

**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 MOTION TO TAKE ADMINISTRATIVE NOTICE
IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Respondents ILWU International and its Locals 8 and 40 (collectively, “Respondents” or “ILWU”) hereby move the Board to take judicial notice of the following public records, attached to the Declaration of Robert Remar filed in support of the instant motion:

Exhibit A: A true and correct copy of the brief filed by the National Labor Relations Board on February 17, 1987 in *California Cartage Co. v. NLRB*, 822 F.2d 1203 (D.C. Cir. 1987). (Remar Decl. ¶¶ 3-4)

Exhibit B: A true and correct copy of excerpts from the transcript of the ULP hearing in *International Longshore and Warehouse Union (ICTSI Oregon, Inc.)*, Case No. 19-CC-100903, *et al.*, where Administrative Law Judge Jeffrey Wedekind admitted into the record the very same evidence that Respondents had moved for Administrative Law Judge William Schmidt to admit as “new evidence” in the instant proceeding pursuant to their motion to reopen the record. The excerpted transcripts also contain additional evidence elicited as a result of the proffered

“new evidence” concerning the PMA carriers’s and ICTSI’s exclusive right of control over the disputed reefer work to the exclusion of the Port. The case pending before Judge Wedekind is closely related to the instant case because it involves identical claims of secondary boycott violations by the same Respondents at the same facility against the same Charging Party employer based on the identical legal theory that ILWU job actions had an unlawful, secondary objective of acquiring the disputed reefer work. The only difference between the two cases is that the case before Judge Wedekind concerns alleged jobs actions to obtain the disputed reefer work occurring after the close of the ULP hearing in the instant case. (Remar Decl. ¶¶ 5-6)

Exhibit C: A true and correct copy of the exhibits, which accompany the excerpted transcripts contained in Exhibit B, and which were admitted into the record by Judge Wedekind in *International Longshore and Warehouse Union (ICTSI Oregon, Inc.)*, Case No. 19-CC-100903, *et al.* These exhibits, along with the excerpted transcript, would have been elicited and admitted into the instant record had Judge Schmidt granted Respondents’ motion to reopen the record to allow for the admission of exhibits and the production by Charging Party ICTSI of similar and revealing exhibits showing the ultimate “right of control” that the PMA carriers and ICTSI have held from the start of this dispute. (Remar Decl. ¶ 7)

Motions to take administrative notice are governed by Rule 201 of the Federal Rules of Evidence. *Bud Antle, Inc.*, 359 NLRB No. 140, 2013 WL 3227277, at *1 n.3 (June 26, 2013); *ITT Federal Service Corporation*, 335 NLRB No. 79, 2001 WL 1083276, at *1 n.1 (Aug. 27, 2001). Rule 201 provides for judicial notice of adjudicative facts that are “capable of accurate

and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). A court may take judicial notice of records and filings in federal and state court and administrative bodies. *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001), *overruled on other grounds by Galbraith v. County of Santa Clara* 307 F.3d 1119, 1125–26 (9th Cir. 2002) (affirming district court’s judicial notice of the fact of a prior Extradition Hearing and plaintiff’s signing of extradition waiver, but not to support conclusion of waiver where in dispute); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.1986) (judicial notice of filings in prior federal court proceeding); *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir.1986) (taking judicial notice of state administrative records).

“The Board may take administrative notice of its own files.” *Sne Enterprises, Inc.*, 344 NLRB 673, 681 n.7 (2005); *Bryant & Stratton Bus. Inst.*, 321 NLRB 1007, 1007 n.2 (1996) (taking administrative notice of the charge and dismissal letter in related Board proceeding since they are official records of the Board); *Massachusetts Laborers' Dist. Council (A. Amorello & Sons, Inc.)*, 314 NLRB 61, 61 n.1 (1994) (taking administrative notice of transcript, exhibits, and briefs in a related Board proceeding); *Am. Baptist Homes of the W.*, 359 NLRB No. 46 n.2 (Dec. 15, 2012) (taking administrative notice of briefs filed in separate Board action addressing same legal issue).

Judicial or administrative notice also may be taken of filings in other court and administrative proceedings to determine the positions taken therein insofar as they are relevant to the issues at hand. *N. California Dist. Council of Laborers, et al. (Mustang Construction, Inc.)*, 305 NLRB 809, 809 (1991) (taking administrative notice of admission made by union in brief filed with the federal district court); *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1136, 1137 & n.8 (9th Cir. 2012) (taking judicial notice on appeal of legal positions asserted in other

proceedings, but ultimately deeming them irrelevant to the issues under review); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (taking judicial notice on appeal of legal briefs filed in other court proceedings to determine what issues were previously litigated and subject to preclusion or waiver); *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1016 n.9 (9th Cir. 2012) (sustaining district court taking judicial notice of legal briefs in other litigation to reflect the position of 30% of class members on their understanding of a class settlement); *U.S. v. Thornton*, 511 F.3d 1221, 1229 (9th Cir. 2008) (Despite the district court's refusal to do so, the Ninth Circuit took judicial notice of agency policy statement relevant to issues under review).

“Judicial notice may be taken at any stage of the proceeding, including on appeal, and is mandatory if requested by a party and the court is supplied with the necessary information.” *Papai v. Harbor Tug and Barge Co.*, 67 F.3d 203, 207 n.5, *rev'd on other grounds*, 520 U.S. 548 (1997) (citing Fed. R. Evid. 201(d,f), other citations omitted) (taking judicial notice of ALJ decision and pleadings filed in administrative LHWCA worker compensation proceeding to determine if it precludes Jones Act claim on appeal); *see also* cases cited therein. Thus, appellate courts have taken judicial notice of legally noticeable events and filings in other related cases that occur after the decision of the lower court or administrative body under appeal. *Papai v. Harbor Tug and Barge Co.*, 67 F.3d at 207, n.5; *Buddha v. City Of Ashland*, 325 Fed. Appx. 486, 487 (9th Cir. 2009) (“We take judicial notice that the City has now adopted a formal written copyright infringement policy. . . .”); *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 924 n.3 (9th Cir. 2002) (taking judicial notice, on appeal, of a decision released by an administrative law judge after the district court's decision).

The Board's 1987 appellate brief in *California Cartage*, the transcript of the November/December, 2013 ULP hearing in Case No. 19-CC-100903, *et al.* before ALJ Wedekind, and the exhibits admitted into the record in that hearing are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). There can be no reasonable dispute as to their authenticity nor the fact of their respective filings in the other proceedings.

The documents are also highly relevant to the issues raised by Respondents' Exceptions to the decision of the Administrative Law Judge and the Answers thereto. The Board's *California Cartage* brief sets forth additional analysis and argument in successful defense of the of its findings in *ILWU (Cal Cartage)*, 278 NLRB 220 (1986) as to PMA employers' "right of control" over container work and the reasons why container work is "functionally related" to traditional longshore work.

In addition, the transcript and exhibits from the related 2013 case of 19-CC-100903, *et al.*, support Respondent's exceptions to Judge Schmidt's denial of Respondents' motion to reopen the ULP hearing in this matter, requiring the admission of such "new evidence" and such further related evidence that would have been elicited at the re-opened hearing. (Remar Decl. ¶¶ 5-7) Review of the testimony and exhibits admitted in the case before Judge Wedekind discloses that: (a) the evidence was not available to Respondents before the close of the hearing before ALJ Schmidt because it came into existence afterwards but well before ALJ Schmidt issued his decision; (b) the evidence is highly relevant to the key issue of "right of control" over the disputed reefer work; (c) the evidence shows that witnesses for the General Counsel essentially lied about the nature of the Terminal Use Agreements and that by virtue of such agreements, the PMA carriers and ICTSI have always, even in the time period covered by ALJ Schmidt's

decision here, had the “right of control” over the disputed reefer work, while the Port does not; and (d) the exclusion of such highly probative evidence as to a dispositive issue – “right of control” -- in the instant case is an abuse of discretion and an injustice as to the truth of the facts in dispute.

Lastly, taking administrative notice of the excerpted transcript and exhibits from the closely related case tried before ALJ Wedekind would be an appropriate remedy arising from overturning ALJ Schmidt’s refusal to admit such evidence into the instant record.

For the above reasons, Respondents’ Motion to Take Administrative Notice should be granted.

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):

- 1. RESPONDENTS ILWU’S MOTION TO TAKE ADMINISTRATIVE NOTICE IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**
- 2. DECLARATION OF ROBERT REMAR IN SUPPORT OF RESPONDENTS ILWU’S MOTION TO TAKE ADMINISTRATIVE NOTICE 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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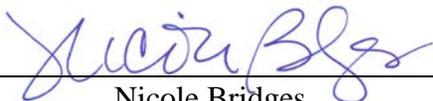
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BY E-MAIL: I caused the documents to be sent to the person at the electronic notification address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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



 Nicole Bridges