

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, ILWU LOCAL 8
AND ILWU LOCAL 40,

Respondents,

and

ICTSI OF OREGON, INC., and PORT OF
PORTLAND,

Charging Parties.

Case No. 19-CC-082533, *et al*

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, ILWU LOCAL 8
AND ILWU LOCAL 40,

Respondents,

and

ICTSI OF OREGON, INC.

Charging Party.

Case No. 19-CC-100903

RESPONDENTS ILWU'S MOTION TO CONSOLIDATE RELATED CASES

Respondents ILWU International and its Locals 8 and 40 hereby move and request¹ the Board to consolidate Case No. 19-CC-100903, decided by Administrative Law Judge Wedekind, with Case No. 19-CC-82533, *et al.*, which is currently pending before the Board on Respondents' Exceptions to the Decision by Administrative Law Judge William Schmidt.² Both matters concern allegations brought by the same Charging Party (ICTSI Oregon, Inc. ("ICTSI")) against the same Respondents (ILWU International and its Locals 8 and 40 (collectively, "ILWU")) for the same type of alleged unlawful secondary conduct allegedly in connection with the same labor dispute over the assignment of dockside "reefer" work³ at the same location at Terminal 6 in Portland, Oregon. In both matters, the General Counsel alleges that Respondents have engaged in unlawful work slowdowns in order to compel ICTSI and other parties to assign reefer work at Terminal 6 to ILWU employees. The only difference between the two cases, as noted by Judge Wedekind, is that the latter "covers the subsequent time period beginning September 2012." (Wedekind Decision at 3:12-13.)

Accordingly, consolidation is appropriate for several reasons. First, the two matters involve numerous identical issues of fact and law regarding theories of secondary actions in violation of section 8(b)(4)(B). Second, Judge Wedekind's decision rests entirely, and without independent scrutiny, on the findings of fact and conclusions of law issued by Judge Schmidt as

¹ On June 20, 2014, Respondent counsel asked all parties for their respective positions concerning this request. By separate emails sent on June 23, 2014, General Counsel and the Charging Parties stated their objections to consolidation.

² For convenience and clarity, we refer to the first case as the "Schmidt case" and second as the "Wedekind case."

³ Case No. 19-CC-82533, *et al.*, also concerns virtually identical allegations brought by Charging Party Port of Portland. While the Port of Portland was not a Charging Party in Case No. 19-CC-100903, a witness from the Port of Portland testified at the hearing and ALJ Wedekind ultimately concluded that Respondents engaged in conduct to pressure ICTSI to cease doing business with the Port. (Wedekind Decision at 16:1-2.)

to the secondary nature of the labor dispute at issue. Third, Judge Schmidt’s decision will be significantly impacted by the Board’s review of the Wedekind case because Respondents have excepted to Judge Schmidt’s refusal to consider certain evidence which was later admitted in the Wedekind case and ruled upon in his decision. Fourth, consolidation is compelled for the very reasons Judge Wedekind gave in adopting without review the findings in the Schmidt decision—namely judicial efficiency and economy, the risk of inconsistent outcomes, and unnecessary delays. Fifth, consolidation would speed final resolution of the labor dispute underlying both actions. Moreover, General Counsel and the Charging Parties have litigated the Schmidt case without sacrificing for the sake of time the proper consideration of the complex issues implicated herein.

Consolidation is appropriate where, as here, the two cases involve the same parties and present the same issues for resolution. *Connecticut Light & Power Co.*, 222 NLRB 1243, 1243 (1976) (“Since the cases contain common issues, we find that administrative efficiency dictates that the two cases be consolidated.”); *Malcom X Ctr.*, 222 NLRB 944, 944 n.2 (1976) (consolidating two cases “as they raise the same issues and appropriate resolution of these issues can only be accomplished through consolidation”). Various factors are considered in deciding whether to consolidate, including the risk that matters will have to be relitigated and the likelihood of delay if consolidation is granted. *Frontier Hotel & Casino*, 324 NLRB 1225, 1226 (1997). The Board has found it appropriate to consolidate cases “in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay.” *Cent. Distributors*, 266 NLRB 1021, 1021 n.2 (1983).

The Schmidt and Wedekind cases should be consolidated because they involve identical issues of fact and law as to identical theories of secondary actions in violation of Section

8(b)(4)(B) against the same Respondents, with the only difference being the alleged time periods of violations. Since both cases turn on the same factual and legal issues, there is also a substantial overlap in the evidence pertinent to the resolution of both cases. Indeed, the entire trial record from the Schmidt case was admitted as Joint Exhibit #1 in the Wedekind case. (*See* Wedekind Decision at 2, fn. 4.)

Most importantly, Judge Wedekind's decision rests entirely, and without independent scrutiny, on the findings of fact and conclusions of law issued by Judge Schmidt as to the secondary nature of the labor dispute and the direct involvement of Respondent agents in the first set of alleged job actions from the Schmidt case. Judge Wedekind ruled that he was obligated to adopt, without review, all of Judge Schmidt's findings and conclusions as to all the underlying elements of the Section 8(b)(4)(B) allegations in the second case before him.⁴ He, consequently, barred Respondents from litigating their "work preservation" defenses as constituting "relitigation" of issues already ruled upon by Judge Schmidt.⁵

Judge Wedekind summarized the findings from the Schmidt Decision that established for

⁴ Judge Wedekind explained:

As indicated above, the Unions have filed exceptions to Judge Schmidt's decision, which remain pending, and thus his findings are not final. Nevertheless, contrary to the Unions' contention, it is appropriate to consider and rely on those findings in deciding the issues in this case. The issues decided by Judge Schmidt were fully litigated before him, and relitigating or revisiting those issues de novo in this related proceeding, while the matter is before the Board, would be antithetical to judicial efficiency and economy and potentially lead to inconsistent and unnecessary delays.

(Wedekind Decision at 4:5-10.)

⁵ As Judge Wedekind noted, "I thereafter ruled at the second pretrial conference call on November 7 that the Unions would not be permitted to relitigate Judge Schmidt's findings, but could present newly discovered and previously unavailable evidence or evidence of changed circumstances since the period addressed in that case." (Wedekind Decision at 4, fn. 9.)

him the elements of the section 8(b)(4)(B) violations in the second case as follows:

Based on that hearing record and the parties' post hearing briefs, in August 2013 Judge Schmidt issued a decision finding that the Unions violated Section 8(b)(4)(i) and (ii)(B) of the Act as alleged. Specifically, Judge Schmidt found that the Unions lacked a valid work-preservation claim to the dockside reefer work because the Port's electricians, rather than the longshoremen, had historically performed that work at the terminal. He further found that the Port retained the right of control over the reefer work when it leased the terminal's operations to ICTSI in 2010; that the Port was therefore the "primary" employer in the work-assignment dispute; and that ICTSI and the carriers were "neutrals" in that dispute. Although the Unions contended that their coastwise labor agreement with PMA compelled a different conclusion, Judge Schmidt rejected the argument as the Port was not a member of the PMA or party to that agreement, and ICTSI did not join the PMA until after executing the lease with the Port. He also rejected the Unions' argument that the carriers' ownership interest in the refrigerated containers gave the carriers the right to control who plugged and monitored them after being unloaded at the Port. Finally, Judge Schmidt found that various agents of the Unions did, in fact, threaten ICTSI officials in May 2012 and subsequently orchestrate intermittent slowdowns and work stoppages at the terminal in June 2012 in support of their dispute with the Port. *ILWU ("ILWU I")*, JD(SF)-36-13, 2013 WL 4587186 (August 28, 2013), Respondents' exceptions filed October 30, 2013.

(Wedekind Decision at 2:33 – 3:10.)

Judge Wedekind then explained in his Decision how the "binding" rulings from the Schmidt Decision dictate his own finding of a secondary labor dispute and Respondent's agency liability in the case before him:

Accordingly, for purposes of deciding the issues in this case, consistent with Judge Schmidt's decision in *ILWU I*, I find that the Port's electricians, rather than the longshoremen, historically performed the dockside reefer work at the terminal; that the Port continued to have the right of control over that work and was the "primary" employer with respect to the work assignment dispute with the Unions; and that ICTSI and the carriers were "neutrals" in that dispute, during the relevant period. I further find that agents of the Unions unlawfully threatened ICTSI officials in May 2012 and orchestrated intermittent slowdowns and work stoppages at the 2012 in support of their dispute with the Port over the dockside reefer work.

(Wedekind Decision at 5:4-11.)

The Wedekind Decision, therefore, stands, falls or changes on the Board's review of the

Schmidt Decision. And the reverse is equally true – the Schmidt Decision also turns, in significant part, on the Board’s review of the Wedekind Decision. This is because in the Schmidt case, Respondents’ Exceptions concern, among other things, the denial of their motion to admit into that record certain evidence which was later entered into the record of the Wedekind case. Respondents assert that such evidence (documentary and testimonial) shows that the carrier lines and ICTSI, rather than the Port, have always had “right of control” over the disputed reefer work, which makes the dispute “primary” in both cases.⁶

While Judge Schmidt refused to consider the evidence, Judge Wedekind found that it failed to establish “right of control” by the carriers and ICTSI. If Judge Schmidt incorrectly ruled, then the Board must consider the significance of the rejected evidence. However, because such evidence is now in the Wedekind record and ruled upon in the Wedekind Decision, the Board must necessarily agree or disagree with Judge Wedekind’s conclusion about the disputed evidence. Similarly, if Judge Wedekind ruled incorrectly in finding the disputed evidence insufficient to establish “right of control” by the carriers and ICTSI, then this would necessarily undermine the finding of secondary labor dispute in both cases. Thus, the Board can most efficiently and fairly consider the issue as to the disputed evidence in both cases by consolidating them and considering both records and both ALJ Decisions simultaneously.

Consolidation is also compelled for the very reasons Judge Wedekind gave in adopting

⁶ The disputed evidence consists of the testimony of ICTSI executive David Trzyzewski as well as various emails and contract proposals between ICTSI and carriers concerning the continuation of their Terminal Use/Stevedoring Services contract at Terminal 6. See, e.g. TR. (W) 624-628, 1446-1450, 1475-77, 1498-1499, 1506, 1513-1519 and R Ex. (W) # 33, 41-43. This evidence shows that the carriers and ICTSI determine and negotiate the terms of the disputed reefer work as a service to be performed by ICTSI for the carriers, without any involvement to or involvement by the Port. (*Id.*) Respondents submit that this evidence shows that the carriers and ICTSI have had “right of control” over the disputed reefer work at all material times, including the time periods covered by the Schmidt Decision.

without review the findings in the Schmidt Decision:

As indicated above, the Unions have filed exceptions to Judge Schmidt's decision, which remain pending, and thus his findings are not final. Nevertheless, contrary to the Unions' contention, it is appropriate to consider and rely on those findings in deciding the issues in this case. The issues decided by Judge Schmidt were fully litigated before him, and relitigating or revisiting those issues de novo in this related proceeding, while the matter is before the Board, would be antithetical to judicial efficiency and economy and potentially lead to inconsistent and unnecessary delays.

(Wedekind Decision at 4:5-10.)

The overlapping issues noted by Judge Wedekind warrant a singular and comprehensive consideration by the Board of all evidence and argument at one time. The importance of this cannot be overstated. Resolution of the work preservation issue regarding the disputed reefer work at Terminal 6 will have significant and far-reaching implications for the ILWU, its longshore employers and other parties that extend well beyond the Port in Portland and affect West Coast labor relations as a whole. Permitting the two cases to be reviewed by two separate Board panels would require the Board to revisit much of the same evidence and arguments and reconsider the same questions of fact and law. Separate review of the two *ILWU/ICTSI* cases "would be antithetical to judicial [i.e., administrative] efficiency and economy and potentially lead to inconsistent and unnecessary delays."

Rather than cause undue delay as asserted by General Counsel, consolidation would actually speed resolution of the labor dispute underlying both cases. As noted, the Wedekind case incorporates the Schmidt record. Thus, Board review of the Wedekind case will necessarily require review of both records. It, therefore, would be far more efficient and expeditious for the Board to review both records only once and issue only one consolidated Decision that addresses the many overlapping factual and legal issues.

While General Counsel opposes this motion on grounds that the consolidation would delay the Schmidt case, it would necessarily accelerate review of the Wedekind case. This, in turn, would actually expedite resolution of the labor dispute underlying both cases. The Port of Portland will argue that, as a Charging Party only in the Schmidt case, its sole concern is the speedy resolution of that case and not the Wedekind matter. However, the Port has the same interest as all involved parties in having the underlying labor dispute itself resolved. This will not happen until both cases are decided, which consolidation would expedite.

Moreover, General Counsel and Charging Parties have litigated the Schmidt case without sacrificing for the sake of time the proper consideration of the complex issues herein. Indeed, General Counsel and Charging Parties obtained from the Board extensions totaling three and a half months for the filing of their Answering Briefs to Respondents' Exceptions.⁷ Respondents did not object because, among other things, we too recognize that proper adjudication overrides any rush to judgment. Accordingly, for all the above reasons, the Board should consolidate the Wedekind case with the Schmidt case. Respondents also have simultaneously filed a request to extend the deadline to file exceptions to ALJ Wedekind's decision from June 27, 2014 to August 8, 2014 in order to give Respondents adequate time to prepare and file exceptions following the

⁷ In the Schmidt case, Respondents filed their Exceptions on October 30, 2013, making Answering pleadings due fourteen days later on November 13, 2013. On November 6, 2013, the General Counsel and Charging Parties requested a seven weeks extension to January 3, 2014. On November 7, 2013, the Board granted the request. On December 23, 2013, General Counsel and Charging Parties filed a second request for extension of time of more than four weeks. On the same date, the Board granted the request, setting filing of Answering pleadings for February 3, 2014. On January 6, 2014, the General Counsel and Charging Parties filed a third request for extension, this time with a Motion to Sever and Abey and Partially Postpone Briefing" concerning the Section 8(b)(4)(D) allegations. On January 27, 2014, the Board granted the motion in full, extending the filing of the Answering briefs to February 24, 2014, which was the day they were finally filed. In all General Counsel and Charging Parties obtained three and half months of extensions or "delay" as they now would characterize the instant motion and the accompanying motion to extend the time for filing Exceptions as to the Wedekind Decision.

Board's decision on this motion in light of Respondent counsel's scheduling conflicts and the weight of the record and issues in this case.⁸

Dated: June 24, 2014

Respectfully submitted,
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⁸ The General Counsel and Charging Party ICTSI object to any extension beyond 14 days.

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 **June 24, 2014** I caused the foregoing document(s):

ILWU's MOTION TO CONSOLIDATE RELATED CASES

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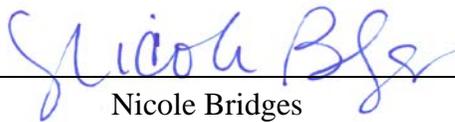
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- BY E-MAIL:** I caused the documents to be sent to the person at the electronic notification address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission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

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

Executed on **June 24, 2014**, at San Francisco, California.



Nicole Bridges