UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

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

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INTRODUCTION

Respondents ILWU International and its Locals 8 and 40 (collectively, "Respondents" or "ILWU") submit the following Reply Brief in response to the Answering Briefs filed by the General Counsel, Charging Party ICTSI Oregon, Inc. ("ICTSI"), and Charging Party Port of Portland ("Port") (collectively, the "Answering Parties") and in support of Respondents' Exceptions to the Administrative Law Judge's Decision ("ALJD"), dated August 28, 2013, including exceptions to his underlying denial of Respondents' motion to reopen the record.[1]

As a preliminary matter, Respondents request that the Board temporarily defer ruling on this matter in order to consolidate or have coordinated review of this action with *International Longshore and Warehouse Union (ICTSI Oregon, Inc.)*, Case No. 19-CC-100903, *et al.*, which is currently pending before Administrative Law Judge Jeffrey D. Wedekind. The hearing in the latter case closed on December 13, 2013 and post-hearing briefs are being filed on March 13, 2014. Both matters concern claims brought by the same Charging Party (ICTSI) against the same Respondents alleging that Respondents engaged in unlawful secondary conduct in order to compel ICTSI and others to assign dockside reefer work at Terminal 6 to ILWU employees. Since both cases involve identical issues of fact and law regarding the right of control and the Union's work preservation objective as applied to the disputed reefer work, consolidation would serve administrative efficiency and economy and avoid the risk of inconsistent rulings.

Moreover, consolidation or coordinated review of the Schmidt and Wedekind cases is necessary for proper consideration of Respondents' exceptions to ALJ Schmidt's denial of our motion to reopen; that motion sought to reopen the record to elicit and admit "new evidence" concerning the PMA carriers' and ICTSI's actual excersice of "right of control" over the disputed reefer work, with the Port affirmatively removing itself from such matters because of its prior transfer to ICTSI of its Terminal Use stevedore services agreements with the carriers. As shown in Respondents' accompanying Motion to Take Administrative Notice, filed herewith,

[1] On February 20, 2014, the Board granted General Counsel's motion to sever and hold in abeyance the § 8(b)(4)(D) allegations. Accordingly, this brief only addresses the § 8(b)(4)(B) allegations.

such "new evidence" rejected by ALJ Schmidt was months later admitted into the record in the closely related case in *International Longshore and Warehouse Union (ICTSI Oregon, Inc.)*, Case No. 19-CC-100903, et al. Since the Board has already ordered abeyance of the Section 8(b) (4) (D) allegations of the instant matter, such consolidation or coordinated review would not unduly delay adjudication and would promote administrative economy by allowing all issues considered at the same time.

As to the merits of Respondents' Exceptions, the central issue in this case is whether Respondents were engaged in primary or secondary activity. Respondents have consistently maintained that they were enforcing a lawful work preservation agreement, which constitutes primary activity protected by the Act. *See NLRB v. Int'l Longshoremen's Ass'n ("ILA II")*, 473 U.S. 61, 81-82 (1985). The Union's avowed work preservation agreement is set forth in the Maintenance and Repair ("M&R") provisions in §1.7 of the ILWU-PMA collective bargaining agreement, known as the Pacific Coast Longshore Contract Document ("PCLCD"). Nonetheless, the Answering Briefs filed by the General Counsel, ICTSI, and the Port focus almost entirely on the Port's CBA with the District Council of Trade Unions ("DCTU"), the Port's employment relationship with its own employees, the Port's lease agreement with ICTSI, and the Port's conduct before and after the execution of that lease. This undue emphasis on the Port's contracts and the Port's behavior repeats a fundamental misconception of the work preservation doctrine and serves to divert attention away from the material issues in this case. Since Respondents are the ones charged with misconduct and asserting a work preservation motive, it is Respondents' CBA, Respondent's objectives, and Respondents' bargaining unit work that should be the focus of the Board's inquiry. The impact that the ILWU's work preservation agreement has on the Port and its employees has absolutely no bearing on the merits of this case. *ILA II*, 473 U.S. at 78 ("extra-unit effects, no matter how servere, are irrelevant to the [work preservation] analysis"); *NLRB v. Local 825, Int'l Union of Operating Eng'rs*, 400 U.S. 297, 303 (1971) ("primary activity is protected even though it may seriously affect neutral

third parties"). Accordingly, the Board should reject the Answering Parties' deficient attempts to show an unlawful secondary objective based on the incidental effects that Respondents' M&R agreement has on the Port.

DISCUSSION

I. The ILWU Had A Valid Work Preservation Objective As To Container Maintenance In General and the Reefer Work in Particular.

Answering Parties assert that lawful work preservation requires a finding that ILWU longshoremen had performed the disputed reefer work specifically at Terminal 6 as opposed to all the other terminals and ports where longshoremen perform this work. This echoes the ALJ's finding that "Respondents lack a valid work preservation claim with respect to the dockside reefer work because it has never been a function performed by the employees they represent at T6." (ALJD 42:16-19) Such analysis however has been rejected by the Supreme Court and the D.C. Circuit -- "the fact that longshoremen have never previously performed work at the exact same location does not prevent the work sought from being the functional equivalent of work the longshoremen have performed." *California Cartage Co. v. NLRB*, 822 F.2d 1203, 1207 (D.C. Cir. 1987); *ILA I*, 447 U.S. at 508-509; *see Bermuda Container Line LTD v. ILA*, 192 F.3d 250, 257 (2d Cir. 1999) (holding that work performed at various ports may lawfully be preserved at covered ports where longshoremen have not previously performed the work). Answering Parties' challenge to this legal principle arises from a refusal to accept the ILWU-PMA bargaining unit as a single, integrated, coastwise unit consisting of a single coastwise workforce employed by multiple employers. *See, e.g., Cal Cartage v. NLRB*, 822 F.2d at 1209 (such arguments "are at bottom a challenge to the bargaining unit determination made by the Board in 1938. These contentions, however, were rejected by the Board in its 1974 decision [208 NLRB 994] and were not reasserted before the Board on remand by any party."); *ILWU (Cal Cartage)*, 208 NLRB at 997-998 ("We reject the General Counsel's argument that members of PMA who do not directly employ longshoremen are neutral, secondary employers entitled to the protection

of Section 8(b) (4) of the Act. The ILWU's unit of longshoremen was found appropriate by the Board in 1938. At that time the Board recognized and accepted the fact that not all members of the Waterfront Associations, predecessors of PMA, directly employed longshoremen. Nevertheless, the Board was cognizant then, as it is now, that employers in the shipping industry on the Pacific coast have a direct and vital interest in the terms and conditions of employment for longshoremen"). Longshore bargaining units are "defined not just in terms of the employees of one employer, but in terms of employees doing work for multiple employers bound by the terms of [the PCLCD] and functioning collectively as the primary employer." *Am. President Lines, Ltd. v. ILWU, Alaska Longshore Div., Unit 60*, ---F. Supp. 2d---, 2014 WL 608737, at *7 (D. Alaska Feb. 18, 2014) (holding lawful under section 8(e) work preservation agreement for all longshoremen in statewide Alaska bargaining unit even where disputed work may not have been performed by specific employer at specific location).

Answering Parties further claim that the efforts to enforce section 1.7 container maintenance provisions as to the reefer work constitutes unlawful "work acquisition" based on a false reading of the *ILA* and *Cal Cartage* cases. In particular, they assert that those cases did not involve the present situation where work, done for years by others, was shifted to longshoremen under work preservation agreements of the past, requiring the possible layoff of non-longshore workers. A cursory reading of these cases, however, discloses that the Board and courts had explicitly upheld the *en masse* shifting to longshoremen, in all ports coastwise, of stuffing/unstuffing containers previously performed by Teamsters and others at freight consolidating stations and warehouses operated outside the longshore bargaining units. *See, e.g., ILWU (Cal Cartage),* 278 NLRB 220, 221 (1986) (noting that the lawful work preservation agreements "would require shipping companies to cease subcontracting container stuffing work to employers who did not employ ILWU members and to establish, if necessary, their own container freight stations on or adjacent to the docks within the work jurisdiction of the ILWU."); *ILA v. NLRB,* 613 F.2d 890, 908-909 (D.C. Cir. 1979) (J. Skelly Wright), *aff'd,* 447

U.S. 490 (1980) ("*ILA I*") rejecting the argument that because "employees of consolidators and trucking companies with off-pier terminals did the work of stuffing and stripping containers away from the pier,…. for ILA labor to lay claim to this work amounted to work acquisition rather than to preservation of traditional ILA work").

Indeed, several Board cases have upheld other ILWU-PMA longshore work preservation agreements under which work related to containers, such as operation of container cranes, performed by others and never by longshoremen, was nonetheless transfered to longshoremen, which the Board not only upheld but enforced through Sec 10(k) awards.[2] Significantly, the Board directly rejected the argument made by Answering Parties that the shifting to longshoremen of work they had never previously done proved that the ILWU and PMA were unlawfully "using the automation concept of that contract as a device to conduct jurisdictional raids on Operating Engineers." *ILWU Local 10 (Howard Terminal)*, 147 NLRB at 361. *See also, ILWU Local 19 (Albin Stevedore Co.)*, 144 NLRB 1443, 1448-49 (1963) (holding that "the larger automation concord between Respondents (ILWU) and PMA far outweighed all other considerations"). In fact, the Board has even acknowledged the need and appropriateness in such situations for the PMA employers to train longshoremen in jobs they have never done but acquired through work preservation agreements with PMA. *E.g., Longshoremen ILWU Local No. 50*, 244 NLRB 275, 276 (1979) (noting that under the mechanization agreements, "the Employers are obligated to train longshoremen to perform the work properly and safely").

The longshore work preservation caselaw equally refutes Answering Parties' claim that the effect of depriving the Port and IBEW electricians of reefer work, which they have

[2] *See, e.g., ILWU Local 10 (Howard Terminal)*, 147 NLRB 359 (1964)(proceeding arose from ILWU Local 10 having "engaged in a work stoppage in order to force or require Howard to assign certain crane work to longshoremen or members of Respondents rather than to members of Local 3 [Operating Engineers]," (359) the latter who had been performing the crane work; the Board nevertheless assigned the work to ILWU as part of valid work preservation agreements; "certain of these agreements were occasioned because of the increasing use of mechanized equipment on the west coast waterfront to perform tasks which formerly had been done by individual workers" other than longshoremen. (360-361); the ILWU-PMA agreements eventually required that work performed by nonlongshoremen on "old equipment," be shifted to ILWU longshoremen even though they had not done this work before, and offering the incumbent crane operators to join the ILWU bargaining unit as registered longshoremen. (360-361).

performed since the advent of containerization in Portland, somehow proves an unlawful secondary objective. The DC Circuit in *ILA v. NLRB* admonished the Board not to confuse effects of work preservation with its object:

> Nowhere has it been established, or even intimated, that the ILA, perhaps with a view to organization, was attempting to focus its boycott on the labor relations of the trucking companies and the consolidators. Those employers were affected by the boycott, to be sure, as were their employees. But we must distinguish between the incidental effects of primary activity, on the one hand, and a secondary purpose on the other. The former are allowable under the national labor laws, and there has been no convincing showing by the NLRB that the latter exists. The challenged boycott unquestionably focused on the "labor relations of the contracting employer Vis-a-vis his own employees."

613 F.2d at 911-912. Accordingly, the court concluded – "Inescapably the effects of such agreements are felt upon employers (and their employees) other than the contracting employer. But those effects are incidental to the agreement with the contracting employer and not necessarily reflective of a secondary objective such as organizing the employees of the other affected employers." 613 F.2d at 903. Likewise, in *ILWU (Cal Cartage),* 278 NLRB 220, 221 and fn.14 (1986), the Board noted as a lawful effect that the work preservation agreements "would require shipping companies to cease subcontracting container stuffing work to employers who did not employ ILWU members and to establish, if necessary, their own container freight stations on or adjacent to the docks within the work jurisdiction of the ILWU," and rejecting that this constitutes an unlawful "union signatory clause" because it does not "exceed the legitimate interests of unit employees vis-à-vis their own employers" and finding that the work preservation effects constitute lawful "refusl-to-handle clauses." 278 NLRB 220, 221 and fn.14.

Answering Parties' characterization of the reefer work as falling outside longshore work flies in the face of the record evidence[3] and ALJ Schmidt's findings.[4] They also fail to

[3] The record establishes that reefer work has long been a part of the ILWU jurisdiction and performed by the ILWU bargaining unit coastwide. (Tr. 1443-44; Resp. Exs. 10, 11, 15-17)

[4] ALJ Schmidt described the reefer work as follow: "Yet this particular work task takes place smack in the middle of a complex stevedoring operation traditionally performed by longshore workers and marine clerks represented by ILWU local unions, an industrial labor organization concerned with technological advances that imperil the livelihood of their members." (ALJD at 5). "[T]his division of labor at T6 could not appear to be more ill-

distinguish reefer work from the container work previously held in *ILA, Cal Cartage* and other longshore cases, to be traditional or "functionally related" to longshore work. Answering Parties overlook the *ILA* mandate to assess "work patterns," rather than specific jobs. And as to "work patterns" arising from containerization, the longshore caselaw clearly holds that work functionally related to containerization, which continues to displace traditional break bulk longshore work, constitutes longshore work and are not limited to the specific types of work addressed therein. See, e.g., *ILA v. NLRB*, 613 F.2d at 910 ("Further, the very nature of containers belies any notion that they present work distinctly different from and unrelated to traditional longshoremen's work. …. The correspondence between the shift to containerized shipping and the sharp reduction in employment opportunities for longshoremen bears witness to the wisdom of these observations.") Maintenance and repair of containers and related equipment has long been recognized as "longshore work" under the Longshore and Harbor Workers Compensation Act.[5]

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conceived." (*Id*.) "Local 8's claim is grounded essentially on internal interpretations in recent years of provisions in the coastwise PMA/ILWU collective-bargaining agreement applicable to West Coast ports which recognize the dockside reefer work as traditional stevedoring work that must be performed by longshore workers with specific exceptions at several ports other than Portland. (ALJD at 6)

[5] See, *e.g.*, the holding and cases cited in *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp.*, 718 F.3d 384, 396 (5th Cir. 2013) (*en banc*)(concurrence, joined by seven members of the twelve judge majority)(holding that "container repair" work, falls under LHWCA, when in "the direct chain of unloading a ship" and where its nonperformance "would halt the entire loading process," relying on Supreme Court authority that workers who maintain and repair stevedore equipment perform "the type of duties that longshoremen perform." 718 F.3d at 396-97 (omitting citations and quotations). The courts have looked to LHWCA jurisprudence in determining whether particular work preservation claims in the longshore industry concern jobs involving traditional longshore "work patterns," which would be primary and lawful, or entirely unrelated, acquisitioned work, which would be secondary and unlawful. In *ILA v. NLRB*, 613 F.2d at 910 the D.C. Circuit found stuffing/unstuffing of containers to involve traditional longshore "work patterns" to make lawful a work preservation claim under the NLRA, partially based on determinations of traditional longshore work under the LHWCA, *citing, Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 53 (2d Cir. 1976), *aff'd sub nom. Ne. Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 269-70 (1977) (holding that Congress in its 1972 LWHCA Amendments expanded the definition of longshore work to include jobs created by containerization, explaining that "the container is a modern substitute for the hold of the vessel.")

Section 1.7 concerns solely maintenance and repair of containers, containerized equipment and new equipment from new technologies. Like the teamsters and freight consolidator employees in *ILA* and *Cal Cartage*, the IBEW electricians gained this work only as result of the signatory carriers' investments and introduction of containerization at the continuing expense and erosion of longshore jobs. It can't therefore be said that sec 1.7 assigns to ILWU work traditionally outside longshore jurisdiction and that belonged to IBEW before the advent of containerization. This is because maintenance and repair of containers, such as the reefer work itself, arose directly and exclusively from containerization itself. Thus, ILWU does not under Sec 1.7 "acquire" work from IBEW or other groups as to jobs that existed before containerization. See, *American Trucking Associations, Inc. v. NLRB*, 734 F.2d 966, 976 (4th Cir. 1984) (rejecting Board argument that "an otherwise valid work preservation agreement sheds its 'preservative' identity and assumes an 'acquisitive' one when applied 'at the expense of' workers whose jobs existed prior to the development of the new technology….")

Because of the present increase in job displacement from robotics, ILWU longshoremen simply are recapturing, under Section 1.7 of the PCLCA, this container servicing work, which is "functionally related" to traditional longshore work, that arose only because of the advent of containerization rather than electrician work IBEW members performed before such technology. The M&R provisions merely implement further, in response to the new technological challenges of robotics, the original and continuing purpose of the historic series of longshore work preservation agreements "to allow the employers to introduce new machinery while preserving the Longshoremen's right to fill all available jobs." *NLRB v. ILWU Local 50*, 504 F.2d 1209, 1216 (9th Cir. 1974) (rejecting the Board's improperly narrow view of longshore work).

Answering Parties seek to establish the absence of a valid work preservation objective of ILWU by building an argument of valid work preservation objectives of the IBEW electricians and the Port. Such argument uses the very same approach rejected by the Supreme Court in *ILA I* by "focus[ing] on the work done by the employees of the charging part[y]," —dockside reefer work at Terminal 6—and arguing that the ILWU is trying to acquire work historically performed by another union. *ILA I*, 447 U.S. at 507. This approach "would have been entirely appropriate in considering an agreement to preserve the work of [the Port's] employees, but it misses the point when applied to judge this contract between [ILWU] and [PMA]." *See id.* at 508. Moreover, "a dispute does not lose its character as a work preservation dispute simply because more than one union may have a work preservation claim to the same work." *Int'l. Ass'n of Machinists, District Lodge 190, Local Lodge 1414 (SSA Terminal LLC),* 344 NLRB 1018, 1020 (2005).

ICTSI claims that the *ILA* and *Bermuda Container* cases are distinguishable because those cases involved agreements reached to preserve for union members traditional longshore work that was lost because of technological innovation. (ICTSI Br. at 36-38) However, this argument ignores the express language in the PCLCD stating that the parties entered the M&R agreement to "offset the introduction of new technologies and robotics that will necessarily displace/erode traditional longshore work and workers." (Resp. Ex. 1, pp. 218-222; Tr. 1984) Additionally, ICTSI's unsupported assertion that such technological changes have not yet come to pass or that jobs have not been lost is patently false. Coast Committeemean Leal Sundet testified about how the nature of longshore work was changing with the introduction of robotics and that at least one terminal operator was putting a fully robotic operation into place. (Tr. 1576, 1613)

In any event, there is no authority for the proposition that a union must wait until after jobs have been lost at the hands of technology before entering an enforceable work preservation agreement. In fact, the *ILA* and *Cal Cartage* cases hold just the opposite. *ILWU (Cal Cartage)*

278 NLRB at 224. ("We find that the ILWU was not precluded from negotiating the return to the docks of its traditional and historical work. In fact, the ILWU's manner of dealing with containerization illustrates the fact that the impact of new technology can often only be assessed over the course of time. During this time the parties may adopt alternative measures as part of their continuing effort to reach a satisfactory solution. We find this to be the case here."); Cal Cartage v. NLRB, 822 F.2d at 1208 ("The courts and Board recognize the appropriateness and practical necessity of renegotiating adjustments in the longshore mechanization agreements in the face of ongoing new technologies….In any event, the Board held, the M & M Agreement was not intended to fix for all time the rights of the signatories to deal with the economic consequences of containerization. Rather, upon expiration of the M & M Agreement, the parties were free to reassess the impact of changing technology and adopt a new approach."); *ILA v. NLRB*, 613 F.2d at fn 178 ("We break no new ground when we characterize collective bargaining as 'a constant and unending dialogue of powers.' [cite omitted]. As in any dialogue, the most appropriate response cannot always be framed instantaneously. Rather, ideas generally develop over time; the best ideas may indeed require the longest gestation periods. Be that as it may, the crucial point here is that the dialogue over how best to assimilate containerization and, more particularly, the work of stuffing and stripping containers in the port area into traditional longshore work patterns has never ceased.")

Answering Parties assert work preservation provisions in sec 1.7 based on nascent robotics comes too soon. However, this factor was wholly rejected in *Cal Cartage* where it was noted, "At the time the M & M Agreement was signed, only one steamship serving the West Coast had been fully converted to carry containers. During the subsequent decade, containers swept the industry." *Cal Cartage v. NLRB*, 822 F.2d 1203, 1206 (DC Cir. 1987). See also, the circuit court decision in *ILA v. NLRB*, noting that at the time of the first work preservation agreements in 1959, "containerization had not yet become widespread in New York," and "the first fully containerized vessel was not introduced into the busy North Atlantic trade route until

1967. It was nevertheless thought necessary by the parties in 1959 to achieve some level of agreement on how containerized shipping would be handled." 613 F.2d at 896.

According to ICTSI, since the Port electricians have always performed dockside reefer work at Terminal 6, it cannot be the case that technological innovation has changed the method of doing the disputed work. This argument once again conflates the work done by the employees of the charging party (dockside reefer work at Terminal 6) with the work sought to be preserved by the ILWU (maintenance and repair work on the PMA carriers' containers). ICTSI's assertion also rests on the false premise that longshore jobs will not be displaced at Terminal 6 unless technological innovation occurs specifically at Terminal 6. As explained in Respondents' opening brief, increased mechanization at other terminals will displace jobs in the Port of Portland and elsewhere because cargo will be diverted to the more efficient terminals. (Resp Br. at 23-24) The impact of robotics and job-killing technologies in one port or terminal also harms the work opportunity for the entire coastwise unit given that longshoremen regularly travel and transfer up and down the West Coast. See, Resp. Ex. 1, Supplements I, II, and III at pp. 160-177 (providing for coastwise registration, travel, and transfer of longshoremen); Marzano, Tr. 2031:17-21, 2033:11-22 (explaining how "registration is coast wise" and the travel/transfer practices). Therefore, an agreement to preserve work for longshore workers in a coastwise bargaining unit may take into account the potential displacement of work caused by technological developments at other Ports. *See Bermuda Container Line LTD v. ILA*, 192 F.3d 250, 257 (2d Cir. 1999).

Here, it is undisputed that technology has already dramatically changed the method of doing traditional longshore work. *See California Cartage*, 822 F.3d at 1206. There is also evidence establishing that the PMA employers plan to introduce robotics at the terminals to displace traditional longshore jobs. (Tr. 1576-1578) Therefore, the pertinent inquiry for purposes of the work preservation doctrine is whether the negotiated M&R agreement reflects the Union's attempt to preserve for only its bargaining unit members work traditionally done by

them or "functionally related" work in light of this technological innovation. Importantly, however, the agreement need not "represent the most rational or efficient response to innovation" in order to be lawful. *ILA 1*, 447 U.S. at 511.

A careful examination of the relationship between traditional longshore work and the work sought to be preserved under the M&R agreement as well as the detrimental impact of technology on jobs available for ILWU longshoremen shows that the ILWU's objective consistently has been work preservation and not the satisfaction of union goals outside of the longshore unit.[7] Indeed, this "is not a case in which an avowed work preservation agreement 'seeks to claim work so different from that traditionally performed by the bargaining unit employees' that a secondary objective might be inferred." *Id.* Moreover, the fact that the preserved M&R work is the same or similar to work previously done by other employees—such as the Port electricians—has no bearing on whether the ILWU had a primary or secondary objective. *See ILA I*, 447 U.S. at 508-10 (recognizing that "the work of stuffing and stripping containers is similar to work previously done by both longshoremen and truckers" and holding that the work preservation doctrine would be "sapped of all life" if a union could not enforce an agreement to preserve work it had never previously performed). The record facts make clear that the Union is not trying to monopolize jobs but merely trying to preserve or recapture "functionally related" work to offset the loss of longshore jobs from robotics and new automation and the incidental effect on the Port and its employees does not render the Union's objective unlawful.

II. The Carriers Have the Right to Control the Assignment of Reefer Work On Its Own Containers

Under the second prong of the work preservation analysis, "the contracting employer

[7] Thus, there is no evidence that Respondents' action to enforce Sections 1.7 and subparts of the PCLCA as to the reefer work at Terminal 6 has either the intent or the effect of benefiting other ILWU bargaining units with other employers. Respondents are exclusively "selfish" in seeking to have the work preservation agreement, as to maintenance and repair work on containers, benefit only longshoremen in the single, coastwise bargaining unit and no others.

must have the power to give the employees the work in question—the so-called 'right of control' test." *ILA I*, 447 U.S. at 504. "The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work." *Id.*

The Supreme Court, D.C. Circuit, and the Board have all unambiguously held that carriers in the longshore industry have the right to control the assignment of work performed on their own containers for purposes of the work preservation doctrine. *See ILA I*, 447 U.S. 4at 512 n.27 (recognizing that carriers control the stuffing and stripping of cargo from their own containers); *ILA II*, 473 U.S. at 74 n.12 (noting with approval that "the ALJ, Board, and Courts of Appeals have unanimously concluded that the longshoremen's employers, marine shipping companies, have the 'right to control' container loading and unloading by virtue of their ownership or leasing control of the containers"); *ILA v. NLRB*, 613 F.2d 890, 913 (D. Cir. 1979) (stating that "[i]t is difficult to imagine a more forceful demonstration of control" than the shippers' "refus[al] to supply their containers to the truckers and consolidators" to ensure compliance with work preservation rules); *California Cartage*, 278 NLRB 220, 223 (1986) (holding that PMA carriers have plenary control over the handling of containers they own or lease in West Coast ports so as to render lawful their obligation under the PCLCD to assign stuffing/unstuffing work to the ILWU).[8] Nonetheless, ALJ Schmidt completely disregarded this established case law and found that the PMA carriers lack the right to control reefer work performed on their own containers.

Perhaps recognizing the glaring conflict between the ALJ's finding and the governing case law, the Answering Parties go to great lengths to mischaracterize the findings in the *ILA* and *Cal Cartage* cases of carrier "right of control" over the work done to their containers. Specifically, they assert, (GC Ans. Br at 30-31; ICTSI at 33), that the *ILA and Cal*

[8] Most recently, the District Court of Alaska also held that a carrier company had the right of control over the assignment of loading work based on evidence showing that the carrier "controls where [its] containers go, when they go…when they get there, and who takes the[m]." *Am. President Lines*, 2014 WL 608737, at *7.

Cartage cases found the carriers to have the "right of control" only because they had occasionally assigned the disputed, container stuffing and unstuffing work *to their own employees* (i.e., ILWU longshoremen) at various past times and location instead of releasing the containers to another company to perform that work with non-longshoremen.[9] This argument fails for a couple reasons.

First, while it it true that the carriers in the *ILA* and *Cal Cartage* cases had assigned the disputed container stuffing/unstuffing work to both ILWU longshoremen and third party employers and workforces, the same is true here. The undisputed evidence shows that the carriers had in the past released their containers to both ILWU longshoremen in the coastwise unit and to others, such as the Port and its IBEW electricians.

More to the point, the *ILA* and *Cal Cartage* decisions nowhere state that the carriers' assignments of the disputed work to both longshoremen and to others serves as the talisman for carrier "right of control." Rather, "the ALJ, Board, and Court of Appeals unanimously concluded that . . . [the carriers] have the 'right to control' container loading and unloading work *by virtue of their ownship or leasing control of the containers*," and because they could "prescribe the conditions under which [the containers] may be released to shippers, consolidaters, truckers, and warehousemen." *ILA II*, 473 U.S. 61, 74 n.12 (1985); *American Trucking Ass'n*, 734 F.2d 966, 978 (1984); *ILA* (*Dolphin Fowarding, Inc.)*, 266 NLRB at 234.

The Answering Parties' attempt to distinguish the *ILA* and *Cal Cartage* cases on the ground that here the PMA carriers "are not privileged to come onto the Port's property, or

[9] For example, the General Counsel asserts:

> Critically [in *Cal Cartage*], 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). (GC Br. at 30-31)

Evidently, the General Counsel (and the Charging Parties as well) misconstrue the identity of the carriers' "own employees." The cases clearly show them to be longshoremen. *E.g., ILWU (Cal Cartage)*, 208 NLRB at 997-998 (rejecting the claim that carriers do not directly employ longshoremen when employed by other PMA member companies); and *Cal Cartage v. NLRB*, 822 F.2d at 1209 (rejecting same); *see also, Bermuda Container Line LTD v. ILA*, 192 F.3d at 257 (finding carriers to be employers of ILA longshoremen based on the Supreme Court's *ILA I* and *ILA II*.

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." (ICTSI Br. at 34) The General Counsel similarly asserts that the carriers lack such control at Terminal 6 because that terminal "comes with an IBEW-represented workforce performing the dockside reefer work." (GC Br. at 31) These arguments lack merit for several reasons.

First, this constitutes a circular argument that rests on the very conclusion sought to be established. The Answering Parties essentially argue that the carriers lack the right to control the reefer work because they cannot tell the Port or ICTSI how to assign that work. However, the issue of whether the carriers can direct the assignment of reefer work is one of the primary disputes in this case. Therefore, their assertion that reefer work at Terminal 6 must necessarily be performed by IBEW workers cannot buttress their argument that the carriers lack the right of control.

Second, and more fundamentally, their argument once again miconstrues the work in controversy from the point of view of the Port and IBEW electricians rather than within the ILA-PMA bargaining unit and assumes, without record citation, that the carriers are somehow bound by the terms of the Port-ICTSI lease, purporting to require that the carriers' containers be serviced by Port electricians at Terminal 6. *ILA I* recognized that the mischaracterization of the work in controversy would necessarily affect the right-to-control analysis – "It is plain that the outcome of the right-to-control test will be significantly affected by whether the work in controversy is viewed as the stuffing and stripping done at the off-pier facilities of truckers and consolidators by their own employees or as, for example, the stuffing and stripping of certain types of cargo from containers owned or leased by, and in the possession and control of, the shipping companies."*Id.* at 512 n.27.

The carriers need not have the authority to come onto the Port's property and perform their own reefer work at Terminal 6 in order to demonstrate their right of control over the

assignment of reefer work performed on their own containers. Indeed, as discussed above, the authority to choose the location and conditions for the release of their containers demonstrates the very type of control that was present in both the *ILA* and *California Cartage* cases. E.g., *American Trucking*, 734 F.2d at 978, and *California Cartage*, 278 NLRB at 221-23.

The Board's 1987 appellate brief to the D.C. Circuit in the *Cal Cartage* case makes this point clear as to the overarching "right of control" held by carriers (a.k.a. steamship lines) over the assignment of work performed on their own containers:

> [S]teamship lines own or lease containers. A steamship line also directs shippers to deliver cargo to specified container freight stations where the cargo is stuffed into the steamship line's containers by the container freight station operator pursuant to a contract between the steamship line and the container freight station operator. In other words, the steamship lines provide the containers and decide which container freight station will do the container stuffing work. It is therefore undisputed that the steamship lines have the right of control over the assignment of the disputed container stuffing work.

Appellate Brief of NLRB at 55, filed in *California Cartage*, 822 F.2d 1203 (1987). (See Ex. "A" to Remar Declaration and Motion for Administrative Notice, filed herewith.) The instant record shows nothing has changed in this regard. Therefore, contrary to the General Counsel's asserton, the fact that the carriers own or lease the containers and can decide who takes possession of them is critical to the determination of whether they have the right to control assignment of reefer work on those containers.

The General Counsel mischaracterizes Respondents' argument as "customer equals primary" whereby the Act's secondary boycott protections would be stripped from every customer who maintains physical ownership over an object that is the subject of work sought by a union. (GC Br. at 29) According to the General Counsel, this is akin to treating restaurant customers as primary employers over disputes regarding the restaurant's assignment of waitressing work. (*Id.* at 29 n.18). Respondents, of course, do not assert anything close to "customer equals primary" argument.

Consequently, contrary to the General Counsel's contention, a finding that the carriers

constitute primary employers in this case would not necessitate a "customer equals primary" rule here or in other industries. Even so, the Port argues that it is the carriers' customers, not the carriers, who control the work at issue because they get to choose how the container work is ultimately performed. (Port Br. at 13) However, this argument was considered and rejected by the ALJ and the Board in the *ILA* case. *See ILA (Dolphin Forwarding, Inc.),* 266 NLRB at 261. In a decision adopted by the Board, the ALJ explained that "the choice exercised by shippers, importers, and their agents matures only after the technology is made available to them" and that options made available to those customers "are not of their own design, but have been made possible by the innovation action of the various employers bound to the Rules," namely the carriers. *Id.* Thus, the ILA's work preservation agreement was "a response to restrain otherwise discretionary action of the immediate contracting employers, who, through their development of and control over the job-eroding technology, are the primary offenders of the job intersts of their own employees." *Id.* Similarly, in the present case, "the [ILWU]'s effort to preserve their work through negotiated restrictions with respect to whom and under what conditions the container [and other] technology is to be released to outsiders relates directly to a labor relations problem within the primary work unit." *See id.* The M&R agreement serves to restrain the discretionary action of the carriers who develop new technology. Therefore, the fact that the carriers' true "customers," the owners of the cargo inside the containers, may prescribe the way in which their cargo is handled does not preclude a finding that Respondents were seeking only to regulate the relations between the Union and its primary employer.

The carriers' own position supports this conclusion. As set forth in detail in Respondents' opening brief, the undisputed record evidence shows that the carriers have consistently maintained that as signatories to the PCLCD, they are primary employers obligated to have ILWU labor perform reefer work on the containers that they lease or own. (Resp. Exs. 27-31; GC Exs. 4-5, 8-9) Hanjin told the Port in no uncertain terms that it was "REQUIRED to use ILWU labor to plug, unplug and monitor reefers at T6." (Resp. Ex. 27; GC Ex. 4) In fact, ALJ Schmidt's failure to

give this substantial weight is contrary to Board precedent.[11] The record also confirms that Hanjin actually bypassed the Port when it failed to comply with its directive. (Tr. 331) The Answering Parties have not identified anything in the record to refute this evidence, but ICTSI nonetheless make the unsupported assertion that the carriers' continued calls on Terminal 6 demonstrates that they lack any right to control. This argument finds no support in the record and should therefore be rejected. Besides, the carriers' use of terminal 6, after a self-imposed hiatus, simply reflects their overarching right to control the release and handling of their containers wherever and whenever they choose.

ICTSI's curious interpretation of the amendment to the Port's terminal use agreements with the carriers also should be rejected. According to ICTSI, the amendment to the Port's agreement with carrier Hapag Lloyd demonstrates the carrier's agreement to have the Port's electricians continue to perform reefer work after ICTSI began terminal operations. The plain text of the amendment belies this assertion. To the contrary, the amendment actually acknowledges that IBEW might not have jurisdiction over the reefer monitoring work and therefore provides for discounted rates to the carrier based on the possibility of reefer work shifting from IBEW to the ILWU. (Resp. Ex. 9; Resp Ex. 26, p. 2) More to the point, the amendment was made when the Port operated terminal 6, not ICTSI. Additionally, neither the ALJ nor the Answering Parties have proffered an explanation as to why the Port negotiated such agreements if, as they suggest, the Port possessed the right of control and the lease clearly barred reefer work from being performed by the

[11] The Board has on many occasions, in upholding the legality of similar ILWU-PMA work preservation arrangements, placed considerable evidentiary weight on the PMA Employers' insistence that the disputed work falls under traditional longshore work and under the control of PMA employers (i.e., the carriers who own and control the release and handling of their containers). *See, e.g., ILWU, Local 13 (California Cartage)*, 278 NLRB 220 (1986); *ILWU Local No. 50*, 244 NLRB 275(1979); *Vance, J. Duane (Longshoremen & Warehousemen, Local 19)*, 137 NLRB 119, 124-25 (1962) ("I am convinced that the work stoppages complained of were engaged in for the purpose of requiring PMA members to observe the work assignment provisions of the contract.... PMA employers, the General Counsel's "innocent bystanders," agree with Respondents in the latter's construction of the work assignment clauses and confess their duty to comply therewith."). In fact, the Ninth Circuit has reversed the Board, finding legal error, in not according sufficient weight to the PMA position and the PMA-ILWU joint interpretation of their contract. *NLRB v ILWU Local No. 50*, 504 F.2d 1209, 1215-17 (9th Cir. 1974)(remanding to Board § 8(b)(4)(D) decision where it failed to accord the governing weight warranted for PMA's support of ILWU interpretation of work assignment provisions as upheld by the longshore arbitrator).

ILWU bargaining unit.

The General Counsel's challenge to the carriers' and, through them, ICTIS's right of control over container work rests on the false claim that the terminal use/stevedore services agreements supposedly do not expressly grant carriers control over the assignment of reefer work. The agreements do indeed cover reefer work (see, e.g., R.# 6, Ex B thereto; TR. 371-73) as well as all other stevedore and container-related work that the carriers assign the terminal operator (once the Port, now ICTSI) to perform. In any case, the absence of express contract language granting such authority does not suggest the carriers lack control. Indeed, the Board and the courts in the *ILA* and *California Cartage* cases never required such evidence, presumably because the carriers' control over the assignment of container work was implicit in their unmistakable authority to decide where to release its containers. Similarly, here it is undisputed that the carriers possess the authority to select the Port, the terminal and operator for the performance of all work on its containers, including reefer work, and to prescribe the conditions for the release of its containers to any selected contractor.

Additionally, the General Counsel's assertion that there is no evidence of carriers exercising actual control over the performance of reefer work is easily refuted by the testimony and documentary evidence in the record. (*See* Resp. Brief ISO Exceptions pp. 27-34) PMA Coast Director Richard Marzano testified that carriers control what happens with regard to the handling of their reefers and provide continuous instructions and directions to the terminal operators on what is to be done with their equipment while at T-6. (Tr. 2028-29) The Port's own electricians confirmed that virtually all decisions concerning the hourly performance of reefer work are subject to the direction and control of the carriers. (Tr. 800-18, 865-902) This testimony is also corroborated by the carriers' emails to ICTSI providing instructions on how to handle its reefers. (Resp Exs. 32-45) Moreover, the carriers have demonstrated their ability to bypass Terminal 6 altogether when their directives are not complied with. (Tr. 331)

Lastly, the General Counsel asserts that even if the PMA carriers are found to control the

work, it would not "exonerate Respondents' threats and work stoppages at Terminal 6 insofar as they were aimed at the non-PMA carriers who call upon the terminal as well." (GC Br. at 25 n.15) Notably, the General Counsel does not—because it cannot—cite to any record evidence or ALJ findings suggesting that Respondents engaged in conduct directed at non-PMA carriers. The carrier grievances were directed only at PMA carriers and all the alleged conduct relating to productivity at Terminal 6 was directed at ICTSI. Moreover, it is undisputed that PMA carriers Hanjin and Hapag Lloyd represent 98 percent of the business at Terminal 6. (Tr. 179, 1283-84) Therefore, if the PMA carriers and ICTSI are found to control the work at issue, then all of the Respondents' alleged conduct would constitute lawful primary activity.

III. The Port Does Not Control the Assignment of Reefer Work on the Carriers' Containers

As discussed above, Supreme Court and Board precedent as well as the undisputed record evidence all lead to the inexorable conclusion that carriers on the waterfront possess the right to control the assignment of reefer work performed on its own containers. Nonetheless, the ALJ found here that it is the Port, and not the carriers, who have the right of control based on its mischaracterization of the work in controversy. In their attempt to support the ALJ's conclusion, the Answering Parties similarly mischaracterize the work at issue and go to greath lengths to redirect the Board's focus from Respondents' work preservation objective to the Port's work preservation objective. Of course, the latter is entirely irrelevant to the merits of this case, as detailed above.

It is similarly immaterial that the Port, as emphasized by the General Counsel and ICTSI, controls its own electricians. The same was true as to freight consolidators and others in the *ILA* and *Cal Cartage* cases – they too control their non-ILWU workforces. Control over non-longshoremen says nothing about the Port's authority to control the receipt and assignment of reefer work on the carriers' containers. The Answering Parties' arguments appear to conflate the right to control the receipt and assignment of reefers with the right to control the employees doing

the work.

The Board should also reject the invitation to treat the Port's own behavior as evidence that the Port had the legal authority to engage in that behavior. For example, the Answering Parties repeatedly emphasize the language in the Port's lease agreement without explaining how the Port's purported reservation of reefer work proves that it had the authority to do so without the carriers' consent. The carriers and their stevedoring service agreements are the source, in the first instance, of any historic control the Port may have enjoyed over the reefers.

Indeed, ALJ Schmidt got it right in noting that the Port, "is dependent for its economic vitality on the willingness of the carriers in the shipping industry to use the stevedore services provided at T6." (ALJD at 48). The fact that the contracts between the Carriers and ICTSI may grant ICTSI or even the Port, beforehand, temporary "custody" or "possession" of the reefers while at T6 fails as a matter of law to override the steamship carriers' ultimate control by setting the terms for the continued release of their containers. *See, e.g.,ILA v. NLRB*, 613 F.2d at 912-13 and n. 190 (holding that truckers "control" over containers in their "custody and possession" do not "impair" the shippers' "power of disposal over the containers", "as the shipper can simply refuse to release a container to a trucking company or consolidator." "Unless the shippers turn over the containers, as they ultimately chose not to do in the cases before us, this "right" is without substance.")

Similarly, the fact that the Port's electricians have continued to perform the reefer work at Terminal 6 and that the Port is paying them for that work does not establish the Port's legal entitlement to perform that work. In fact, the record shows that ICTSI is the one who charges the carriers for all the stevedoring work and then pays the Port for the employment of IBEW electricians to perform reefer work. (Tr. 371-73) It is therefore the carriers who are ultimately paying for the reefer work.

As made clear it Respondents' opening brief, the reefer work arises from and follows the carriers' stevedoring service contracts. Therefore, once ICTSI became a member of PMA and

took over the Port's stevedoring service contracts, without any restrictions agreed to by the carriers, it had an obligation to assign work performed on the carriers' reefers to the ILWU. And contrary to the General Counsel's contention, the Union does not assert that the right of control reverted back to the carriers when the stevedoring contracts were assigned to ICTSI. Rather, Respondents maintain that the carriers always retained the right of control over the assignment of its reefer work and any control previously possessed by the Port stemmed from the carriers' assignment of stevedoring contracts to the Port. Indeed, it is beyond dispute that the Port never had any reefer work to control before entering stevedoring contracts with the carriers. Therefore, upon assigning those contracts to ICTSI, the Port lost any derivative control that it had pursuant to that contract, since it failed to reserve it with the carriers.

If the Port in fact controls the assignment of the disputed reefer work, then the Port would be the carriers' point of contact if that reefer work is not performed in a satisfactory manner. However, the unrefuted testimony of ICTSI's Terminal Manager Jim Mullen confirmed that the carriers rely on ICTSI, and not the Port, to ensure that their reefers are properly handled. (Tr. 327-28) This is not surprising given that ICTSI is the only entity at the Port with whom the carriers have a contract and to whom they release their containers. The carriers therefore cannot assert a breach of contract claim against the Port for ICTSI's failure to adequately provide reefer services.

Moreover, the fact that the Port owns the property upon which Terminal 6 is located is entirely beside the point. ICTSI's discussion of the Port's property rights constitutes a straw man argument that bears no relation to Respondents' position or the merits of this case. Respondents are not challenging the Port's rights as a property owner, nor are they challenging the Port's authority to lease its property to ICTSI pursuant to certain lawful terms and conditions. However, no tenent of property law supports the Answering Parties' contention that the Port's status as a property owner somehow vests the Port with the authority to control the assignment of work performed on the carriers' containers. To use ICTSI's words, the right to work on the carriers' containers is simply not a part of the "bundle of rights" belonging to the Port by virtue

of its property ownership. To be sure, the carriers can move and have serviced its containers wherever it chooses without the Port and T6; but the Port cannot do likewise without agreement by the carriers to release their containers to the Port or T6.

Furthermore, ICTSI's reliance on dicta from *United Food and Commecial Workers Union Local No. 367 (Quality Food Centers, Inc.)*, 333 NLRB 771 (2001) is misplaced. That case is readily distinguishable from the present facts because the lessee in that case consistently maintained sole and exclusive control over the disputed work. To be sure, Respondents are not asserting that lease restrictions may never govern the right to control the assignment of work. However, lessors and lessees cannot prescribe the allocation of work they do not control. Here, since the carriers possess ultimate control over the assignment of reefer work on their own containers, neither the Port (as the lessor) nor ICTSI (as the lessee) can claim that right for itself absent an assignment of that work from the carriers.

The Answering Parties further try to establish Port control by asserting that Sundet's discussions with the Port regarding the assignment of reefer work shows that the Port was the primary employer. However, based on Sundet's testimony, he had such conversations with the Port primarily because the Port wanted the ILWU's support in its transition to privatize Terminal 6 for partly political reasons. (Tr. 1471) And while Sundet informed the Port that the Union wanted the new operator to be a PMA-member company, the record does not establish that he ever went to the Port to request that it directly assign the reefer work to the ILWU. (Tr. 1472) Moreover, Answering Parties overlook the critical fact that these discussions took place when the Port operated the terminal. Therefore, the mere fact that Sundet met with Port representatives to talk about reefer work does not evince Port control over the assignment of that work.

The General Counsel also attempts to establish Port control by asserting that "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." (GC Br. at 9, 28) To support this assertion, the General Counsel cites testimony by PMA Director Richard Marzano,

wherein he states that PMA does not have the authority to actually assign workers on a daily basis to perform particular tasks at Terminal 6 because it is not an employer. (Tr. 2050) Marzano further testified that in order to protect the integrity of the ILWU-PMA collective bargaining agreement and to have the disputed reefer work assigned to ILWU members, PMA took steps to convince ICTSI to effect that assignment. (Tr. 2052-53) Thus, contrary to the General Counsel's gross mischaracterization of the record, the testimony merely shows that PMA, as the bargaining representative of its member companies, which does not directly operate any terminals or ships, could only effect the work assignment by putting pressure on its member companies, which is perfectly lawful. (*See, Cal Cartage*.) At no point did Marzano or anyone else testify that the carriers' admitted their only recourse was to put pressure on the Port.

IV. ICTSI Is A Primary Employer, Not An Unoffending Neutral

As discussed above and in Respondents' opening brief, the record is replete with evidence showing that the reefer work is assigned pursuant to the carriers' stevedoring service contracts (Resp Ex. 6, at "Exhibit B-2"; Tr. 1667-71) and that upon being assigned those contracts, ICTSI assumed "all responsibilities of the Port under the agreement." (Resp. Ex. 24; *see also* Tr. 1653-56) ICTSI's Terminal Manager James Mullen confirmed that the Port subsequently severed its ties with the Carriers and that ICTSI became solely responsible to the Carriers for all the services set forth in those agrements, which includes the disputed reefer work. (Tr. 327-28) Nonetheless, the ALJ concluded that ICTSI is not a primary employer for purposes of the ILWU-PMA work preservation agreement. (ALJD 44:8-21, 45:1-5) ICTSI attempts to defend this conclusion but asserting that it is an unoffending neutral because it does not have the right to control the disputed work. These conclusions are contrary to the *ILA* and *California Cartage* cases as detailed above. Moreover, they ignore the realities of the longshore industry and the fundamental basis upon which the Board relied in certifying the coastwise ILWU-PMA collective bargaining unit.

In *California Cartage*, the Board took the position that terminal operators, like ICTSI

here, are primary employers with regard to container stuffing work. Appellate Brief of NLRB at 56-60, *California Cartage*, 822 F.2d 1203 (1987). The Board correctly observed that a contrary finding would be inconsistent with the holding in *ILA II*, explaining:

> If the Supreme Court had considered the employers who lacked the right of control—the stevedoring firms—to be neutrals under the right-of-control test with regard to the container stuffing dispute, the Supreme Court would have found the Rules to be unlawful for failure to meet the right-of-control test. Instead, the Supreme Court found that the Rules met the right-of-control test…

Appellate Brief of NLRB at 58, *California Cartage*, 822 F.2d 1203 (1987). The Board stated that this conclusion was also "supported by the legal and functional integration of these employer groups . . . within PMA." *Id.* As explained by the Board:

> [T]he individual employers—by joining the PMA—all formally united into a single entity for purposes of dealing with the ILWU; having gained the bargaining strength offered by their uniting, it would be inconsistent for the PMA stevedoring firms and the PMA terminal firms to claim the status of neutrals vis-à-vis the ILWU's disputes with the PMA steamship lines.

Id. at 58-59. The Board also emphasized the significance of the coastwise ILWA-PMA collective bargaining relationship in its right-of-control analysis:

> [I]t is undisputed that there is a high degree of functional integration and economic dependence giving the different PMA employers unusually strong common interests when dealing with the ILWU.
>
> Indeed, the Board's original certification of the longshoremen's bargaining unit in 1938 explicity recognized that most steamship lines did not directly employ any longshoremen, but the Board nevertheless included steamship lines in the certified unit. *Shipowners' Association*, 7 NLRB 1002, 1017 (1938). . . . The Board concluded that "[i]n this particular industry the community of interest of the participating employers i[s] unmistakable." Id. In these circumstances, the Board could reasonably conclude that the interests of each employer group in the outcome of the other employer groups' disputes with the ILWU were so strong that the employer groups should not be considered neutrals with regard to each others' disputes with the ILWU.

Id. at 59-60. The Board went on to explain that unlike neutral employers who "have no direct economic interest in the outcome of the union's dispute with [another employer] . . . the stevedore firms and the terminal firms—who employed the longshoremen and who had to establish the

container freight stations called for in the Supplements—had a very direct interest in the outcome of the ILWU's dispute with the steamship lines regarding the assignment of the container stuffing work." *Id.* at 60-61.

The rationale set forth in the *California Cartage* case applies with equal force to the facts here. Indeed, the Answering Parties would be hard-pressed to argue that the "legal and functional integration" of the PMA employers in this case is somehow less pronounced today than it was when the *California Cartage* case was decided. And like the terminal operators in *California Cartage*, ICTSI has a very direct interest in the outcome of the Union's dispute with the carriers regarding the assignment of work on the carriers' reefers. As the terminal operator assigned the work set forth in the stevedoring services contracts, ICTSI is the one contractually obligated to the carriers to ensure the reefer work is done and done correctly under their stevedoring/terminal use agreements. Moreover, the record establishes that ICTSI was well aware of ILWU's claim over reefer work performed on PMA containers well before it entered the lease agreement with the Port, took over the stevedoring services contracts, and applied to become a PMA member company. (Tr. 1160-61, 1489-90) ICTSI also expressly represented that neither it nor its affiliate was bound by any labor agreement at the time it applied to become a PMA member. (Resp. Ex. 5) Given these circumstances, ICTSI plainly is not the type of "unoffending employer" or "helpless victim" that § 8(b) (4) was designed to protect. *See Edward J. Debartolo Corp. v. NLRB*, 463 U.S. 147 (1983); *ILA v. Allied Int'l, Inc.*, 456 U.S. 212, 223 n.20, 225 (1982); *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 692 (1951). Rather, it is part of a complex, integrated industry of employers that are functionally and economically dependent on the stability of coastwise labor relations with the ILWU.

Furthermore, the fact that the Port's contract stevedore, MTC/PA used before ICTSI, never assigned the dockside reefer work to the ILWU does not demonstrate the absence of control by ICTSI. During the time that MTC/PA managed stevedoring operations at Terminal 6, it was the Port, and not MTC/PA, that acted as the terminal operator and remained in charge of entering and

maintaining stevedoring service contracts with the carriers. (Tr. 974-75, 1650) The reefer work performed on the carriers' containers explicitly derives from the stevedoring service contracts. (*See* Resp. Ex. 6, at "Exhibit B-2") The Port therefore had the right to control the assignment of reefer work by virtue of its direct contract with the carriers. This shifted to ICTSI when it replaced the Port as the terminal operator under the carrier stevedoring agreements.

Additionally, ICTSI's arguments based on *Electrical Workers, Local 501 (Atlas Construction Company)*, 216 NLRB 417 (1975), constitute a red herring and should be disregarded. In *Atlas Construction*, the Board addressed the circumstances under which a neutral employer, i.e., one who possesses no contractual right to control the work sought by a union, might lose its status as a neutral employer based on its own affirmative conduct. This test has no application here because, for the reasons discussed above, ICTSI is not a neutral employer because, as a PMA member, it has a direct primary collective bargaining relationship with ILWU, is bound by the terms of PCLCA, and has, through the carriers, the right to control reefer work pursuant to its stevedoring services contracts with the carriers.

V. The Record Evidence Does Not Support a Finding of Misconduct By ILWU Local 40

The ALJ concluded that "Respondents" violated the Act by making threats and filing and prosecuting grievances against the carriers. (ALJD 49:14-39) Although Local 40 is an autonomous entity that is separate and distinct from the other Respondents, the ALJ's decision lumped them all together and held that "Respondents," as a group, engaged in the alleged misconduct. Respondents have excepted to the ALJ's conclusions on the ground that there was no evidence to support a finding of misconduct by Respondent Local 40. (Resp Exception Nos. 22-26; Resp Br. at 18)

The Answering Parties claim that Respondents essentially waived this argument by excepting to the ALJ's ultimate conclusions but failing to except to the ALJ's specific factual findings with regard to Local 40. However, the factual bases of the ALJ's ultimate legal conclusions with respect to Local 40 are not clear from his decision. For example, the ALJ

determined that "Respondents" violated the act by filing and processing grievances against the carriers but nowhere in his decision does the ALJ make a finding that Local 40 or its agents ever filed any such grievances. The only way to challenge the ALJ's unsupported conclusion under these circumstances is to except to his ultimate conclusion.

More importantly, none of the Answering Parties have been able to identify any record evidence showing that Local 40 engaged in any slowdowns, made any threats, or filed any grievances. The few transcript citations in the General Counsel's brief merely establish: (1) that reefer work cannot be done without clerk interaction, (2) that Local 40 members were instructed to follow the directive of the Joint Coast Labor Relations Committee—the highest governing body under their contract, and (3) that Local 40 officials and members attended a meeting with the International and discussed Local 8's efforts to obtain the reefer work. Needless to say, this evidence is not sufficient to establish a § 8(b) (4) (B) violation.

VI. The ALJ Erred In Denying Respondents' Motion to Reopen the Record

In addition to excepting to the ALJ's ultimate decision, Respondents also excepted to the ALJ's denial of Respondents' Motion to Re-Open the Record. Contrary to ICTSI's assertion, Respondents did in fact specifically identify the part of the decision to which objection is made. Respondents' exceptions make clear that they are challenging: (1) "the ALJ's application of section 102.48(d)'s newly discovered evidence requirement on a motion to reopen the record while the matter is still pending before the ALJ for decision, and (2) "the ALJ's finding that Exhibits 58 through 61 would lack probative value because of speculation regarding impact of alleged economic activity on carrier negotiations." (Resp. Exceptions Nos. 27-28) Moreover, Respondents identified the highly probative value of the evidence in its motion to reopen the record that they filed with the ALJ, which was incorporated by reference into Respondents' opening brief. (Resp Br. 55)

As set forth in Respondents' opening brief, *Norton Health Care Inc. d/b/a Norton Audubon Hosp. & Norton Suburban Hosp.*, 350 NLRB 648, 649 (2007) and *Inland Container Corp.*, 273

NLRB 1856, 1856-57 (1985) establish that an ALJ may reopen the record to admit evidence arising after the close of the hearing. The Port attempts to distinguish these cases by asserting that those cases concerned evidence existing at the time of the hearing, but which was not discovered until after trial." This is simply not true. Rather, both cases involved evidence that arose after the hearing but was probative of facts as they existed at the time of the hearing. Similarly, the evidence proffered by Respondents arose after the hearing but is highly probative of the parties' relationships, including the right of control, as they existed at the time of the hearing. Therefore, rationale set forth in *Norton Health Care* and *Inland Container Corp*. easily extends to the present case.

CONCLUSION

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

Dated: March 10, 2014

Respectfully submitted,
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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA, 94109. I hereby certify that on **March 10, 2014**, I caused the following document(s):

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

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

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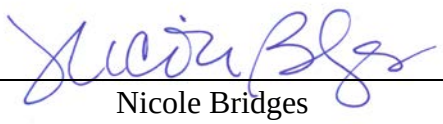
☑ **BY E-MAIL:** I caused the documents to be sent to the person at the electronic notification address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Executed on **March 10, 2014**, at San Francisco, California.



Nicole Bridges