

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 ANSWERING BRIEF IN OPPOSITION TO
RESPONDENTS ILWU'S AND ILWU LOCAL 4'S CROSS-EXCEPTIONS

On August 13, 2014, Administrative Law Judge William L. Schmidt ("ALJ Schmidt") issued a decision dismissing the Consolidated Complaint allegations that Respondent International Longshore and Warehouse Union, AFL-CIO ("ILWU") and Respondent International Longshore and Warehouse Union Local 4, AFL-CIO ("Local 4") (collectively, "Respondents"), engaged in conduct in violation of §§ 8(b)(4)(ii)(B) and (D). Counsel for the General Counsel ("GC") has filed numerous exceptions to that decision and a brief in support of those exceptions.¹

Based on documents that they waited to subpoena until the instant proceeding, rather than in the predicate 10(k) proceeding, Respondents sought to argue that Kinder Morgan Terminals, Inc. ("KMT") and International Brotherhood of Electrical Workers Local 48 ("Local 48") engaged in collusion when IBEW Local 48 threatened to picket KMT. Recognizing that Respondents were attempting to relitigate the threshold issue of collusion that the Board had already decided in the underlying 10(k) proceeding (GCX 7 at 2-3), ALJ Schmidt correctly denied Respondents' attempted relitigation on the basis of extant Board precedent. (Tr 201:13-23, 938:15 - 940:21). Respondents have filed cross-exceptions to ALJ Schmidt's denial and argue in their brief in support of cross-exceptions ("CEBr") that they should be permitted to relitigate this issue as collusion is allegedly relevant to the § 8(b)(4)(D) finding and is not a threshold issue. As shown below, the Board should deny the cross-exceptions because the issue of alleged collusion is a threshold issue that the Board already decided and may not be relitigated under Board precedent. Moreover, even if it were proper to relitigate, the documents relied on by Respondents do not establish collusion, fraud, or deceit as claimed by Respondents.

I. ALJ Schmidt's Denial of Respondents' Attempt to Relitigate the Threshold Issue of Collusion Is Amply Supported by Established Board Precedent

Respondents' argument (CEBr at 2) that, on the basis of documents that they have untimely proffered, the Board should uphold Respondents' collusion defense or remand the issue to ALJ Schmidt is baseless. As ALJ Schmidt correctly found, Board precedent precludes Respondents from relitigating the

¹ Respondents have filed an Answering Brief to GC's Exceptions Brief ("Answering Brief"), and GC has filed a reply brief to that Answering Brief.

threshold issue of collusion once the Board considered and rejected it in the 10(k) proceeding. *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 160, slip op. at 3 n.12 (2011).

Respondents nonetheless argue (CEBr at 10-11) that they are entitled to relitigate issues decided in a § 10(k) proceeding in a § 8(b)(4) proceeding pursuant to *Longshoremen ILWU Local 6 (Golden Grain)*, 289 NLRB 1 (1988), despite the Board in that decision having specifically found that a union may “not . . . relitigate threshold matters that are not necessary to prove an 8(b)(4)(D) violation.” *Id.* at 2 n.4. The Board strictly adheres to that principle. *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 179, slip op. at 3 (2011) (Board precludes relitigation of threshold issue of collusion); *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 160, slip op. at 3 n.12 (2011) (Board precludes relitigation of threshold issue of collusion); *Teamsters Local 216 (Granite Rock Co.)*, 296 NLRB 250 n. 2 (1989) (Board precludes relitigation of threshold issue whether agreed-on method of settlement exists); *Laborers Local 721 (Hawkins & Sons)*, 294 NLRB 166, 169 n.12 (1989) (Board precludes relitigation of preliminary matter of whether certain entities are employers under the Act); *Ironworkers Local 751 (Hoffman Construction)*, 293 NLRB 570 n.1 (1989) (Board precludes relitigation of threshold issues of whether disputed work was completed or whether grievance concerning disputed work should be resolved by arbitration).

Although Respondents claim (CEBr at 12-13) that the Board permitted the parties to “relitigate” the threshold issue of collusion in *Marble Polishers Local 47-T (Grazzini Bros.)*, 315 NLRB 520, 522 (1994), that claim is patently wrong. There was no relitigation in that matter. Rather, the Board granted the General Counsel’s Motion for Summary Judgment and determined, like ALJ Schmidt here, that the union was not entitled to a hearing on that issue. In fact, the Board specifically reaffirmed the principle that it would not permit the relitigation of threshold or preliminary matters not necessary to prove a § 8(b)(4)(D) violation. *Id.* at 522 n.7.

Moreover, contrary to the presumption underlying Respondents’ argument, whether Local 48 legitimately threatened to picket KMT is *not* necessary to prove the Consolidated Complaint’s allegations that Respondents’ coercive conduct violated §§ 8(b)(4)(ii)(B) and (D). Rather, that issue was relevant only to the determination whether there was reasonable cause to believe that *Local 48* had violated § 8(b)(4)(D)

and the Board should hold a § 10(k) hearing to resolve the competing demands against KMT for the disputed electrical work.

There is also no merit to Respondents' further argument (CEBr at 12-14) that they can nonetheless relitigate the issue of collusion because collusion is allegedly not a threshold issue. Threshold issues are ones that "concern whether the proceeding is properly before the Board for disposition not whether a violation of Sec. 8(b)(4)(D) has been committed." *Ironworkers Local 751 (Hoffman Construction)*, 293 NLRB 570 n.1 (1989). As the Board may proceed with a determination under § 10(k) of the Act only if there is reasonable cause to believe that § 8(b)(4)(D) has been violated, the Board requires a finding on three separate threshold issues before it may proceed: 1) whether there are competing claims to the disputed work; 2) whether a party has used proscribed means to enforce its claim to the work in dispute; and 3) whether the parties have not agreed on a method for the voluntary adjustment of the dispute. *See, e.g., Longshore & Warehouse Local 19 (National Construction Alliance II)*, 361 NLRB No. 122, slip op. at 4 (2014); *Laborers Local 860 (Ronyak Paving, Inc.)*, 360 NLRB No. 40, slip op. at 3 (2014).

The determination whether a union has colluded to engage in a sham threat to picket/strike is a threshold issue because the Board cannot conclude that a work dispute is properly before it unless it finds that there is reasonable cause to believe that the union has engaged in proscribed means (no sham threat) to enforce its claim to the disputed work (the second threshold issue). By the same token, the Board will not proceed if it determines that the threat was a sham because it has then decided the threshold issue that the union has not used proscribed means to enforce its work claim. Here, the Board determined the threshold issue in the § 10(k) proceeding that there was insufficient evidence to support Respondents' claim that Local 48's threat to picket was a sham. Respondents, therefore, cannot relitigate that threshold issue already decided by the Board. *See, e.g., Laborers Local 860 (Ronyak Paving, Inc.)*, 360 NLRB No. 40, slip op. at 4 (2014) (Board rejects allegation that Laborers' threat to strike was a sham and therefore concludes that there is reasonable cause to believe Laborers union used proscribed means to enforce its claim to the disputed work); *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 3-4 (2010) (as Laborers' threat to picket or engage in work stoppage was not a sham, Board finds reasonable cause to believe that Laborers union has used proscribed means to enforce its work claim); *Carpenters*

(*Standard Drywall*), 348 NLRB 1250, 1253-54 (2006) (as Board finds that there is insufficient evidence to establish collusion between the Carpenters union and the employer, Board concludes that there is reasonable cause to believe that Carpenters has used proscribed means to enforce its claim to the disputed work).

The instant case presents a good example of why the Board precludes relitigation of such threshold issues. Respondents seek to reargue the issue of collusion even though the Board previously determined in the 10(k) proceeding that Respondents presented insufficient evidence to support that contention. Respondents rely on numerous documents (RX 52 -71) they subpoenaed for the instant § 8(b)(4) proceeding to argue that KMT colluded with Local 48 to set up the § 10(k) hearing and allegedly “deceive” the Board through a sham threat. All of the documents, however, existed prior to the start of the § 10(k) hearing. The most recent subpoenaed documents of the group (RX 68 -71) are dated April 2, 2011. The Board’s § 10(k) hearing, however, began on April 4, 2011, and continued as late as May 3, 2011. Thus, the documents are not new or previously unavailable evidence.² Rather, Respondents could have subpoenaed the very same documents they rely on now prior to the § 10(k) hearing to support their contention that there was collusion and the threat was a sham. The fact that Respondents were not diligent and waited years later to subpoena the documents does not grant them the right to relitigate this threshold issue now when they previously had the opportunity to prove their argument and failed.

II. Even if Properly Litigable, the Proffered Documents Do Not Establish that Local 48’s Threat to Picket Was A Sham

Respondents chastise (CEBr at 9-10) KMT for not being neutral and aiding Local 48 in the § 10(k) proceeding. That hardly establishes that KMT is not entitled to the protections of § 8(b)(4)(D), however. As the Supreme Court has recognized, some employers “are not neutral and have substantial economic interests in the outcome of the § 10(k) proceeding. A change in work assignment may result in different

² Respondents seek to mislead the Board on this point by stating in their Brief in Support of Cross Exceptions that this evidence is “now available” (at 3) and that Local 48 “for the first time, on October 29, 2013” produced the subpoenaed documents. Compounding this effort to mislead the Board is Respondents’ further erroneous assertion in their Answering Brief (at 16 n.16) that this evidence of collusion was “not available to Respondents at the time of the 10(k) hearing, so it was not considered.”

terms or conditions of employment, a new union to bargain with, higher wages or costs, and lower efficiency or quality of work." *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 124-125 (1971). Nonetheless, §§ 10(k) and 8(b)(4)(D) "were enacted to protect employers who are partisan in a jurisdictional dispute as well as those who are neutral." *Id.* at 130.

In any event, the proffered documents do not reveal unlawful collusion between KMT and Local 48 or that Local 48's threat to picket was a sham. Although Respondents make much of the fact that counsels for KMT and Local 48 worked closely by sharing numerous letters, and that KMT advised Local 48 about the particularities of 10(k) proceedings and how to defeat Respondents' work claim, there is nothing unlawful or improper about such efforts.

Even if it were true, it simply does not matter that KMT's counsel may have encouraged Local 48 to issue a threat to create a jurisdictional dispute because KMT preferred to continue the longstanding business practice of having Local 48-represented electricians perform the electrical work rather than Respondents' longshoremen. "[I]f every action taken, no matter how natural or inevitable a business step, which gives rise to a dispute between rival groups of employees, disqualified an employer from section 8(b)(4)(D) relief, that section would become a dead letter." *ILWU Local 14 v. NLRB*, 85 F.3d 646, 653 (D.C. Cir. 1996) (quoting *International Longshoremen's and Warehousemen's Union v. NLRB*, 884 F.2d 1407, 1412 (D.C. Cir. 1989)).

Similarly, it is hardly surprising that Local 48 worked closely with KMT to defeat Respondents' efforts to deprive the employees it represents of the jurisdiction over the disputed electrical work. After all, Local 48-represented employees had performed that work for KMT and its predecessors for nearly two decades. Thus, Respondents' wild claims (CEBr at 2-8) that KMT and Local 48 engaged in deceit and perjury to deceive the Board during the 10(k) proceeding are much ado about nothing.

Although Respondents complain (CEBr at 3-4) about KMT's counsel providing Local 48's counsel with background information to set up a 10(k) proceeding, and that they were "chummy" in contrast to the sharp tone of the threat, those facts do not demonstrate improper collusion. See, e.g., *Electrical Workers Local 196 (Aldridge Electric)*, 358 NLRB No. 87, slip op. at 3 (2012) (evidence of cooperation between Local 196 and the employer whereby employer gave Local 196's counsel exhibits to use at the hearing;

employer's vice president met with Local 196's counsel before the hearing; and Local 196's business agent stated that he would work with employer to have the § 10(k) hearing resolved in its favor, is not affirmative evidence of collusion); *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1140 (2005) (although evidence showed that employer's president stated that union wanted him to file a "10(k)" and he was not certain that union would have followed through with threat to picket if work had been reassigned, it does not constitute affirmative evidence of collusion or that threat was a sham).

Finally, as they did in their Motion to Reopen the Record, Respondents improperly accuse (CEBr at 5-8) a witness of perjury and deceit by cherry picking some of his testimony from the § 10(k) hearing. The fact that the witness was forgetful or even evasive hardly establishes perjury. In any event, as that testimony was presented to and considered by the Board when it determined that Respondents had presented insufficient evidence of collusion, there is nothing new or previously unavailable about it warranting revisitation.

III. Conclusion

As argued above, established Board precedent supports ALJ Schmidt's decision to deny Respondents' untimely effort to relitigate the threshold issue of collusion. Counsel for the General Counsel therefore respectfully requests that the Board deny Respondents' cross-exceptions in their entirety.

Dated at Seattle, Washington, this 10th day of December, 2014.



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

CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Answering Brief in Opposition to Respondents ILWU's and ILWU Local 4's Cross-Exceptions, was served on the 10th day of December, 2014, on the following parties:

E-FILE:

Gary Shinnors, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W., Room 11602
Washington, DC 20570-0001

E-MAIL:

Eleanor Morton, Attorney
Lindsay R. Nicholas, Attorney
Robert S. Remar, Attorney
Leonard Carder LLP
1188 Franklin St., Ste. 201
San Francisco, CA 94109-6852
emorton@leonardcarder.com
lnicholas@leonardcarder.com
rremar@leonardcarder.com

Charles I. Cohen, Esq.
Jonathan C. Fritts, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004-2541
ccohen@morganlewis.com
jfritts@morganlewis.com

Matthew D. Ross, I
Leonard Carder LLP
1330 Broadway, Ste. 1450
Oakland, CA 94612-2591
mross@leonardcarder.com

Kirsten Donovan, Esq.
ILWU
1188 Franklin St., Ste. 201
San Francisco, CA 94109-6800
kirsten.donovan@ilwu.org

Todd C. Amidon, Senior Counsel
Pacific Maritime Association
555 Market St., Fl. 3
San Francisco, CA 94105-5801
tamidon@pmanet.org

Richard F. Liebman, Attorney
Barran Liebman LLP
601 SW 2nd Ave., Ste. 2300
Portland, OR 97204-3159
rliebman@barran.com

John S. Bishop, Attorney
Noah Barrish, Attorney
Elizabeth A. Joffe, Attorney
McKanna Bishop Joffe LLP
1635 NW Johnson St
Portland, OR 97209-2310
jbishop@mbjlaw.com
nbarish@mbjlaw.com
ljoffe@mbjlaw.com

Lester V. Smith, Attorney
Bullard Law
200 SW Market St., Ste. 1900
Portland, OR 97201-5720
lsmith@bullardlaw.com

Norman D. Malbin, Attorney
IBEW Local 48
4619 SW Condor
Portland, OR 97239
nmalbin@comcast.com


Jacqueline Canty, Office Asst.