

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,)	
)	Case Nos. 19-CC-82533
and)	19-CD-82461
)	19-CC-87504
ICTSI OREGON, INC.)	19-CD-87505
)	
and)	
)	
PORT OF PORTLAND)	Case No. 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.)	Case No. 19-CC-100903
)	

ICTSI OREGON, INC.’S OPPOSITION TO MOTION TO CONSOLIDATE

I. INTRODUCTION

Respondents ILWU International and its constituent local unions, Locals 8 and 40 (collectively “Respondents” or “ILWU”), have moved to consolidate as yet unfiled exceptions from Administrative Law Judge Wedekind’s May 30, 2014 decision in Case No. 19-CC-100903 (hereafter “the Wedekind case”) with exceptions that Respondents previously filed from Administrative Law Judge William Schmidt’s August 29, 2013 decision in Case No. 19-CC-

82533 *et al* (hereafter “the Schmidt case”). The General Counsel has filed his opposition to Respondents’ motion to consolidate. Charging Party ICTSI Oregon, Inc. (“ICTSI”) supports the General Counsel’s opposition and offers the following to augment the contentions contained in the General Counsel’s brief.

II. FACTS

Respondents’ exceptions in the Schmidt case have been fully briefed by the parties and have been “at issue” since March 10, 2014, a period of almost four months. Accordingly, the Schmidt case is currently awaiting decision by the Board. By comparison, Respondents have not yet filed their exceptions in the Wedekind case and have been granted an extension of time to file said exceptions to July 25, 2014. Assuming that no further extensions are granted to either side, the Wedekind case will not be “at issue” for decision until sometime in late August 2014. However, it is likely that the Wedekind case will not be fully briefed to the NLRB until sometime in September 2014 or perhaps even later.

There were seven parties in the Schmidt case: (1) the General Counsel; (2) Charging Party, ICTSI; (3) Charging Party, Port of Portland (“the Port”); (4) Intervener International Brotherhood of Electrical Workers, Local 48 (“IBEW Local 48”); and (5) the three ILWU respondents, namely, the ILWU International and Locals 8 and 40. The complaints filed by the General Counsel in the Schmidt case involved allegations that §§ 8(b)(4)(B) and (D) of the Act were violated by certain specific conduct committed by Respondents’ officers and members between May 24, 2012 and August of 2012. While the “right to control” the work of plugging, unplugging and monitoring refrigerated containers at the dock at Terminal 6 (“the disputed 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. All parties, including the Port of Portland and IBEW Local 48, were afforded the opportunity to present evidence and question witnesses regarding this issue as well as all other issues in the case. Judge Schmidt ultimately found on the evidence presented that the three ILWU respondents were guilty of violating §§ 8(b)(4)(B) and (D) in the manner alleged in the General Counsel's Complaint.

The Wedekind case involved only five parties, the General Counsel, the Charging Party ICTSI, and the three ILWU respondents. The Port was neither a charging party nor did it intervene. Although a Port official testified at hearing, he did so under subpoena by the ILWU. IBEW Local 48 was neither a charging party nor an intervener in the Wedekind case. None of its officials or members testified at hearing. Accordingly, these entities were afforded no right to participate or present evidence regarding the allegations in the Wedekind case or regarding any alleged changed circumstances since the close of the record in the Schmidt case.

The issues in the Wedekind case involved factual allegations of continued ILWU misconduct from September 2012 through June 2013. Judge Wedekind properly declined to permit re-litigation of circumstances relating to the "right to control" the disputed work as those circumstances existed in June through August of 2012, the time period at issue in the Schmidt case, but permitted all parties to submit evidence regarding any changed circumstances since that time.

III. DISCUSSION

ICTSI has little to add to the cogent analysis set forth in the General Counsel's opposition to Respondents' motion to consolidate. However, a few points are worth considering. First, contrary to Respondents' contention and as set forth above, the Schmidt and Wedekind cases do not "involve the same parties * * *." (Respondents ILWU's Motion to Consolidate Related

Cases, p. 2.) Neither the Port nor IBEW Local 48 was a party in the Wedekind case and it would do a serious disservice to both to require them to see a case in which they were respectively involved as charging party and intervener delayed and/or affected by a case in which they did not participate at all.¹ In all of the cases cited by Respondents in their motion to consolidate, the parties in the cases that were consolidated were identical and not merely overlapping. *See, e.g., Connecticut Light & Power*, 222 NLRB 1243 (1976) (parties in consolidated representation cases were identical); *Malcolm X Center*, 222 NLRB 944 (1976) (the same).

Second, it is virtually a certainty under the circumstances presented here that consolidating the two cases will substantially delay resolution of the Schmidt case. The Schmidt case is ready for decision and has been for almost four months. The exceptions in the Wedekind case have not even been filed yet and briefing is far from complete. As a result, the Board will be compelled to “put the brakes” on its consideration of the Schmidt case while it waits for the Wedekind case to catch up. While conceding that the Board views the likelihood of delay as a heavy factor militating against consolidation, *Frontier Hotel & Casino*, 324 NLRB 1225, 1226 (1997), Respondents blithely ignore the near certainty that consolidation will cause such a substantial delay here.

However, it is this very delay, not administrative efficiency, which Respondents seek by their motion to consolidate. Respondents are well aware that ICTSI has filed a lawsuit against them seeking damages under § 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, as a result of Respondents’ secondary conduct and that the district court has stayed trial of that lawsuit pending the Board’s disposition of the Schmidt case. *Int’l Longshore & Warehouse Union v. ICTSI Oregon, Inc.*, 932 F. Supp. 2d 1181, 1198-99 (D. Or. 2013). Adopting a process

¹ Accordingly, the Port and IBEW Local 48 have opposed Respondents’ motion to consolidate.

that substantially delays the Board's adjudication of the Schmidt case thus seriously prejudices ICTSI in obtaining redress in court.

But delay is precisely what Respondents desire. Accordingly, the ILWU International's public pronouncements since ALJ Wedekind's decision was issued demonstrate its intention to drag both the Schmidt and Wedekind cases out for as long as it can. Thus, on June 5, 2014, a few days after issuance of ALJ Wedekind's decision, the ILWU International published a responsive article on its website, *The Longshore & Shipping News*, entitled "Portland Slowdown Just Got Slower" in which the ILWU (1) assailed the ALJ and/or the Board for being a "dupe" of ICTSI and for being a "hammer on working people;" (2) emphasized that the two adverse decisions issued by Judges Schmidt and Wedekind were "non-binding" until the Board adopted them; and (3) bragged that it would take years for a final outcome of the cases.

In light of this public pronouncement, the ILWU's request to consolidate the Schmidt and Wedekind cases must be viewed with a healthy skepticism. As aptly stated by the General Counsel in his objections to the current motion, it is not judicial efficiency that the ILWU aims to achieve through its motion, but delay and confusion. *See* Counsel for the General Counsel's Opposition to Respondent's Motion to Consolidate Related Cases ("General Counsel's Opposition"), pp. 2-4 (noting that the ILWU's motion constitutes a mechanism for delaying the proceeding and "for cross-pollinating the record evidence in the two actions," so that the Board would consider extra-record evidence admitted in the Wedekind case in its review of the Schmidt decision).

Rather than adopting the ILWU's procedural stratagem for delaying resolution of the Schmidt case, the Board should instead proceed to decide that case forthwith because, as eloquently stated by the General Counsel, "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.” (General Counsel’s Opposition, p. 4.) Respondents should not be permitted to profit by their continued violation of § 8(b)(4)(B) since the close of the record in the Schmidt case by using those violations as an excuse to delay resolution of that case.

IV. CONCLUSION

The Board should deny Respondents’ motion to consolidate and should process and decide the Schmidt and Wedekind cases separately.

Dated: July 7, 2014.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT

/s/ Michael T. Garone

Michael T. Garone

Attorneys for ICTSI, Oregon, Inc.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 7th day of July, 2014, I electronically filed the foregoing CHARGING PARTY'S OPPOSITION TO MOTION TO CONSOLIDATE with the National Labor Relations Board with the eFiling system.

I further certify that on the 7th day of July, 2014, I caused to be served a copy of the foregoing document by electronic mail to the following:

E-File:

National Labor Relations Board
Office of the Executive Secretary
1099 14th St. N.W
Washington, D.C. 20570-1000

E-Mail:

Mara-Louise Anzalone, Esq.
Lisa J. Dunn, Esq.
Helena A. Fiorianti, Esq.
Counsel for the Acting General Counsel
National Labor Relations Board, Region 19
915 Second Avenue, Room 2948
Seattle, WA 98174-1078
E-mail: mara-louise.anzalone@nlrb.gov
lisa.dunn@nlrb.gov
helena.fiorianti@nlrb.gov

Randolph C. Foster, Esq.
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1229
E-mail: rcfoster@stoel.com

Robert Remar, Esq.
Amy Endo, Esq.
Emily Maglio, Esq.
Leonard Carder, LLP
1188 Franklin Street, Suite 201
San Francisco, CA 94109
E-mail: rremar@leonardcarder.com
aendo@leonardcarder.com
emaglio@leonardcarder.com

Norman Malbin, Esq.
IBEW, Local 48
15937 NE Airport Way
Portland, OR 97230-4958
E-mail: norman@ibew48.com

Noah T. Barish
John S. Bishop
McKanna Bishop Joffe LLP
1635 NW Johnson Street
Portland, OR 97209
E-mail: nbarish@mbjlaw.com
jbishop@mbjlaw.com

Kathy Peck
Peck Rubanoff & Hatfield
5285 Meadows Road, Suite 104
Lake Oswego, OR 97035
E-mail: kpeck@prhlaborlaw.com

/s/ Michael T. Garone
Michael T. Garone, OSB No. 802341
Of Attorneys for ICTSI Oregon, Inc.