

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 OPPOSITION
TO RESPONDENTS' MOTION TO REOPEN THE RECORD

I. INTRODUCTION

Virtually one year after the close of the record in this matter, Respondents International Longshore and Warehouse Union ("ILWU") and International Longshore and Warehouse Union, Local 4 ("Local 4") (collectively, "Respondents"), now seek to reopen the record pursuant to § 102.48(d) of the Board's Rules and Regulations to permit the introduction of several documents that pertain to alleged events that occurred several months after the close of the hearing in this matter. Respondents seek to show that, contrary to General Counsel's argument, Kinder Morgan Terminals ("KMT") has the right to control the assignment of the disputed electrical maintenance and repair work ("electrical work").¹ The Board should immediately deny Respondents' Motion to Reopen the Record ("Motion") because Respondents have failed to meet their burden of demonstrating extraordinary circumstances that warrant the reopening of the record.

¹ As General Counsel has already argued at page 36 of its Brief in Support of Exceptions to the Administrative Law Judge's Decision ("Exceptions Brief"), it is not even necessary for the Board to address this issue of right of control to find that Respondents violated the Act, as alleged, if the Board determines that Respondents have not met their burden of demonstrating that their coercive conduct had a lawful work preservation object by showing that the disputed electrical work was fairly claimable. See, e.g., *Food & Commercial Workers Local 367 (Quality Food)*, 333 NLRB 771, 772 (2001) (as union failed to demonstrate that the work in question was fairly claimable, employer's right to control the work was irrelevant).

As discussed in detail below, Respondents' Motion should be denied for several reasons. First, established Board precedent does not permit the reopening of the record for the type of post-hearing events evidence that Respondents seek to introduce. Second, contrary to Respondents' assertions (Motion 6-9), the evidence that Respondents seek to introduce does not require a different result or undermine General Counsel's argument that Respondents' coercive conduct violated §§ 8(b)(4)(ii)(B) and (D). Third, contrary to Respondents' unsupported, unwarranted, and otherwise outrageous assertions (Motion at 10-12), the record should not be reopened on the alleged basis that witnesses gave false or perjured testimony. Fourth, contrary to Respondents' contention (Motion at 9-10), permitting the introduction of such evidence would unduly prejudice the rights of the General Counsel and the Charging Party, International Brotherhood of Electrical Workers, Local 48, AFL-CIO ("Local 48"). By contrast, denial of Respondents' Motion would not prejudice Respondents, who seek to show only that KMT succumbed to their coercive secondary conduct months after the hearing closed.

II. The Board Should Deny the Motion Because Respondents Seek to Introduce Purported Evidence Concerning Alleged Events that Occurred After the Close of the Hearing

Respondents move to reopen the record to permit the Board's consideration of seven additional documents in deciding this matter. Those purported documents include: 1) a May 30, 2014, letter from KMT Director of Operations Neil Maunu to the Port of Vancouver ("POV"); 2) a June 16, 2014, response from the POV to Maunu; 3) the June 19, 2014, minutes from a JPLRC special meeting; 4) an August 11, 2014, letter from KMT Terminal Manager Noa Lidstone with attachment; 5) a sign-up sheet for an electrical "MR" mechanic that is undated, but is provided for in Document 3's alleged June 19, 2014, minutes; 6) an October 9 and 10, 2014 Interview Schedule; and 7) an October 20, 2014, letter from KMT Terminal Manager Lidstone to Respondent Local 4 regarding the selection of two employees.

As can be readily seen, each of these documents refers to events (*i.e.*, the sending of letters; a JPLRC meeting being held; employees signing up; employees being interviewed; and employees being

selected) that occurred between May 30 and October 20, 2014. The record in the instant matter closed on December 12, 2013 (Tr 1132: 20-21, 1133: 2-15).² Accordingly, Respondents seek to reopen the record to present evidence concerning alleged events that occurred from 5½ to more than 10 months after the close of the hearing. Under well-established Board precedent, the Motion should be denied because the proffered documents do not constitute either "newly discovered" or "previously unavailable" evidence as they pertain to alleged events that had not yet occurred by the time of the hearing's close. See, e.g., *LIUNA Local 265 (Henckels & McCoy)*, 2014 WL 3467487 (Board denies motion to reopen the record as it seeks to proffer evidence concerning an alleged event that occurred after the close of the hearing); *Ryder Student Transportation, Inc.*, 297 NLRB 371 n. 1 (1989) (same); *Allis-Chalmers Corp.*, 286 NLRB 219 n. 1 (1987) (same); *K & E Bus Lines*, 255 NLRB 1022 n. 2 (1981) (same).

Cases cited by Respondents in support of their Motion are inapposite. In *Norton Audubon Hospital*, 350 NLRB 648, 648-49 (2007), involving a compliance proceeding, the Board permitted the Charging Party to reopen the record to present newly discovered evidence that, *at the time of the hearing*, there had been a lactation consultant position available that the discriminatee was eligible to fill, contrary to the judge's finding. Thus, unlike here, where Respondents are seeking to present evidence of alleged events that did not occur until many months after the hearing's close, the Charging Party in that case was presenting newly discovered evidence of an event (*i.e.*, the existence of a position) that had occurred by the time of the hearing. Similarly, in *Inland Container Corp.*, 273 NLRB 1856 (1985), the Board permitted the reopening of the record to permit newly discovered evidence concerning an event (the criteria used when an employer had selected applicants for hire) that had occurred by the close of the hearing. As the newly discovered evidence (a witness' response to a court interrogatory that conflicted with her testimony during the unfair labor practice proceeding) also raised the issue of whether a witness had committed

² References to pages of the transcript of the unfair labor practice hearing in this proceeding are identified as Tr _: __, with the first number being the page number and the second number referring to the lines on the page.

perjury in testifying concerning a material fact, the Board determined that it was proper to reopen the record to consider such perjury allegations. *Id.* at 1857. As argued *infra*, Respondents have not presented any credible evidence demonstrating that any witness committed perjury during the unfair labor practice proceeding.

Furthermore, *International Harvester Co.*, 236 NLRB 712 (1978), and *Jordan Marsh Co.*, 80 NLRB 343 (1948), do not support Respondents' contention that the Board should grant its Motion pursuant to § 102.48(d) of the Board's Rules and Regulations. In *International Harvester*, after the Board had sought enforcement of its initial decision, the court remanded the matter to the Board with the direction to take additional evidence on a particular issue. The Board reopened the record for an administrative law judge to take additional evidence "in accordance with the remand of the court." *Id.* at 712. There is no similar directive from a court here. *Jordan Marsh* is a representation case to which § 102.48(d) of the Board's Rules and Regulations does not apply. In any event, the Board permitted additional evidence to be taken in that matter to determine whether changes subsequent to the Direction of Election required a different determination regarding the unit that was scheduled to vote in a forthcoming representation election. In contrast, as the present matter involves an unfair labor practice proceeding and no unit determination is pending, *Jordan Marsh* is clearly inapposite.

III. The Board Should Deny Respondents' Motion Because Respondents' Conduct Violates §§ 8(b)(4)(ii)(B) and (D) Even if the Evidence Were Accepted and Credited

The Board should also deny the Motion because the proffered documents would not alter the result here, *i.e.*, that KMT lacked the right of control over assignment of the disputed electrical work. As General Counsel has argued in its Exceptions Brief (at 36-39), KMT lacked the right of control to lawfully assign the disputed electrical work to Respondents' members because the POV's Management Agreement with KMT requires that KMT comply with all applicable laws and regulations and KMT's assignment of the disputed work to Respondents' members would violate Washington State law. Respondents now contend that KMT

does have the right of control allegedly because their proffered documents show that KMT could lawfully assign that work and has done so (albeit months after the hearing in this matter closed). On the contrary, the proffered documents show nothing of the sort.

Respondents place particular emphasis on the POV's purported June 16, 2014, response to KMT's Director of Operations, Neil Maunu. In an apparent attempt to mislead the Board into finding that the POV had approved and authorized KMT's use of Local 4 members to perform the disputed electrical work, Respondents highlight in bold (Motion at 6) one sentence from that letter stating that the Management Agreement "leaves it up to Kinder Morgan to determine whether the electrical system should be maintained by a contractor or by other hired staff." The *very next sentence* of that letter, however, states that the POV "requires that the employment of electrical staff and the [electrical] maintenance and repair work itself be conducted in accordance with local, state and federal laws and regulations." Thus, there is no change in policy or stunning new revelation evidenced by this document. The POV's letter merely restates what the language of the Management Agreement already says. That is, although the decision who to hire to perform the electrical work is KMT's, POV's Management Agreement with KMT mandates that KMT's hiring decision comply with applicable law.

There is certainly no indication in this June 16 response that the POV approves or authorizes KMT to hire Respondents' members to perform the disputed electrical work. Indeed, the POV does not have the authority to determine whether the hiring of Local 4's members to perform the disputed electrical work complies with applicable Washington State law, the National Labor Relations Act, or any other law. As noted by the General Counsel in his Exceptions Brief (at 37), that has already been demonstrated by the fact that the State of Washington issued citations and fines to another PMA employer at the POV for using Respondents' unit employees to perform the same type of electrical M&R work. Thus, this document neither establishes that KMT was the primary employer in this dispute nor that Respondents' conduct in demanding that KMT hire its members to perform the disputed electrical work was lawful.

The other proffered documents showing that the JPLRC mandated that KMT assign the disputed work to Respondents' members, KMT's subsequent posting of the position at Local 4' hall, and KMT's subsequent interviewing and hiring of Local 4's members to perform the disputed electrical work, similarly do not provide any revelation that KMT, in fact, had the right of control over the work and was a primary employer under relevant labor law principles. Those documents reflect merely that KMT has succumbed (albeit months after the close of the hearing) to Respondents' continuing unlawful secondary coercion. That has never been in dispute – Respondents have at all material times had the raw power and ability to coerce KMT unlawfully to make a decision to cease its multi-decade practice of doing business with electrical contractors whose employees were not represented by Respondents, or to make a decision to cease using Local 48's electricians to perform the disputed electrical work in direct contravention of the Board's 10(k) decision. That they chose to wield such power is why the General Counsel intervened in the first place. Indeed, the alleged 2014 events revealed by the proffered documents (*i.e.*, JPLRC mandate and the coerced posting, interviewing, and hiring) involve the very same type of conduct engaged in by Respondents in 2012 that General Counsel has alleged in the consolidated complaint violates §§ 8(b)(4)(ii)(B) and (D).

In sum, the documents proffered to support Respondents' Motion do not present anything new requiring a different result here. Respondents' conduct still violates §§ 8(b)(4)(ii)(B) and (D). Accordingly, the Board should deny Respondents' Motion. *See, e.g., Planned Building Services*, 330 NLRB 791, 792 (2000) (Board denies motion to reopen record where it seeks to adduce evidence that would not require a different result); *WXRK*, 300 NLRB 633 n.1 (1990) (Board denies motion to reopen record where it seeks to adduce evidence concerning an alleged event that occurred after the close of the hearing and that would not alter the result).

IV. The Board Should Deny Respondents' Motion to Reopen the Record Because the Outrageous Claims of Fraud, Deceit, Perjury, and False Testimony Are Illogical and Unsupported by Any Evidence

In an effort to convince the Board to grant their Motion, Respondents stoop to a new low in accusing witnesses called to the stand by the General Counsel of "fraud," "deceit," "perjury," and "false testimony" (Motion at 10-12). Before making such accusations in print, a party should exercise extreme caution to ensure that such accusations are well-founded and well-supported by the record evidence. Respondents failed to do so before making their unwarranted and outrageous accusations here.

Respondents claim that the evidence that they belatedly seek to introduce reveals that KMT engaged in fraud and deceit and that KMT officials called to the stand during the underlying 10(k) and unfair labor practice proceedings gave perjured and false testimony. The question arises as to what evidence supports such serious allegations of misconduct. Nothing Respondents have offered provides such support. Indeed, Respondents have offered absolutely no evidence showing that the officials have recanted their testimony, gave conflicting or contrary sworn testimony in another proceeding, or had documents in their possession showing that the employment of Respondent Local 4's members to perform electrical maintenance and repair work did not violate Washington State law or did not breach the Management Agreement with the POV.

All that Respondents "offer" to support their outrageous accusations are the same documents described above: the May 30, 2014, letter from KMT to the POV seeking clarification whether the Management Agreement permitted it to hire its own employees to perform the electrical work; the POV's response that essentially restated the terms of the Management Agreement; and documents showing that KMT subsequently decided to accede to Respondents' demands that it post a position with Local 4 seeking to hire an employee who can perform the disputed electrical work, interview the Local 4 candidates who applied, and hire one of the Local 4 candidates to perform that work. Those documents do not and cannot

show that KMT or its officials falsely testified or engaged in fraud, deceit, or perjury when they took the position or testified that they believed that the Management Agreement and Washington State law did not permit them to *lawfully* hire Local 4's members to perform the electrical M&R work. That belief was (and still is, in General Counsel's view) correct and maintained in good faith, particularly in light of the fact that the State of Washington had recently cited and fined another PMA-member employer at the POV for using Local 4's members to perform such work. See Exceptions Brief at 37.

At best, the documents that Respondents proffer show only that KMT changed its mind in at some point after June 2014 regarding its agreement to post, interview, and hire a Local 4 member to perform the electrical M&R work. Such a subsequent change in position is simply not indicative of false or perjured testimony during the prior years' 10(k) and unfair labor practice proceedings. Moreover, the documents do not reveal *why* KMT decided to change its position and hire Local 4-represented employees to perform the work. It may have been because KMT was unwilling to wait, in the face of Respondents' unlawful demands, for the lengthy administrative process to run its course before the Board issued its determination. It is not easy for KMT to operate its business in these circumstances where the vast majority of its workforce is comprised of employees represented by Respondent Local 4. Or, it may have been, as suggested *infra*, that KMT succumbed to Respondents' unlawful demands and changed its position due to additional coercive conduct from Respondents in the form of secondary work slowdowns.

In any event, Respondents have failed to present any evidence of fraud, deceit, perjury, or false testimony warranting reopening the record. Accordingly, the Board should reject Respondents' outrageous accusations and deny the Motion.

V. The Board Should Deny the Motion Because Receipt of the Documents Alone Unduly Prejudices the General Counsel and the Charging Party

Contrary to Respondents' assertion (Motion at 10), Respondents will not be prejudiced if their Motion is denied allegedly on the basis that the record contains allegations and evidence that are

"demonstrably false." As argued above, there is absolutely no merit to Respondents' claims that the record contains "demonstrably false" testimony or evidence or that the allegations regarding Respondents' unlawful coercive conduct are anything but well-founded and accurate.

By contrast, the interests of Local 48 and the General Counsel in prosecuting this matter would be unduly prejudiced if the Board were to grant Respondents' improper attempt to supplement the record with mere "evidence" of alleged events that occurred many months after the close of the hearing. Respondents' purported evidence does not explain *why* KMT allegedly took the actions set forth in the proffered documents. Although Respondents apparently seek to leave the impression with the Board that KMT has changed its legal position regarding the hiring of Local 4's members to perform the disputed electrical work, such is not the case and General Counsel and Local 48 would be unduly prejudiced if this blatant manipulation were permitted based on Respondents' skewed characterization of purported actions several months *after* the close of the hearing.

Despite Respondents' attempted manipulation, there is already some evidence in the record suggesting that Respondents may have engaged in additional forms of unlawful secondary conduct to coerce KMT to take the actions it allegedly did after the hearing closed and that the Administrative Law Judge foreclosed further inquiry. First, as General Counsel had suggested, KMT's purported actions reveal only that KMT succumbed to Respondents' coercive secondary conduct simply because it did not want to wait the many months for the administrative process to run its course while trying to operate its business with a workforce that is almost completely represented by Respondent Local 4. Moreover, near the close of the hearing, KMT's counsel began to present evidence allegedly showing that Respondents were responsible for work slowdowns in order to further coerce KMT. See Tr 1015:1 – 1016: 7, 1019:18 – 1022:1. After Respondents' counsel objected, General Counsel acknowledged that the consolidated complaint did not contain any allegations that Respondents had engaged in unlawful work slowdowns, but argued that the evidence was relevant regarding Respondents' object underlying their conduct that was

alleged to be unlawful in the consolidated complaint. See Tr 1022: 5 – 1023:2. As there was no separate allegation regarding a work slowdown, Administrative Law Judge Schmidt did not permit KMT's counsel to proceed further with his line of inquiry regarding specific slowdown conduct. See Tr 1025:8 - 1027:9.

In the event that Respondents' Motion were granted and its purported evidence of alleged events occurring months after the hearing's close were received into the record, General Counsel and Local 48 would be unduly prejudiced; they were not permitted to pursue the above line of inquiry and show that Respondents' additional unlawful secondary pressure in the form of crippling work slowdowns was a motivating factor behind KMT's alleged acquiescence to hiring Local 4's members to perform the disputed electrical work. However, as argued above, there is no need to direct the judge to take additional evidence, as Respondents have failed to meet their burden of demonstrating that the record should be reopened. Accordingly, the Board should deny the Motion and not permit Respondents to supplement the record in such a prejudicial manner.

VI. Conclusion

For all of the reasons set forth above, Counsel for the General Counsel respectfully requests that the Board deny Respondents' Motion to Reopen the Record.

Dated at Seattle, Washington, this 28th day of November, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Opposition to Respondent's Motion to Reopen the Record, in cases 19-CC-092816, 19-CC-115273, 19-CD-092820, and 19-CD-115274, was served by e-file and e-mail, as noted below, on November 28, 2014, on the following parties:

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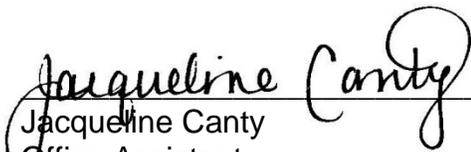
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