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

Respondents ILWU and its Locals 8 and 40 have requested that the Board take administrative notice of the Board's own pleadings and certain exhibits, along with corresponding hearing transcript excerpts, 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.* General Counsel ("GC") does not oppose the request as applied to the *Cal Cartage* pleading[1], but moves to strike the request as applied to the exhibits and related transcript in the matter pending before Judge Wedekind. In arguing that this request is inappropriate, the GC mischaracterizes Respondents' request as an "end-run whereby the Board would base its decision in this matter on evidence never put before the Administrative Law Judge." (Mot. to Strike at 5) However, contrary to the GC's assertion, Respondents motion for administrative

[1] This pleading – a legal brief filed in 1987 by the Board with the D.C. Circuit in support of previous, longshore work preservation agreements – provides compelling argument for the PMA carriers, and ICTSI's, plenary "right of control" over their own containers, including the refrigerated containers ("reefers") at issue here.

notice and the submitted parts of the record in the Wedekind case have been filed solely as further support to show that Respondents' motion to reopen the record, which is explicitly part of Respondents' exceptions to Judge Schmidt's decision, should have been granted. More specifically, the exhibits and transcript excerpts from the Wedekind case show that had Judge Schmidt granted Respondents' motion to reopen the record, it would have led to the elicitation and submission of such evidence, which demonstrates that the right of control has been held by the carriers and ICTSI for all material times and well before the instant dispute.[2] Indeed, the GC's own arguments demonstrate that the effect that the proffered exhibits would have had on the outcome is a relevant consideration in deciding whether to reopen the reocrd. (Mot to Strike at 8)

Moreover, the GC's assertion that these documents would not affect the outcome in this case is simply incorrect. (Mot. to Strike at 8-9) It is beyond dispute that the primary issue in this case is whether the carriers and ICTSI possess the right of control. As set out more fully in Respondents' Motion to Reopen the Record, the proffered exhibits establish that the carriers and ICTSI have always had the right of control by virtue of Terminal Use Agreements, which are already in the record in this case. In other words, the exhibits are relevant to the issue of control as it existed before, during, and after the close of the hearing. And the mere fact that the exhibits arose after the close of the hearing does not render them irrelevant as to the parties' relationships before the close of the hearing. Indeed, the Board has reopened the record to admit such evidence under similar circumstances in *Norton Health care Inc. d/b/a Norton Audubon Hosp. &*

[2] Respondents well understand that the evidence from the Wedekind hearing goes beyond the evidence we had submitted in support of the Motion to Reopen the record before ALJ Schmidt. This was the precisely the point of the Motion to Reopen – to obtain a further hearing on the evidence we did have in order to also elicit from Charging Party ICTSI , especially on cross-examination, other related evidence concerning the "right of control" held by ICTSI and the carriers over the disputed reefer work. Clearly, had ALJ Schmidt agreed to hold further hearings in the instant matter, both the evidence submitted with our Motion to Reopen and the related, ensuing evidence admitted by ICTSI before ALJ Wedekind would have been part of the instant record.

Norton Suburban Hosp., 350 NLRB 648, 649 (2007) and *Inland Container Corp.*, 273 NLRB 1856, 1856-57 (1985).[3]

Accordingly, the GC's Motion to Strike Respondents' Motion to Take Administrative Notice should be denied.

Dated: March 27, 2014

Respectfully submitted,
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[3] The General Counsel's other arguments are fully refuted in our prior pleadings concerning Respondents' Motion to Reopen and our exceptions to ALJ Schmidt's denial of the motion.

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 27, 2014** I caused the foregoing document(s):

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

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.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **March 27, 2014**, at San Francisco, California.

Nicole Bridges