

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL LONGSHORE AND WAREHOUSE
UNION, AFL-CIO, and INTERNATIONAL LONGSHORE
AND WAREHOUSE UNION, LOCAL 4, AFL-CIO

and

Cases 19-CC-092816
19-CC-115273
19-CD-092820
19-CD-115274

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 48, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to § 102.46(a) of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel (the "General Counsel") hereby files the following exceptions to the Decision and Order of Administrative Law Judge William L. Schmidt (the "Judge") dated August 13, 2014, based upon evidence presented during a 7-day hearing following issuance of an amended Consolidated Complaint (the "Complaint") on October 28, 2013. The General Counsel takes exception to the following:¹

1) The Judge's finding that the General Counsel failed to prove essential Complaint allegations that Respondents violated Sections 8(b)(4)(B) and (D) (ALJD 2:14-15) because Respondents' demands that Kinder Morgan Terminals ("KMT") assign disputed electrical maintenance and repair work ("electrical work") to employees they represent violate §§ 8(b)(4)(ii)(B) and (D) based on the record evidence and well-established Board precedent.

2) The Judge's finding that Accurate Electric of Oregon, Inc. ("AEO") acquired the disputed electrical work in 2004 (ALJD 4: 9-10) because the record evidence demonstrates that Accurate Electric ("Accurate") acquired the disputed electrical work in 2004 and performed it until 2010, when AEO was formed and acquired the work and has performed it since

3) The Judge's finding that unit employees who work for other PMA employers at other West Coast ports regularly perform electrical maintenance and repair work (ALJD 4: 14-16) because the finding is legally irrelevant as to whether Respondents had a work preservation objective in seeking the disputed electrical work from KMT and because the record evidence is insufficient to support the finding that unit employees regularly perform such work.

4) The Judge's finding that Respondents adduced multiple instances over a recent two year period of PMA employers in California, Tacoma, and Seattle soliciting applications through ILWU local unions for workers to fill unit positions that require a variety of electrical and electronic skills, certificates, and state electrical licenses (ALJD 5: 4-7) because the finding is legally irrelevant as to whether Respondents had a work preservation objective in seeking the disputed electrical work from KMT.

¹ References to the Administrative Law Judge's Decision and Order appear as (ALJD____; ____). The first number refers to the pages and the second number refers to the lines.

5) The Judge's finding that the workers of the electrical contractors who KMT has used to perform the disputed electrical work for years are represented by the ILWU (ALJD 5: 13-16) because the record evidence demonstrates that IBEW Local 48 has always represented those workers.

6) The Judge's finding that KMT notified PMA on November 21 that it was suspending any further action towards hiring ILWU members to perform the disputed work in view of the October 22, 2013 unfair labor practice charges in Cases 19-CC-115273 and 19-CD-115273 (ALJD 12: 1-3, 9-11) because the record evidence demonstrates that KMT's November 21, 2012 letter to PMA refers to the unfair labor practice charges previously filed against Respondents in Cases 19-CC-092816 and 19-CD-092820.

7) The Judge's finding that the citations issued by the State of Washington against another terminal operator at the Port of Vancouver for having Respondent Local 4's members perform electrical maintenance and repair work were "the direct outgrowth of the 10(k) hearing" (ALJD 12 n.9) to the extent it suggests that the Board's 10(k) hearing predetermined the citations and monetary penalties assessed as opposed to an independent investigation by the State of Washington.

8) The Judge's finding that the evidence in the present proceeding casts considerable doubt on the sustainability of the findings of fact, analysis, and conclusions in the 10(k) hearing (ALJD 14: 22-24) because the record evidence does not undermine, but reaffirms, the conclusion that the Board's findings, analysis, and conclusions in its 10(k) decision were correct.

9) The Judge's statement that the General Counsel argued that Respondents did not have a work preservation objective only because they have never performed the electrical maintenance and repair work at the VBT (ALJD 14: 36-39) because General Counsel had further argued to the Judge that Respondents did not have a legitimate work preservation objective because the record evidence does not establish that Respondents' unit employees have traditionally performed electrical maintenance and repair work and their contract with PMA does not and cannot preserve work that the unit employees have not traditionally performed.

10) The Judge's statement that General Counsel alleged that Respondents violated the Act by the physical blocking of AEO's electricians at the VBT on October 18 and 21, 2012 (ALJD 15: 23, 26-37) because the record evidence demonstrates that General Counsel alleged that Respondents violated

§§ 8(b)(4)(ii)(B) and (D) the Act by preventing AEO's electricians from performing the disputed electrical work on October 18 and 21, 2013.

11) The Judge's finding that KMT was obligated to seek authorization from the Port of Vancouver to perform the disputed electrical maintenance repair work or to become a licensed electrical contractor so that it could comply with Washington State law and assign the disputed work to Respondents' members (ALJD 17:46 – 18:5) 2-4) because the law does not require KMT to accede to Respondents' wishes to assign them the work by taking affirmative steps to pressure an independent third party to grant such authorization or transform its business operation .

12) The Judge's finding that the record does not contain evidence showing that PMA employers seeking to hire large numbers of workers qualified to perform electrical work at the docks in Seattle and Tacoma are not in compliance with Washington State law (ALJD 18: 5-7) as it is both irrelevant, because it assumes that the State of Washington can cite employers for violating state electrical law on the basis of job postings as opposed to actual work, and is contradicted by record evidence showing that the State of Washington cited and assessed monetary penalties against a PMA employer at the VBT because it was not in compliance with State law when it used Respondent Local 4 members to perform electrical work on cargo handling equipment.

13) The Judge's finding that Respondents have a fairly claimable right under the 2008 PCLCD to the work described in its six grievances (ALJD 18: 9-10) because the record evidence demonstrates that while that contract may grant Respondents the right to perform maintenance and repair work, it does not grant Respondents the right to perform the disputed electrical work that its unit employees have not traditionally performed either at the VBT or at ports on the West Coast.

14) The Judge's finding that it is the work performed by ILWU mechanics in the multiemployer coastwise unit, and not unit work performed at the VBT, that determines the fairly claimable work question (ALJD 18: 13-18) because it conflicts with existing Board precedent finding that the unit work performed at the employer targeted by Respondents' actions is determinative with respect to claims of fairly claimable work or work preservation.

15) The Judge's finding that the preponderance of the record evidence shows that ILWU-represented longshore mechanics perform both electrical and mechanical maintenance and repair work at numerous West Coast ports (ALJD 18: 18-20) because the record evidence revealing occasional and incidental performance of electrical maintenance and repair work by Respondents' members is insufficient to demonstrate that Respondents' unit employees have traditionally performed such work or that Respondents had a work preservation objective.

16) The Judge's finding that the 2008 PCLCD structurally defines all M&R work, whether electrical or mechanical, as work to be performed by employees that belong to Respondents' coastwise unit unless the PMA employer qualifies for an exception under either of two PCLCD Letters of Understanding ("LOU") (ALJD 18: 26-29) because the PCLCD cannot preserve electrical M&R work, as opposed to mechanical M&R work, that unit employees have not traditionally performed, and because the contractual LOU exceptions are irrelevant to the work preservation determination, as previously determined by the Board in its 10(k) decision.

17) The Judge's finding that in light of his previous finding that it is not encumbered by Washington State law, KMT is not powerless to accede to Respondents' demand that it assign the electrical M&R work to Respondents' unit employees (ALJD 18: 32-35) because of the reasons set forth above in Exceptions 11 and 12.

18) The Judge's finding that it has now been contractually determined that it is obliged to assign the electrical M&R work to Respondents' unit employees (ALJD 18: 35) because the arbitrator's contractual determination is both irrelevant to the State of Washington's determination as to whether KMT violates state law by having Respondents' unit employees perform the work and the Board's determination whether Respondents' actions violate §8(b)(4)(ii)(B), and directly conflicts with the Board's 10(k) decision.

19) The Judge's finding that Arbitrator Kagel noted in his decision that KMT relies on and is accorded the benefit of the Bulk Terminal Past Practice LOU in its use of nonunit workers to perform the electrical M&R work for the Port of Portland (ALJD 18: 40-43) because Kagel's decision states that the LOU provides an exception for nonunit employees to perform M&R work, not electrical M&R work.

20) The Judge's finding that Respondents' efforts to compel KMT to assign the disputed electrical M&R work has been primary activity from the outset (ALJD 18:45 – 46:1) because the record evidence and existing Board precedent establish that Respondents' actions have an unlawful secondary object in violation of § 8(b)(4)(ii)(B).

21) The Judge's finding that the right of control over the assignment of the electrical M&R work at the VBT is vested in KMT (ALJD 19:6-7) because the record evidence establishes that KMT does not have control over the assignment of the disputed electrical M&R work as demanded by Respondents in light of the management agreement to which it is bound and Washington State law..

22) The Judge's finding that the record is devoid of evidence that Respondents seek to influence AEO's decision regarding which workers it assigns to perform the disputed electrical M&R work but decidedly care about KMT's decision to call AEO rather than Respondents' dispatch hall to perform that work (ALJD 19: 13-16) because that determination reflects an artificial and mechanical test that conflicts with existing Board precedent and fails to recognize that Respondents decidedly do seek to influence which workers AEO assigns to perform the electrical M&R work where those workers are not represented by Respondents.

23) The Judge's finding that this case involves a primary contract dispute that Respondents have with KMT, nothing more and nothing less (ALJD 19: 19-20) because it fails to recognize that Respondents' activities in pursuit of their contractual demands against KMT have an unlawful object in violation of §§ 8(b)(4)(ii)(B) and (D).

24) The Judge's finding that KMT is not obliged in any manner to use Accurate's employees represented by IBEW Local 48 (ALJD 19: 20-21) because it ignores the Board's 10(k) awarding the disputed electrical M&R work to the employees represented by IBEW Local 48 and the picketing or other coercive actions that IBEW Local 48 can lawfully take against KMT if KMT assigns the work to Respondents' unit employees and not those represented by IBEW Local 48.

25) The Judge's finding that KMT has a contractual obligation that provides a substantial basis for Respondents' claims here (ALJD 19: 21-22) because that alleged contractual obligation to assign the electrical M&R work to Respondents' unit employees is based on an arbitrator's determination that is

irrelevant to an 8(b)(4)(B) determination and is in direct conflict with the Board's 10(k) decision so that Respondents' activities in reliance on it violated § 8(b)(4)(ii)(D).

26) The Judge's finding that Local 48's claim to the electrical M&R work is grounded on its agreement with AEO, not KMT (ALJD 19: 26-27) because, unlike the Board recognized in its 10(k) decision and as the record evidence establishes, the finding fails to recognize that Local 48's claim is also based on its employees' performance of the disputed electrical M&R work for KMT (and its predecessor) during its entire existence at the VBT and not just while employed by AEO.

27) The Judge's finding that, if Local 48 had an agreement with KMT, KMT would likely have acquired a red-circle exception under the PCLCD (ALJD 19: 28) because such speculation is unwarranted because as explained in Exception 19 above, that exception applies to M&R work and not the electrical M&R work that Local 48-represented employees have performed for KMT during its entire existence at the VBT.

28) The Judge's finding that Local 48's March 18 threat that gave rise to the 10(k) proceeding had an unlawful object of seeking to impose on KMT a *de facto* union signatory agreement prohibited by § 8(e) (ALJD 19: 29-31) because it fails to recognize that the Board proceeded with its determination under § 10(k) on the basis that it found that Local 48's threat had an unlawful object proscribed by § 8(b)(4)(D) of forcing KMT to assign the disputed work to employees represented by Local 48, rather than Respondents, and had nothing to do with an alleged threat to impose an agreement on KMT prohibited by § 8(e), which would concern an unlawful object proscribed by § 8(b)(4)(A) and which does not give rise to a 10(k) proceeding.

29) The Judge's finding that based on KMT's historical practice he strongly suspects that if certain select employees of Accurate who have regularly performed work at VBT since 1998 obtained employment elsewhere, Accurate's presence at the VBT would quickly fade as has happened to its predecessors (ALJD 19: 31-34) because it is irrelevant to the determination of whether Respondent's activities directed at KMT had unlawful objects in violation of §§ 8(b)(4)(ii)(B) and (D) during the relevant time period encompassed by the Complaint when KMT was contracting with Accurate to perform the disputed electrical M&R work.

30) The Judge's finding that the far more expanded record in the instant proceeding supports the conclusion that the Board's findings and conclusions in the 10(k) decision merit reconsideration (ALJD 19: 40-41) because the Judge's rationale for rejecting the Board's conclusions in the 10(k) decision is based not on an alleged expanded record, but primarily on the same evidence that was presented to the Board in the 10(k) proceeding and the Judge's substitution of his legal judgment for that of the 3-Member Board.

31) The Judge's finding that Board's conclusion in its 10(k) decision that the two relevant LOUs in the PCLCD granting exceptions have no application fails to appreciate their purpose as they are extremely meaningful to assess Respondents' work preservation defense (ALJD 19:43 – 20: 3) because as noted above in Exception 19, those LOUs provide exceptions with regard to the performance of M&R work, not electrical M&R work, so they don't apply with respect to Respondents' work preservation defense which requires Respondents to demonstrate that their employees unit have traditionally performed such electrical M&R work.

32) The Judge's finding that the Board's repeated mention in its 10(k) decision that present M&R work constitutes the traditional longshore work of unit employees directly contradicts the Board's conclusion in the same 10(k) decision that the parties' agreement about M&R work set forth in §§ 1.71 et seq. of the PCLCD is limited to that work resulting from the future introduction of robotics and other new technologies (ALJD 20: 5-8) because it misstates the Board's conclusion in its 10(k) decision concerning the M&R work covered under §§ 1.71 et seq. of the PCLCD .

33) The Judge's finding that the Board's conclusion in its 10(k) decision that the parties' agreement makes no reference to electrical M&R work appears not to have considered the use of the word "electronics" in section 1.73 and in the red-circle LOU (ALJD 20: 9-11) because it either ignores the fact that the Board did address the use of that term in its conclusion or substitutes his judgment for that of the 3-Member Board that the agreement's description of "electronics" is too vague to cover the disputed electrical M&R work at issue.

34) The Judge's finding that the most notable support in the alleged expanded record of this proceeding to find that the Board's construction of the 2008 PCLCD made in its 10(k) decision fails to reflect a fair and reasonable construction of the parties' intent is that PMA never advanced the claim during

arbitration proceedings that M&R work reserved to unit employees was limited to future electrical work resulting from the introduction of robotics and future technologies (ALJD 20: 11-17) because as noted above in Exception 32, the finding is based on the Judge's misstatement of the Board's conclusion in its 10(k) decision concerning the M&R work covered under §§ 1.71 *et seq.* of the PCLCD .

35) The Judge's finding that even if the relevant portions of the PCLCD made no reference to electrical M&R work, the application of the common maxim of contract interpretation that the "greater includes the lesser" merits the conclusion that both electrical and mechanical M&R work are included (ALJD 20 fn. 12: 39-42) because it substitutes his legal judgment for that of the 3-Member Board, which found in its 10(k) decision that the PCLCD does not cover the electrical M&R work at issue.

36) The Judge's finding that the fact that the PCLCD provisions dealing with M&R work twice refer to "electronic" work as unit work warrants the conclusion that the parties understood that electrical M&R work related to the operation of cargo handling equipment constituted unit work (ALJD 20 fn. 12: 45-47) because it substitutes his legal judgment for that of the 3-Member Board, which found in the 10(k) decision that the agreement's description of "electronics" is too vague to cover the disputed electrical M&R work at issue.

37) The Judge's finding that he agrees with Respondents' contention that the Board's 10(k) decision repeated the fundamental error the Supreme Court addressed in *ILA I* (ALJD 23: 23-24) because the Board's conclusion in its 10(k) decision that Respondents did not have a legitimate work preservation objective when they sought to acquire the electrical M&R work that its unit employees had never performed is fully consistent with the principles set forth in the *ILA I* decision.

38) The Judge's finding that according virtually insurmountable primacy to the past practice at a single location of a coastwise bargaining unit is unsupportable under the *ILA* cases (ALJD 23: 36-37) because the *ILA* cases did not find that the ILA had a lawful work preservation objective on the basis of its coastwise bargaining unit but rather on the basis that technological change had displaced traditional unit work, which is not applicable here where electrical M&R work is not traditional unit work.

39) The Judge's finding that the Bulk Terminal Past Practice LOU has monumental significance because it precluded KMT from following its past practice of using nonunit employees to perform bargaining

unit work (*i.e.*, electrical M&R work) (ALJD 23: 38-40) because that LOU provides an exception with respect to the performance of M&R work, not electrical M&R work.

40) The Judge's finding that the Board's 10(k) decision misapplies the strict definition of "work acquisition" activities as set forth in *ILA II* (ALJD 23: 42-43) because the Board's determination that Respondents were seeking to acquire the disputed electrical M&R work because they cannot preserve that work that their unit employees have never performed is fully consistent with the principles set forth in *ILA II*.

41) The Judge's finding that as the 2008 PCLCD seeks to limit the more recent outsourcing of unit jobs to nonunit employees, no unlawful work-acquisition objective can be inferred here from Respondents' enforcement of the terms of that agreement (ALJD 24: 20-24) because the PCLCD's limitation on the outsourcing of unit jobs has no application here where Respondents could not seek to limit the outsourcing of work that their unit employees have never performed.

42) The Judge's finding that any inference of a secondary objective would not be warranted in this case based on the Supreme Court's perception of the "preservation/acquisition dichotomy" in *ILA II* (ALJD 24: 26-27) because the record evidence establishes that Respondents had an unlawful secondary objective in seeking to coerce KMT to assign them the disputed electrical M&R work that their unit employees had never performed.

43) The Judge's finding that, on the basis of the alleged expanded record in this case, Respondents' work preservation defense warrants dismissal of the Complaint in its entirety (ALJD 24: 29-30) because the Judge's conclusion that Respondents established a legitimate work preservation defense is based on the substitution of his legal judgment for that of the 3-Member Board, as opposed to an expanded record, and his faulty analysis of the relevant case law.

44) The Judge's finding that Respondents' physical blocking of AEO's employees from performing the electrical M&R work they were called to perform at the VBT on October 18 and 21, 2013 did not violate Section 8(b)(4)(B) and (D) (ALJD 24: 31-33) because the evidence establishes that such conduct had an unlawful object of coercing KMT to cease doing business with Accurate and to assign Respondents' unit employees the disputed electrical M&R work in direct contravention of the Board's 10(k) decision directing KMT to assign that work to employees represented by IBEW Local 48.

45) The Judge's finding that his recommended order will provide for the dismissal of the Complaint in its entirety (ALJD 24: 34-35) because the record evidence and existing Board and Supreme Court precedent establish that Respondents violated §§ 8(b)(4)(ii)(B) and (D) as alleged in the Complaint.

46) The Judge's conclusion of law that the General Counsel failed to prove that Respondents violated §§ 8(b)(4)(ii)(B) and (D) because the record evidence and existing Board and Supreme Court precedent establish that Respondents violated §§ 8(b)(4)(ii)(B) and (D) as alleged in the Complaint.

47) The Judge's finding that it was unnecessary to address Respondents' contention that KMT voluntarily prepared a job description for Respondent Local 4 to post at its hall (ALJD 24 fn.14: 44-46) because the record evidence demonstrates that KMT prepared the job description only because of Respondents' directive and coercion.

48) The Judge's Order dismissing the Complaint (ALJD 25: 5-7) because the record evidence and existing Board and Supreme Court precedent establish that Respondents violated §§ 8(b)(4)(ii)(B) and (D) as alleged in the Complaint.

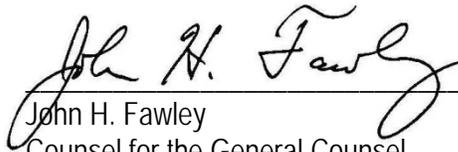
49) The Judge's failure to find that Respondent violated § 8(b)(4)(ii)(B) by refusing to withdraw and continuing to maintain its grievances demanding that KMT assign the disputed electrical work to their unit employees; directing KMT to assign the electrical M&R work to their unit employees; by directing KMT to prepare and post an electrician position at Respondent Local 4's dispatch hall; and by preventing AEO's IBEW Local 48-represented electricians from performing electrical maintenance and repair work for KMT with an object of requiring KMT to cease doing business with Accurate Electric of Oregon.

50) The Judge's failure to find that Respondent violated § 8(b)(4)(ii)(D) by refusing to withdraw and continuing to maintain its grievances demanding that KMT assign the disputed electrical work to their unit employees; directing KMT to assign the electrical M&R work to their unit employees; by directing KMT to prepare and post an electrician position at Respondent Local 4's dispatch hall; and by preventing AEO's IBEW Local 48-represented electricians from performing electrical maintenance and repair work for KMT with an object of forcing KMT to assign the disputed electrical M&R work to their unit employees, which directly conflicts with the Board's 10(k) determination finding that employees represented by IBEW Local 48 are entitled to perform that work.

51) The Judge's failure to order Respondents to withdraw their grievances demanding that KMT assign the disputed electrical work to their unit employees; to cease and desist from directing KMT to assign the electrical M&R work to their unit employees, directing KMT to prepare and post an electrician position at Respondent Local 4's dispatch hall, and preventing Accurate Electric of Oregon's IBEW Local 48-represented electricians from performing electrical maintenance and repair work for KMT; and to post a remedial notice consistent with established Board precedent.

DATED at Seattle, Washington, this 8th day of October, 2014.

Respectfully submitted,

A handwritten signature in black ink, reading "John H. Fawley". The signature is written in a cursive style and is positioned above a horizontal line.

John H. Fawley
Counsel for the General Counsel
National Labor Relations Board, Region 19
2948 Jackson Federal Building
Seattle, Washington 98174