UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, AFL-CIO,	
and	
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 8, AFL-CIO,	Case No. 19-CC-082533 Case No. 19-CC-082744
and	Case No. 19-CD-082461
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 40, AFL-CIO,	Case No. 19-CC-087504 Case No. 19-CD-087505
and	
ICTSI OREGON, INC.,	
and	
PORT OF PORTLAND.	

CHARGING PARTY ICTSI OREGON, INC.'S OPPOSITION TO RESPONDENTS' MOTION TO TAKE ADMINISTRATIVE NOTICE IN SUPPORT OF EXCEPTIONS AND IN SUPPORT OF GENERAL COUNSEL'S MOTION TO STRIKE

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I. INTRODUCTION

Accompanying their Reply Brief in Support of Exceptions to the Decision of the Administrative Law Judge ("Reply Brief"), Respondents International Longshore and Warehouse Union and its constituent local unions, Local 4 and Local 8 (collectively "Respondents"), filed a Motion to Take Administrative Notice in Support of Exceptions ("Motion for Administrative Notice"). In this belated Motion for Administrative Notice, Respondents seek to expand the already voluminous record before the Board in the above-referenced case heard and decided by Administrative Law Judge Schmidt to include an appellate brief filed by the NLRB over 27 years ago in an unrelated matter as well as voluminous exhibits and selective pages of transcript from a separate unfair labor practice case heard by Administrative Law Judge Wedekind in November and December of 2013 regarding events which occurred after the record closed in this case. In addition to its unfounded attempt to graft portions of the record in the as yet undecided case before ALJ Wedekind onto the record here, Respondents embedded in their Reply Brief a "request" based on no legal authority that "the Board temporarily defer ruling" in this case "in order to consolidate or have coordinated review" with the case currently before ALJ Wedekind, one which may or may not ever come before the Board on exceptions. (Reply Brief, p. 3.)

In response to the Motion for Administrative Notice, the General Counsel filed a Motion to Strike and Opposition to Respondents' Motion to Take Administrative Notice in Support of Exceptions ("Motion to Strike"). In this motion, the General Counsel interposed no objection to the Board taking administrative notice of its ancient appellate brief. However, the General Counsel vigorously opposed the Board's taking administrative notice of hundreds of 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. (Motion to Strike, pp. 1-2.) The General Counsel did not allude in its Motion to Strike to Respondents' request embedded in their Reply Brief to defer ruling on the exceptions in this case until such time as the decision in the case before ALJ Wedekind comes before the Board.

Charging Party ICTSI Oregon, Inc. ("ICTSI") files this brief in opposition to the Motion for Administrative Notice filed by Respondents, including the request to take administrative notice of the NLRB's 27-year-old appellate brief as well as the evidence submitted before ALJ Wedekind. In addition, ICTSI opposes Respondents' efforts to unduly delay adjudication of their exceptions by seeking to defer Board action until such time as the case before ALJ Wedekind may also be presented for review.

II. DISCUSSION

A. Respondents' Motion for Administrative Notice of the Evidence Presented to ALJ Wedekind Should be Denied

ICTSI fully supports the General Counsel's position that granting the ILWU's Motion for Administrative Notice and reopening the record in this case for receipt of the evidence submitted in the hearing before ALJ Wedekind is both "inappropriate and unwarranted." (Motion to Strike, p. 4.) ICTSI will not repeat those arguments here. *See* Motion to Strike, pp. 4-9 (detailing the General Counsel's contentions that the ILWU's motion for the Board to take administrative notice of these materials should either be stricken or denied). However, a few additional points warrant discussion.

First, the Respondents' grandiose claim that the materials are "highly relevant to the key issue of 'right to control' over the disputed reefer work" for the "time period covered by ALJ Schmidt's decision" simply does not withstand scrutiny. (Motion for Administrative Notice, pp. 5-6.) The complaints filed by the General Counsel in this case

involve allegations that §§ 8(b)(4)(B) and (D) of the Act were violated by certain specific conduct committed by ILWU officers and members between May 24, 2012 and August of 2012. While the "right to control" the reefer work was a central issue at hearing, that issue was fully litigated by the parties based upon extensive evidence regarding the conditions and contractual arrangements that were in existence at the time the events complained of took place.

Thus, numerous contracts and other legal documents were entered into evidence at the hearing before ALJ Schmidt, including, but not limited to, (1) the Lease between ICTSI and the Port of Portland ("the Port"); (2) the Terminal Use Agreement between Hanjin, an ocean carrier and terminal customer, and the Port which was assigned to ICTSI when ICTSI began operating Terminal 6; (3) certain amendments to the Terminal Use Agreement between Hapag-Lloyd, another ocean carrier and terminal customer, and the Port which was also assigned to ICTSI; and (4) the Port's Tariff. These documents, along with several others, including the collective bargaining agreement between the Port and the District Council of Trade Unions making clear that the disputed work must be performed by the Port's electricians, formed the backdrop for the parties' factual and legal arguments before ALJ Schmidt about which entity had the "right to control" the disputed work at the time the unfair labor practices in this case took place.

In addition to this documentary evidence, ALJ Schmidt was also presented with detailed testimony regarding the business relationships between the Port, ICTSI and the ocean carriers through August of 2012. He was presented with evidence regarding the assignment of the carrier contracts by the Port to ICTSI when ICTSI took over operation of the terminal in February 2011, the manner in which ICTSI billed the carriers for services provided to the carriers under those contracts, and the manner in which the disputed work

was performed by the Port's electricians. Thus, ALJ Schmidt was informed that, while ICTSI was required under the Lease to utilize Port electricians to perform the disputed work and to reimburse the Port for the related costs, ICTSI also was able to bill the carriers for the provision of those services under the carrier contracts. He was also made fully aware that the assigned contracts between the carriers and ICTSI were set to expire on December 31, 2012 and that ICTSI would then be negotiating for successor agreements with the carriers past that date.

Viewed against this evidentiary backdrop, the lack of relevance to this case of the materials now being proffered by Respondents becomes apparent. The materials submitted by the ILWU relate almost exclusively to ICTSI's unsuccessful attempts to negotiate successor terminal use contracts with its two main customers, Hanjin and Hapag Lloyd, after January 1, 2013. Thus, the exhibits that the ILWU seeks to offer are dated between January 3, 2013 and May 16, 2013, long after the record closed in the case heard and decided by ALJ Schmidt. These documents do not bear upon or even mention any incidents that were litigated before ALJ Schmidt.

Nor do they have any relevance to the issue of which entity controlled the disputed work during the time period litigated before ALJ Schmidt. The ILWU's assertion that these documents show that ICTSI "always" had the right to control the disputed work is without legal support and makes no sense. (Motion for Administrative Notice, p. 5.) All the proffered documents and the testimony accompanying them indicate is that ICTSI attempted to negotiate pricing for the disputed work with the carriers after the previously assigned carrier contracts expired on December 31, 2012 and that, in the absence of an agreement on pricing, ICTSI unilaterally set such pricing for certain carrier calls after January 1, 2013.

However, the documents do not indicate any agreement between the carriers and ICTSI regarding the identity of the individuals who would perform the disputed work. In fact, they establish the opposite, that the carriers have no control over the means and manner of providing the services, including the direction of labor. The documents also do nothing to change the fact that the Lease between ICTSI and the Port continued to require that the disputed work be performed by the Port's electricians and that, in fact, the work continued to be performed by the Port's electricians subject to the direction and control of Port management both prior to and after January 1, 2013. While the ILWU is free to argue before ALJ Wedekind that these documents somehow are relevant to the "right to control" during the time at issue in the hearing before him, the ILWU's overstated claim that these documents have the potential to change the result in this case, or are even relevant to the issues presented to ALJ Schmidt, is specious and without support. *See Fitel/Lucent Technologies, Inc.*, 326 NLRB 46 (1998) (in order for the Board to consider newly discovered evidence under Board Rule § 102.48(d), the evidence must, if adduced and credited, "require a different result than that reached by the judge").

In addition to having no relevance to the issues presented by this case, the materials being proffered by the ILWU cannot be considered "newly discovered" evidence under the Board's regulations because the "evidence" did not exist at the time the record closed in the hearing before ALJ Schmidt in August 2012. The Board has consistently held that "newly discovered" evidence under § 102.48 of the Board's Regulations must be evidence that existed at the time of the hearing before the ALJ and cannot consist of evidence regarding circumstances arising or events occurring after the close of the hearing. *See, e.g.*, *Machinists Lodge 91 (United Technologies)*, 298 NLRB 325 n. 1 (1990), *enf'd* 934 F.2d 1288 (2nd Cir. 1991). The Board has also recognized that it is inappropriate to take

administrative notice of facts that arose after the close of hearing. *See ITT Federal Services Corp.*, 335 NLRB 998 (2001) ("proffered documents, which * * * concern an event that occurred after the hearing, are not susceptible to administrative notice").

Seeking to avoid this well-established authority, the ILWU argues that the Board has reopened the record to admit evidence that arose after the close of the hearing "under similar circumstances" in *Norton Health Care, Inc.*, 350 NLRB 648 (2007), and *Inland Container Corp.*, 273 NLRB 1856 (1995). The ILWU is wrong. Both of these cases involved evidence that existed at the time of hearing and neither case involved circumstances similar to this case.

For example, *Norton Health Care* involved a compliance hearing that was held between October 21 and October 23, 2002. *Norton Health Care, Inc.*, 350 NLRB at 648. The issue was whether there was a particular job available to a discriminatee prior to or at the time of hearing. *Id.* at 649. Despite issuance of a subpoena by the General Counsel upon the respondent employer and the questioning of its witnesses, which the Board found constituted due diligence, the evidence at hearing was that there was no such available position. *Id.* The newly discovered evidence which the General Counsel sought to admit established that, at the time of hearing, there was, in fact, a position available to the discriminatee. The Board ruled that this evidence "would change the result the judge reached regarding [the discriminatee's] reinstatement." *Id. Norton Health Care* clearly involved evidence that was in existence at the time of hearing regarding the availability of a job for the discriminatee and it is difficult to imagine how Respondents can claim otherwise.

Inland Container Corp. is no different. In that case, an employer witness in an illegal refusal to hire case testified at hearing that the employer applied only three criteria

in selecting employees for hire after it acquired a new facility. *Inland Container*, 273 NLRB at 1856. This testimony led to the dismissal of the complaint. After the hearing, the same employer witness answered an interrogatory in a related judicial proceeding in which she revealed that there were, in fact, four criteria applied in selecting employees for hire, the fourth being an applicant's willingness to work in a non-union environment. *Id.* As a result, the Board reopened the record to take additional evidence regarding this fourth criterion, holding that the union had acted diligently to uncover this additional reason at the hearing and that the case raised "a substantial question whether a key witness or witnesses may have committed perjury regarding a material fact." *Id.* at 1857. As with *Norton Health Care*, the newly discovered evidence directly related to events and circumstances that were in existence at the time of hearing, namely, the employer's criteria for hiring during the time period covered by the complaint.[1]

The cases cited by the ILWU bear no resemblance to this case. Here, the evidence proffered by Respondents arose or was created after the close of hearing and relates for the most part to negotiations for successor carrier contracts, all of which took place after the close of hearing. None of the documents relate to any events that were litigated before ALJ Schmidt.

However, there are additional practical reasons why the Board should not permit the ILWU to add selected evidence from a subsequent hearing which has not yet been decided to the record of a hearing that has already been concluded and decided. First, the parties in the first hearing included not only the General Counsel, the Respondents, and ICTSI, but

[1] In arguing that the evidence in these cases arose after the hearing, Respondents conflate the circumstances leading to the discovery of the newly discovered evidence with the evidence itself. For example, in *Inland Container*, the union discovered the fact that there was a fourth criterion for hiring due to a statement made by the employer witness after the hearing. *Inland Container*, 273 NLRB at 1856. However, the statement of that witness clearly concerned circumstances existing at the time of hearing.

also the Port of Portland and the International Brotherhood of Electrical Workers ("IBEW"), the union representing the Port's electricians. Neither the Port nor the IBEW was a party to the hearing before ALJ Wedekind. Adding the record in that case, whether by means of administrative notice or otherwise, prejudices these parties, who were unable to cross-examine witnesses or examine documents, and raises due process concerns.

Second, the taking of administrative notice by the Board is governed by the standards for judicial notice under Federal Rule of Evidence 201. *ITT Federal Services Corp.*, 335 NLRB at 998 n.1 (2001). Under that rule, facts can be judicially noticed only if they are not subject to reasonable dispute. *See, e.g.*, *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 895 (10th Cir. 1994). Here, Respondents pluck from the voluminous record from another case certain portions of that record which they erroneously believe support their position in this case. They offer no legal support for the notion that this is an appropriate use of either judicial or administrative notice.[2]

B. Respondent's Motion for Administrative Notice of the Board's Ancient Brief in Another Case Should Also Be Denied

Respondents' attempt to influence the Board's decision by seeking administrative notice of an appellate brief filed by the NLRB some 27 years ago should also be denied. Respondents concede in their Motion for Administrative Notice that administrative notice of filings in other judicial or administrative proceedings is proper only "insofar as they are relevant to the issues at hand." (Motion for Administrative Notice, p. 3.) Here, statements in a 27-year-old appellate brief in an unrelated case regarding work, the stuffing and

[2] Thus, to the extent that the Board decides to take administrative notice of portions of the record in the case before ALJ Wedekind in its review of this case, ICTSI contends that the Board should take administrative notice of the entire record.

unstuffing of commodities into and out of containers, which is completely different than the disputed work in this case, are simply not relevant.

Frankly, it is difficult to comprehend what use Respondents seek to make of this old brief. Are they suggesting the brief is an admission against interest by the Board that the disputed work here, the plugging and unplugging of refrigerated containers by Port electricians into electrical receptacle banks owned by the Port of Portland, is controlled by the ocean carriers? If so, Respondents' contention is farfetched because the brief contains no statement or admission at all regarding the right to control the disputed work under the circumstances existing during the time period litigated before ALJ Schmidt. But even if *arguendo* the statements in the brief bear in some vague way on the issues presented here, which they do not, are the Respondents suggesting that the Board is not permitted to change or refine its position over time? Such a suggestion is laughable.

The Board should decide this case on the evidence presented to ALJ Schmidt and not on the extraneous materials belatedly submitted by Respondents. Thus, in *Dahl Fish Co.*, 279 NLRB 1084 (1986), *enf'd* 813 F.2d 1254 (D.C. Cir. 1987), the respondent, after the close of hearing, moved the ALJ to take administrative notice of certain pleadings filed in a related state court proceeding. *Id.* at 1109. The ALJ, in a decision affirmed by the Board, denied the respondent's motion. In doing so, the ALJ noted that the respondent "failed to show with requisite specificity that the proffered pleadings would assist in reaching a determination of the issues" or that they "contain facts which are not subject to reasonable dispute * * *." *Id.* The ALJ also noted that the respondent "did not claim the material contained newly discovered evidence or that it would be useful as an admission." *Id.* Accordingly, the ALJ properly stated: "The proffered pleadings go to the heart of the dispute and I must resolve the issues based on proof not arguments contained in selected

pleadings filed in another proceeding." *Id.* The Board should follow its decision in *Dahl Fish Co.* and decide the exceptions based on the record before ALJ Schmidt. Accordingly, the Board should deny Respondents' motion to take administrative notice in this case of the NLRB's 27-year-old pleading.[3]

C. The Board Should Not Defer Ruling in This Case

Respondents also ask the Board, without citing any legal authority, to defer ruling on this case until ALJ Wedekind issues his decision in the subsequent case and exceptions are filed and briefed. The Board should refuse to take this unprecedented step for several reasons. First, such a process would entail inordinate delay. There is no telling how long it will take ALJ Wedekind to issue his decision nor is it completely certain that exceptions will be filed in the case before him. And if exceptions and/or cross-exceptions are filed from his decision, the briefing process may take an extended period of time.

Second, Respondents are well aware that ICTSI has filed a lawsuit against Respondents seeking damages under § 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, as a result of their secondary conduct and that the district court has stayed that lawsuit pending the NLRB's disposition of this case. *Int'l Longshore & Warehouse Union v. ICTSI Oregon, Inc.*, 932 F. Supp. 2d 1181, 1198-99 (D. Or. 2013). Adopting a process that substantially delays the Board's adjudication of this matter for what could be a period of years thus seriously prejudices ICTSI in obtaining redress in court.

[3] While much of what was said by the Board in *Dahl Fish Co.* applies here, the support for taking administrative notice of the pleading here is even weaker than in that case. In *Dahl Fish Co.*, the pleadings were in a related case between the parties, addressed the same or similar issues as addressed in the NLRB proceedings, and were temporally proximate to those proceedings. *Id.* at 1109. Here, the pleading is in an unrelated case with different issues involving different parties that was filed more than a quarter of a century ago. In addition, if Respondents believed this old appellate brief was somehow relevant, they should have offered it as evidence in the hearing before ALJ Schmidt, giving both the judge and the parties an opportunity to address its significance, if any.

Third, Respondent's contention that consolidated review of ALJ Schmidt's decision and ALJ Wedekind's eventual decision is somehow "necessary for proper consideration of Respondents' exceptions to ALJ Schmidt's denial of [their] motion to reopen" is simply a red herring. (ILWU's Reply Brief, p. 1.) ALJ Schmidt's denial of Respondents' motion to reopen the record should be decided on the basis of the submission made to ALJ Schmidt at the time of the motion, not on additional materials that were never presented to him and which he had no opportunity to consider.

The ILWU's contention that this case should be placed in a sort of legal limbo because the Board has severed and held in abeyance the § 8(b)(4)(D) allegations tried before ALJ Schmidt is also groundless. (ILWU's Reply Brief, p. 2.) The Board has already decided that there is no reason to delay adjudication of the § 8(b)(4)(B) allegations in this case because of the legal issues surrounding the § 8(b)(4)(D) allegations. To the extent the Board affirms ALJ Schmidt's conclusion that Respondents violated §8(b)(4)(B) in this case, ICTSI will most likely be entitled to the exact same relief that would be available under § 8(b)(4)(D). The pendency of the case before ALJ Wedekind simply does not justify delaying to ICTSI, as the injured party, the benefits flowing from an affirmance of ALJ Schmidt's decision regarding the § 8(b)(4)(B) allegations tried before him.

III. CONCLUSION

For the reasons stated above, the Board should deny Respondents Motion for Administrative Notice and/or grant the General Counsel's Motion to Strike.

DATED this 3rd day of April, 2014.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 3rd day of April, 2014, I electronically filed the foregoing **CHARGING PARTY ICTSI OREGON, INC.'S OPPOSITION TO RESPONDENTS' MOTION TO TAKE ADMINISTRATIVE NOTICE IN SUPPORT OF EXCEPTIONS AND IN SUPPORT OF GENERAL COUNSEL'S MOTION TO STRIKE** with the National Labor Relations Board with the eFiling system.

I further certify that on the 3rd day of April, 2014, I caused to be served a copy of the foregoing document by electronic mail to the following:

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