *Id.* at 399-400 (citing *Enterprise Ass’n*, 429 U.S. at 517; *Nat’l Woodwork*, 386 U.S. at 629). See also *United Food & Commercial Workers, Local 367 (Quality Food Centers, Inc.)*, 333 NLRB 771, 773 (2001) (in absence of evidence of diminution of unit work, union’s conduct was not intended “to preserve unit members’ jobs, but to reach out to monopolized jobs when their own unit jobs are not threatened”) (citations omitted).

Based on the Supreme Court’s warning in its *ILA I* decision, the Board will reject a union’s attempts to recast the disputed work as “claimable” merely because it falls within the union’s trade jurisdiction. *Service Employees Local 32B-32J*, 313 NLRB at 400. To be claimable, rather, the work in question must either be “identical to or very similar to that already performed by the bargaining unit and that bargaining unit members have the necessary skill and are otherwise able to perform,” *Newspaper & Mail Deliverers (Hudson News)*, 298 NLRB 564, 566 (1990), or it must be the “functional equivalent” or sufficiently related to work they performed before it was eliminated by technological changes. *Service Employees Local 32B-32J*, 313 NLRB at 400. Performance of the disputed work for a brief, temporary period is insufficient to establish the work as “fairly claimable.” *Food & Commercial Workers Local 367*, 333 NLRB at 772.

## 2. Right to Assign the Work in Question

In applying the Supreme Court's second test set forth in the *ILA I* decision to determine whether a union's objective is valid work preservation, its objective will be deemed secondary, not primary, where the union exerts pressure against an employer that has no power to assign to its own employees the work in question. Thus, even where a union is able to identify a contractually valid work preservation clause, its attempt to enforce it against an employer lacking such control is considered secondary because of the "inexorably logical conclusion that such pressure tactically is calculated to satisfy union objectives elsewhere." *Service Employees Local 32B-32J*, 313 NLRB at 400 (citing *Enterprise Ass'n*, 429 U.S. at 507). Such is the case where, pursuant to the terms of a lease, the targeted employer "never had the authority to perform the disputed work" and therefore "had no control to surrender." *Quality Food Centers, Inc.* 333, NLRB at 772 (footnote omitted). Moreover, as discussed *infra*, if the employer "has lost control of the work, and such loss of control was not initiated by it or at its own volition, the work preservation defense is not a valid one." *Teamsters Local 917 (Peerless Importers)*, 349 NLRB 1057 (2007) (citing *Enterprise Ass'n*, 429 U.S. at 525-526).

## 3. Containerization and "Fairly Claimable" Work

In *NLRB v. Int'l Longshoremen's Ass'n*, 473 U.S. 61 (1985) ("*ILA II*"), at issue was the lawfulness of the Rules on Containers that ILA and PMA had negotiated to deal with the technological innovation known as containerization. The Court agreed with the Board that the rules had a work preservation objective of preserving traditional longshore jobs of loading and unloading of cargo, which containerization had severely depleted. However, the Court disagreed with the Board's determination that the rules

were unlawful because the ILA had applied them to acquire cargo handling work for its members that: (a) unnecessarily duplicated work done by “shortstopping” truckers and “traditional” warehousemen; and (b) had been essentially eliminated and therefore could not be preserved. *Id.* at 72.

With regard to the first rationale, the Court found that the Board had again improperly focused on the rule’s effects on the extra-unit employees (truckers and warehousemen) to find a secondary object rather than focusing on the rules’ preservation of work traditionally performed by the unit employees. *Id.* at 79. In rejecting the second rationale, the Court disagreed with the Board’s legal premise that the rules could not lawfully preserve traditional work that had been eliminated by containerization or technological innovation. *Id.* at 80. Accordingly, the Court affirmed the decision of the circuit court of appeals that had refused to enforce the Board’s decision.

### **C. Lost Neutrality**

In determining a party’s role in a labor dispute, the totality of the circumstances must be considered. *See Nat’l Woodwork Mfr. Ass’n v. NLRB*, 386 U.S. 612, 644. There is no single test or “set of verbal formulae” that informs this decision. *Vulcan Materials Co. v. United Steelworkers*, 430 F.2d 446, 451 (5th Cir.1970), *cert. denied*, 401 U.S. 963 (1971). As the ALJ correctly noted, the Board’s control test is not “mechanical,” and the Board will evaluate “not only the situation the pressured employer finds himself in but also how he came to be in that situation.” (ALJD 41:33-40, *citing Local Union No. 438, United Pipe Fitters (George Koch Sons, Inc.)*, 201 NLRB at 63).

Indeed, the Board will look beyond its right-of-control test is that where there is specific evidence that the neutral in question knowingly engineered the work dispute in

question by entering into a contract that undermined its prior collective bargaining obligation. (ALJD 42:2-5, citing *Painters Dist. Council No. 20 (Uni-Coat Spray Painting)*, 185 NLRB 930 (1970). A union bears the burden of proof on this issue, and must show “affirmative conduct” by the ostensibly offending neutral “initiating” the means whereby it “actively and knowingly” contracted away its control. See *Int’l Bhd. of Teamsters, Local 917, (Peerless Importers, Inc.)*, 349 NLRB at 1059-60; *SEIU, Local 525*, 329 NLRB at 639, n.9; *Electrical Workers, Local 501 (Atlas Construction Company)*, 216 NLRB 417 (1975).

In a related rationale, a union may privilege its conduct aimed at a secondary employer where it demonstrates that it is “so involved in, or exercise[s] such actual and active control over the management policies and/or labor relations of the primaries as to become enmeshed in the latter’s dispute.” *SEIU, Local 525*, 329 NLRB at 638, n.9; *Simplex Wire*, 285 NLRB at 838 (1987); see also *Mine Workers (Boich Mining)*, 301 NLRB 872, 873 and 873 n.11 (1991) (“nature of the day-to-day operations and of the labor policies of the two entities are of paramount consideration. In fact ... the most important factor may be centralized control of labor relations”). Strong economic interdependence between a secondary and a primary employer, without more, fails to demonstrate the requisite “substantial control” necessary to negate the secondary employer’s neutrality for purposes of the Act’s protection under § 8(b)(4)(B). *SEIU, Local 525*, 329 NLRB at 670.

Instead, the question is whether the secondary has “substantial, active and actual control” over the daily labor relations of the primary and the working conditions of the primary’s employees sufficient to empower it with a means to resolve the dispute;

the union necessarily fails to meet this “heavy burden” where the secondary employer’s control and economic involvement was such that it could “meaningfully accede to all of the Union’s demands only by ceasing to do business with the [primary].” *Carpet Layers Local 419*, 467 F.2d at 406, *affirming Carpet, Linoleum, etc. Local No. 419*, 190 NLRB 143 (1971); *SEIU, Local 525*, 329 NLRB 638; *Sheet Metal Workers, Local 80 (Limbach Co.)*, 305 NLRB 312, 314 n.5 (1991), *enf’d in rel. part*, 989 F.2d 515 (D.C. Cir. 1993); *Newspaper & Mail Deliverers*, 271 NLRB at 67. Ultimately, this “issue can be resolved only by considering on a case-by-case basis the factual relationship the secondary employer bears to the primary employer. *Int’l Bhd of Teamsters Local 560 (Curtin-Matheson Scientific)*, 248 NLRB 1212, 1214 (1980).

An employer that joins a multi-employer bargaining association “does not sacrifice its neutrality” merely as a function of such membership, even where that association represents both neutrals and primaries to a dispute who are involved in a joint effort to oppose unionization of the primaries’ employees. See *SEIU, Local 525*, 329 NLRB 638. In such a situation, where the neutral’s participation in such an association affords them no “actual or active control” over the primaries’ management policies or labor relations, it will not be considered “enmeshed” in the primary dispute sufficiently to transform them into primary employers themselves. *Id.*

## **V. RESPONDENTS’ EXCEPTIONS**

As noted above, by their exceptions, Respondents concede that, beginning in mid-May of 2012, they began a campaign of threats, slowdowns, grievances, arbitrations and litigation against ICTSI and the carriers who call on Terminal 6. Indeed, at hearing, Respondents presented no serious defense to these factual allegations.

Specifically, Respondents do not dispute that they, by their agents, repeatedly threatened Charging Party ICTSI with work slowdowns and stoppages if they were not awarded the disputed work. They further concede that they are responsible for their members making good on such threats by means of slowdowns and coordinated interference with Terminal 6 operation resulting in full shutdowns on more than one occasion. Respondents also stipulated that they filed and prosecuted pay-in-lieu of grievances against ICTSI and various carriers and maintained a federal lawsuit against ICTSI to enforce an arbitration award under the PCLCD, in each case with the goal of being awarded the disputed work. As such, if the Board agrees with the ALJ that ICTSI and/or the carriers are neutrals, and that Respondents' means of achieving their goal was thus to "cause the Port to abandon its historical practice of using its own electricians" to perform this work (see ALJD 46:34-39), Respondents must concede that they have violated § 8(b)(4)(B) as alleged.

Respondents are thus tasked with making the impossible possible; that is, reimagining ICTSI and the PMA carriers that call on T6 as primary employers with respect to the work of the Port electricians. This requires ignoring the controlling Board law cited by the ALJ<sup>14</sup> and positing a diversionary "reassignment" scheme in which *the Port* is improperly meddling in matters not its own by having the audacity to assign the disputed work (for over 40 years) in blatant disregard of the "deal" Respondents have

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<sup>14</sup> *Enterprise Ass'n of Pipefitters, Local 638 (The Austin Company, Inc.)*, 204 NLRB 760, 760 (1973); *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507 (1977).

made with PMA to pilfer it. Respondents' fun-house mirror reflection of the Board's secondary boycott law was correctly rejected by the ALJ, as it should be by the Board.<sup>15</sup>

Respondents additionally argue that the *Noel Canning* decision by the Court of Appeals for the D.C. Circuit "removes the legal authority of the Board, including the General Counsel and the ALJ, to adjudicate this case." As set forth below, this argument is a red-herring in that the Board, pending resolution of this issue, is tasked with carrying out its responsibility to enforce the Act.

## **VI. THE ALJD WAS CORRECTLY DECIDED**

Faced with a relatively convoluted fact pattern and multiple obfuscatory lines of defense offered by Respondents, the ALJ handily "demystified" this matter by extracting and distilling the critical record evidence, which he then correctly evaluated under the relevant Board law. As set forth below, and as demonstrated by the evidence adduced at hearing, the ALJ correctly found that Respondents' conduct simply cannot be justified as "primary" and their asserted "work preservation" defense correspondingly fails, because Respondents' members have never performed the work in question and additionally because the parties at whom Respondent's coercion was directed – ICTSI and the Terminal 6 carriers – have never controlled the work in question.

In order to reach his conclusions, the ALJ considered and rightly rejected Respondents' multiple efforts to warp and distort the Board's case law, several of which they continue to press in their exceptions to the Board. Ultimately, nothing in Respondents' exceptions warrants reversing the ALJ's conclusion their actions cannot

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<sup>15</sup> Furthermore, even if the Board were willing to accept Respondents' claim that the PMA carriers and ICTSI should be viewed as "co-primary employers" who fortitiously happen to control the work Respondents desire, this not exonerate Respondents' threats and work stoppages at T6 insofar as they were aimed at the *non-PMA carriers* who call upon the terminal as well.

have a valid bargaining unit “work preservation” object, because no member of the coast-wise multi-employer bargaining unit has ever had the ability to control the assignment of the disputed work. (ALJD 42-43) As such, Respondents’ threats and other coercion directed at ICTSI and the carriers are not “a shield carried solely to preserve traditionally performed [ILWU] bargaining unit jobs” but instead amount to a sword used “to reach out to monopolize jobs or acquire new job tasks.” *National Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 630-31 (1967).

**A. The ALJ Properly Found that the Port Controls the Disputed Work (Exceptions 1, 2, 13)**

The ALJ correctly found that, pursuant to the Board’s “right of control” test, the Port is the primary employer in this dispute. (ALJD 43:27-32) Agreeing with the ALJ in this regard is the District Court for the District of Oregon, the Ninth Circuit Court of Appeals and the Board itself.<sup>16</sup> Notably, Respondents, by their exceptions, do not identify any record evidence on the issue of “right to control” that was not before the Board when it issued its 10(k) Award. Nor do Respondents except to ALJ’s factual findings (made in part in reliance on the 10(k) Award) that, “[t]hroughout the operation of T6 as a container facility, the Port has always controlled the dockside reefer work.” (ALJD 43:35-36) Nor do they contest the ALJ’s conclusion that the terms and conditions of employment for these workers are controlled solely by the Port as their direct employer. (ALJD 7:1-7)

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<sup>16</sup> *International Brotherhood of Electrical Workers, Local 48 and ICTSI Oregon, Inc. and Int’l Longshoremen’s Union, Local 8, AFL–CIO*, 358 NLRB No. 102, slip op. (Aug. 13, 2012); *Hooks ex rel. NLRB v. Int’l Longshore & Warehouse Union*, 905 F. Supp.2d 1198, 1211 (D. Ore. 2012), *enf’d in relevant part Hooks ex rel. NLRB v. Int’l Longshore & Warehouse Union*, 2013 U.S. App. LEXIS 19969, slip op. (9th Cir. Sep. 30, 2013); *Hooks ex rel. NLRB v. Int’l Longshore & Warehouse Union*, 905 F.Supp.2d 1198, 1212-14 (D. Ore. 2012).

Respondents instead attempt to manufacture ambiguities within the inconvenient Lease document, which clearly reserves the reefer work for the Port electricians. Despite the plain language of the Lease document, Respondent would have the Board find that it is somehow “vague” and that the testimony of the Port’s Chief Commercial Officer Nathaniel Ruda required corroboration regarding its genesis and purpose. Yet Respondent failed to call a single witness to contradict Ruda, a direct participant in the Lease negotiations, who unequivocally testified that the relevant Lease provisions were designed by the Port to reserve the disputed work for the Port electricians and that, in practice, it did exactly that. By suggesting that Respondent is entitled to an inference that Ruda would have been contradicted by witnesses Respondent itself failed to call, Respondents essentially demand that the Board disregard the ALJ’s decision to credit Ruda’s testimony; this the Board should not do. *See Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd* 188 F.2d 362 (3d Cir. 1951) (Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless clear preponderance of evidence dictates they are incorrect).

**B. The ALJ Properly Rejected Respondents’ Arguments that ICTSI and the Carriers are Primary Employers Under the Act (Exceptions 15-18)**

Respondents have acknowledged that, as the Board and the Supreme Court have explicitly held, no valid work preservation object may be found where a union’s conduct is aimed at an employer that lacks the ability to assign the work in question. (Resp. Br. at 20; *National Woodwork*, 386 U.S. at 644-45; *Enterprise Ass’n*, 429 U.S. 520-21) As such, Respondents’ exceptions necessarily fail in the absence of a finding that the carriers who call on the Port are in fact the primary employers of the Port

electricians solely by virtue of their physical ownership of the containers. The carriers' ownership interest in the containers on which Respondents' members wish to perform work, Respondents would have the Board find, effectively "enmeshes" them in any dispute over work physically involving such containers, regardless of whether they, in fact, have the power to assign such work to Respondents' members.

The ALJ properly rejected this fantastic iteration of the Board's "work preservation" test (discussed in detail, *infra*), as should the Board. As a preliminary matter, Respondents' position would have the Board ignore the credible and unrebutted record evidence that the carriers have no ability to resolve Respondents' dispute except by exerting pressure on ICTSI (which, in turn, can do no more than breach its Lease with the Port). In this regard, the ALJ properly found that there is no evidence of the carriers exercising actual, direct control over the performance of the disputed reefer work itself, and further that the carriers had never, prior to the commencement of Respondents' unlawful secondary conduct, ever announced their expectations regarding the performance of such work. These findings were amply supported by the record evidence. Indeed, according to Respondents' own PMA witnesses, neither the daily work performance of the Port electricians or the labor relations strategy that is applied to them is of any concern to PMA, and, in order to effect the *assignment* of reefer work at Terminal 6, PMA's only option is to attempt to convince ICTSI to effectuate such a change. (Tr. 1281, 1322, 2050-53)

The record reveals that, indeed, Respondents have not – and cannot – identify the means by which any single carrier – or ICTSI – may itself directly control the

assignment of the disputed work to a particular group of employees.<sup>17</sup> Even if they were supported by the record evidence, which they most certainly are not, Respondents' notions fail when held to basic scrutiny. According to Respondents, the only reason that the disputed work exists is because the carriers, "serving as ICTSI's customers," own containers that need to be serviced. (Resp. Br. at 33) In Respondents' words, "[s]imply put, the disputed reefer work would not exist *but for* the carriers' releasing their containers at Terminal 6 pursuant to the [Stevedore Service Agreements]." (Resp. Br. at 37) But, as the ALJ correctly noted, the Stevedore Service Agreements on their face fail to grant the carriers any control over work assignment; moreover, it could be argued that the carriers' total lack of control is evidenced by their negotiation of language protecting them from being overcharged in the event that the work *were* transferred to Respondents' members.

Essentially, Respondents' bare-bones "customer equals primary" argument would strip the Act's secondary boycott protections from every customer who maintains physical ownership over an object that is the subject of work sought by a union.<sup>18</sup> Indeed, as the Ninth Circuit Court of Appeals ably pointed out in upholding the First Injunction, the fact that the carriers technically either own or lease the reefer containers *on which the Port electricians perform work*, in no way bears on the fact that they have no authority to direct the assignment of the work to a different group of employees. As the Court of Appeals stated:

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<sup>17</sup> Insofar as ICTSI is concerned, Respondents appear double down on their argument by blithely claiming (*sans* explanation) that, because the carriers have the right to control the reefer work, ICTSI does as well. (Resp. Br. at 27; arguing that ALJ erred by not "correctly recognizing that the PMA carriers, and thereby, ICTSI as well, have right of control over the reefer work").

<sup>18</sup> What ILWU argues is the equivalent of claiming that a restaurant's customers are not neutrals in a dispute over the restaurant's assignment of waitressing work to a particular work group; in fact, the carriers in this case may no more "serve themselves" than could such diners.

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.

See *Hooks ex rel. NLRB v. Int'l Longshore & Warehouse Union*, 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)).

Respondents claim, in this regard, that the Supreme Court and the Board have irrevocably granted "primary employer" status to the PMA member carriers in any dispute with the Respondent ILWU. But the cases cited by Respondent, *NLRB v. Int'l Longshoremen's Ass'n*, 473 U.S. 61 (1985) ("*ILA II*") and *International Longshoremen's Union (California Cartage Company)*, 278 NLRB 220 (1986) ("*California Cartage*"), do no such thing. In fact, what each of those cases considered was a situation in which PMA carriers *had been demonstrated to control the assignment of the work in question*, such that they were deemed no longer in need of the Act's secondary boycott protections.

In the *California Cartage* case, the Board considered the PMA carriers agreement with the ILWU to either "establish their own container freight stations" or use contractors employing longshore labor to perform the work of "stuffing" and "unstuffing" of containers, which the Supreme Court had already found to be the "functional equivalent" of longshore work lost to mechanization. See *id.* at 221. Critically, and unlike the situation here, the carriers were free, once their ship had arrived at the terminal in question, to assign the stuffing and unstuffing task (which was performed off the dock) however they chose. *Id.* at 223. The *ILA II* case likewise involved "stuffing" and "unstuffing" of containers, work found to have been assigned by the carriers in that

case to their own employees. See *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)*, 266 NLRB 230, 232 (1983).

A very different situation is presented in this case; the carriers may call upon T6, which comes with an IBEW-represented workforce performing the dockside reefer work, or they may cease doing business with the Port. Notably, in connection with the First Injunction, both the District Court judge and the Court of Appeals for the Ninth Circuit explicitly rejected Respondents' attempt to rely on the "stuffing" and "unstuffing" cases, noting their factual dissimilarity on the issue of the carriers' control. See *Hooks ex rel. NLRB*, 905 F. Supp.2d at 1211; *Hooks ex rel. NLRB*, 2013 U.S. App. LEXIS 19969, slip op. at \* 9, n.2 (9th Cir. Sep. 30, 2013). Nothing in Respondents' exceptions warrants a different conclusion by the Board.

**C. The ALJ Properly Found that the Port Has Never Relinquished Its Control over the Disputed Work (Exceptions 6-12, 14)**

The ALJ properly found that, "[n]o evidence shows that the Port ever relinquished its control at anytime to anyone over the historical practice of using Port electricians to perform the dockside reefer work." (ALJD 43:41-43; Tr. 996-997; 1011) Respondents' have a ready answer for this inconvenient reality: citing no legal authority whatsoever. Respondents claim that the Port somehow ceded its control over the work in connection with its negotiation of and agreement to the Lease with ICTSI. Therefore, Respondents argue, their goal could never have been to pressure ICTSI and the carriers to cause the Port to relinquish such control. (ALJD 46:41-47; Resp. Br. at 27-34)

Respondents' formulation requires the assumption, as a legal matter, that the carriers' container ownership carries with it an implicit right of consent to the Port's

reservation of control over the reefer work in its Lease with ICTSI. The fact that the carriers did not, in fact, give such consent, according to Respondents, proves that, when the Port entered into the Lease and assigned the carrier contracts to ICTSI, it “relinquished control and responsibility over all the services” it had provided to the carriers. (Resp. Br. at 31) Since it lost control over the reefer work via the assignment, Respondents argue, the Port had nothing to “reserve” under the Lease document and the carriers’ original “control” must have “reverted” back to them. (Resp. Br. at 31-34)

Respondents’ arguments are naïve at best. As a preliminary matter, to accept Respondents’ tortured analysis would require a finding that, in fact, the reservation language in the contract amounts to mere surplusage as far as the disputed work is concerned, and even more bizarrely, that the Port, after it “relinquished control and responsibility” regarding the reefer work, gratuitously continued to direct this work on a day-to-day basis and compensate the Port electricians for performing it. In any event, Respondents’ construct – that a lease explicitly reserving the disputed work for Port employees in fact does not do so, because this reservation was not “blessed” by the carriers – in no way alters the undisputed evidence that these same carriers are in fact customers with no avenue to influence the disputed work assignment except by ceasing doing business with the Port. As Respondents put it, their “ultimate and plenary control over the reefer work” lays in their ability to “bypass the Port of Portland altogether.” (Resp. Br. at 34)

Indeed, as noted by the ALJ, both the documentary evidence and the parties’ conduct demonstrate that the carriers are validly considered neutrals with no lawful means of affecting the assignment of the disputed work. As the ALJ notes, prior to

Respondents' threats and coercion of the carriers, they never made any attempt to influence which group of employees performed the disputed work, nor did they ever attempt to have any influence over how that work was performed. Moreover, Respondents' official Sundet clearly knew who to talk to once he had failed to "persuade" ICTSI to breach its Lease: he went not to the carriers, but to the Port, telling ICTSI's management that he would get *the Port's* permission for ICTSI to "prefer" Local 8. (ALJD 23)

Likewise, as noted by the ALJ, Respondents at hearing failed to adduce any credible evidence that ICTSI lost its status as a neutral. (ALJD 45:24-32) Indeed, ICTSI's commitment to the Port preceded the creation of its collective bargaining obligation to Respondents, and, as Ruda credibly testified, the Port, not ICTSI, reserved the reefer work for the Port electricians in early drafts of the Lease well before it engaged in direct negotiations with ICTSI. (ALJD 45:27-32) Thus, in the absence of any evidence that ICTSI "deliberately hatched" the Lease provisions in question, the ALJ correctly declined to engage in the sort of guesswork<sup>19</sup> the Board has declared inappropriate in evaluating whether an ostensible neutral has lost the protection of the Act. (ALJD 45:30-32. *See also Electrical Workers, Local 501 (Atlas Construction Co.)*, 216 NLRB 417 (1975); *Painters District Council No. 20 (Uni-Coat Spray Painting)*, 185 NLRB 930 (1970)).

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<sup>19</sup> Indeed, to find otherwise would require positing an extra-record version of events in which ICTSI deliberately agreed to permit the Port to maintain control over the reefer work to preemptively "divest" Respondents' members of a relatively small amount of work (which they had never actually performed) in order to engineer a labor dispute two years later that would threaten to destroy ICTSI's business at T6.

**D. The ALJ Properly Found that Respondents Failed to Raise a Valid Work Preservation Defense (Exceptions 4, 5)**

Respondents at hearing made no effort to prove that the T6 reefer work has ever been performed by their members. Instead, Respondents posit that, as a matter of law, there is a single, coast-wise ILWU bargaining unit that became entitled to the work when PMA agreed that it should be so. Indeed, Respondents claim that they are entitled to appropriate work from rival unions by exacting pressure on whomever they choose by contractually “agreeing” with their bargaining partner, the PMA, that the T6 reefer work constitutes a fair compensation for looming advances in technology in the industry. Thus, even though the performance of the disputed work by the Port electricians involved no *diminution* of traditionally performed PCLCD unit work, Respondents ask the Board to find that they are not, conversely, “reach[ing] out to monopolize jobs or acquire new job tasks when [ILWU] own jobs are not threatened.” *Nat’l Woodwork*, 386 NLRB at 630-31.

The problem with applying this reasoning to the facts of this case is obvious: here, Respondents’ conduct is not aimed to prevent the depletion of bargaining unit work no such depletion is threatened, or even possible, as it was not their work to begin with. *Longshoremen Local 1291 (Holt Cargo Systems)*, 309 NLRB 1250 (1992) (finding § 8(b)(4)(ii)(B) violation and rejects work preservation defense where union failed to show that targeted employers’ unit employees had ever performed the work sought); *Service Employees Local 32B-32J (Nevins Realty Corp.)*, 313 NLRB at 399-400 (same). Compare *Machinists District 190 Local 1414 (SSA Terminals, LLC)*, 344 NLRB 1018 (2005), *aff’d* 253 Fed. Appx. 625 (9th Cir. 2007) (where ILWU demonstrated that its unit

employees had historically performed reefer work for targeted employer, its grievance had a valid work preservation objective and the Board quashed the § 10(k) notice); *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818 (1986), *aff'd* 827 F.2d 581 (9th Cir. 1987) (same); *Bermuda Container Line, Ltd v. Int'l Longshoremen's Union*, 192 F.3d 250 (2d Cir. 1999) (finding lawful work preservation objective where neutral's proposed relocation threatened to "deplete the number of longshore jobs available to ILA workers" and "directly hurt existing members of the bargaining unit"). Moreover, unlike the famed "containerization" cases on which Respondents are expected to rely, this case involves no technological innovation that requires a deeper analysis of the "work traditionally performed" element. *See, e.g., ILA I; ILA II.*

Ultimately, Respondents' work preservation defense is hinged entirely on their extraordinary interpretation of the decisions by the Supreme Court and the Board, which they claim grant Respondents the right to claim work admittedly never performed by their members and not within the control of the entities targeted by Respondents (ICTSI and the PMA), provided that Respondents have gained the agreement of the PMA to do so. Respondents would thus have the Board adulterate the fundamental principle that multi-employer bargaining requires consent. In Respondents' universe, the Port simply does not exist: "it is simply a third party that is completely excluded from the contractual rights and obligations arising from the PCLCD." (Resp. Br. at 41) This conceit was laid bare by the ALJ. (See ALJD 42, *citing Sheet Metal Workers Local 27*, 321 NLRB 540 (1996))

Specifically, the ALJ found that Respondents' alleged "agreement" is an invalid basis for pressuring the PMA to, in turn, pressure the Port to assign such work

accordingly. As the ALJ found, there is simply “no valid contractual underpinning” for such a claim, since it is entirely premised on a process that Respondent ILWU and PMA “invented at the bargaining table” without the Port’s participation or consent. (ALJD 42:21-37, *citing Greenhoot, Inc.*, 205 NLRB 250 (1973)) The Board should likewise soundly reject Respondents’ invitation to upend the fine balance of the Board’s decades-old protection of neutrals with no right to assign disputed work by allowing Respondents to “conquer” any new work they desire simply by convincing their collective bargaining partner that this would be in their mutual best interest.

**E. The ALJ Properly Found that Local 40 Engaged in Unlawful Conduct (Exception 24)**

Without excepting to any particular factual finding by the ALJ, Respondents claim that the ALJ improperly found Local 40 guilty of violating the Act. (See Resp. Br. at 53) According to Respondents, “there is absolutely no evidence in the record establishing that Local 40, its members, or its agents ever threatened or engaged in any job actions or slowdowns or otherwise disrupted ICTSI’s operations at Terminal 6.” (*Id.*)

As noted above, the ALJ in fact made numerous factual findings, each well supported by the record evidence, regarding Local 40’s role in the slowdowns at T6, including specific reference to its “coordinated effort” with Local 8 to shut down the terminal’s operations. (See ALJD 28-30) In this regard, Respondents fail to dispute the ALJ’s specific factual finding that, on June 5, 2012, “officials of Local 40 became overtly involved in supporting Local 8’s efforts to secure the dockside reefer work by job actions” (ALJD 29:36-37; see Tr. 1565, 1889), and that Local 40 officials and members attended a joint meeting with the International admittedly held for the purpose of supporting “Local 8’s efforts to obtain the T6 dockside reefer work.” (ALJD 34:28-35;

see Tr. 1550-51, 1555, 1887, 1898-99) Based on this clear record evidence, Respondents' hollow effort to avoid liability for Local 40 should be firmly rejected.

**F. The ALJ Properly Denied Respondents' Effort to Re-open the Record (Exceptions 27, 28)**

On June 25, 2013, nearly a full year after the close of the record in this case, Respondents submitted four documents to the ALJ, arguing that they should be received as new, material evidence. Counsel for the General Counsel and Charging Parties opposed Respondents' motion, and, on July 18, 2013, the ALJ denied it, based on the Board's newly discovered evidence rule. Respondents did not file a special appeal to the Board regarding this ruling, but now argue that these extra-record documents should now be considered by the Board.

Under these circumstances, the Board should reject Respondents' belated attempt to appeal the ALJ's decision denying Respondents' motion to re-open. In any event, to the extent that the Board treats Respondents' exceptions based on this extra-record evidence as a motion to re-open the record before the Board, the Board should deny such motion on the ground that Respondents have failed to demonstrate that the documents in question are newly discovered and previously unavailable and that they would dictate a different result in this case. See *Transit Management of Southeast Louisiana, Inc.*, 331 NLRB No. 30 (2000) (citing *Novel Knit Inc.*, 299 NLRB 58, n.2 (1990) and § 102.48(d)(1) of the Board's Rules and Regulations).

**G. The Board Should Reject Respondents' Belated Deferral Argument Not Raised Before the ALJ**

Respondents take issue with the ALJ's failure to "defer" to a PMA arbitrator on the issue of whether Local 8 mechanics engaged in an orchestrated self-assignment

action on June 6, 2012. But Respondents have not (and cannot) point the Board to the where this issue was properly raised before the ALJ. Under such circumstances, its deferral argument is untimely. See *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *MacDonald Engineering Co.*, 202 NLRB 748 (1973). In any event, Respondents' deferral argument runs counter to the Board's well established policy of refusing deferral in secondary boycott cases such as this one. See, e.g., *Iron Workers Pacific Northwest (Hoffman Construction)*, 292 NLRB 562, 577-78 (1989), *enf'd* 913 F.2d 1470 (9th Cir. 1990) (citations omitted).

#### **H. The ALJ Properly Rejected Respondents' Arguments Based on the *Noel Canning* Decision**

Respondents brief in support of exceptions includes a single-paragraph argument, not identified in Respondents' exceptions, nor raised as an affirmative defense or argued to the Administrative Law Judge, that recent decision from the Court of Appeals for the District of Columbia and the Third Circuit dictate that the Board, the General Counsel and the ALJ lack statutory authority to adjudicate cases because it lacked a proper quorum of Board members based on constitutionally invalid recess appointments of certain Board members. (See Resp. Br. at 46, *citing Noel Canning v NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted* 81 U.S.L.W. 3695 (U.S. Jun. 24, 2013) (No. 12-1281); *NLRB v. New Vista Nursing & Rehabilitation*, 2013 WL 2099742, - - F.3d - - (3d Cir. May 16, 2013).

However, as the Board stated most recently in *Universal Lubricants, LLC*, 359 NLRB No. 157 (Jul. 16, 2013), this question remains in litigation and at least three other courts of appeals have disagreed with the decision of the D.C. Circuit (see *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (*en banc*), *cert. denied* 544 U.S. 942 (2005);

*U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (*en banc*); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). As the Board has stated, “[p]ending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act.” See *Sub-Acute Rehabilitation Center at Kearny, LLC d/b/a Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 n.1 (2013). Accordingly, Respondents’ arguments in this regard should be rejected.

## VII. CONCLUSION

Hamstrung by the record facts, Respondents’ position is balanced atop a prolific, if unstable, array of legal arguments aimed to distract from the record evidence that Respondents aimed to claim work for employees who have not previously performed it and targeted entities (ICTSI and the carriers) who had no power to assign it. Based on the foregoing, and the entire record evidence, Counsel for the General Counsel respectfully submits that the ALJ properly found that Respondents violated §§ 8(b)(4)(i) and (ii)(B) of the Act as set forth in the ALJD, and Respondents’ exceptions should be rejected, and the Board should affirm and adopt the ALJ’s findings of fact, conclusions of law, and recommended Order. It is further requested that the Board order whatever other additional relief it deems just and necessary to remedy Respondents’ numerous violations of the Act.

DATED AT Seattle, Washington this 24<sup>th</sup> day of February, 2014.



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of **Counsel for the General Counsel's Answering Brief to Respondents' Exceptions Regarding § 8(b)(4)(B) Allegations** was served on the 24<sup>th</sup> day of February, 2014, on the following parties:

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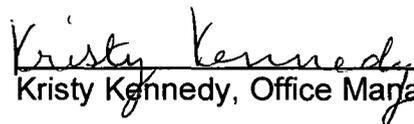
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