

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

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

Cases 19-CC-092816
19-CC-115273
19-CD-092820
19-CD-116274

**IBEW LOCAL 48's OPPOSITION TO
RESPONDENTS' MOTION TO REOPEN THE RECORD**

I. Introduction

Respondents International Longshore and Warehouse Union ("ILWU") and International Longshore and Warehouse Union, Local 4 ("Local 4") moved to reopen the record pursuant to §102.48(d) of the Board's Rules and Regulations. Charging party International Brotherhood of Electrical Workers, Local 48, AFL-CIO ("Local 48") hereby agrees with, adopts and concurs with the General Counsel's November 28, 2014 Opposition to Respondents' Motion to Reopen the Record for all the arguments and reasons set forth therein. Local 48 provides the following additional arguments and reasons for opposing Respondents' motion and respectfully requests that the Board deny the motion.

II. The Evidence Respondents Seek to Add Could and Should Have Been Submitted as Rebuttal Evidence During the Hearing in this Matter

Respondents claim that the evidence they seek to add to the record – namely the opinion of one Port of Vancouver ("POV") manager that the management agreement between the POV and Kinder Morgan Terminals ("KM") permits KM to hire its own employees to perform the

disputed electrician work so long as it complies with all laws and regulations and the resulting actions to create, post, and hire for such a position – was not available until long after the hearing in this matter. It is clear, however, that Respondents could and should have presented any evidence about whether the management agreement and/or the relevant laws and regulations permitted KM’s direct hiring of ILWU-represented employees during the hearing, before the record closed, in rebuttal to the General Counsel’s evidence.

Respondents claim that the evidence at issue in this motion rebuts the General Counsel’s argument that Kinder Morgan Terminals (“KM”) does not have the right to control the assignment of the disputed electrician work. As the General Counsel argued, KM does not have the right to assign the disputed work to Respondents because its management agreement with the Port of Vancouver (POV) requires Kinder Morgan to comply with all applicable laws and regulations, and it would violate Washington State law to assign the electrical work to Respondents. (GC Exceptions Brief, 36-39.)

Counsel for the General Counsel made this argument clear in his opening statement at hearing. Tr. 42:22-23 (“As such conduct is directed at an employer who cannot lawfully assign the work to Respondent’s members...”); 44:14-20 (“... there is good reason that Kinder has continually used the IBEW Local 48 affiliated electrical contractors rather than its own ILWU represented employees to perform this work. . . most notably because the management agreement and State law require it”); 47:5-9 (“Moreover, even if the work were fairly claimable, once Kinder signed the management agreement permitting it to operate at the Port, Kinder has never had the authority to lawfully assign the work to its own employees because it would not be in compliance with State statutes and regulations.”).

Respondents' counsel responded to that argument in her own opening statement by specifically claiming that Respondents' evidence would show that neither the management agreement between the POV and KM nor Washington State electrical licensing law prohibit KM from using its own employees to perform the electrician work. Tr. 58:3-59:10.

Those opening statements were made on October 29, 2013, the first day of hearing. Tr. 1. That same day, the General Counsel entered into evidence KM's management agreement with the POV. GC Exh. 2(a), (b), and (c); Tr. 64:2-67:18. He also presented the testimony of KM Operations Director Neil Maunu, which included his explanation that KM uses an outside electrical contractor to perform the disputed work because of KM's management agreement with the POV and because of Washington state laws and regulations. Tr. 75:9-24; 76:6-77:13; 141:3-10; 142:1-16. *See also* GC Exh. 18 (communicating to PMA KM's concern about another POV terminal operator being cited by State of Washington for using ILWU members to perform electrical work).

On the next day of hearing, October 30, 2013, the General Counsel offered the testimony of KM Commercial Director for West Coast Operations Kevin Jones. Tr. 304:20. Jones was the primary negotiator of KM's management agreement with the POV, and he testified that the agreement does not permit KM (or its predecessor, Hall Buck) to have its employees perform the disputed electrical work. Tr. 308:3-11; 309:4-8. He further testified that the agreement was very deliberately drafted as a "management agreement" rather than a lease. Tr. 310:19-21.

The General Counsel also called Washington State Lead Electrical Inspector David Campbell to testify on October 30, 2013. Tr. 372:22-24. Campbell testified that, to perform electrical work, an entity must meet one of three criteria: 1) it must be a licensed and bonded

electrical contractor that employs certified electricians; 2) it must be the owner of the property, purchase the requisite permits and have the work inspected; or 3) it must have a signed lease that allows it to perform the electrical work on somebody else's property. Tr. 385:10-23. *See generally*, Tr. 387-390. Because none of these criteria exist, KM cannot legally hire the longshore workers directly to do the work.

Indeed, as he testified, Campbell issued citations to Ports America, another terminal operator at the POV, for using its own ILWU-represented employees to perform electrical work without being a licensed electrical contractor in violation of these Washington requirements. Tr. 379:24-380:24; 383:13-384:3; 390:23-395:24. In addition to Campbell's testimony, the General Counsel offered the relevant Washington statutory and regulatory provisions as well as the non-compliance citations issued to Ports America. GC Exhs. 21, 22, 23, and 24.

As such, by October 30, 2013, Respondents were fully aware of the General Counsel's right-to-control argument and supporting evidence concerning the lack of a lease granting KM the ability to perform the disputed electrical work and the violations of Washington law it would commit if it did use its own ILWU-represented employees to perform that work. There were five additional days of hearing thereafter: October 31, November 1, December 10, December 11, and December 12, 2013. Respondents had ample time to identify and present evidence rebutting the General Counsel's evidence as Respondents' counsel claimed it would.

Respondents could have, for example, called POV "Business Development Manager" Mike Schiller, the author of Respondents' Proposed Exhibit 81, to rebut the testimony of Maunu and Jones about their interpretation of the management agreement between the POV and KM. Respondents have failed to explain how the June 16, 2014 letter from Schiller to Maunu

contained in Respondents' Proposed Exhibit 81 – and generated more than six months after the hearing ended -- offers anything that was unavailable at the time of the hearing. *Conditioned Air Systems, Inc.*, 2012 NLRB LEXIS 747, (Case No. 5-CA-79299), Slip Op. at 1, n.1 (2014) (denying belated motion to reopen the record to introduce testimony of witness because respondent failed to explain why it did not offer witness's testimony at hearing, despite being on notice that her status as an agent was a disputed issue).

The hearing was the time to produce Respondents' contrary position on whether the management agreement prohibited KM from assigning the disputed electrical work to its own ILWU-represented employees. Yet Respondents failed to call Schiller or any other POV representative to testify about the meaning of the management agreement. Nor did Respondents call any witnesses from the State of Washington to rebut Campbell's testimony that Washington law prohibits POV terminal operators from having their own ILWU-represented employees perform the work.

The evidence Respondents now seek to add to the record, or at least its substantial equivalent, could have been elicited at the time of the hearing, before the record closed. Having failed to present that evidence at hearing, Respondents should not be allowed at this late juncture to add the evidence.¹

¹Because Schiller's June 16, 2014 letter (Respondents' Proposed Exhibit 81) is what set in motion the additional proposed exhibits concerning the subsequent alleged creation of a position and hiring of a longshore worker to perform the disputed work, all of those proposed exhibits should be rejected.

III. The Board Should Deny Respondents' Motion as Untimely Because Respondents Failed to "Promptly" Move to Reopen the Record As Required by Sec. 102.48(d)(2) of Board's Rules and Regulations

Section 102.48(d)(2) of the Board's Rules and Regulations requires that any motion to reopen the record be "promptly" filed:

Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, *except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence*. Copies of any request for an extension of time shall be served promptly on the other parties.

Id. (emphasis added). The Board has repeatedly denied motions to reopen the record as untimely when movants delay filing several months or more after discovering the evidence at issue. *See Cogburn Healthcare Center*, 343 NLRB 98, 98-99 (2004) (denying motion to reopen record as untimely when movant made no effort to show that it "promptly" moved to reopen the record); *Precoat Metals*, 341 NLRB 1137 (2004) (denying motion to reopen record as untimely under Section 102.48(d)(2) when movants delayed filing motion until many months after discovering evidence); *c.f. Point Park Univ.*, 344 NLRB 275, 276 (2005) (denying motion to reopen record in part because delay in seeking to reopen the record for over two months after procuring documents constituted lack of "reasonable diligence" required to justify reopening the record).

In *Precoat Metals*, for example, the Board denied charging parties' motion to reopen the record as untimely because they waited until after the Administrative Law Judge's decision to move to reopen the record, despite having discovered that evidence many months before that decision issued. 341 NLRB at 1137, n.1. There, the hearing before the ALJ concluded on January 27, 2000, and the charging parties obtained the relevant evidence a month later on February 23, 2000. *Id.* The ALJ's decision issued on January 31, 2001, but the charging parties

did not file their motion to reopen the record until April 4, 2001. *Id.* The Board found that the charging parties “waited more than 2 months after the issuance of the judge’s decision” to file their motion and offered no explanation for the delay. *Id.* Accordingly, the Board determined that their motion was not filed “promptly” upon discovery of the evidence as required by Section 102.48(d)(2), and denied the motion as untimely. *Id.*

Respondents’ motion to reopen here is likewise untimely. Administrative Law Judge William L. Schmidt issued his Decision and Order in this matter on August 13, 2014. Four of the seven exhibits Respondents seek to enter into evidence through their Motion to Reopen the Record pre-date that August 13, 2014 decision. (Proposed Exhibits R.80 [May 30, 2014], R.81 [June 16, 2014], R.82 [June 19, 2014], and R.83 [August 11, 2014].) Yet respondents waited until November 19, 2014— three months after ALJ Schmidt’s decision— to file the instant motion. As in *Precoat Metals*, even though Respondents possessed many of the proposed exhibits before the ALJ issued a decision, they waited to file their motion until after that decision, in the process waiting months after discovering the proposed evidence before moving to reopen. Consequently, respondents have failed to move to reopen “promptly” as required by Section 102.48(d)(2), and their motion should be denied as untimely. *See Precoat Metals*, 341 NLRB at 1137, n.1.

IV. The Board Should Deny Respondents’ Motion to Reopen the Record Because the Board Should Give Little, if Any, Weight to Evidence Influenced by Coercive Conduct

As the General Counsel argues, there is evidence in the record suggesting that Respondents unlawfully coerced Kinder Morgan to take the actions that led to the creation of the exhibits Respondents seek to enter into the record. (Counsel for the General Counsel’s Opposition to Motion to Reopen the Record, p. 9-10.) Over Respondents’ counsel’s objection,

the ALJ permitted Maunu's testimony that production dropped "by about 45 percent on all cargoes" since the hearing in this matter began. Tr. 1015:3-1016:15; 1019:18 - 1022:1.² The ALJ did not permit the General Counsel to delve much further into evidence of coercive slowdown activity because the consolidated complaint contained no specific allegations of Respondents' coercive slowdowns. Tr. 1025:8-1027:9. Nonetheless, the limited evidence that was allowed provides at least some evidence that Respondents slowed production in order to coerce KM to cede to their demands that KM assign the disputed work to longshoremen.

Avoiding slowdowns that cause a precipitous drop in production provides a far more likely explanation for the remarkable change in KM's conduct than somehow seeing the light of the ILWU's position after receiving Schiller's letter. On November 21, 2012, Maunu wrote to the PMA indicating that it was not moving forward with conducting interviews among ILWU members who expressed interest in performing the disputed electrical work because of the recently filed charge in this unfair labor practice proceeding. GC Exh. 18. Maunu specifically indicated that it was "advisable to suspend further action related to the list *until these legal questions are satisfactorily resolved.*" *Id.* (emphasis added). *See also* Tr. 106:23-108:4. Given that the legal questions are still pending before the Board, something occurred to cause KM to make a 180-degree change in its position about hiring Local 4 unit members to perform the disputed work. The gun-to-the-head explanation, i.e. that doing so was the only way to avoid continued production slowdowns, is far more plausible than any explanation based on Schiller's letter.

²The ALJ also admitted, over Respondents' counsel's objection Kinder Morgan Exhibit 3. Tr. 1028:14-19.

The Board should deny Respondents' Motion to Reopen the Record because it appears that the evidence Respondents seek to add to the record was influenced by Respondents' unlawful pressure. *Sheet Metal Workers Union Local 162*, 207 NLRB 741, 748-49 (1973). There, in evaluating whether the disputed pipe fabrication work was customarily and traditionally performed by the employees of the contractors in a multi-employer association or by outside manufacturers and distributors, the Board gave little weight to evidence that contractors had assigned the disputed work to their own employees where doing so was to avoid similar union coercion:

“Bruce Nickel followed the more general pattern and its recent departure therefrom was occasioned apparently because of union pressure. [* * *] Systemaire is apparently motivated by a desire to avoid difficulties with Respondent, and concedes that such purchases are more costly than they would be if purchased from the manufacturers.”

Id. The Board should consider the evidence of Respondents' slowdown activity, not to support a separate basis for finding a violation of Section 8(b)(4)(ii), but to diminish the value of the evidence Respondents seek to add to this record. Having vigorously opposed the introduction of further evidence of its unlawful coercive activity, Respondents should not be permitted now to introduce evidence of the fruits of that coercion. As the General Counsel argued, that would unduly prejudice both the General Counsel and Local 48.

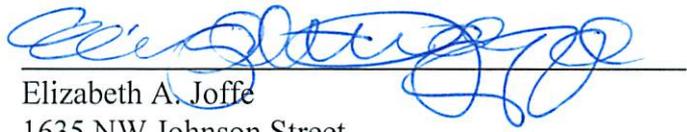
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V. Conclusion

For all the reasons set forth herein, and for the reasons set forth in the Counsel for the General Counsel's Opposition to Respondents' Motion to Reopen the Record, Local 48 respectfully requests that the Board deny Respondents' motion.

DATED at Portland, Oregon, this 10th day of December, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of IBEW LOCAL 48's OPPOSITION TO RESPONDENTS' MOTION TO REOPEN THE RECORD was served on the date stated below on the following parties:

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DATED this 10th day of December, 2014. MCKANNA BISHOP JOFFE, LLP


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