

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-82533  
19-CD-82461  
19-CC-87504  
19-CD-87505

and

PORT OF PORTLAND

Case 19-CC-82744

**GENERAL COUNSEL'S MOTION TO STRIKE  
AND OPPOSITION TO RESPONDENTS' MOTION TO TAKE  
ADMINISTRATIVE NOTICE IN SUPPORT OF EXCEPTIONS**

Counsel for the General Counsel respectfully submits this motion to strike and opposition to the motion filed on March 10, 2014 by Respondents International Longshore and Warehouse Union, AFL-CIO, International Longshore and Warehouse Union Local 8, and International Longshore and Warehouse Union Local 40 (collectively, "Respondents") requesting that the Board take "administrative notice" of one of its own pleadings filed with the District of Columbia Court of Appeals in *California Cartage Co. v. NLRB*, 822 F.2d 1203 (D.C. Cir. 1987), as well as nearly 400 pages of

documentary and testimonial evidence from the record of a separate case against Respondents heard after the close of the record in this case (“Respondents’ Motion”).

As a preliminary matter, Counsel for the General Counsel agrees that the Board may certainly take “administrative notice” of its own pleadings. However, Counsel for the General Counsel moves to strike the remainder of Respondents’ Motion, as it attempts to introduce evidence before the Board not previously considered by the Administrative Law Judge in this proceeding. In the alternative, Counsel for the General Counsel opposes Respondents’ Motion as a repackaging of its prior, unsuccessful efforts to reopen the record in this case.

## **I. PROCEDURAL BACKGROUND**

The instant proceeding involved a twelve-day hearing before Administrative Law Judge William J. Schmidt (“ALJ Schmidt”) during which testimonial and documentary evidence was offered on the central issue of whether the PMA-member carriers that call on the Port of Portland’s Terminal 6 have the right to control the disputed work in this case (the “Disputed Work”). (See, e.g., Tr. 1281, 1322, 1561, 2046-53) At no time during the hearing did Respondents seek enforcement of any subpoena for production of documents by Charging Party.<sup>1</sup> The hearing ended on August 29, 2012. On October 25, 2012, the parties submitted their post-hearing briefs to the Administrative Law Judge.

On June 25, 2013, nearly a full year after the close of the record, Respondents submitted six documents to ALJ Schmidt, arguing that these documents should be received as new, material evidence (the “Rejected Exhibits”). Counsel for the General

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<sup>1</sup> In any event, the ALJ could not have ordered production of the evidence now offered by Respondent, as it postdated the hearing.

Counsel and Charging Parties opposed Respondents' Motion, and, on July 18, 2013, ALJ Schmidt denied Respondents' Motion, based on the Board's newly discovered evidence rule. (A copy of the ALJ Schmidt's July 18, 2013 Order is attached as Exhibit B hereto). Respondents did not file a special appeal with the Board regarding this ruling.

In a separate unfair labor practice proceeding against Respondents (Case 19-CA-100903), a second twelve-day hearing was recently heard before Administrative Law Judge Jeffrey Wedekind. At the outset of that hearing (which, like this case, involved allegations of secondary boycott activity in connection with the Disputed Work), ALJ Wedekind, citing *Wynn Las Vegas*, 358 NLRB No. 81 (Jul. 3, 2012), and *Detroit Newspapers*, 326 NLRB 782 (1998), ruled that Respondent would not be permitted to relitigate issues decided by ALJ Schmidt in the instant case, but would be permitted to put on evidence of "changed circumstances" since the close of the record before ALJ Schmidt. (See Transcript of Case 19-CA-100903 at 17-18, attached as Exhibit A hereto). Accordingly, during that hearing, Respondent was permitted to introduce documents (including those attached at Exhibit C to Respondents' Motion) based on the explicit rationale that they met this criteria. (See, e.g. *id.* at 1449-50)

Following the close of that record in December 2013, Respondents then argued in their brief in support of exceptions to ALJ Schmidt's decision that the Board should consider the Rejected Documents. Counsel for the General Counsel opposed these exceptions as a de-facto motion to re-open the record before the Board. (See Counsel for the General Counsel's Answering Brief to Respondents' Exceptions at 37, citing *Transit Mgt. of Southeast Louisiana, Inc.*, 331 NLRB No. 30 (2000), *Novel Knit Inc.*, 299

NLRB 58 n.2 (1990) and § 102.48(d)(1) of the Board's Rules and Regulations).

**A. Respondents' Most Recent Effort to Reopen the Record**

Respondents' Motion attaches two of the Rejected Exhibits, as well as ten additional documents Respondents never offered before ALJ Schmidt and excerpts from the testimony in Case 19-CA-100903) (the "Proffered Evidence"), and claims that this evidence should be considered by the Board because it was later admitted by ALJ Wedekind in Case 19-CA-100903. The only portion of the Proffered Evidence actually ruled on by ALJ Schmidt are the two documents attached to Respondents' Motion as "R(W) 33" and "R(W) 37" (reflecting their designation in ALJ Wedekind's hearing); as Rejected Exhibits in ALJ Schmidt's hearing, they were designated as "R 60" and "R 58," respectively.<sup>2</sup> (See Respondents' June 25, 2013 Motion to Reopen Record, attached as Exhibit C hereto).

**II. REOPENING THE RECORD FOR RECEIPT OF THE PROFFERED EVIDENCE IS INAPPROPRIATE AND UNWARRANTED**

Respondents inaccurately claim that the Proffered Evidence should be admitted because it constitutes "the very same evidence Respondents had moved for [ALJ Schmidt] to admit as 'new evidence.'" (Respondent's Motion at 1) This is simply not the case. In fact, Respondents are now demanding that the Board consider ten documents (and the transcript testimony accompanying their introduction in Case 19-CA-100903) that ALJ Schmidt never ruled upon, because, prior to now, Respondents had never offered them in this case. As an alternative rationale, Respondents claim that the Proffered Evidence (including the portions of the transcript of the proceeding before ALJ

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<sup>2</sup> ALJ Schmidt additionally rejected a cover e-mail to one of the documents later offered before ALJ Wedekind, but not the attached document. This cover email is the first page of the exhibit designated as "R (W) 39" before ALJ Wedekind, and was rejected as the first page of "R 59" before ALJ Schmidt.

Wedekind) *would have* been elicited and admitted into the record of this case had Judge Schmidt granted Respondents' original motion to reopen and additionally ordered the production by Charging Party ICTSI of "similar and revealing exhibits" bearing on the right to control the Disputed Work. (Resp. Motion at 2) But Respondents never requested that ALJ Schmidt order any such production by Charging Party ICTSI, either during the hearing or in their original motion to re-open before ALJ Schmidt. (See Respondents' June 25, 2013 Motion to Reopen Record, attached as Exhibit B hereto)

Either way, Respondents are clearly attempting an end-run whereby the Board would base its decision in this matter on evidence never put before the Administrative Law Judge. *See, e.g., Ozburn-Hessey Logistics, LLC*, 2011 WL 3585241, slip op. (Aug. 15, 2011) (granting General Counsel's motion to strike documents attached to Respondent's brief in support of exceptions where documents were "not part of the official record" and "excluded from consideration by the Board." Noting, *inter alia*, that "the Board may not take judicial notice of the disputed exhibits because the facts asserted therein are facts in dispute"). *See also Adco Elec. Inc.*, 307 NLRB 1113 n.1 (1992) (granting General Counsel's motion to strike attachment to Respondent's brief in support of exceptions, where the same attachment had been initially attached to Respondent's post hearing brief, where, *inter alia*, the attachment constituted new evidence that should have been introduced by a motion to reopen the record).

### **III. THE PROFERRED EXHIBITS DO NOT MEET THE BOARD'S STANDARD FOR "NEWLY DISCOVERED EVIDENCE"**

Respondents' request for "administrative notice" amounts to no more than a third, belated attempt to re-open the record in this proceeding. But the Proffered Evidence clearly falls well outside the bounds of Board's "newly discovered evidence" exception;

accordingly, Respondents' de-facto motion to re-open should therefore be rejected.

As the Board recognizes, there is "a strong policy favoring an end to litigation," *R.L. Polk & Co.*, 313 NLRB 1069, 1071 and n.11 (1994). The Board's Rules and Regulations permit re-opening an administrative record only under extraordinary circumstances not present here:

(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. . . . A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only *newly discovered evidence*, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly on the other parties.

Section 102.48 (d) of the Board's Rules and Regulations.

**A. The Proffered Exhibits Did Not Exist  
At the Time of the Hearing Before ALJ Schmidt**

The Board has consistently held that "newly discovered" evidence must be evidence that existed at the time of the trial. *See, e.g., APL Logistics, Inc.*, 341 NLRB 994, 996 n.2 (2004). *See also Machinists Lodge 91 (United Technologies)*, 298 NLRB 325 n.1 (1990), *enfd*, 934 F.2d 1288 (2d Cir. 1991); *Fitel/Lucent Technologies*, 326 NLRB 46 n.1 (1998); *Allis-Chalmers, Corp.*, 286 NLRB 219 n.1 (1987); *A.N. Electric Corp.*, 276 NLRB 887 n.1 (1985); *Lincoln Hills Nursing Home, Inc.*, 266 NLRB 740, n.1

(1983); *Owen Lee Floor Service*, 250 NLRB 651 n.2 (1980).

Here, by contrast, the Proffered Evidence was explicitly admitted by ALJ Wedekind, citing *Wynn Las Vegas*, 358 NLRB No. 81 (Jul. 3, 2012), and *Detroit Newspapers*, 326 NLRB 782 (1998), as evidence of control over the disputed work by ICTSI and the carriers who call on Terminal 6 *only* during the period following the close of hearing in this matter heard by ALJ Schmidt. Thus, based on ALJ Wedekind's ruling, the Proffered Evidence necessarily pertains solely to facts arising after the hearing and, as such, does not constitute newly discovered evidence. See *APL Logistics, Inc.*, 341 NLRB at 996 n.2 (citing *Machinists Lodge 91 (United Technologies)*, 298 NLRB 325 n.1 (1990), *enfd* 934 F.2d 1288 (2d Cir. 1991)). See also *Fitel/Lucent Technologies*, 326 NLRB at 46 n.1 (1998) (quoting *Owen Lee Floor Service*, 250 NLRB 651 n.2 (1980)). For this reason alone, the Proffered Evidence cannot be considered newly discovered under the Board's definition, and Respondents' Motion should therefore be denied. See, e.g., *Allis-Chalmers Corp.*, 286 NLRB No. 17 (1987) (“[w]e deny the motion as it proffers evidence concerning an alleged event that occurred after the close of the hearing”) (citing *K&E Bus Lines*, 255 NLRB 1022 n.2 (1981)).

**B. Respondents Failed to Act with Reasonable Diligence to Uncover and Introduce the Proffered Exhibits**

To the extent Respondents argue that the Proffered Evidence somehow relates to a period in time prior to the close of the record before ALJ Schmidt, it is nonetheless inadmissible, as Respondents have failed to demonstrate that they were “excusably ignorant” of the evidence and acted with diligence to timely offer it before ALJ Schmidt. *Fitel/Lucent Technologies, Inc.*, 326 NLRB at 46, n.1 (quoting *Owen Lee Floor Service*, 250 NLRB at 651 n.2 (1980)). Excusable ignorance may be found only where the

movant shows “facts from which it can be determined that the movant acted with reasonable diligence to uncover and introduce the evidence.” *Id.* The Board has found that reasonable diligence requires that a party both subpoena the evidence and, if necessary, seek enforcement of its subpoena before the close of the record. See *Labor Ready, Inc.*, 330 NLRB at 1024 (denying motion to re-open record for introduction of evidence respondent could have subpoenaed from an individual who was present at the hearing); *Point Park University*, 344 NLRB 275, 276 (2005) (rejecting party’s claim of newly discovered evidence where it had allowed record to close without seeking enforcement of its subpoena seeking such evidence). See also *Planned Building Services, Inc.*, 347 NLRB 670, 680 n.4 (2006) (rejecting party’s effort to offer, after hearing, after party failed at hearing to object to administrative law judge’s refusal to admit them). Respondents have made no such showing with respect to the Proffered Evidence.

**C. The Proffered Evidence Would Not Alter the Result in this Case**

Even where extra-record evidence otherwise meets the Board’s requirements for newly discovered evidence, the Board’s Rules and Regulations require that it be rejected where its introduction would not require a different result. See § 102.48(d)(1). See also *Fitel/Lucent Technologies*, 326 NLRB at 46 n.1; *Opportunity Homes*, 315 NLRB 1210 n.5 (1994); *Owen Lee Floor Service*, 250 NLRB at 651 n.2.

As stated above, it is undisputed that Proffered evidence was explicitly offered by Respondents in the matter before Judge Wedekind to establish control over the disputed work *following the close of the hearing in this case* by ICTSI and the carriers who call on Terminal 6. As such, even if properly offered, these documents would still

be totally irrelevant to the issues before the Board in this matter. Indeed, even if these documents somehow established that, following the close of the hearing, the parties' legal relationships so seismically changed that Respondents' conduct – *had it taken place after such a change* – would have been lawful, this does not materially impact any issue currently before the Board. For this additional reason, Respondents' Motion should be denied.

**III. CONCLUSION**

Based on the foregoing, Counsel for the General Counsel prays that the Board strike, or in the alternative, deny Respondents' Motion to Take Administrative Notice in Support of Exceptions to the Decision of the Administrative Law Judge.

DATED AT Seattle, Washington this 26<sup>th</sup> day of March, 2014.



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Mara-Louise Anzalone  
Counsel for the General Counsel  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174

## CERTIFICATE OF SERVICE

I hereby certify that a copy of **General Counsel's Motion to Strike and Opposition to Respondents' Motion to Take Administrative Notice in Support of Exceptions** was served on the 26<sup>th</sup> day of March, 2014, on the following parties:

E-file:

Gary Shinnors, Executive Secretary  
National Labor Relations Board  
1099 14th Street, N.W., Room 11602  
Washington, DC 20570-0001

E-mail:

Robert S. Remar, Attorney  
Amy Endo, Attorney  
Emily Maglio, Attorney  
Leonard Carder LLP  
[rremar@leonardcarder.com](mailto:rremar@leonardcarder.com)  
[aendo@leonardcarder.com](mailto:aendo@leonardcarder.com)  
[emaglio@leonardcarder.com](mailto:emaglio@leonardcarder.com)

Kirsten Donovan, Attorney  
Coast Longshore Division  
ILWU  
[kirsten.donovan@ilwu.org](mailto:kirsten.donovan@ilwu.org)

Michael T. Garone, Attorney  
Schwabe, Williamson & Wyatt  
[mgarone@schwabe.com](mailto:mgarone@schwabe.com)

Kathy A. Peck, Attorney  
Peck, Rubanoff & Hatfield  
[kpeck@prhlaborlaw.com](mailto:kpeck@prhlaborlaw.com)

Norman D. Malbin, General Counsel  
IBEW, Local 48  
[norman@ibew48.com](mailto:norman@ibew48.com)

Randolph C. foster  
Stoel Rives LLP  
[rcfoster@stoel.com](mailto:rcfoster@stoel.com)

  
\_\_\_\_\_  
Kristy Kennedy, Office Manager

1 seeking any Board affidavits or statements. Only non-Board  
2 affidavits and statements.

3 MR. REMAR: That's right.

4 JUDGE WEDEKIND: In light of that, the issue basically  
5 went away.

6 MR. REMAR: Right.

7 JUDGE WEDEKIND: We -- I'll go ahead and mention at this  
8 point we also had a question arise about the prior case that  
9 Judge Schmidt, William Schmidt, presided over 12 days in July  
10 and August of 2012. He issued a decision about a year later on  
11 August 28, 2013 which the Unions have appealed to the Board and  
12 filed exceptions to the Board. An issue arose about whether  
13 the Unions would be permitted to relitigate issues decided by  
14 Judge Schmidt in that case and we had some discussion about  
15 that.

16 I gave an initial ruling on that issue stating that I  
17 would not permit relitigation of the same issues that Judge  
18 Schmidt decided based on my reading of two cases, Wynn Las  
19 Vegas, 358 NLRB 81 and Detroit Newspapers, 326 NLRB 782.  
20 However, Judge Schmidt's decision dealt with a finite period of  
21 time. The allegations in this case involve a subsequent period  
22 of time. And the Unions are based on the representations made,  
23 they're going to argue that there are changed circumstances.  
24 Things changed regarding the right to control the work and  
25 other related issues in connection with the AP-4 allegations.

Exhibit A

1           And I indicated that based on -- and the Unions -- the  
2 Unions stated that they had certain evidence. In fact, they  
3 had attempted to present that evidence to Judge Schmidt after  
4 the close of his hearing and he denied that. Based on that  
5 evidence and any other representations that the Unions may want  
6 to make with respect to the factual basis for their  
7 allegations, I would permit them to put on that evidence of  
8 changed circumstances. And we can discuss that some more if  
9 the parties like. But I just wanted to give that historical  
10 summary before we jump into the subpoenas.

11           I have three of them. Trying to decide which should go  
12 first. I think -- I mean I really don't care but I think it  
13 might after I think about this, it might make sense to start  
14 with ICTSI's petition to revoke the subpoena on it. So we have  
15 -- so we know what ICTSI's going to provide and isn't going to  
16 provide and then we can talk about the courts. Make sense?

17           MR. REMAR: Yes, Judge, and may I make a comment --

18           JUDGE WEDEKIND: Sure.

19           MR. REMAR: -- concerning your ruling.

20           JUDGE WEDEKIND: Right, sure.

21           MR. REMAR: Thank you. I would like it noted for the  
22 record that counsel for Respondents did submit at the request  
23 of Your Honor a pleading to try and convince you that we were  
24 allowed to litigate issues that were also presented to Judge  
25 Schmidt because of the unique posture of the Schmidt decision

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PORT OF PORTLAND

## ORDER DENYING MOTION TO REOPEN RECORD

The hearing in this case closed on August 29, 2012. On June 25, 2013, Respondent ILWU (Respondent) filed a motion pursuant to § 102.35(a)(8) of the Board's Rules and Regulations to reopen the record "for consideration of new, material evidence and law."<sup>1</sup> The Acting General Counsel (AGC) and the Charging Parties oppose the motion to the extent that it seeks to reopen the record for the purpose of receiving Respondent's proposed documentary evidence.<sup>2</sup>

Respondent seeks to reopen the record for the purpose of receiving the following exhibits attached to its motion:

1. Respondent's Exhibit 57: The court order of June 17, 2013, in the case of *Pacific Maritime Association v. NLRB*, 3:12-cv-02179-MO, vacating the Board's decision and determination reported at 358 NLRB No. 102 (2012).
2. Respondent's Exhibit 58: The Stevedoring and Terminal Services Rate Schedules between ICTSI Oregon, Inc. and the CKYH Alliance, a group composed of certain steamship carriers, including Hanjin, Hapag-Lloyd, K-Line, Cosco, and the others, signed on February 20, 2013, by Elvis Ganda on behalf of ICTSI Oregon.
3. Respondent's Exhibit 59: Email exchanges from September 2012 to March 2013, between ICTSI Oregon and members of the CKYH Alliance concerning the modification of the existing stevedore contracts and the terms of the Stevedoring and Terminal Services Rate Schedules for CKYH Alliance referred to in Item 2, above.
4. Respondent's Exhibit 60: Email exchanges in January 2013 between the Port of Portland (Port) and the CKYH Alliance purporting to reflect the Port's lack of involvement in the renegotiation of the stevedore contracts between the CKYH Alliance and ICTSI Oregon.
5. Respondent's Exhibit 61: Email exchanges from October, 2012 to March, 2013, between Terminal Maintenance Corporation (TMC) and the CKYH Alliance pertaining to proposed modifications to the terms of the agreement between them for the maintenance and repair of the Alliance's reefers, including plugging, unplugging and monitoring of those reefers.
6. Respondent's Exhibit 62: The letter of November 28, 2012, from Charles I. Cohen, counsel for PMA, to NLRB Subregion 36 setting forth

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<sup>1</sup> The Board's Rules and Regulations at § 102.35(a)(8) vests an administrative law judge with authority in cases pending before the judge "to order hearings reopened."

<sup>2</sup> The Respondent filed a reply to the opposition documents filed by the AGC and the Charging Parties. The AGC filed a motion to strike Respondent's reply. The motion to strike is denied.

argument on behalf of PMA for the position that the on-dock reefer work performed at West Coast marine terminals constitutes traditional ILWU longshore work, and that the PMA member carriers exercise plenary control over that reefer work, as well as all other stevedoring work, by setting the terms for the release and handling of their reefers.

7. Respondent's Exhibit 63: Letters, dated November 6, 2012, April 29, 2013, and May 1, 2013, from the Port to ILWU Local 8, setting forth the Port's position that the 1984 collective bargaining agreement between the Port and Local 8 was terminated in 1994.

Respondent also calls attention to the court rulings in *Noel Canning v NLRB*, 705 F.3d 490 (D.C. Cir. 2013), and *NLRB v. New Vista Nursing and Rehabilitation*--- F.3d ----, 195 L.R.R.M. 2781, 2013 WL 2099742 (3rd Cir. 2013), and argues that those cases hold that, since early 2011 and continuing to date, the Board, as presently constituted, lacks statutory authority to adjudicate unfair labor practice cases due to the absence of a lawfully constituted quorum.

Respondent argues all of the exhibits attached to its motion as well as the cited cases are relevant to the matter pending before me for decision and therefore should be a part of the record in this proceeding.

#### I.

The AGC does not object to my taking administrative notice of Item 1, above, on the ground that Board law permits an ALJ to take notice of court proceedings without the necessity of reopening the record. I agree, and accordingly, I take notice of the court's order in the matter of *Pacific Maritime Association v. NLRB*, 3:12-cv-02179-MO (the *PMA* case) and will address the obvious impact of that order in my decision.

However, the Charging Parties both note that no decision has yet been made about appealing the court's order in the *PMA* case and the AGC stated explicitly that "[n]otwithstanding this decision, which vacated the (Board's) 10(k) Decision addressing the assignment of the disputed work at issue in this case, Counsel for the Acting General Counsel is not withdrawing the Complaint allegation based in § 8(b)(4)(D) of the Act."

As I presently perceive the court's order in the *PMA* case to be a matter of seminal importance to the 8(b)(4)(D) issues pending before me (see *NLRB v. Plasterers' Local 79*, 404 U.S. 116 (1971) (unfair labor practice allegations under § 8(b)(4)(D) "must be read in light of §10(k) with which (they are) interlocked")), the AGC is hereby directed to advise the tribunal when a definitive decision is reached by the Board as to whether an appeal will be taken in that matter so it may consider and determine whether the court's order of June 17 constitutes the law of the case for purposes of this

administrative adjudication. See e.g., *Sabine Towing*, 263 NLRB 114 (1982). For that reason, administrative notice will also be taken of the Board's decision concerning an appeal of the court's order in the *PMA* case if it occurs while this matter is still pending before me.

In addition, I take notice of the courts' decisions in the *Canning* and *New Vista* cases. But in doing so, I do not deem it necessary or useful to entertain argument concerning those cases. Accordingly, I will not invite the parties' argument as to this question.

## II.

The AGC and the Charging Parties vigorously oppose the remaining aspects of Respondent's motion to reopen. In particular, the AGC argues that Respondent's Exhibits 58 through 61 should be rejected on the ground that they do not meet the "newly discovered evidence" standard the Board applies when considering motions to reopen under § 102.48(d)(1) of the Board's Rules and Regulations.<sup>3</sup> I agree not only as to those four exhibits but also as to the remaining two, Respondent's Exhibits 62 and 63.

With regard to the threshold question, Section 102.48(d)(1) provides in pertinent part: "Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing." The Board defines newly discovered evidence as "evidence that was in existence at the time of the hearing, and of which the movant was excusably ignorant." *Seder Foods Corp.*, 286 NLRB 215, 216 (1987). Based on that definition, the Board does not consider evidence that came into existence following the close of the hearing as evidence admissible under the newly discovered evidence rule. *Allis-Chalmers, Corp.*, 286 NLRB 219, fn 1 (1987).

Exhibits 58 through 61 deal unquestionably with matters that arose or came into existence following the close of the hearing. Consequently, I find they are not admissible under the Board's newly discovered evidence rule. I note further that the probative value of such evidence would be questionable where, as here, any resolution as to whether the matters addressed in those

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<sup>3</sup> Read literally, Sec. 102.48(d) applies to motions to reopen after the issuance of a Board decision. No rule exists concerning motions to reopen the record where, as here, the matter is pending before an administrative law judge for decision apart from the cursory authorization in Sec. 102.35(a)(8) for a judge to rule on such motions when they occur. Furthermore, upon the issuance of a judge's decision, the proceeding is automatically transferred to the Board. For that reason, a rule similar to that found in Sec. 102.48(d) applicable to judges would make no sense because a judge's jurisdiction over the case ceases with the transfer for all purposes other than incidental typographical corrections to the decision issued by the judge. Be that as it may, the ample Board precedent developed over the years under Sec. 102.48(d) (sometimes even invoked as to motions made before the issuance of a Board decision) provides ample instructive guidance, if not precedent binding on the Board's judges, when ruling on such motions at this stage of the proceeding

four exhibits would have occurred at all absent Respondent's admitted efforts that are at the heart of this proceeding, irrespective of whether they amount to lawful primary activity or unlawful secondary activity under § 8(b)(4)(B), would be problematic and highly speculative.

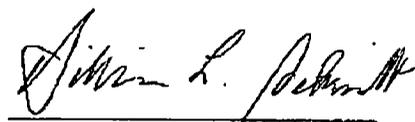
Exhibit 62 can be fairly characterized as a legal brief that sets forth perceived facts and argument by the PMA in seeking the dismissal of an unfair labor practice charge pending before the Regional Director. Even though it makes reference to events that occurred well before the close of the hearing in this proceeding, the fact of the matter is that this brief was prepared and submitted following the close of this hearing. Hence, I find that it too fails to qualify as newly discovered evidence admissible under the Board's rule.

Finally, aspects of Exhibit 63 do predate the close of this hearing but they are three attachments to the documents prepared following the close of this hearing. Specifically, attachments, which date back to 1994, are the Port's notice of termination of the 1984 collective bargaining agreement between the Port and ILWU Local 8, the related § 8(d) notice sent to the Federal Mediation Service at the time, and the Port's subsequent withdrawal of its notice of termination. As the documents to which these three items were attached were prepared after the close of the hearing, and as Respondent has failed to show why they should be considered to have been "excusably ignorant" of the three attachments, I find that Exhibit 63 is not admissible in its entirety under the newly discovered evidence rule. For that reason, I find it unnecessary to consider whether the proffered exhibit has sufficient relevance to warrant reopening the record.

For the foregoing reasons, the motion to reopen the record is hereby denied. This motion and all responses thereto are made a part of the record. Respondent's Exhibits 58 through 63 are remanded to the rejected exhibit file.

SO ORDERED.

Dated: July 18, 2013, at San Francisco, California.



William L. Schmidt  
Administrative Law Judge

Served via facsimile:

Mara-Louise Anzalone	206.220.6305
Lisa J. Dunn	503.326.5387
Kirsten Donovan	415.775.1302
Eleanor Morton	415.771.7010
Robert S. Remar	415.771.7010
Carson Glickman-Flora	206.378.4132
Michael T. Garone	503.796.2900
Norman D. Malbin	503.251.9952
Randolph C. Foster	503.220.2480
Daniel G. Mueller	503.220.2480
Cathy Peck	503.699.4111