International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289 *and* SSA Marine, Inc. and International Longshore and Warehouse Union. Cases 19–CD–000502 and 19–CD–000506

March 12, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On May 8, 2012, Administrative Law Judge William G. Kocol issued the attached decision. The General Counsel, the Charging Party, and Intervenor filed exceptions and supporting briefs, and the Respondent filed an answering brief to the exceptions. The Respondent filed cross-exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs to the cross exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289 (IAM or Respondent), did not violate Section 8(b)(4)(ii)(D) of the Act by maintaining an arbitration action against the Charging Party, SSA Marine, Inc. (Employer or SSA Marine), with an object of coercing the Employer to reassign certain disputed work to employees it represented rather than to employees represented by the Intervenor, International Longshore and Warehouse Union (ILWU). Accordingly, he dismissed the complaint. For the reasons set forth below, we reverse.

I. BACKGROUND

1. The underlying work dispute

The Employer and its predecessors have operated marine cargo terminals and provided stevedoring services at various ports on the Puget Sound in Washington, including the Port of Seattle, where the instant dispute arose. Since the 1940s, the Employer and the IAM have been parties to several collective-bargaining agreements covering all maintenance and repair (M&R) work on equipment owned or leased and operated by the Employer in the Puget Sound area. The work in dispute here is the maintenance and repair of the Employer's stevedoring and terminal service equipment while the equipment is present at Terminal 91 in Seattle.

The Employer also has a longstanding relationship with the ILWU, through the Pacific Maritime Association (PMA), a multiemployer association that negotiated collective-bargaining agreements with the ILWU on behalf of approximately 70 companies at various ports on the West Coast, including the Port of Seattle. For more than 40 years, the Employer, as a member of the PMA, has utilized ILWU-represented employees to provide traditional longshore work, such as operating cargo-handling equipment to load and unload vessels. The ILWU-represented employees have also performed certain M&R work for the Employer and other PMA members at several ports along the West Coast, but not in the Puget Sound area.

On July 1, 2008, during the term of the latest collective-bargaining agreement between the IAM and the Employer, the PMA and the ILWU executed a Memorandum of Understanding for the years 2008–2013 (MOU). The MOU provided for the Employer to assign to ILWU-represented mechanics the M&R work at "all new marine terminal facilities" at which the Employer subsequently commenced operations.

To assuage the Employer's concerns about possible repercussions from the MOU's assignment of M&R work to ILWU-represented employees, the Employer asked for and received from the PMA an indemnification agreement. This agreement provided that the PMA would reimburse the Employer for damages resulting from breaching its contract with the IAM, including if the IAM were to seek and obtain "pay-in-lieu" relief.

On April 24, 2009, the Employer moved its preexisting cruise ship operations from Terminal 30, where IAM-represented employees had been performing the M&R work, to Terminal 91, and it assigned the M&R work to ILWU-represented employees.

The IAM filed a grievance challenging the Employer's assignment of the Terminal 91 M&R work to ILWU-represented employees. On May 8, 2009, Arbitrator Michael Cavanaugh issued a decision and award sustaining the grievance and directing the Employer to make its IAM-represented employees whole. Cavanaugh did not, however, direct the Employer to reassign the disputed work to those employees.

On May 12, 2009, the Employer received a letter from the IAM stating that it would take all actions necessary—including picketing—to obtain reassignment of the M&R work at Terminal 91 to employees represented by the IAM. On June 10, 2009, the Employer filed a charge in Case 19–CD–00502, alleging that the IAM's letter constituted an unlawful threat in violation of Section 8(b)(4)(D).

2. Procedural background

On January 22, 2010, the Board issued a Decision and Determination of Dispute awarding the disputed work to employees represented by the ILWU and not to employees represented by the IAM. 355 NLRB 23. On February 11, 2010, the IAM notified the Regional Director that it intended to comply with the Board's determination, and the Region approved the withdrawal of the charge in Case 19–CD–000502. But, in June 2010, the IAM notified Arbitrator Cavanaugh and the Employer that it was seeking contractual pay-in-lieu remedies based on Cavanaugh's award and that it intended to seek enforcement of the initial arbitral award. This resulted in the filing of a second charge in Case 19–CD–000506 on September 25, 2010.

On December 15, 2010, acting on the Employer's request for reconsideration, the Board issued a new Decision and Determination of Dispute in Case 19–CD–000502, affirming the award of the work to employees represented by the ILWU. 356 NLRB 288. However, due to procedural irregularities the Board subsequently vacated that decision and remanded the matter to the Regional Director for further action. 356 NLRB 1282.

On May 26 and 27, 2011, the Regional Director reinstated the charge in Case 19–CD000502 and filed a request with the Board to issue a new Decision and Determination of Dispute. On July 22, the Board issued another Decision and Determination of Dispute, once again awarding the disputed work to employees represented by the ILWU. 357 NLRB 126. Among other things, the Board's decision ordered the IAM to notify the Regional Director, within 14 days and in writing, whether it would refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination. Id.

3. The current dispute

Following the Board's July 22 Decision and Determination of Dispute, the IAM informed the Regional Director that it would not withdraw its demand that the arbitrator schedule a hearing regarding the contractual payment-in-lieu relief. On October 31, 2011, the Regional Director issued a consolidated complaint in Cases 19–CD–000502 and 19–CD–000506 alleging that the IAM violated Section 8(b)(4)(ii)(D) by continuing to maintain, and refusing to withdraw, its arbitral action seeking monetary and/or contractual remedies, with an object of forcing and requiring the Employer to assign the disputed work to IAM-represented employees.

By letter to the Region dated November 10, 2011, the IAM reiterated that it reserved the right to seek full contractual monetary relief based on Arbitrator Cavanaugh's award if the Board were to rule in its favor.[1] The IAM stated that it intends to seek pay-in-lieu relief for the period from July 1, 2008 (the date the PMA and the ILWU executed the MOU), to July 21, 2011 (the day before the Board's Decision and Determination of Dispute), or, in the alternative, from July 1, 2008, to the present, but no other or additional relief.

4. The Adminstrative Law Judge's Decision

The judge dismissed the consolidated complaint. He acknowledged that a union violates Section 8(b)(4)(ii)(D) by attempting to obtain disputed work, after a 10(k) determination awarding the work to employees represented by another union, by requiring an employer to pay monetary damages. See *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB 1921, 1923 (2011); *Sheet Metal Workers Local 27 (E.P. Donnelly, Inc.)*, 357 NLRB 1577 (2011), enfd. 737 F.3d 879 (3d Cir. 2013). The judge, however, found that precedent inapposite here because the IAM disclaimed interest in performing the disputed work and seeks only damages for the Employer's breach of contract. The judge concluded that, in light of the IAM's disclaimer, the General Counsel failed to show that its pursuit of pay-in-lieu damages had a prohibited object under Section 8(b)(4)(ii)(D)—i.e., forcing the Employer to assign the work to IAM-represented employees.

The judge also found that the Employer was not restrained or coerced by the IAM's pursuit of pay-in-lieu damages because the PMA had agreed to indemnify the Employer against any costs arising from breaching its contract with the IAM.[2] Accordingly, he concluded that PMA assumed any coercive effect from the IAM's conduct onto itself and away from the Employer.

II. DISCUSSION

Section 8(b)(4)(ii)(D) makes it an unfair labor practice to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization." It is well established that a union violates Section 8(b)(4)(ii)(D) by maintaining a lawsuit or arbitration to obtain work awarded by the

[1] The letter stated that the IAM would not attempt to enforce the arbitration award until the Board resolved the instant case.

[2] The judge rejected, on due process grounds, the General Counsel's and the ILWU's arguments that Sec. 8(b)(4)(ii)(D) would prohibit the coercion of PMA as well as the Employer. The judge pointed out that the complaint did not allege, and there is no charge supporting, any unlawful conduct directed towards the PMA, and the IAM should not have to guess which employer it is alleged to have restrained and coerced.

Board under Section 10(k) to employees represented by another union. See, e.g., *Laborers Local 261 (W. B. Skinner, Inc.)*, 292 NLRB 1035, 1035 (1989). Moreover, it is equally well established that a union violates Section 8(b)(4)(ii)(D) by maintaining a lawsuit or arbitration to obtain monetary damages in lieu of the work. See *Standard Drywall*, supra at 1923; *E. P. Donnelly,* supra at 1579 and cases cited at fn. 5.

Here, the stipulated facts show that, since the Board's 10(k) determination awarding the disputed work to employees represented by the ILWU, the IAM has refused to withdraw, and continued to maintain, an action against the Employer seeking pay-in-lieu or other monetary remedies based on the arbitrator's May 8, 2009 decision. Accordingly, the IAM's actions violate Section 8(b)(4)(ii)(D).

Furthermore, there is no merit in the IAM's contention, accepted by the judge that this case is distinguishable from those cited above because of the IAM's putative "disclaimer of interest" in the disputed work. As stated, a union's continued pursuit of monetary damages in lieu of the work after a contrary 10(k) determination is coercive within the meaning of Section 8(b)(4)(ii)(D). See *Roofers Local 30 (Gundle Construction)*, 307 NLRB 1429, 1430 (1992), enfd. 1 F.3d 1419 (3d Cir. 1993); *Longshoremen ILWU Local 13 (Sea-Land)*, 290 NLRB 616 (1988), enfd. 884 F.2d 1407 (D.C. Cir. 1989); *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, 271 NLRB 759 (1984), enfd. sub nom. *Longshoremen ILWU Local 32 (Weyerhaeuser) v. Pacific Maritime Assn.*, 773 F.2d 1012 (9th Cir. 1985), cert. denied 476 U.S. 1158 (1986). Moreover, a union's pursuit of monetary damages in these circumstances is coercive even where, as here, it is accompanied by an express disclaimer of interest in having employees it represents assigned to perform the disputed work. See *Gundle Construction*, 307 NLRB at 1430.

Finally, we find, contrary to the judge, that the Employer's indemnification agreement with the PMA does not provide an alternative ground for dismissing the 8(b)(4)(ii)(D) allegation against the IAM. Simply put, the IAM is seeking contractual damages against the Employer, not the PMA, and the pursuit of the claim is coercive under Section 8(b)(4)(ii)(D) regardless whether the claim ultimately succeeds. See *Standard Drywall*, supra 1923 ("It is well settled that a union's *pursuit* of a lawsuit or arbitration to obtain . . . monetary damages in lieu of the work . . . violates Section 8(b)(4)(ii)(D).") (Emphasis added.). Thus, for 8(b)(4)(ii)(D) purposes, it is of no consequence that the Employer may have an indemnification agreement with a third party under which it would be reimbursed for monetary costs arising from a breach of contract.[3]

For the foregoing reasons, we conclude that the IAM violated Section 8(b)(4)(ii)(D) by refusing to withdraw, and otherwise continuing to maintain, an action against the Employer seeking to enforce Arbitrator Cavanaugh's award and to obtain pay-in-lieu or other monetary remedies pertaining to disputed work after the Board awarded that work to employees represented by the ILWU.

CONCLUSIONS OF LAW

1. SSA Marine, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289 and International Longshore and Warehouse Union are each labor organizations within the meaning of Section 2(5) of the Act.

3. By refusing to withdraw and otherwise continuing to maintain an action against the Employer seeking to enforce Arbitrator Cavanaugh's May 8, 2009 decision and to obtain pay-in-lieu or other monetary remedies, contrary to the Board's Decision and Determination of Dispute in 357 NLRB 126 (2011), the Respondent violated Section 8(b)(4)(ii)(D) of the Act.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice proscribed by Section 8(b)(4)(ii)(D) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289, Seattle, Washington, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to withdraw and otherwise continuing to maintain an action against SSA Marine, Inc. seeking to enforce Arbitrator Cavanaugh's award and to obtain pay-in-lieu or other monetary remedies, contrary to the

[3] In *E. P. Donnelly*, supra at 1580, the Board found that a claim for declaratory relief for breach of contract constitutes coercion in violation of Sec. 8(b)(4)(ii)(D), even in the absence of monetary relief. Here, likewise, any arbitration award for lost wages would be based on the arbitrator's finding that the Employer violated its collective-bargaining agreement with the IAM. It follows that the IAM's pursuit of such a finding would itself constitute coercion sufficient to violate Sec. 8(b)(4)(ii)(D), regardless of whether the Employer or the PMA would ultimately be responsible for any monetary damages.

Board's Decision and Determination of Dispute in 357 NLRB 126 (2011). The work consists of:

> The maintenance and repair of SSA Marine's stevedoring and terminal service equipment while it is present at Terminal 91 in Seattle, Washington.

(b) Refusing to comply with the Board's Decision and Determination of Dispute reported at 357 NLRB 126 (2011).

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Seek the withdrawal of the Cavanaugh arbitration award against SSA Marine, Inc.

(b) Within 14 days after service by the Region, post in conspicuous places in its Puget Sound, Washington business offices, meeting halls, and all places where notices to members are customarily posted, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 14 days after service by the Region, deliver to the Regional Director for Region 19 signed copies of the notice in sufficient number for posting by SSA Marine, Inc. at its Puget Sound, Washington facility, in all places where notices to employees are usually posted, if the Employer is willing.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to withdraw or otherwise maintain an action against SSA Marine, Inc. seeking to enforce Arbitrator Cavanaugh's May 8, 2009 award and to obtain pay-in-lieu or other monetary remedies, contrary to the Board's Decision and Determination of Dispute in 357 NLRB 126 (2011).

WE WILL seek the withdrawal of Arbitrator Cavanaugh's award against SSA Marine, Inc.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 160, LOCAL LODGE 289

John H. Fawley, Esq., for the General Counsel.
Jacob H. Black, Esq. (Robblee, Detwiler & Black, PLLP), of Seattle, Washington, for the Respondent.
James McMullen, Esq., for the Charging Party.
Phil A. Thomas, Esq. (Leonard Carter, LLP), of San Francisco, California, for ILWU

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried based on a joint motion and stipulation of facts approved by me on March 19, 2012. SSA Marine, Inc. (herein SSA) filed the charge in Case 19–CD–000502 on June 10, 2009, and the charge in Case 19–CD–000506 on September 28, 2010. The General Counsel issued the order consolidating cases, consolidated complaint, and notice of hearing on October 31, 2011. The complaint alleges that the International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289 (Respondent) demanded that SSA assign certain work to employees it represents rather than to employees represented by the International Longshore and Warehouse Union (ILWU) but thereafter, the Board assigned the work to the ILWU represented employees. The complaint alleges that

Respondent violated Section 8(b)(4)(ii)(D) by threatening to picket SSA and by maintaining an action in arbitration seeking monetary and/or other contractual remedies, thereby undermining the Board's award, both with an objective of forcing and requiring SSA to assign the work to employees that Respondent represents. Respondent filed a timely answer that denied it had violated the Act.

On the entire record and after considering the briefs filed by the General Counsel,[1] Respondent, SSA,[2] and ILWU, I make the following.

FINDINGS OF FACT

I. JURISDICTION

SSA, a State of Washington corporation with an office and place of business in Seattle, Washington, is engaged in the business of providing stevedoring and terminal services at the Puget Sound area marine terminals, including cruise ship terminals. During the past 12 months, a representative period, while conducting these business operations, SSA purchased goods and supplies valued in excess of $50,000 directly from entities outside the State of Washington. The parties stipulate, and I find, that SSA is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Respondent and ILWU are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Pacific Maritime Association (PMA) is a multiemployer collective-bargaining agent. Its members include the approximately 50 for-profit stevedore companies, marine terminal operators, and maintenance contractors who employ longshoremen, mechanics, and other categories of dockworkers at waterfront facilities located at ports in Washington, Oregon, and California, and approximately 20 for-profit ocean carriers who engage the stevedore companies, marine terminal operators, and maintenance contractors to load and unload cargo from their oceangoing vessels. At all material times, SSA and other employer-members of PMA have duly authorized PMA to represent them in negotiations with the ILWU over the terms and conditions of employment for a coastwide multiemployer bargaining unit of employees performing work described in the ILWU–PMA Pacific Coast Longshore & Clerks Agreement (PCL&CA) at the Ports of Seattle and other Pacific Coast ports in Washington, Oregon, and California. PMA has never had a collective-bargaining relationship with Respondent and is not a party to any agreements with Respondent.

At all material times, SSA has been party to a collective-bargaining agreement with IAM that covers all maintenance and repair work on equipment owned and/or leased by SSA in the Puget Sound area. Prior to July 1, 2008, pursuant to its collective-bargaining agreement with IAM, SSA assigned its maintenance and repair work in the Puget Sound area to employees represented by IAM. At all material times, SSA as an employer-member of PMA has been party to a collective-bargaining agreement with ILWU. In July 2008, during the term of IAM's contract with SSA, PMA entered into a contract with ILWU giving maintenance and repair work at all "new" terminals to ILWU members. At all times since July 1, 2008, SSA has assigned the work of the maintenance and repair of its stevedoring and terminal service power equipment while present at Terminal 91 in Seattle, Washington (the disputed work), to employees who are represented by the ILWU, and who are neither members of, nor represented by, Respondent. Respondent has not been certified by the Board as the exclusive collective-bargaining representative of any of the employees performing the disputed work, nor has the Board issued any order determining that Respondent is the exclusive collective-bargaining representative of the employees performing that work.

On April 24, 2009, Respondent initiated a grievance against SSA regarding the assignment of the disputed work to the ILWU. On May 8, 2009, Arbitrator Michael Cavanaugh issued a "Decision and Award" finding that SSA had breached its collective-bargaining agreement with Respondent by assigning the disputed work to its employees represented by ILWU, rather than those represented by Respondent, and directing SSA to make Respondent-represented employees whole. Arbitrator Cavanaugh succinctly gave the following overview of the case:

> The Employer operates marine terminals and provides stevedoring services in Puget Sound, including at cruise ship terminals in Seattle. The Union represented the maintenance and repair (M&R) mechanics who have historically serviced the power equipment used at the cruise terminals. During the summer of 2008, the Employer, as a member of the Pacific Maritime Association, negotiated a replacement labor agreement covering employees in its International Longshore & Warehouse Union (ILWU) bargaining unit. As part of the PMA/ILWU Agreement for the years 2008–2013, maintenance work on equipment used at "new" facilities was assigned to ILWU mechanics [footnote omitted]. For the 2009 cruise ship season, cruise ships will call at the Smith Cove Terminal in Puget Sound, located at Terminals 90-91, instead of at Terminal 30 and Pier 66 as in prior years. Apparently, ILWU has claimed the M&R work at the Smith Cove facility, claiming that it is "new," and the Employer has responded by subcontracting the maintenance work on its equipment to Harbor Industrial. Harbor is a PMA member and employs ILWU mechanics. The Union maintains that by subcontracting its maintenance work to Harbor and its ILWU work force, the Employer has violated the terms of the SSA/IAM Agreement because that Agreement unequivocally preserves historical maintenance work in the Puget Sound area for the IAM bargaining unit.

Later Arbitrator Cavanaugh summarized SSA's contractual obligations to Respondent as follows:

> Under the terms of their Agreement, which preexisted [sic] the provisions of the PMA/ILWU Agreement for a number of years, the Employer has been and continues to

[1] Respondent's motion to strike portions of the General Counsel's brief is denied.

[2] For good cause shown, I grant SSA's motion to file its brief one day late.

> be obligated to perform this M&R work with the members of the IAM bargaining unit. That is so because Article 2, for example, provides that "work which has been historically performed by the members of the bargaining unit *will continue to be performed by the members of the bargaining unit."* . . . Similarly, Article 5 ("Recognition, Hiring and Jurisdiction") provides in pertinent part, "to further clarify this Article, it is understood that IAM represented employees will maintain and repair *all equipment owned and leased by SSAT in the Puget Sound area.* . . . The facts in evidence substantiate the Union's contention that the equipment maintenance work at Smith Cove Terminal is the precise work formerly by the IAM mechanics at Pier 66 and Terminal 30 [emphasis in original].

Given these facts it is entirely unsurprising that Arbitrator Cavanaugh found that SSA had breached its contract with Respondent. By letter dated May 12, 2009, following receipt of the arbitrator's Decision and Award, Respondent demanded under the threat of picketing that SSA assign the disputed work to employees represented by Respondent, pursuant to its collective-bargaining agreement with SSA, and to make the Respondent-represented employees whole.

By letter dated May 14, 2009, ILWU informed PMA that it rejected and repudiated the arbitrator's decision and award and that it would pursue all available and appropriate remedies to insure that the disputed work continued to be performed by ILWU-represented employees.

Following receipt of the above demands from Respondent and ILWU, SSA filed the charge in Case 19–CD–00502. Between June 30 and July 2, 2009, a hearing pursuant to Section 10(k) of the Act was held in Seattle, Washington. On January 22, 2010, the Board by its two-sitting Members issued a Decision and Determination of Dispute, which is reported at 355 NLRB 23 (2010), finding that SSA's employees represented by the ILWU were entitled to perform the disputed work and that Respondent was not entitled by any means proscribed by Section 8(b)(4)(D) of the Act to force SSA Marine to assign the disputed work to employees represented by Respondent. Following Respondent's written agreement to comply with the Decision and Determination of Dispute described, the Regional Director approved SSA's withdrawal of its charge in Case 19–CD–00502.

In June 2010, Respondent notified Arbitrator Cavanaugh and SSA that it was seeking contractual "pay-in-lieu" remedies to enforce Cavanaugh's May 8, 2009 Decision and Award, and that a hearing should be scheduled. Following Respondent's notification that it was seeking the contractual pay-in-lieu relief, SSA filed the charge in Case 19–CD–00506 on September 28, 2010. Respondent has never withdrawn its demand that a hearing be held before Arbitrator Cavanaugh regarding the contractual pay-in-lieu relief it is seeking. A hearing has never been held and Respondent's demand has been held in abeyance pending resolution of the instant proceedings before the Board.

On December 15, 2010, the Board issued a Decision and Determination of Dispute, which is reported at 356 NLRB 288, finding that SSA's employees represented by the ILWU were entitled to perform the disputed work and that Respondent was not entitled by any means proscribed by Section 8(b)(4)(D) of the Act to force SSA Marine to assign the disputed work to employees represented by Respondent. On May 24, 2011, the Board issued an Order Vacating and Remanding, which is reported at 356 NLRB 1282, in which it vacated the above Decision and Determination of Dispute that issued on December 15, 2010, as having been improvidently issued, and remanded the case to the Regional Director. On May 26, 2011, the Regional Director issued an Order Revoking Approval of Withdrawal of Charge in which he revoked the approval of the withdrawal of the charge in Case 19–CD–00502 and reinstated the charge. On July 22, 2011, the Board issued its Decision and Determination of Dispute, which is reported at 357 NLRB 126, finding that SSA's employees represented by ILWU are entitled to perform the disputed work and that Respondent is not entitled by any means proscribed by Section 8(b)(4)(D) of the Act to force SSA Marine to assign the disputed work to employees represented by Respondent.

Following issuance of the Board's Decision and Determination of Dispute on July 22, 2011, Respondent has informed the Regional Director that it would comply with the decision and would not demand that Respondent's members be dispatched to perform the disputed work, but that it would not withdraw its demand that the arbitrator schedule a hearing regarding the contractual pay-in-lieu relief described. Respondent has not otherwise assured SSA or the Regional Director that it would never seek any monetary and/or other contractual remedies (specifically, "pay-in-lieu" relief) to enforce Arbitrator Cavanaugh's May 8, 2009 Decision and Award. By letter dated November 10, 2011, Respondent has agreed not to take any actions to enforce Arbitrator Cavanaugh's May 8, 2009 Decision and Award pending resolution of the instant matter by the Board, but it has specifically reserved the right to seek full contractual backpay relief if the Board issues a Decision and Order in favor of the Respondent. Should Respondent seek contractual backpay relief, as described above, Respondent will not, under any circumstances, seek to dispatch Respondent's members to perform the disputed work at any time now or in the future, in contravention of the Board's July 22, 2011 10(k) Decision and Determination. Rather, Respondent intends to seek "pay-in-lieu" relief for Respondent's members for the time period of July 1, 2008, to July 21, 2011, and/or July 1, 2008, to present, but no other relief. The relief requested would be within the order of magnitude of the number of hours per year that ILWU-represented employees have performed the disputed work, as estimated. The estimated number of hours that SSA employees represented by ILWU have performed since spring 2009 is as follows: 2476 hours for 2009; 2784 hours for 2010; and 2543 hours for 2011.

Referring to a concept developed during negotiations in 2008 to address PMA member concerns about an ILWU proposal to modify the PCL&CA through a Memorandum of Understanding (MOU) provision that assigns to the ILWU "the maintenance and repair work on all new marine terminals that commence operations after July 1, 2008," SSA asked for and received from PMA an agreement that promises to reimburse SSA for damages that come about as a result of SSA's breaching its contract with Respondent for the assignment of the dis-

puted work No such agreement had been made in the past. Pursuant to that agreement, requested and reached as described above, PMA agreed to fully indemnify SSA if Respondent were to seek and obtain the "pay-in-lieu" relief. The reimbursement would be paid entirely from PMA's general assets. Although PMA is a not-for-profit organization, paying the reimbursement would not require PMA to increase its cargo dues materially or to make any special assessments from its members, including from SSA.

B. Issues Presented

The parties describe the issues in this case as follows.

Has Respondent IAM, since on or about July 22, 2011, coerced or restrained any person engaged in commerce or in an industry affecting commerce with an unlawful object in violation of Section 8(b)(4)(ii)(D) of the Act by refusing to withdraw and otherwise continuing to maintain its legal action seeking to obtain any pay-in-lieu or other monetary remedy to enforce Arbitrator Cavanaugh's May 8, 2009 Decision and Award?

C. Positions of the Parties

1. The General Counsel's position

The General Counsel contends that Respondent's continued maintenance of its legal action seeking to obtain pay-in-lieu or other monetary relief seeking to enforce an arbitrator's award directly contradicts and undermines the Board's July 22, 2011 decision awarding the disputed work to employees represented by the ILWU. Under well-settled Board law, Respondent's continued maintenance of its legal action after July 22, 2011, violates Section 8(b)(4)(ii)(D) of the Act.

Commencing July 2008, SSA assigned the disputed work to employees represented by the ILWU. After Respondent filed a grievance, an arbitrator issued a decision and award finding that SSA's assignment of the disputed work to ILWU-represented employees breached SSA's collective-bargaining agreement with Respondent and ordered SSA to make Respondent-represented employees whole. The arbitrator did not determine the specific amount of make-whole-relief owed because he found that the record developed before him was insufficient to make that determination. Following issuance of the arbitrator's decision, Respondent threatened to picket if SSA did not reassign the disputed work to employees represented by Respondent. A hearing pursuant to Section 10(k) of the Act was held in light of Respondent's and ILWU's competing demands for the work, Respondent's threat to obtain the work, and the absence of any voluntary method for resolving the dispute. Due to various procedural issues, the Board did not issue a final Decision and Determination of Dispute until July 22, 2011 (the 10(k) decision). In that decision, the Board determined that employees of SSA represented by ILWU were entitled to perform the disputed work and that Respondent was not entitled by means proscribed by Section 8(b)(4)(D) to force SSA to reassign the disputed work to employees represented by Respondent. Meanwhile, in June 2010, Respondent initiated a legal action before the arbitrator seeking an order requiring pay-in-lieu or other monetary relief to make its employees whole for the contractual breach that the arbitrator had concluded SSA had caused by assigning the disputed work to ILWU-represented employees. Since the issuance of the Board's July 22, 2011 10(k) decision, Respondent has refused to withdraw and continues to maintain that legal action. Although Respondent's initiation of its action to enforce the arbitrator's decision was not unlawful, its continued maintenance of that action following the Board's July 22, 2011 10(k) determination violates the Act. Settled Board law is clear that such post-10(k) determination conduct is proscribed by Section 8(b)(4)(D) because it directly undermines the Board's 10(k) determination, which constitutes the final resolution regarding the disputed work. Here, Respondent's legal action seeking monetary relief because SSA had ILWU-represented employees perform the disputed work, directly undermines the Board's 10(k) determination that those ILWU-represented employees are entitled to perform the disputed work. It does not matter that Respondent does not seek a remedy requiring SSA to reassign the work to its members or that PMA would reimburse SSA for any damages awarded. Under well-established Board law, seeking contractual pay-in-lieu relief for employees not entitled to perform the disputed work under the Board's 10(k) determination constitutes unlawful coercion in violation of Section 8(b)(4)(ii)(D) of the Act regardless of which person in commerce is required to pay the damages.

2. Respondent's position

This case arose from a jurisdictional dispute between Respondent and ILWU over "maintenance and repair" (M&R) work performed at Terminal 91 in Seattle by SSA. In an earlier proceeding, each union claimed the work, and on July 22, 2011, the Board issued a 10(k) award providing that employees of SSA represented by ILWU were entitled to perform the work. For decades, SSA has assigned M&R work in Puget Sound to employees represented by Respondent. SSA is a member of PMA, an entity that bargains on behalf of companies working at the various ports on the West Coast, including SSA. During the summer of 2008, SSA, as a member of PMA, negotiated a labor agreement covering employees represented by the ILWU. On July 1, 2008, PMA and the ILWU entered into an agreement providing that M&R work at "new" Puget Sound terminals would be assigned to ILWU. Prior to PMA signing the agreement, SSA procured PMA's promise that PMA would indemnify SSA from any damages that would result from SSA's breach of its CBA with Respondent as a result of the new language negotiated with the ILWU. After the SSA-ILWU agreement was signed in July 2008, SSA assigned M&R work to ILWU members at Terminal 91. Respondent grieved SSA's assignment of M&R work and an arbitrator held that SSA's assignment was a violation of its CBA with Respondent. Respondent has held the remedy phase of the arbitrator's decision in abeyance pending the outcome of this proceeding. Respondent's pursuit of pay-in-lieu remedy on the foregoing facts does not subvert the Board's 10(k) award. A pay-in-lieu remedy in no way "undermines" the Board's 10(k) award because it will not, with a certainty, coerce SSA to reassign Respondent's members the M&R work that was awarded to ILWU members by the Board. Nor will SSA incur any financial loss. It is settled law that 10(k) determinations are undermined when con-

fronted with inconsistent arbitral decisions because "an employer would be presented with a choice of either complying with the Board's decision and risking Section 301 damages, or complying with an arbitrator's decision which was contrary to the Board's determination." *Carpenters Local 33 (AGC of Massachusetts),* 289 NLRB 1482, 1484 (1988). Here, SSA is not confronted with such a choice. While the Board has held in different circumstances that there is essentially no material difference between seeking the assignment of work and seeking payment in lieu of work, on the unique facts of this case there is a material difference. Two important facts set this case apart from the run-of-the-mill "pay-in-lieu" case. First, SSA is completely indemnified from any financial loss related to the arbitral remedy Respondent is seeking. Second, SSA cannot be coerced to "assign" M&R work to Respondent because PMA made a "commitment" to the ILWU in the 2008 negotiations to give the M&R work to the ILWU. PMA then made an indemnification agreement with SSA because it was in the "best interest of the industry for SSA to go along with that commitment." In sum, SSA will not reassign work to Respondent in reaction to a pay-in-lieu remedy because the "industry" does not prefer such an assignment, SSA has no financial liability, and Respondent would not accept an assignment contrary to the Board's 10(k) decision. On the unique facts of this case, there is no coercion of SSA and no subversion of the Board's 10(k) decision. The Board has consistently allowed unions to pursue a contract remedy in situations where an entity other than the employer responsible for assigning work is liable for the contract damages. See, e.g., *AGC of Massachusetts*, supra; *Iron Workers Local 751 (Hoffman Construction),* 293 NLRB 570 (1989); *Laborers Local 731* (*Slattery Associates*), 298 NLRB 787 (1990). PMA is responsible for any contract damages owed to Respondent. Because PMA does not assign the work covered by the Board's 10(k) determination, Respondent's pursuit of contract damages does not have a coercive effect on SSA's assignment of work.[3] In light of the foregoing, Respondent's actions do not subvert the Board's 10(k) decision. Congress surely did not intend for the Board to protect an employer who foments dispute by knowingly reneging on a clear agreement with one union by later signing an irreconcilable agreement with another union. Moreover, there can be no dispute that SSA understood this fact as it simultaneously negotiated protection, in the form of indemnification from PMA, from grievances surely to be brought by Respondent. SSA freely and knowingly chose to give the ILWU contractual claims to this work because it does not risk paying damages in a grievance proceeding. In this circumstance, the Board's processes should not be made available to shield an intentionally wrongdoing SSA from the natural consequences of its actions, particularly where the Respondent's actions have no coercive effect on SSA. The real nature of this dispute relieves Respondent of any prohibition from seeking pay-in-lieu relief, under the Board's July 22, 2011 10(k) decision, as SSA is not thereby coerced.

[3] Respondent further argues that, at a minimum, seeking a pay-in-lieu remedy for the time period of the breach (July 1, 2008) until the Board's 10(k) decision (July 22, 2011), could not be coercive to SSA and in no way subverts the Board's July 22, 2011 decision.

3. SA's position

SSA concurs with the General Counsel's position.

III. LEGAL ANALYSIS

Section 8(b)(4)(ii)(D) makes it unlawful for a union to threaten, coerce, or restrain any person engaged in commerce where an object of that conduct is to force or require any employer to assign particular work to employees in a particular labor organization rather than employees in another labor organization. As the Supreme Court has indicated, by enacting this provision Congress sought to protect employers and the public from the detrimental impact of jurisdictional strikes. *NLRB v. Plasterers' Local 79,* 404 U.S. 116, 130 (1971).

The facts in this case, however, do not easily fall within the evil Congress sought to forbid. As the Board has earlier found in its 10(k) award, Respondent has represented employees performing M&R work for SSA and its predecessors for decades and that the then existing collective bargaining indisputably covered that work. And as Arbitrator Cavanaugh concluded SSA, PMA, and ILWU then decided to take that work away from employees represented by Respondent and give that work to employees represented by ILWU, who had never theretofore performed this work for SSA. To that extent, SSA was not an innocent bystander caught up in a dispute not of its own making between two unions; rather, it created the dispute. Yet in this proceeding the General Counsel seeks to shield SSA from the effects of its breach of contract and even have Respondent reimburse SSA for the costs involved in defending against Respondent's clearly meritorious grievance!

Section 10(k) requires the Board to hear and determine the jurisdictional dispute. That is, the Board is required to decide which labor organization gets the work. Section 10(k) also requires that the 8(b)(4)(D) charge that triggered the 10(k) hearing be dismissed upon compliance with the 10(k) award of the Board. So the issue in this case is whether or not Respondent has complied with the Board's 10(k) award of the work to ILWU. But the manner in which the Board has fulfilled it obligations under Section 10(k) may be contributing to the creation of jurisdictional disputes such as the one in this case. This is so because although the Board applies a multifactor test in determining who should get the work, the result is always the same—the Board awards the work to the labor organization to whom the employer itself has most recently assigned the work. One may read the first few sentences of the 10(k) award to ascertain to whom the employer has assigned the work most recently and then read no further for the Board will certainly assign the work to that organization. So it did not require any extensive legal analysis for SSA, PMA, and ILWU to feel confident that the Board would uphold their decision to take the work from employees represented by Respondent.

Of course, once the Board awards the work the employees who normally would have performed the work are likely out of a job. But what other remedies are available for those employees whose collective-bargaining agreement has been violated and who suffered from the dislocations caused them by their

employer's breach of the collective-bargaining agreement? Here Respondent sought monetary damages for the employees it represents for the breach of contract that deprived them of work. As the General Counsel correctly points out, it is well-settled that after the Board issues its 10(k) award a union may not continue to obtain the disputed work by requiring an employer to pay monetary damages until it does so. *Plasterers Local 200 (Standard Drywall, Inc.),* 357 NLRB 1921, slip op. at 3 (2011); *Sheet Metal Workers Local 27 (E.P. Donnelly, Inc.),* 357 NLRB 1577 (2011), and cases cited therein. Those cases fit comfortably within conduct that is prohibited by Section 8(b)(4)(D) in that the unions engaged in coercion (attempting to require an employer to pay money) for a prohibited object (forcing that employer to assign work to that union). But what about the circumstances here, where Respondent has clearly and unequivocally renounced the disputed work and seeks only damages for SSA's breach of contract? The General Counsel does not directly address this issue. Rather he cites *Iron Workers Local 433 (Otis Elevator),* 309 NLRB 273, 274 (1992), affd. 46 F.3d 1143 (9th Cir. 1995). But there is no evidence in that case that the union there unequivocally stated it does not seek, and would not accept the disputed work. The General Counsel also cites *Marble Polishers Local 47-T (Grazzini Bros.,)* 315 NLRB 520, 523 fn. 9 (1994). But that case too is distinguishable in that the union never made an unequivocal renunciation of the disputed work and the Board concluded that there had not even been a contract between the employer and the union that would support a breach of contract. I conclude that the General Counsel has failed to show that Respondent's pursuit of monetary damages was for the purpose of forcing SSA to assign the work back to employees represented by Respondent; Respondent has clearly given up on that effort. The General Counsel also points to wording in some cases that a union may not "undermine" a Board's 10(k) award. But there is no statutory or direct case authority that bars all undermining; if Respondent sought to regain the work through collective bargaining with SSA would that not "undermine" the Board's award? Nor is it clear that what Respondent has done here results in unlawful undermining. Remember, the wording in the Board's 10(k) award forbids Respondent from seeking the work in a manner prohibited by Section 8(b)(4)(D).

Not only do I conclude that the General Counsel has failed to show that Respondent's conduct had a prohibited object, I also conclude that he has failed to show that the conduct has restrained or coerced SSA. This is so because, as Respondent points out, PMA has agreed to indemnify SSA of any costs arising from its breach of contract. This is not surprising given that the fact that PMA could confidently assume the Board would affirm SSA's taking of the work from the employees who performed it for decades and, in breach of its collective-bargaining obligations, give the work to the ILWU and then bar Respondent from seeking any effective remedy for that breach. But nonetheless PMA's conduct has served to assume any coercive effect from Respondent's conduct onto itself and away from SSA. Interestingly, in its brief ILWU disagrees with the General Counsel and agrees with Respondent that SSA is not being coerced under these unique circumstances. However, the General Counsel and ILWU counter by correctly pointing out that Section 8(b)(4)(D) forbids conduct directed at any person engaged in commerce and PMA is certainly such a person. The problem, however, is that the complaint does not allege, and there is no charge supporting, any unlawful conduct directed towards PMA by Respondent. Respondent should not be required to guess which employer it has alleged restrained and coerces. At this point due process prevents litigation of that matter in this proceeding.

In its brief Respondent argues:

> Congress surely did not intend for the Board to protect an employer who foments dispute by knowingly and blatantly reneging on a clear agreement with one union by later signing an irreconcilable agreement with another union, all while procuring indemnity for grievances that were inevitably to be brought by the IAM. The Board's processes should not be made available to shield an intentionally wrongdoing SSA from the natural consequences of its actions.

I agree.

Core policies of the Act support the integrity of the collective-bargaining process, collective-bargaining contracts, and stable, mature collective-bargaining relationships such as existed between SSA and Respondent before SSA's breach of contract. Core policies of the Act discourage breaches of those contracts, encourage use of the grievance-arbitration process and respect for properly issued arbitration awards. Core policies under the Act encourage effective remedies for those breaches of contract so that the effects on employees are mitigated to some degree. A confluence of factors under Section 8(b(4)(D) and Section 10(k) have seemed to have undermined those policies in cases such as this. In the absence of clear precedent I will not take the next step down this road.

On these findings of fact and conclusions of law and on the

[Recommended Order omitted from publication.]