

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

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, AFL-CIO,  
INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, LOCAL 8, AFL-CIO,  
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

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, AFL-CIO,  
INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, LOCAL 8, AFL-CIO,  
INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, LOCAL 40, AFL-CIO

and

ICTSI OREGON, INC.

Cases 19-CC-100903

**COUNSEL FOR THE GENERAL COUNSEL'S  
OPPOSITION TO RESPONDENTS' MOTION TO CONSOLIDATE RELATED CASES**

Counsel for the General Counsel respectfully opposes the Motion to Consolidate Related Cases filed on June 24, 2014 by Respondent International Longshore and Warehouse Union ("Respondent ILWU"), and its Locals 8 and 40 ("Respondent Local 8" and "Respondent Local 40") (collectively, "Respondents").

While post-hearing consolidation of these actions is certainly well within the Board's discretion and may facially appear to offer a "streamlined" procedural path for the cases, a more appropriate approach would be for the Board to reviewing and decide Case 19-CC-100903 without consolidation by simply taking notice of its own findings in Cases 19-CC-82533, *et al.* See, e.g., *United Aircraft Corp.*, 180 NLRB 278, n.1 (1969). In fact, close scrutiny of Respondents' Motion reveals that consolidation is not only unnecessary and unwarranted, but is being sought as a means to place before the Board (and any further reviewing tribunals) extra-record evidence on the critical issue of "right to control" the disputed work in Cases 19-CC-82533, *et al.* This ploy, when compounded with the likelihood that post-hearing consolidation of the cases will likely delay the Board's resolution of this long-litigated matter, actually presents a compelling case for *foregoing* consolidation.

There is no serious debate that what began as a dispute over literally two jobs at the Port of Portland's Terminal 6 has evolved into a highly contentious litigation involving significant effort, time and expense, and has spawned numerous ancillary district court actions, both for private damages and injunctive relief under the Act. Respondents have made multiple, unsuccessful attempts to re-open the record in Cases 19-CC-82533, *et al.* for the purpose of introducing evidence they claim exonerates them by retroactively establishing that, contrary to the Board's own finding in *Electrical Workers Local 48 (ICTSI Oregon, Inc.)*, 358 NLRB No. 102 (2012), the Port of Portland has never had the "right to control" the disputed work.

Respondents' own Motion suggests that judicial efficiency is not what they aim to achieve via consolidation. Indeed, Respondents' stated purpose for seeking to consolidate is to provide them with a procedural setting for cross-pollinating the record

evidence between the two actions, such that the Board (and presumably any reviewing courts) will mistakenly consider in its review of Cases 19-CC-82533 *et al.* extra-record evidence only later admitted in Case 19-CC-100903 on the critical issue of the right to control the disputed work. (See Resp. Br. at 5 & n.6) By leaving the cases (and their records) discrete and intact, the Board can easily avoid such a result in its own and any further review of these matters.

In any event, procedural consolidation is fundamentally unnecessary in two cases that have already been litigated, in that the Board is fully capable of taking notice of its own findings and conclusions to the extent they inform a later proceeding. See, *e.g.*, *United Aircraft Corp.*, 180 NLRB at 278, n.1 (denying motion to consolidate cases currently pending before it and instead taking notice of prior findings). In this regard, Respondents' claim that, by failing to consolidate these proceedings, the Board would be forced to "revisit" evidence and "reconsider the same questions of fact and law," (see Resp. Br. at 6), misapprehends the Board's policy against re-litigation of issues, as described and carefully adhered to by Administrative Law Judge Wedekind. (See *Decision of Administrative Law Judge Jeffrey D. Wedekind*, JD(SF)-24-14, dated May 30, 2014, at 4, *citing Wynn Las Vegas, LLC*, 358 NLRB. No. 81, n.1 (2012); *Grandrapids Press of Booth Newspapers*, 327 NLRB 393, 394-95 (1998), *enf'd mem.*, 215 F.3d 1327 (6th Cir. 2000); *Detroit Newspapers Agency*, 326 NLRB 782, n.3 (1998), *enf. denied on other grounds* 216 F.3d 109 (D.C. Cir. 2000)). The Board will no more be required to "revisit" its findings than was Judge Wedekind required to "revisit" his predecessor Administrative Law Judge's findings in the prior case.

Finally, there is a significant risk that consolidation at this very late stage in the proceedings would necessarily halt the Board's review of the recommended decision in

of Cases 19-CC-82533, *et al.*, which was issued nearly a year ago, in order to await the parties' briefings on exceptions in the more recent case. Under such circumstances, consolidation would not effectuate the purposes of the Act. See, e.g., *Venture Packaging, Inc.*, 290 NLRB 1237 (1988) (denying motion to consolidate based on concern over delay in adjudication); *Jessie Beck's Riverside Hotel*, 231 NLRB 907, 908-09 (1977) (same), *enf'd*, 590 F.2d 290 (9th Cir. 1978).

As Respondents themselves acknowledge, the Board's determination as to whether the Terminal 6 work slowdowns constitute unlawful secondary boycott activity has "far reaching implications . . . that extend well beyond the Port in Portland and affect West Coast labor relations as a whole." (Resp. Br. at 6) Indeed, time is of the essence if the Act's secondary boycott protections are to be effective against Respondents, which view their actions as wholly protected and lawful. Moreover, contrary to Respondents' suggestion, putting the cases "on hold" is certainly not justified by the fact that the briefing of exceptions in Cases 19-CC-82533 *et al.* itself required several months, especially in light of the fact that Respondents have already received a 28-day extension of time in which to file their exceptions in Case 19-CC-100903. (See Partial Extension of Time to File Exceptions and Supporting Brief, dated June 25, 2014)

As the Board has noted, consolidation does not always effectuate the purposes of the Act and there is no "blanket rule" or "absolute" policy in favor of consolidating pending actions (even where they involve overlapping parties, facts and issues).<sup>2</sup> Here, Respondents' envisioned "consolidation" would merely create a venue for Respondents' continued efforts to re-litigate the issue of "right to control" by having the Board consider

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<sup>2</sup> *Service Employees Local 87 (Cresleigh Mgt.)*, 324 NLRB 774, 775 (1997) (citations omitted). See also *Great Western Produce*, 299 NLRB 1004, 1004 n.1 (1990).

in its review of Cases 19-CC-82533 *et al.* extra-record evidence only later admitted in Case 19-CC-100903. Accordingly and for the additional reasons set forth above, Counsel for the General Counsel respectfully requests that the Board deny Respondents' Motion to Consolidate Related Actions.

**DATED** at Seattle, Washington, this 27<sup>th</sup> day of June, 2014.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Opposition to Respondent's Motion to Consolidate Related Cases was served on the 27<sup>th</sup> day of June, 2014, on the following parties:

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