United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: July 15, 2014

TO: Dennis P. Walsh, Regional Director
Region 4

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT:

International Longshoremen's Association, AFL-CIO (Greenwich Terminals)	420-9042
Case 04-CC-123452	440-5001
	560-2575-6713
District 15, International Association of Machinists	560-7540-8001-1750
and Aerospace Workers, AFL-CIO	560-7540-8020-5050
(Greenwich Terminals)	560-7580-4033-0100
Case 04-CD-124119	584-3740-5900

The Region submitted these cases for advice as to whether the International Longshoremen's Association ("ILA") violated Section 8(b)(4)(ii)(B) of the Act by filing contractual grievances against three shipping companies ("the Carriers") to coerce them to cease doing business with Greenwich Terminals if it did not assign the work of maintaining and repairing the Carriers' shipping containers to ILA-represented employees. The Region also requested advice as to whether District 15, International Association of Machinists and Aerospace Workers ("Machinists") violated Section 8(b)(4)(ii)(D) by threatening economic action against Greenwich Terminals if it reassigned the disputed container maintenance and repair work from Machinists-represented employees currently performing the work to ILA-represented employees.

We conclude that because the grievances filed by the ILA against the Carriers covering work controlled by the Carriers raise a colorable work preservation claim, the ILA did not coerce the Carriers in furtherance of an unlawful secondary object within the meaning of Section 8(b)(4)(ii)(B). We further conclude that the Machinists' threats of economic action do not give rise to a jurisdictional dispute within the meaning of Section 8(b)(4)(ii)(D) because the Carriers are not neutral employers caught between the conflicting demands of the ILA and the Machinists.

FACTS

Greenwich Terminals, LLC ("Greenwich"), a stevedoring company, operates the Packer Avenue Marine Terminal at the Port of Philadelphia. Operations at the terminal include the loading and unloading of shipping containers, and the maintenance and repair of those containers pursuant to contracts with various shipping companies, including the three Carriers involved in this case.[1] Since Greenwich began operating the terminal in 2002, it has directly employed ILA-represented employees to load and unload the containers and Machinists-represented employees to maintain and repair them.[2] The containers are either owned or leased on a long-term basis by the Carriers.

Greenwich's ILA-represented employees are covered by a Master Contract that applies to ILA-represented employees working in ports on the Atlantic and Gulf Coasts.[3] The Master Contract is negotiated by the U.S. Maritime Alliance ("USMX"), which is a multi-employer association that includes shipping companies and local port associations. The Carriers that are involved in this case are parties to the Master Contract through their membership in the USMX. A local agreement that covers terms not included in the Master Contract is negotiated by the Ports of the Delaware River Maritime Association ("DRMA"), a multi-employer association that bargains with the ILA on behalf of employers doing business at the Ports of Philadelphia and Wilmington. Greenwich is a member of the DRMA and a party to the Master Contract as a result of DRMA's membership in the USMX.

Article I, section 3 of the Master Contract states that it is a "full and complete agreement on all Master Contract issues relating to the employment of longshore employees on container and ro-ro vessels and container ro-ro terminals in all ports from Maine to Texas. . . ."[4] Article VII, section 3 further states that "the

---

[1] These carriers are: the Mediterranean Shipping Company USA, Inc., CMA CGM, and CSAV Agency North America.

[2] ILA-represented employees also plug and unplug refrigerated containers ("reefers") on board vessels and at the terminal, maintain reefer temperature, attach and remove portable generators ("gensets") from reefers, and fuel the gensets.

[3] The term of the Master Contract is from October 1, 2004 through September 30, 2010.

[4] The term "ro-ro" is an acronym that refers to the "roll-on-roll-off" method of moving cargo from ground transport vehicles to a ship and vice-versa.

ILA's Master Contract jurisdiction continues on a multi-port bargaining unit basis covering all ports from Maine to Texas at which ships of USMX carriers and subscribers may call." In addition, a portion of the Master Contract is known as the Containerization Agreement.[5] Sections 1 and 2 of the Containerization Agreement state:

> Management and Carriers recognize the existing work jurisdiction of ILA employees covered by their agreements with the ILA over **all container work which historically has been performed by longshoremen and all other ILA crafts at container waterfront facilities . . . [including] the maintenance and repair of containers.**
>
> Management, the Carriers, the direct employers and their agents **shall not contract out any work covered by this agreement.** Any violations of this provision shall be considered a breach of this agreement. (Emphasis added.)

In Article IX, section 1, the Master Contract reaffirms that ILA jurisdiction covers "maintenance and repair of equipment (which term includes containers and chassis) and such equipment as its members have historically maintained and which is owned, controlled, operated, or interchanged by USMX members. . . ."

In January 2014,[6] a dispute arose when carrier Horizon Lines, LLC, transferred a portion of its operations from the Port of New York to the Packer Avenue Terminal at the Port of Philadelphia. At the Port of New York, Horizon Lines had used ILA-represented employees to do container repair work. However, after moving to the Packer Avenue Terminal, it began using Machinists-represented employees to do the work. As a result, on February 18, the Machinists sent a letter to Greenwich threatening to "utilize all economic means at its disposal to protect its historic jurisdiction over the maintenance and repair of containers and chassis at the Packer Avenue Terminal from any claim to that work by the [ILA]. . . ."[7]

---

[5] The Master Contract incorporates the Containerization Agreement that is appended to it as Appendix A.

[6] All dates are in 2014.

[7] The Machinists have a collective-bargaining agreement with Greenwich that is effective from October 1, 2011 through September 30, 2014.

On February 27, the ILA filed grievances against each of the three Carriers involved here alleging that they were violating Articles VII and IX of the Master Contract and sections 1 and 2 of the Containerization Agreement by using non-unit employees for the maintenance and repair of their containers. The grievances were scheduled to be heard by the Local Industry Grievance Committee on March 25, but the hearing was cancelled and, to date, has not been rescheduled.

Although ILA-represented employees have never done container maintenance and repair work at the Packer Avenue Terminal, they do perform that work at another terminal at the Port of Philadelphia. They also perform container maintenance and repair work at other ports along the Atlantic and Gulf Coasts, including the repair of containers owned by the three Carriers involved in this case.

ACTION

We conclude that because the grievances filed by the ILA against the Carriers covering work controlled by the Carriers raise a colorable work preservation claim, the ILA did not coerce the Carriers in furtherance of an unlawful secondary object within the meaning of Section 8(b)(4)(ii)(B). We further conclude that IAM's threats of economic action do not give rise to a jurisdictional dispute within the meaning of Section 8(b)(4)(ii)(D) because the Carriers are not neutral employers caught between the conflicting demands of the ILA and the Machinists. Accordingly, the instant charges should be dismissed, absent withdrawal.

I. The ILA's Grievances Do Not Violate Section 8(b)(4)(ii)(B) Because They Seek to Preserve Traditional Bargaining Unit Work for ILA-Represented Employees.

Section 8(b)(4)(ii)(B), the so-called secondary boycott provision of the Act, makes it an unfair labor practice for a labor organization that has a labor dispute with a "primary" employer to pressure other "neutral" employers who do business with the primary, where the union's objective is to force the neutral to cease doing business with the primary so as to increase its leverage in its dispute with the primary.[8] A union that files a grievance based on an interpretation of a collective-

[8] *See, e.g., National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 622-627 (1967); *NLRB v. Hotel Employees Local 531*, 623 F.2d 61, 65-66 (9th Cir. 1980) ("Union pressure is secondary when it is brought to bear upon a neutral or secondary employer for the purpose of forcing that neutral or secondary employer to apply pressure to the primary employer with whom the union has a labor dispute. The tactical objective of secondary pressure is not to influence the labor policy of the

bargaining agreement that seeks to acquire work for its members, rather than to preserve the work they have traditionally performed, engages in unlawful secondary activity that violates Section 8(b)(4)(ii)(B).[9] Specifically, filing a grievance based on a reading of a contract that would effectively convert a lawfully written provision into a *de facto* "hot cargo" provision that violates Section 8(e) is coercion of a neutral employer in violation of Section 8(b)(4)(ii)(B).[10] However, such a grievance remains lawful despite the presence of a cease doing business object where it has the primary objective of preserving work for bargaining unit employees.[11]

---

neutral employer against whom it is directed, but to influence the labor policy of the primary employer.").

[9] *See, e.g., Air Line Pilots Ass'n (ABX Air, Inc.)*, 345 NLRB 820, 823 (2005) ("contract clauses which have a purpose 'to acquire for bargaining unit employees work which has traditionally been performed by employees of other employers' are not 'designed to protect the wages and job opportunities of unit employees' and, as such, 'are considered as having an unlawful secondary effect' "), *enf. denied on other grounds*, 525 F.3d 862 (9th Cir. 2008) (finding RLA, not NLRA, governed labor dispute involving pilots); *Newspaper & Mail Deliverers Union (New York Post)*, 337 NLRB 608, 608-609 (2002); *Elevator Constructors Local 3 (Long Elevator & Machine Co.)*, 289 NLRB 1095, 1095 (1988), *enf'd,* 902 F.2d 1297 (8th Cir. 1990).

[10] *See Newspaper & Mail Deliverers Union (New York Post)*, 337 NLRB at 609 ("a union violates Section 8(b)(4) by filing a grievance based on a reading of a portion of a collective-bargaining agreement that would effectively convert it into an unlawful Section 8(e) provision"); *Food & Commercial Workers Local 367 (Quality Food Centers)*, 333 NLRB 771, 771-772 (2001) (union violated 8(b)(4)(ii)(B) by filing grievance based on interpretation of contract that would acquire for unit employees work of concessionaire that they had never performed and was specifically excluded from contract's recognition clause) ; *Elevator Constructors Local 3 (Long Elevator & Machine Co.)*, 289 NLRB at 1095 (union violated 8(b)(4)(ii)(A) where grievance construing contract provision as permitting its members not to enter neutral gate, and thereby precluding neutral employer from performing work, would coerce neutral employer to cease doing business with primary).

[11] *See National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. at 644-645 ; *Air Line Pilots Ass'n (ABX Air, Inc.)*, 345 NLRB at 822 ("even if a contractual provision has a cease-doing-business object, it is lawful if it or its enforcement . . . has a work preservation object").

In *NLRB v. International Longshoremen's Ass'n (ILA I)*, the Supreme Court held that to constitute a lawful work preservation agreement, the agreement must pass two tests:

> First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called 'right of control' test. . . .[12]

The first test is met where the work sought is "fairly claimable," that is, the work sought is "identical to or very similar to that already performed by the bargaining unit and that bargaining unit members have the necessary skill and are otherwise able to perform."[13] Under the second test, i.e., "right of control," the Board will infer that if the employer against which the union takes action has no power to assign the disputed work, then the union's object must logically be to coerce a neutral employer.[14] Thus, a lawful work preservation agreement depends on whether, under all the surrounding circumstances, the union's objective is the preservation of bargaining unit work or whether the agreement was tactically calculated to satisfy union objectives elsewhere.[15] Of course, work preservation clauses may be lawful despite their incidental effect of limiting the group of persons with which the signatory employer may do business.[16]

In this case, Charging Party Greenwich contends that the ILA's grievances would turn a facially valid provision of the ILA's Master Contract and the

---

[12] 447 U.S. 490, 504 (1980) (remanding case to Board to reexamine question of whether ILA's Rules on Containers had valid work preservation object). *See also NLRB v. International Longshoremen's Ass'n (ILA II)*, 473 U.S. 61, 76 (1985).

[13] *Air Line Pilots Ass'n (ABX Air, Inc.)*, 345 NLRB at 823, *quoting Newspaper and Mail Deliverers' Union (Hudson County News Co.)*, 298 NLRB 564, 566 (1990).

[14] *ILA I*, 447 U.S. at 504-505.

[15] *See National Woodwork*, 386 U.S. at 644-45 ("[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees").

[16] See *ILA II*, 473 U.S. at 76, n.16, *quoting NLRB v. Enterprise Ass'n of Pipefitters, Local No. 638*, 429 U.S. 507, 510 (1977).

Containerization Agreement into an unlawful "hot cargo" clause that will coerce the neutral Carriers to cease doing business with Greenwich in violation of Section 8(b)(4)(ii)(B) to force it to reassign the work of maintaining and repairing containers to ILA-represented employees. On the other hand, the ILA contends that the grievances have a valid work preservation objective because they were filed to prevent the Carriers from subcontracting the disputed work outside the bargaining unit, which is a broadly defined unit consisting of all ILA-represented longshoremen in a multi-port area used by the multiple employers who are parties to the Master Contract.

We conclude initially that the relevant bargaining unit is a multi-port unit of ILA-represented employees. In light of this finding, we also conclude that ILA-represented employees have traditionally performed container maintenance and repair work. Finally, we find that the Carriers have the right to control that work, particularly where Greenwich also bound itself to the work assignment adopted by the Carriers in the Master Contract.

A. The ILA's Master Contract created a multi-port bargaining unit to which Greenwich and the Carriers were bound.

In assessing the merits of the ILA's work preservation defense, the threshold issue is whether ILA-represented employees in the appropriate bargaining unit have traditionally performed the disputed work.[17] However, that determination cannot be made without first defining the scope and composition of the appropriate bargaining unit.[18] We conclude, in agreement with the Region, that the ILA's Master Contract created a multi-port bargaining unit encompassing the ILA-represented employees of all the employers who are bound by that agreement, including Greenwich and the Carriers.

In *Bermuda Container Lines, Ltd. v. International Longshoremen's Ass'n*, which involved the ILA's 1996 Master Contract, the court was required to first

---

[17] *See, e.g., Service Employees Local 32B-32J (Nevins Realty Co.) v. NLRB*, 68 F.3d 490, 495 & n.5 (D.C. Cir. 1995) (noting "threshold condition of showing that the work is fairly claimable"), *enforcing* 313 NLRB 392, 399 (1993).

[18] *See, e.g., Food & Commercial Workers Local 367 (Quality Food Centers)*, 333 NLRB at 772 (noting that respondent-union's "work preservation defense must be analyzed in light of the 'traditional scope of the bargaining unit's work as evidenced by the contractual recognition clause and the history of the parties' conduct under it'"); *National Maritime Union (Commerce Tankers Corp.)*, 196 NLRB 1100, 1101 (1972), *enf'd*, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

resolve the scope of the bargaining unit before it could determine whether the union's grievance sought to preserve work traditionally performed by its members or to acquire new work.[19] There, the ILA's Master Contract contained a number of provisions intended to preserve longshoremen work for the ILA's bargaining unit employees. Marine carrier Bermuda Container Lines ("BCL"), who was bound by that agreement, sought to relocate a part of its operations from the Port of New York, where ILA-represented employees performed the work, to the Port of Salem, New Jersey, where non-union labor would have performed the work. The ILA responded by filing a grievance alleging that BCL would violate the Containerization Agreement in the 1996 Master Contract by diverting work away from the ILA's bargaining unit employees.[20] After the grievance was sustained, BCL filed suit seeking to vacate the arbitration award. BCL argued that enforcement of the Containerization Agreement beyond the employees working at the Port of New York was unlawful because the ILA was using the agreement to achieve secondary objectives, i.e., acquiring the longshoremen work at the Port of Salem that never had been performed by ILA-represented employees. The Second Circuit rejected BCL's argument by relying on specific provisions of the ILA's 1996 Master Contract that are identical to provisions contained in the current Master Contract. The court found that "th[e] inclusive language indicates that the agreement not only defined the bargaining unit *but also the primary employment relationship on a coast-wide basis*."[21] In light of this conclusion, the court held that the ILA's grievance was lawful because "[t]he Containerization Agreement was designed to preserve the work of ILA employees in the coast-wide bargaining unit

---

[19] 192 F.3d 250, 256-257 (2d Cir. 1999).

[20] BCL also filed a charge against the ILA with the Board in which it claimed that the ILA had violated Section 8(e) when it filed a grievance and/or obtained an arbitration award against BCL because the ILA converted the 1996 Master Contract's no-subcontracting clause into an unlawful union signatory clause that applied outside the Port of New York. *See* 192 F.3d at 254. The Division of Advice concluded that BCL, as a member of the New York Shipping Association, belonged to a multi-port bargaining unit along the Atlantic and Gulf Coasts and was bound by the 1996 Master Contract, which applied within the entire multi-port unit. Advice therefore recommended that the charge be dismissed. *See ILA (Bermuda Container Lines)*, Case 4-CE-107, Advice Memorandum dated December 13, 1996. Advice subsequently rejected BCL's request for reconsideration. *See ILA (Bermuda Container Lines)*, Case 4-CE-107, Advice Memorandum dated August 22, 1997.

[21] *See Bermuda Container Lines, Ltd. v. International Longshoremen's Ass'n*, 192 F.3d at 257 (emphasis added).

and was directed at BCL by virtue of its status in the multi-employer bargaining association. . . ."[22] "Because the Containerization Agreement within the contract was a valid work preservation clause directed at the primary employment relationship, the contract was legal and . . . Section 8(e) does not prohibit confirmation and enforcement of the arbitration award."[23]

In this case, as in *Bermuda Container Lines*, the ILA's Master Contract states that it is "a full and complete agreement on all issues relating to the employment of longshoremen on container and ro-ro vessels and container and ro-ro terminals in all ports from Maine to Texas. . . ." It also provides that "jurisdiction continues on a multi-port bargaining unit basis covering all ports from Maine to Texas at which ships of USMX carriers and subscribers may call." Because this language is identical to the language contained in the ILA's 1996 Master Contract on which the court in *Bermuda Container Lines* relied, we conclude that the current Master Contract created a multi-port bargaining unit that encompasses all of the employers who are bound by that agreement, including Greenwich and the Carriers. Accordingly, the work historically performed by the ILA-represented employees in this multi-port bargaining unit is the appropriate unit for assessing whether the ILA's grievances have a lawful work preservation or an unlawful work acquisition object.[24]

---

[22] *Id.*

[23] *Id.* at 258. *See also American President Lines, Ltd. v. ILWU*, __ F. Supp. 2d __, 2014 WL 608737, at *7 (D. Alaska 2014) (granting union's summary judgment motion and dismissing shipping company's § 303 suit for damages because ILWU's grievances had primary, work-preservation object; court concluded that ILWU-represented employees traditionally performed relevant cargo-handling work, even if not for current employer, where bargaining unit included ILWU-represented employees of multiple employers who had performed such work at other ports, including at relevant port on earlier date).

[24] *Mine Workers (Dixie Mining Co.)*, 165 NLRB 467, 468 (1967) (bargaining unit for which a union may lawfully seek to preserve work is the "[unit] appropriate for collective bargaining with the meaning of Section 9 of the Act"), *remanded on other grounds*, 399 F.2d 977 (D.C. Cir. 1968), *supplemented by* 188 NLRB 753 (1971); *National Maritime Union (Commerce Tankers Corp.)*, 196 NLRB at 1101, 1106 ("the units which control the determination of the primary or secondary nature of subcontracting clauses are those units found by the Board under its customary standards to be appropriate for collective-bargaining purposes"), quoting *Dixie Mining Co.*, 165 NLRB at 468; *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673, 675 n.10 (1972) ("The 'bargaining unit' for which a union may lawfully seek to

B. The ILA's grievances have a primary, work preservation objective.

As stated above, where a union can establish that its true objective is to preserve for bargaining unit employees work that they traditionally performed, it is engaged in primary activity that does not violate Section 8(b)(4)(ii)(B).[25] To establish this primary, work preservation objective, the union must show that the employees it represents traditionally performed the work and that the targeted employer has the power to give the employees the work in question.[26]

Here, it is undisputed that ILA-represented employees in the relevant multi-port unit perform container maintenance and repair work for the three Carriers involved in this case at another terminal at the Port of Philadelphia. It is also undisputed that ILA-represented employees perform that same work for these Carriers, as well as other shipping companies, at other ports along the Atlantic and Gulf Coasts. Thus, as to the first part of the work preservation analysis, the ILA's grievances have the object of preserving work that bargaining unit employees have traditionally performed. The fact that ILA-represented employees have never performed container repair work at the Packer Avenue Terminal is irrelevant to the ILA's goal of preserving traditional work in its own bargaining unit.[27] Where the

---

preserve work for its members has been defined as the same unit for which separate collective bargaining occurs, whether it consists of employees of a single employer, or a multiemployer association.").

[25] *See ILA I*, 447 U.S. at 504 (finding rules on containers, and ILA's efforts to enforce them, did not violate 8(e) or 8(b)(4)(B) where union sought to preserve traditional longshoremen cargo-handling work; irrelevant that shipping companies would have to cease doing business with off-pier freight consolidators); *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. at 645-646 (where union had primary, work preservation object, it did not violate 8(e) or 8(b)(4)(B) by enforcing contract clause that permitted its members not to handle prefabricated doors even though contractor for which union members worked was forced to cease doing business with prefab-door manufacturer).

[26] *See, e.g., ILA I*, 447 U.S. at 504-505.

[27] It is also irrelevant that Machinists-represented employees may have traditionally performed the disputed work at the Packer Avenue Terminal. "[A] dispute does not lose its character as a work preservation dispute simply because more than one union may have a work preservation claim to the same work."

work has been customarily and regularly performed by employees in a multi-employer bargaining unit, it is fairly claimable unit work regardless of whether employees of individual employers in the unit performed the disputed work.[28]

As to the second part of the work preservation analysis, the Carriers' right to control the container maintenance and repair work is evidenced by the fact that under the terms of the Master Contract, they committed to have ILA-represented employees perform such work. Moreover, by virtue of owning or leasing the containers, the Carriers can ensure that ILA-represented employees perform the disputed work because "the contractual assignment to the ILA operates as a prior restraint upon shippers, importers, or their agents who would choose to utilize containers owned or leased by the steamship companies in violation of the latter's obligation to deep sea ILA labor."[29] Here, Greenwich or its predecessors have always performed the container maintenance and repair work at the terminal.[30] Equally important, Greenwich bound itself to the "prior restraint" adopted by the

---

Machinists District 190 (SSA Terminal), 344 NLRB 1018, 1022 (2005) (quashing notice of Section 10(k) hearing because ILWU had work preservation object), *enf'd*, 253 Fed. Appx. 625 (9th Cir. 2007). In such cases, the right-to-control prong of the work preservation test is used to resolve whether a union targeted a primary or secondary employer. *See Food & Commercial Workers Local 367 (Quality Food Centers)*, 333 NLRB at 772 & n.13, citing *Service Employees Local 32B-32J v. NLRB*, 68 F.3d at 495 n.5. *See also Longshoremen ILA (New York Shipping Ass'n)*, 266 NLRB 230, 260 n.66 (1983), *enf'd in part sub nom.*, *American Trucking Ass'ns, Inc. v. NLRB,* 734 F.2d 966 (4th Cir. 1984), *aff'd*, *ILA II*, 473 U.S. 61 (1985).

[28] *See Bermuda Container Lines, Ltd. v. International Longshoremen's Ass'n*, 192 F.3d at 257; *American President Lines, Ltd. v. ILWU*, __ F. Supp. 2d __, 2014 WL 608737, at *7 ("the court must look to the work done by the bargaining unit employees as a whole and not with reference to the particular employment practices of an individual employer").

[29] *Longshoremen ILA (New York Shipping Ass'n)*, 266 NLRB at 234 & n.30, 261, *enf'd in relevant part sub nom.*, *American Trucking Ass'ns, Inc. v. NLRB*, 734 F.2d at 978, *aff'd*, *ILA II*, 473 U.S. at 74, n.12.

[30] *See, e.g.*, *Machinists Local 724 (Holt Cargo)*, 307 NLRB 1394, 1394-95 (1992) (noting that Holt Cargo, Greenwich's predecessor, performed container maintenance and repair work at Packer Avenue).

Carriers by also becoming a party to the Master Contract with the ILA. In light of these facts, there is no doubt that the Carriers control the disputed work here.[31]

Based on the foregoing, we conclude that the ILA's grievances have a lawful work preservation objective because they seek to preserve work that ILA-represented employees in the multi-port bargaining unit have traditionally performed and that the Carriers have the right to control. The Board has long held that good-faith prosecution of a colorable contract claim does not constitute coercion within the meaning of Section 8(b)(4)(ii)(B).[32] Accordingly, because ILA's grievances raise a colorable work preservation claim, it did not coerce the Carriers in furtherance of an unlawful secondary object in violation of Section 8(b)(4)(ii)(B).

The Board's decisions in *Longshoremen Local 1291 (Holt Cargo)* [33] and *Machinists Local 724 (Holt Cargo)*,[34] do not affect our conclusion. Both of these cases involved the longstanding dispute between the ILA and the Machinists over container maintenance and repair work at the Packer Avenue Terminal, and each resulted in the Machinists continuing to perform the work.[35] In *Longshoremen*

---

[31] Although Machinists-represented employees have performed the disputed work at the terminal in the past, the ILA never abandoned its claim to the work under the current or prior versions of the Master Contract. *Id.* *See also Longshoremen Local 1291 (Holt Cargo)*, 309 NLRB 1283, 1284 (1992).

[32] *See, e.g., Longshoremen ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 92-93 (1988) (finding no 8(b)(4)(D) violation for union's pre-10(k) award grievances; before 10(k) decision awarded disputed work to different union, grievances were arguably meritorious), *aff'd*, 892 F.2d 130 (D.C. Cir. 1989); *Teamsters Local 483 (Ida Cal Freight Lines)*, 289 NLRB 924, 925 (1988) (no 8(b)(4)(ii)(A) violation where union merely grieved and sought to compel arbitration through Section 301 action over whether owner-operators were covered by the labor agreement); *Teamsters Local 94 (California Dump Truck Owners Ass'n)*, 227 NLRB 269, 274 (1976) (no 8(b)(4) violation to enforce a colorable contract claim through a grievance); *Sheet Metal Workers Local 49 (Los Alamos Constructors, Inc.)*, 206 NLRB 473, 476-477 (1973) (seeking of a judicial remedy not unlawful restraint or coercion). *See also NABET (Metromedia, Inc.)*, 255 NLRB 372, 374 (1981).

[33] 309 NLRB 1283 (1992).

[34] 307 NLRB 1394 (1992).

[35] As noted above, Holt Cargo operated the Packer Avenue Terminal before Greenwich.

Local 1291, the ILA filed a grievance under the Master Agreement against several carriers calling on the Packer Avenue Terminal. The grievance alleged that the carriers had breached the Master Agreement by failing to honor the ILA's jurisdiction over the maintenance and repair of containers at waterfront container facilities.[36] The ILA maintained that its grievance did not have an unlawful secondary object because it was attempting to preserve work that its members had traditionally performed. In rejecting the ILA's work preservation defense, the Board premised the Section 8(b)(4)(ii)(B) violation on the fact that ILA-represented employees had never performed the disputed work at the Packer Avenue Terminal and, consequently, there was no work to preserve.[37] However, in reaching this result, the Board did not consider and, therefore, did not determine the scope of the appropriate bargaining unit, the threshold issue in assessing whether the ILA's grievance sought to preserve work traditionally performed by its members or unlawfully sought to acquire new work. Nor did the Board consider or determine the scope of the unit in *Machinists Local 724*, a Section 10(k) proceeding in which the Board awarded the disputed work to the Machinists-represented employees.

Subsequent to *Longshoremen Local 1291* and *Machinists Local 724,* the Second Circuit concluded in *Bermuda Container Lines*, that specific provisions of the Containerization Agreement included in the ILA's 1996 Master Contract created a multi-port bargaining unit encompassing all the employers who were bound by the Master Contract.[38] In so concluding, the court explained that those provisions had a valid work preservation objective and were specifically aimed at saving work for ILA members on a multi-port basis.[39] As previously discussed, the provisions of the ILA's 1996 Master Agreement are identical to the provisions of the Master Contract in this case. Arguably, if the Board in *Longshoremen Local 1291* and *Machinists Local 724* initially had resolved the scope of the appropriate bargaining unit under the ILA's Master Agreement when considering ILA's work preservation defense, the outcomes of those cases would have been different, particularly in light of the decision in *Bermuda Container Lines*.

---

[36] *See Longshoremen Local 1291 (Holt Cargo)*, 309 NLRB at 1285.

[37] *Id.* at 1285-86.

[38] 192 F.3d at 256-257.

[39] The General Counsel similarly concluded that the ILA's 1996 Master Contract created a multi-port bargaining unit along the Atlantic and Gulf Coasts. *See* footnote 20, *supra.*

II. The Machinists Did Not Violate Section 8(b)(4)(ii)(D).

We further agree with the Region's determination that the Machinists' threats of economic action against Greenwich do not give rise to a jurisdictional dispute within the meaning of Section 8(b)(4)(ii)(D). That section makes it an unfair labor practice for a labor organization to threaten, coerce, or restrain any person engaged in commerce with the object of forcing or requiring any employer to assign particular work to employees belonging to one labor organization rather than employees belonging to another labor organization.[40] A jurisdictional dispute arises within the meaning of Sections 8(b)(4)(ii)(D) and 10(k) when an employer is "an obviously neutral party thrust into a work dispute that it did not cause."[41] The purpose of these provisions "is to relieve the employer of the burden of choosing between employee groups that are competing for the assignment of work" where the employer is "perfectly willing to assign [the] work to either group of employees if the other will just let him alone."[42]

On the other hand, an employer may not rely on Sections 8(b)(4)(ii)(D) and 10(k) if the union's action is designed to pressure the employer to preserve for its members work that they have traditionally performed.[43] Thus, where an employer created the dispute by unilaterally assigning work to non-unit employees in breach of a collective bargaining agreement, Sections 8(b)(4)(ii)(D) and 10(k) do

---

[40] *See, e.g.*, *NLRB v. Plasterers' Local 79*, 404 U.S. 116, 123 (1971); *Plasterers' Local 200 (Standard Drywall)*, 357 NLRB No. 160, slip op. at 3 (2011), *enf'd*, 547 Fed. Appx. 809 (9th Cir. 2013).

[41] *Mine Workers (Bronzite Mining)*, 280 NLRB 587, 590 (1986) (Section 10(k) determination proper where dispute was between competing groups of employer's employees rather than between union and employer over interpretation of contract).

[42] *Longshoremen ILWU Local 62-B v. NLRB (Alaska Timber Corp.)*, 781 F.2d 919, 922, 924 (D.C. Cir. 1986).

[43] *Id.* at 925-926 (ILWU did not violate 8(b)(4)(ii)(D) by picketing to protest loss of work opportunities resulting from employer's decision to stop subcontracting to company that employed ILWU members and to start using its own employees instead). *See also Seafarers (Recon Refractory & Reconstruction)*, 339 NLRB 825, 827-828 (2003), *aff'd*, 424 F.3d 980 (9th Cir. 2005); *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320, 1322-23 (1961) (finding no jurisdictional dispute where union picketed employer in "attempt to retrieve the jobs of its members").

not apply.[44] For example, in *Teamsters Local 578 (USCP-Wesco)*,[45] Safeway reassigned the work of restocking shelves to USCP-Wesco in breach of the no-subcontracting clause in its collective-bargaining agreement with the UFCW. After the reassignment, the UFCW filed grievances against Safeway that resulted in favorable arbitration awards. In response, the Teamsters, who represented USPC-Wesco's employees, threatened to picket if the work was assigned back to the UFCW-represented employees. Based on that threat, Section 8(b)(4)(ii)(D) charges were filed against the Teamsters. Recognizing that although the dispute may literally have fallen within the terms of Sections 8(b)(ii)(4)(D) and 10(k) because Safeway was subject to competing claims for the work and one party had threatened to picket to prevent a change in work assignment, the Board nevertheless found that the real dispute was a matter of work preservation. It stated that "Section 8(b)(4)(D) was not designed to authorize the Board to arbitrate disputes between an employer and a union, particularly regarding the union's 'attempt to retrieve jobs' of employees the employer chose to supplant by reallocating their work to others."[46] Safeway was not an "innocent" employer because it had "created th[e] dispute by breaching its collective-bargaining agreement with UFCW and could have ended it by cancelling its subcontract with Wesco. Safeway voluntarily entered into an agreement with UFCW, which included restrictions on subcontracting unit work."[47] The Board therefore concluded that Safeway could not use the Board's proceedings to resolve a dispute of its own making.[48]

Similarly, the current case involves a contractual dispute between the Carriers and the ILA stemming from the Carriers' alleged breach of the ILA's

---

[44] *Teamsters Local 107 (Safeway Stores)*, 134 NLRB at 1323 (distinguishing a jurisdictional dispute cognizable under 8(b)(4)(D) and 10(k) from a situation in which "the employer by his unilateral action created the dispute").

[45] *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818, 820 (1985), *aff'd*, 827 F.2d 581 (9th Cir. 1987).

[46] *Id.*, 280 NLRB at 820-821.

[47] *Id.* at 823.

[48] *See also Seafarers (Recon Refractory & Construction)*, 339 NLRB at 827-828 ("Where a dispute is fundamentally one between an employer and a union, and concerns the union's attempt merely to preserve the work it previously had performed, the Board will not afford the employer the use of a 10(k) proceeding to resolve a dispute of its own making.").

Master Contract to which they are bound. Indeed, the Carriers created the dispute over container maintenance and repair work at the Packer Avenue Terminal by permitting Greenwich, who is also bound by the Master Contract, to assign this work away from ILA-represented employees who perform it in the multi-port unit to Machinists-represented employees. The ensuing dispute over the work, therefore, merely involved the ILA's attempt to preserve work traditionally performed by bargaining unit employees whom it represents under the parties' Master Contract.[49] Thus, because the dispute was created by the Carriers' alleged breach of the Master Contract, they are not "innocent" employers caught between the conflicting demands of two unions. In that context, the Machinists' threats of economic action do not give rise to a jurisdictional dispute within the meaning of Section 8(b)(4)(ii)(D).

In sum, we conclude that because ILA's grievances raise a colorable work preservation claim, it did not coerce the Carriers in furtherance of an unlawful secondary object prohibited by Section 8(b)(4)(ii)(B). We further conclude that the Machinists' threats of economic action do not give rise to a jurisdictional dispute within the meaning of Section 8(b)(4)(ii)(D) because the Carriers created the dispute and, therefore, they are not "innocent" employers caught between conflicting demands for the work. Accordingly, the instant charges should be dismissed, absent withdrawal.

/s/
B.J.K.

---

[49] *Id.* at 827-828. *See also Teamsters Local 578 (USCP-Wesco)*, 280 NLRB at 820-821; *Teamsters Local 107 (Safeway Stores)*, 134 NLRB at 1323.