

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 REPLY BRIEF IN
SUPPORT OF ITS EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I. Introduction

On October 8, 2014, the General Counsel and Charging Party International Brotherhood of Electrical Workers, Local 48, AFL-CIO ("Local 48") filed exceptions to the August 13, 2014 Decision and Order of Administrative Law Judge William L. Schmidt and briefs in support thereof. On November 19, 2014, Respondents International Longshore and Warehouse Union ("ILWU") and International Longshore and Warehouse Union, Local 4 ("Local 4") filed a combined answering brief in response to the General Counsel's and Local 48's exceptions.

Pursuant to §102.46(h) of the Board's Rules and Regulations, Local 48 hereby agrees with, adopts and concurs with the General Counsel's reply to Respondents' answer for all the arguments and reasons set forth therein and provides the following additional reply to Respondents' answering brief.

II. Respondents Inconsistently Argue that the Disputed Work has Always Been Performed by Employees it Represents and that Respondents Bargained to Obtain the Disputed Work in 2008

Throughout their answering brief, Respondents make two conflicting arguments:

1) Respondents-represented workers have historically performed the disputed electrical maintenance and repair (“M&R”) work; and 2) Local 4 bargained the right to perform the disputed electrical M&R work in 2008 negotiations aimed at expanding its jurisdiction in anticipation of new technologies and automation that would eliminate jobs in its historical jurisdiction. *Contrast* Respondents’ Answering Brief in Response to Exceptions, p. 6-8 (explaining 2008 contract negotiations “refining” scope of work jurisdiction provisions) *with id.* at 11-14 (arguing that ILWU-represented workers have performed the disputed electrical work since long before 2008).

Any argument that the 2008 changes only clarified the pre-existing prohibition on subcontracting electrical M&R work is belied by the fact that, for more than 15 years, Respondents never objected to the practice at the VBT of subcontracting electrical M&R work to licensed electrical contractors who use IBEW-represented electricians to do that work. As discussed below, Respondents incorrectly claim that Kinder Morgan Terminals (“KM”) began the subcontracting of electrical M&R work in 1998 because the evidence shows that Hall Buck, KM’s predecessor at the VBT, was subcontracting the work to IBEW-represented electricians for years prior thereto. But even if Respondents were correct that ILWU-represented longshore workers performed that electrical M&R work prior to 1998, that would only beg the question why Respondents did not grieve the subcontracting for approximately 12 years. That is, if, as Respondents claim, the disputed work was theirs prior to 1998, and KM’s use of electrical

contractors beginning in 1998 was an aberration in the coastwise bargaining unit, then why did Respondents wait at least 12 years to grieve that violation?

The answer is that the disputed work has *never* been the historical work of ILWU-represented employees, and it was only after the 2008 negotiations that the ILWU began to execute its coercive scheme to grab the highly skilled craft work of the electrical workers' union. Thus, the Board should not be distracted by any claim that electrical M&R work has actually been performed historically by Local 4 unit members.

III. Respondents' Claim That Employees it Represents Have Always Performed the Disputed Work on a "Broad Scale" Throughout the Coastwise Bargaining Unit is Not Supported by the Record

The Board should reject Respondents' argument that longshore workers in ILWU's coastwise bargaining unit have traditionally performed electrical maintenance and repair work on a "broad scale." Respondents' Answering Brief in Response to Exceptions, p. 11. Local 48 will not repeat its extensive arguments and recitation of the evidence from its brief in support of its exceptions. Local 48's Brief in Support of its Exceptions, p. 5-22. The following errors in Respondents' brief, however, warrant further argument.

Respondent claims that Slavko Antalos performed electrical M&R work at KM's bulk-loading facility in Los Angeles/Long Beach from approximately 1998-2001. Respondents' Answering Brief in Response to Exceptions, p. 12. What Respondents' fail to point out is that Antalos was employed during that period by Harbor Industrial Services not KM. Tr. 582:3-11. While Harbor Industrial assigned Antalos to work in the KM "facility," he was not a direct employee of KM. Thus, his testimony provides no relevant information about whether KM has directly hired its own longshore worker employees to perform electrical M&R work, as

Respondents seek here. It is misleading therefore for Respondents to claim that Antalos' testimony supports its claim that "KM itself has used ILWU workers to perform electronic M&R of its cargo-handling equipment under the PCLCD." Respondents' Answering Brief in Response to Exceptions, p. 12.¹

Respondent also claims that Eric Von Husen's electrical M&R work at the Port of Vancouver ("POV") supports its claim that Respondents' unit members have traditionally performed the disputed work. *Id.* at 13. Respondents failed, however, to include the fact that Van Husen's POV work was for Ports America and further failed to respond to Local 48's argument that any testimony about the electrical work Von Husen performed at the POV is dubious in light of the fact that Ports America was found to have violated Washington law in how it assigned and performed that work. Local 48's Brief in Support of its Exceptions, p.15.²

Particularly in light of these weaknesses in the Respondents' evidence, its claim that electrical M&R work has traditionally been performed by ILWU-represented employees throughout the coastwise bargaining unit is not supported by the evidence.

IV. Respondents' Claim that Employees it Represents Performed the Disputed Work at the Vancouver Bulk Terminal Prior to 1998 is Not Supported by the Record

Respondents' falsely claim that "[t]here is no real dispute that prior to approximately 1998, Local 4 performed all M&R of stevedore cargo handling equipment at the VBT, including electrical and electronic M&R." Respondents' Answering Brief in Response to Exceptions, p. 14; *see also id.* at 34 ("Even with regard to electrical and electronic M&R, there is no dispute

¹Nor is there any evidence in the record about the nature of Harbor Industrial Services' business, such as whether it was a licensed electrical contractor, or its relationship with that port.

²Respondents' later argument that Van Husen continued to perform the electrical work after the citations were issued is addressed below.

that ILWU performed this work at the VBT until 1998 for KM's predecessor").

To the contrary, it is undisputed that IBEW-represented electricians working for outside electrical contractors have performed electrical M&R work at the VBT since *at least* 1995 when Hall Buck began operating the VBT and that Kinder Morgan *continued* that practice of using IBEW-represented electricians when it took over the VBT in 1998.³ See ALJ Decision 11:13 (noting "KMBT continued to call on Accurate for its electrical M&R needs at the VBT"); Tr. 307:12-308:2 (Jones testimony that "Starting in 1995, when Hall Buck took over that operation ... the work *was being performed* by electrical workers, the electrical workers union there at the terminal and subcontracted to them"); 331:8-15; 339:18-340:14 (Sweo testimony that he has been performing the disputed electrical work while employed by electrical contractors since 1995); 968:7-969:5 (Andrews testimony that he has performed the disputed work at both the VBT for various electrical contractors since 1996) .

Thus, Respondents' claims that "[s]tarting in about 1998, KM's practice changed" and "KM began to subcontract the electrical and electronic M&R of other cargo handling equipment to subcontractors" and "the work at the VBT 'temporarily escaped the bargaining unit' as a consequence of KM's 'managerial initiative' to subcontract it" are all wrong. Respondents' Answering Brief in Response to Exceptions, p. 15, 35. The evidence shows clearly that, when KM acquired Hall Buck in 1998, it *continued* Hall Buck's practice of hiring outside electrical contractors who employed IBEW-represented electricians to perform the electrical M&R work.

³Contrary to Respondents' claim that the record is unclear as to when KM took over operations from Hall Buck (Respondents' Answering Brief, p. 14, n.14), KM acquired Hall Buck in the third quarter of 1998. Tr. 306:5-13.

V. Respondents' Argument that KM Has the Right to Control the Work in Dispute Should be Rejected

Respondents argue that KM is the primary employer because KM's subcontracting of the work shows that KM has the right to control its assignment and the primary cannot divest itself of control by subcontracting. Respondents' Answering Brief in Response to Exceptions, p. 42-43. Respondents' argument is flawed for a number of reasons.

First, KM subcontracts the electrical work because it would be unlawful not to do so without dramatically changing the nature of its business, *not* in order to divest itself of control. Because KM is powerless to accede to Respondents' demand to assign the electrical work to its ILWU-represented employees without violating Washington law, then it has no right to control the disputed work. *International Brotherhood of Electrical Workers, Local 501 (Atlas Co.)*, 216 NLRB 417 (1975) citing *Enterprise Ass'n of Steam Pipefitters, Local 638 (The Austin Co.)*, 204 NLRB 760 (1973).

Second, Respondents mischaracterize the General Counsel's argument by claiming "the GC now tries to claim that the Management Agreement makes the POV the primary employer by reserving to the POV the right to control the work in dispute." Respondents' Answering Brief in Response to Exceptions, p. 45. That is not the argument; the argument is that KM does not have the right to control the work because it cannot lawfully hire its own employees to do it. That is, because it neither owns the property nor has a lease giving it a possessory interest in the property and the right to perform the disputed work, and because it is not a licensed and bonded electrical contractor, it must hire an outside electrical contractor to perform the work. Tr. 646:5-13; GC Exh. 1(a) at 2 ("KINDER MORGAN and the PORT intend and understand that this Agreement does not create any leasehold or any other possessory interest as to the Property in favor of

KINDER MORGAN.”) It is that outside electrical contractor – Accurate – that has the right to control here, not the POV.

Third, while Respondents attempt to escape the weight of evidence that it would violate Washington law for KM to assign the disputed work to its ILWU-represented employees by attempting to reopen the record to admit a letter from the POV claiming that it is up to KM to determine whether to have the work performed by a contractor or hired staff, Respondents conveniently fail to acknowledge that the very same letter “requires that the employment of electrical staff and the maintenance and repair work itself be conducted in accordance with local, state and federal laws and regulations.” Respondents’ Proposed Exhibit 81.⁴

Local 48 maintains that the ALJ erred by suggesting that KM could assume control of the electrical maintenance work by merely seeking authorization from the POV to perform it; the POV’s authorization is insufficient to grant KM that control. *See* Local 48’s Brief in Support of its Exceptions, p. 22, n.19. Even if the POV’s authorization was sufficient, however, Respondents’ Proposed Exhibit 81 is insufficient to grant that authorization because the fact remains that KM’s hiring of ILWU-represented employees to do the disputed work would not be in accordance with state law and regulations.

Fourth, Respondents incorrectly claim that Washington State electrical licensing law does not deprive KM of the right of control because KM could, with little difficulty, become a licensed electrical contractor. Respondents’ Answering Brief in Response to Exceptions, p. 46-48. It is not a matter of simply filling out some paperwork, paying a modest fee, and dubbing a Local 4 member with the proper electrician title or “possibly hiring a new employee.” *Id.* at 47.

⁴Local 48 has separately filed, and hereby incorporates, its opposition to Respondents’ motion to reopen the record to include this among its other proposed exhibits.

Assuming the safety risks and liability of becoming an electrical contractor are very significant, particularly when operating on someone else's property.

Curiously, although Respondents claim it would be a simple process for KM to become an electrical contractor, Respondents have failed to produce any evidence suggesting that Ports America, the POV PMA member cited with violations of Washington electrical licensing law for assigning electrical work to ILWU-represented employees, has cured its violations by simply becoming an electrical contractor.

Far short of that, Respondents claim, without providing any citation to the hearing transcript, that Von Husen, the Local 4 member who testified about performing electrical work for Ports America "still does electrical and electronic M&R, notwithstanding the citations issued years ago." *Id.* at 48. Nowhere in Von Husen's testimony was he asked or does he discuss whether and the extent to which he has done any electrical M&R work since the citations were issued. Tr. 790-872. Even if he had testified specifically that he continued to perform that work after the citations were issued, there is no evidence to suggest anything other than that he would have been flouting the law.

Finally, as argued in the General Counsel's and Local 48's opposition to Respondents' motion to reopen the record, any suggestion that KM has the right to control the disputed work because it has, since the record closed, hired an ILWU-represented employee to perform it ignores the elephant in the room, namely that Respondents have, time and again, unlawfully abused their enormous power to coerce KM into ceding to their demands through crippling slowdowns. General Counsel's Opposition to Respondent's Motion to Reopen the Record, p. 9-10; Local 48's Opposition to Respondent's Motion to Reopen the Record, p. 7-9. *See also*

NLRB v. ILWU, Local 8, ILWU, Local 40, and ILWU, Case No. 3:12-cv-01088-SI (D. Or. July 19, 2012) (Dkt. #50) (enjoining and restraining ILWU from “engaging in slowdowns, stoppages, withholding of services, or threatening, coercing, or restraining ICTSI Oregon, Inc. . . . where . . . an object thereof it to force or require ICTSI Oregon, Inc. to cease doing business” with another entity). The Board should not reward Respondents for their unlawful and bullying conduct.

VI. Conclusion

For all the reasons set forth herein, and for the reasons set forth in the Counsel for the General Counsel’s Reply Brief in Support of its Exceptions to the Decision of the Administrative Law Judge, Local 48 respectfully requests that the Board reject the ALJ’s decision and recommended order and find that Respondents violated Section 8(b)(4)(ii)(B) and (D) of the Act.

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 REPLY BRIEF IN SUPPORT OF ITS 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 10th day of December, 2014. MCKANNA BISHOP JOFFE, LLP


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