

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

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

and

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

**IBEW LOCAL 48's RESPONSE TO  
RESPONDENTS' CROSS-EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**I. Introduction**

Respondents International Longshore and Warehouse Union ("ILWU") and International Longshore and Warehouse Union, Local 4 ("Local 4") filed three cross-exceptions to the Decision of the Administrative Law Judge and a brief in support thereof. Charging party International Brotherhood of Electrical Workers, Local 48, AFL-CIO ("Local 48") hereby agrees with, adopts and concurs with the General Counsel's response and answering brief to those cross-exceptions and provides the following additional responses.

**II. Charging Party's Response to Respondents' Cross-Exceptions #1, #2, and #3**

Respondents have filed three cross-exceptions to the August 13, 2014 decision of the Administrative Law Judge ("ALJ"), all of which relate to whether it is proper in this unfair labor practice proceeding to relitigate whether Kinder Morgan Terminals ("KM") and Local 48 colluded to set up the prior 10(k) proceeding in which the Board awarded the disputed work to

Local 48. See *IBEW, Local 48 (Kinder Morgan Terminals and ILWU, Local 4)*, 357 NLRB No. 182 (2011).

Respondents' first cross-exception excepts to the ALJ's core ruling that Respondents are precluded from relitigating here whether KM and Local 48 colluded to set up the 10(k) proceeding. Respondents' Cross-Exceptions, p. 1, citing Tr. 201:13-23. Respondents' second cross-exception excepts to the ALJ's denial of Respondents' motion for reconsideration on his prior ruling that Respondents are precluded from relitigating here whether KM and Local 48 colluded to set up the 10(k) proceeding. Respondents' Cross-Exceptions, p. 1, citing Tr. 938:15-943:15. Respondents' third cross-exception excepts to the ALJ's ruling that Respondents' Exhibits 53 through 71 be admitted only for a limited purpose but not to establish that KM and Local 48 colluded to set up the 10(k) proceeding. Respondents' Cross-Exceptions, p. 2, citing Tr. 961:11-17, 1130:19-1131:14.<sup>1</sup>

The Board should affirm the ALJ's rulings on each of these three points.

**A. The Issue of Collusion Cannot be ReLitigated in This Unfair Labor Practice Proceeding**

Respondents' collusion claim was fully addressed by the Board in the 10(k) proceeding in which Respondents contended "that IBEW's threat was contrived to create the appearance of a

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<sup>1</sup>Actually, the ALJ did not admit the documents for any stated purpose. Accepting the ALJ's prior ruling that the collusion claim could not be relitigated in this proceeding, Respondents sought to have the documents admitted for the purpose of showing the KM is not a neutral. Tr. 955:20-956:2. Counsel for the General Counsel objected to their relevance. Tr. 956:11-957:1; 958:4-5. The ALJ received them into evidence on the parties' stipulation to their authenticity without ruling on the General Counsel's relevancy objection. Tr. 961:11-17. Although counsel for Respondents' later clarified that they were in fact admitted into evidence, they were never admitted for any "purpose." Tr. 1130:19

jurisdictional dispute.” 357 NLRB No. 182, at 2. The Board rejected that argument: “Although ILWU claims that the threat was a sham contrived by Kinder Morgan, it offered no evidence in support of this assertion.” *Id.* at 2-3.<sup>2</sup>

Although Respondents have repeatedly argued that the 10(k) decision is irrelevant to this proceeding, they now seek to relitigate whether the 10(k) proceeding was a sham. *See e.g.* Tr. 56:6-9; Respondents’ Answering Brief in Response to General Counsel and IBEW Exceptions, p. 26 (“Given that the 10(k) decision deserves no weight in determining whether Respondents violated 8(b)(4)(D), manifestly the decision is irrelevant in determining whether Respondents violated 8(b)(4)(B) – an issue not even touched upon in a 10(k) proceeding.”) If the entire proceeding is irrelevant, any claimed collusion leading to the 10(k) proceeding is irrelevant. In any event, the Board should reject Respondents’ effort to relitigate that threshold 10(k) issue here.

The Board has clearly held that the issue of collusion is a threshold issue in a 10(k) proceeding and cannot be relitigated in a subsequent unfair labor practice proceeding. *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 160 at 3, n.12 (2011). The complaint there alleged that the Plasterers Local 200 violated Section 8(b)(4)(ii)(D) by filing and pursuing legal actions with an object of forcing Standard Drywall Inc. (“SDI”) to assign certain plastering work to Local 200-represented employees, contrary to two earlier Section 10(k) proceedings where the Board awarded the work to Carpenters-represented employees. *Id.* at 1. The Board had rejected the Plasterers collusion claim in the second of those prior 10(k) proceedings. *Southwest*

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<sup>2</sup>As counsel for the General Counsel made clear at the hearing, Respondents could have, prior to the 10(k) hearing, subpoenaed the same documents they subpoenaed prior to the hearing in this proceeding, but they did not do so. Tr. 943:25-944:15.

*Regional Council of Carpenters (Standard Drywall)*, 348 NLRB 1250, 1254 (2006). The Plasterers attempted to relitigate the collusion claim in the 8(b)(4)(ii)(D) case, but the Board prevented them from doing so:

“The Respondents renew their arguments that they should be permitted to litigate in this proceeding certain threshold issues decided in SDI-II, including whether there was an agreed-upon method for resolving the jurisdictional disputes and whether SDI and Carpenters engaged in collusion regarding the assignment of the disputed work. It is well settled that threshold issues are not subject to relitigation after a 10(k) award. *Longshoremen ILWU Local 6 (Golden Grain Macaroni Co.)*, 289 NLRB 1, 2 fn. 4 (1988). Additionally, on December 21, 2007, the Board denied on the merits the Respondents' Special Permission to Appeal the judge's ruling precluding the introduction of evidence concerning threshold matters in this proceeding. The Board specifically concluded that the collusion question was a threshold issue in the 10(k) proceeding that could not be relitigated in this unfair labor practice proceeding.”

357 NLRB No. 160 at 3, n.12. The ALJ relied on this *Operative Plastics* holding, as well as the underlying *SDI* case denying the threshold collusion claim, to reach the same conclusion in this case. Tr. 201:15-24; 938:15-940:9; 945:6-9.

Respondents claim that the *Operative Plastics* case “stands alone,” yet they provide no authority suggesting that case has been questioned or weakened, and their reliance on a case pre-dating *Operative Plastics* is misplaced. Respondents' Brief in Support of Cross-Exceptions, p.12, citing *Tile, Marble, Terrazzo Finishers & Shopworkers, Local 47-T*, 315 NLRB 520, 522 (1994). Respondents claim the Board in that case “permitted the parties to re-litigate the issue of collusion in a §8(b)(4)(D) ULP proceeding notwithstanding the fact that the Board had found no collusion in the preceding §10(k) proceeding.” *Id.* at 12-13. That mischaracterizes the procedural posture of the case and the Board's holding.

There was no relitigation of the collusion issue in *Tile, Marble, Terrazzo Finishers*. Rather, the Board decided the case on summary judgment because there were no issues of

material fact. 315 NLRB at 521. Although the respondent claimed that it disagreed with findings made in the 10(k) proceeding, it did not detail the specific findings with which it disagreed or provide new evidence in support thereof. *Id.* at 522. The Board went on to enumerate and affirm those findings though, including the finding that there was no collusion:

“As discussed earlier, the Board rejected the collusion argument in the underlying proceeding because the Respondent did not proffer any evidence to support its allegation. Although the Respondent need not proffer new or previously unavailable evidence in order to show that a genuine issue of material fact exists entitling it to a hearing before an administrative law judge, the Respondent cannot make assertions without any evidence. Mere supposition was not sufficient at the 10(k) proceeding, and reassertion of mere supposition is not sufficient in this proceeding to establish that a genuine issue of material fact exists.”

*Id.* (footnote omitted). This was not a relitigation of the collusion claim; respondents did not even reassert collusion in the 8(b)(4)(D) proceeding. *Id.* at 521. This dictum is merely the Board’s response to the respondent’s vague claim that it disagreed with the Board’s findings in the 10(k) proceeding, and the Board’s holding that such a vague claim does not raise a genuine issue of material facts.

Further, contrary to Respondents’ representation of what that case stands for, the Board went on to state that “[i]t is well settled that a party to a Board 10(k) proceeding cannot relitigate the Board’s work assignment in a subsequent 8(b)(4)(D) case,” including relitigation of the “various factors” the Board considered in making its 10(k) determination. *Id.* at 522, citing *Longshoremen ILA Local 1566 (Holt Cargo)*, 311 NLRB No. 166, slip op. at 2 (1993). Significantly, the Board noted that this “is consistent with the Board’s holding that it will not permit the relitigation of threshold or preliminary matters not necessary to prove an 8(b)(4)(D) violation.” *Id.* at n.7, citing *Longshoremen ILWU Local 6 (Golden Grain)*, 289

NLRB 1, 2, n.4 (1988). That case simply does not support Respondents' claim that relitigation of the collusion claim is proper in this proceeding.

The ALJ correctly held that *Operative Plastics* controls, and that Respondents' cannot relitigate its collusion claim in this proceeding. The Board should affirm the ALJ's ruling on that point.

**B. Even if the Board Considers the Evidence Upon Which Respondents Rely to Support Their Collusion Claim, the Board Should Reject the Claim**

Even if the Board decides to overrule *Operative Plastics* and the ALJ and permit Respondents to relitigate the collusion issue, the evidence upon which Respondents rely – Respondents' Exhibits 53 through 71 – does not support the claim. Respondents' theatrical characterization of those communications notwithstanding, they simply do not prove the claim that Local 48's threat to picket KM if it assigned the disputed electrician work to longshore workers was a sham or ingenuous.

Local 48 vigorously objects to Respondents' vitriolic characterization of its counsel's communications with KM counsel prior to the 10(k) proceeding and to Respondents' outrageous accusations of "perjury" and "deceit." Respondents' Brief in Support of Cross-Exceptions, p. 7-9. Apart from them being highly unprofessional, these accusations grossly mischaracterize the communications between counsel and take them out of context. A careful reading of Respondents' Exhibits 52 through 71 show there is absolutely no support for Respondents' histrionic accusations. There was no perjury or deceit.

It is true that the communications between counsel for Local 48 and KM show that their clients had shared interests in continuing their longstanding practice of having IBEW-represented electricians perform the disputed work rather than have the less-skilled longshore workers who

had never done the work muscle their way into doing that work. That, however, does not render the 10(k) proceeding a “fraud” as Respondents claim. To the contrary, there is no legal reason why Local 48 and KM could not discuss their mutual desire to continue to have the electrical work performed by the highly trained and qualified electricians who had long been doing the work. There is nothing inconsistent about sharing that desired result and Local 48 threatening to picket KM if it bowed to Respondents’ pressure to take the work away from Local 48-represented electricians. KM could and did legitimately both prefer that the disputed work be performed by Local 48-represented electricians and face a real picket threat by Local 48 if, despite its preference, KM assigned the work to longshore workers. Indeed, it is not surprising that in such a jurisdictional dispute there might be very real pressure from two competing unions, including from the union whose members the employer would prefer to use for the disputed work.

The communications between counsel for Local 48 and KM show exactly that. While their relationship is collegial and clearly shows that they both prefer that IBEW-represented electricians continue to perform the disputed electrical work, Local 48’s threat to picket if KM ceded to Respondents’ pressure and assigned that work to longshore workers was genuine. Local 48’s threat to picket letter and cover email convey precisely that conflicted sentiment that, while they are on the same page about who should be doing the disputed work, should KM feel compelled to assign it to Respondents, Local 48 will have no choice but to picket to protect its work. Respondents’ proposed Exh. 59. *See also* Respondents’ proposed Exh. 64.

What Respondents’ fail to show, and could not possibly show, is any evidence that Local 48’s threat to picket KM was a sham. *See Southwest Regional Council of Carpenters (Standard*

*Drywall*), 348 NLRB 1250, 1254 (2006) (holding in 10(k) proceeding no evidence existed to show Carpenters' threat to strike was not genuine, despite prior communications between employer and Carpenters' about what would occur if disputed work was assigned to employees represented by Plasterers); *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005) (finding insufficient evidence that Teamsters' threat to strike was a sham despite employer's testimony that Teamsters wanted employer to file 10(k) and employer was not sure Teamsters would have followed through on the threat); *Teamsters Local 6 (Anheuser-Busch)*, 270 NLRB 219, 220 (1984) (rejecting claim that Brewers' threat to strike was a sham even though Brewers' contract contained a no-strike clause that prohibited such action and its violation could have exposed Brewers to substantial liability).

None of the exhibits Respondents seek to have admitted for the purpose of showing collusion provide any evidence whatsoever that IBEW 48 would not have made good on its threat to picket. Thus, even if Respondents had chosen to subpoena those documents before the 10(k) proceeding, which they failed to do, in light of the cases cited above, the Board would have reached the same conclusion that there was insufficient evidence of collusion.

**C. The Evidence Upon Which Respondents Rely to Support Their Collusion Claim Is Irrelevant to Whether Respondents Violated Section 8(b)(4)(D)**

Perhaps because the law is so clear that the issue of collusion is a threshold issue for a 10(k) proceeding and cannot be relitigated in a subsequent unfair labor practice proceeding, Respondents attempt to boot-strap an argument that the same purported evidence of collusion is relevant to determining whether they violated Section 8(b)(4)(D). Respondents' Brief in Support of Cross-Exceptions, p. 9. Respondents, however, confuse the parties.

Respondents correctly assert that, to establish a violation of 8(b)(4)(D), the General Counsel must prove that a neutral employer faces actual coercion or restraint aimed at “forcing or requiring [it] to assign particular work to employees in a particular labor organization or a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class.” 29 USC §158(b)(4)(D). They go on, however, to confuse who the charging party is here: “An employer faced with a picketing threat that is fake faces no real threat, coercion or restraint. An employer that suggests that a union ‘threaten’ it for the purpose of ‘properly set[ting] up a 10(k) case’ can hardly be considered ‘neutral,’ or the ‘helpless victim’ of a quarrel that does not concern it. Thus, the elements of 8(b)(4)(D) are not present.” Respondents’ Brief in Support of Cross-Exceptions, p. 9-10.

The coercion and restraint that form the charges here, however, are Respondents’ actions to enforce Arbitrator Holmes’ decision and to physically restrain IBEW-represented electricians from continuing to perform electrical work for KM. Order Further Consolidating Cases, Amended Complaint, and Notice of Hearing at 7-8, ¶¶ 7, 8, 10 (10/28/13). This is the conduct with the objective of forcing KM to assign the disputed work to employees Respondents represent and to cease doing business with Accurate. Local 48 is the charging party, and the ILWU and Local 4 are the respondents charged with violating Section 8(b)(4)(ii)(B) and (D). Despite the Board already holding in the appropriate proceeding that there was no collusion, whether Local 48's picketing threat was “fake” is immaterial to whether *Respondents* violated Section 8(b)(4)(ii)(B) or (D).

Respondents cite no authority for their claim that “whether KM engaged in collusion is relevant to establishing whether there is a violation of 8(b)(4)(D).” Respondents’ Brief in

Support of Cross-Exceptions, p. 11. *See also id.* at 14 (“Collusion, at least as alleged in this case, goes to the heart of whether there is a violation of §8(b)(4)(D)”). Having completely failed to explain why an allegation of collusion between KM and Local 48 is relevant to the question of whether *Respondents* unlawfully coerced and threatened KM with the object of forcing it to award the disputed work to employees they represent and to cease doing business with Accurate, the Board should affirm the ALJ’s rulings preventing Respondent from relitigating the collusion issue in this proceeding.

### III. Conclusion

For all the reasons set forth herein, and for the reasons set forth in the Counsel for the General Counsel’s responses to Respondents’ cross-exceptions and supporting brief, Local 48 respectfully requests that the Board deny Respondents’ motion.

DATED at Portland, Oregon, this 10<sup>th</sup> day of December, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of IBEW LOCAL 48's RESPONSE TO RESPONDENTS' CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE was served on the date stated below on the following parties:

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DATED this 10<sup>th</sup> day of December, 2014. MCKANNA BISHOP JOFFE, LLP



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