

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

**INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION**

and

**INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 4**

and

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

**Cases 19-CC-092816
19-CC-115273
19-CD-092820
19-CD-115274**

**RESPONDENTS' REPLY TO OPPOSITIONS TO
MOTION TO REOPEN THE RECORD**

In further support of their Motion to Reopen the Record, Respondents International Longshore and Warehouse Union (“ILWU”) and ILWU Local 4 (“Local 4”) submit this Reply to the General Counsel’s and IBEW Local 48’s (“IBEW”) Oppositions to the Motion. The General Counsel and IBEW oppose reopening the record to admit Respondents’ proffered new documentary evidence, but their arguments against admission do not hold water and pale in comparison to the undeniable relevance of the new evidence and the interests of justice and integrity that weigh heavily in favor of reopening the record for admission.

A. The Request To Reopen The Record Is Procedurally Proper And Should Be Granted Pursuant To § 102.48(d).

As explained in Respondent’s Motion to Reopen the Record, Respondents could not have presented the new evidence at the ULP trial because the evidence did not exist until the trial record had closed. Section 102.48(d) of the Board’s Rules and Regulations identifies three types

of evidence that warrant reopening the record for admission: (1) newly discovered evidence; (2) evidence which has become available only since the close of the hearing; and (3) evidence which the Board believes should have been taken at the hearing. Here, Respondents' proffered new evidence is both newly discovered and evidence which has become available only since the close of the hearing.

The General Counsel and IBEW unavailingly argue that the proffered new evidence should not be admitted because the facts and circumstances in this matter are not identical to those of other cases where the Board reopened the record. First, the General Counsel claims that *Norton Audubon Hospital* and *Inland Container Corp.* are inapposite because in those cases the Board reopened the record to allow admission of newly discovered evidence regarding something that existed or had occurred at the time of the hearing. (General Counsel's Opposition ("GC Opp."), at 3). *See Norton*, 350 NLRB 648, 648-49 (2007) (admitting new evidence that a lactation position existed at the time of the hearing because it could show there was a position to which the employee was entitled that should have been offered upon reinstatement); *Inland Container*, 273 NLRB 1856, 1856-57 (2005) (admitting new evidence regarding the criteria used when hiring, which was the subject of the hearing). This is exactly what Respondents are attempting to do through their Motion to Reopen the Record. The new evidence goes directly to Kinder Morgan's ("KM") knowledge and abilities prior to and at the time of the ULP hearing. For example, the May 30, 2014 letter from KM to the Port of Vancouver ("Port") shows that KM was unclear about the meaning of the language in the Management Agreement, specifically whether KM could hire its own employees to perform electrical and electronic maintenance and repair ("M&R"). (*See* Exh. R.80).¹ If KM was unsure of the Management Agreement's

¹ Respondents have marked for identification purposes the proffered new documentary evidence as exhibits next in order in the record. The proffered new exhibits are marked R.80 through R.86 and are attached to Respondents' Motion to Reopen the Record.

meaning on May 30, 2014, it follows that KM was also unclear as to the meaning of the Agreement at the time of the hearing in October and December 2013. Likewise, the other new evidence documents affirmative actions KM took following the close of the hearing – KM asked ILWU Local 4 to cooperate in assigning electrical and electronic M&R to ILWU workers, KM drafted a job description and requested that it be posted, KM interviewed and hired ILWU workers to perform electrical and electronic M&R. (*See* Exhs. R.82-R.86). The Management Agreement in place when KM took all of these actions in 2014 was the exact same Agreement in place before and during the ULP hearing. Thus, the new evidence demonstrates what KM understood or did not understand to be the meaning of the Management Agreement and what KM was able to do both prior to and at the time of the hearing.

Second, the General Counsel argues that *International Harvester Co.*, 236 NLRB 712 (1978), is irrelevant simply due to its procedural posture.² (GC Opp., at 4). In that case, the court remanded the matter to the Board ordering the Board to admit additional evidence after the Board sought enforcement of its order; but this procedural history does not make the case irrelevant here. In fact, it shows that the interests of justice and the necessity of having an accurate and complete record outweigh strict adherence to administrative procedure no matter what the procedural posture. Similarly, *Jordan Marsh Co.*, which the GC also tries to distinguish, is yet another example of the importance of a complete and accurate record, even in the face of a pending representation election. 80 NLRB 343 (1948) (granting request to reopen the record after Board issued Decision and Direction of Elections but before election in order to hear new evidence concerning organizational changes that occurred *after* the hearing). Here, just as in *International Harvester Co.* and *Jordan Marsh Co.*, the new evidence should be admitted to

² The General Counsel ignores that in *International Harvester Co.*, the Board reopened the record to consider new evidence of branch sales and closings that *postdated* the first hearing. This undercuts the General Counsel's argument that Respondent's Motion should be denied because the new evidence concerns events occurring after the close of the ULP hearing.

ensure that a complete and accurate record is before the Board.

IBEW also makes the unpersuasive argument that Respondents' Motion is untimely. IBEW claims Respondents should have submitted the proffered new evidence at the ULP hearing. (IBEW Local 48's Opposition ("IBEW Opp."), at 1-5). Such an argument is nonsensical as it is undisputed that the new evidence did not exist at the time of the hearing. Additionally, all of the new evidence was created by KM or in response to KM's conduct (the Port's response letter). Thus, there is absolutely no way that Respondents could have submitted this evidence at the hearing. Next, IBEW argues that Respondents did not "promptly" file their Motion to Reopen the Record, but this argument is also without merit. (IBEW Opp., at 6-7). As an initial matter, the authorities IBEW cites provide no support for denying Respondents' Motion. IBEW cites to the Board's denials of motions to reopen the record in *Cogburn Healthcare Center* and *Point Park University*, but both were overruled by the Federal Court of Appeals for the District of Columbia. *Cogburn Health Center, Inc. v. NLRB*, 437 F.3d 1266, 1272-73 (D.C. Cir. 2006) (court held that the Board abused its discretion in rejecting the motion to reopen the record as untimely in *Cogburn Healthcare Center*, 335 NLRB 1397 (2001)³); *Point Park Univ. v. NLRB*, 457 F.3d 42, 51-52 (D.C. Cir. 2006) (court held that the Board's denial of the motion to reopen the record was an abuse of discretion in *Point Park University*, 344 NLRB 275 (2005)). IBEW also cites *Precoat Metals*, but in that case the Board refused to reopen the record in part because the Respondent had the new evidence for eleven months before the ALJ's decision issued and it sought to reopen the record. 341 NLRB 1137, fn. 1. (2004). Here, Respondents had only some of the new evidence for a short period of time before the ALJ Decision, while some evidence did not exist until mere days before or after the Decision issued.

³ IBEW's citation for the NLRB decision in *Cogburn Healthcare Center* was incorrect. The correct citation is 335 NLRB 1397 (2001).

And, IBEW recognizes that each piece of new evidence and the conduct it documents was set in motion by the prior conduct so Respondents did not know that the proffered new evidence was relevant and should be admitted until the sum of the new evidence was before it. After the ALJ issued his decision in August, counsel for Respondents provided the new evidence to the General Counsel in hopes the General Counsel would see that his allegations had been incorrect and that the decision of the ALJ should be permitted to stand. Instead, the General Counsel decided to file Exceptions in October. Thus, Respondents timely filed their Motion to Reopen the Record on November 19, 2014.

B. The Proffered New Evidence Does Undermine The General Counsel’s And IBEW’s Arguments, Showing That KM Is The “Primary” Employer.

The General Counsel and IBEW argue that the new evidence does not disprove the General Counsel’s theory in this case. But, in making such an argument, the General Counsel attempts to change his theory of liability and the allegations set forth in the Consolidated Complaint, casting mere speculation as fact.

First, the General Counsel ignores his own theory of liability unambiguously set forth in the Consolidated Complaint. The Complaint alleges, “Pursuant to the terms of the [Management Agreement] and applicable Washington State regulations, Kinder cannot directly employ any electrical workers to perform work at the Port; it must subcontract any electrical work to a licensed electrical contractor with employees who possess appropriate electrical licenses.” (Con. Comp. ¶ 5(b)). Now, the General Counsel appears to assert a theory that KM cannot assign the disputed work to ILWU because to do so would violate Washington State law. (GC Opp., at 4). By changing his theory at this late stage, the General Counsel essentially concedes that he has failed to prove the allegations in the Consolidated Complaint. Nonetheless, the General Counsel’s “new theory” also fails. The undisputed testimony from the General Counsel’s own

witness Electrical Inspector Campbell, which the General Counsel fails to mention, makes clear that KM could hire ILWU workers to perform electrical and electronic M&R without violating the law – KM could (1) hire a certified master electrician and submit the necessary paperwork and the \$306.10 fee to become a licensed electrical contractor; (2) hire a certified administrator and submit the necessary paperwork and the fee to become a licensed electrical contractor; or (3) have an existing KM employee obtain an administrator’s certification and submit the necessary paperwork and the fee to become a licensed electrical contractor. (Tr. 669:10-670:3; *see also* Tr. 653:7-654:7).⁴

The General Counsel also argues that particular pieces of new evidence do not undermine his theory of liability. He focuses on the June 16, 2014 letter from the Port to KM claiming that Respondents have attempted to mislead the Board as to the content of that letter. Nothing could be less accurate. The Port’s letter clearly stated that the Port “leaves it up to KM to determine whether the electrical system should be maintained by a contractor or by other hired staff.” (Exh. R.81). The letter also stated that KM must comply with local, state, and federal laws and regulations. (*Id.*). The remainder of the proffered new evidence shows that after receiving this letter from the Port, KM decided to (1) request that ILWU Local 4 cooperate with KM in assigning the disputed work to ILWU workers, (2) create and post a job description for ILWU workers to perform the disputed work, and (3) interview and hire ILWU workers to perform the disputed work. (*See* Exhs. R.82-R.86). All of these actions by KM show that without changing its Management Agreement with the Port, KM went on to hire ILWU workers to do the work in dispute. Thus, by its conduct, KM has taken the position that its Management Agreement with the Port allows this. Despite the GC’s attempt to infer otherwise, citations issued by the state of

⁴ Unless otherwise indicated, record cites herein refer to the transcript (“Tr.”) and exhibits from the ULP trial, which occurred in October and December 2013. Citations to the record from the 10(k) proceeding specify “10(k).”

Washington against another employer for violation of applicable state licensing laws are inapposite to KM's conduct and decision to hire ILWU workers to perform the disputed work. There is no evidence in the record or presented by the General Counsel that KM has been cited for any violations. Moreover, KM's hiring of ILWU workers, contrary to the 10(k) determination, eliminates the 8(b)(4)(D) claim against Respondents. *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 126-27 (1971) ("if that union wins the § 10(k) decision and the employer does not comply, the employer's § 8(b)(4)(D) case evaporates, and the charges he filed against the picketing union will be dismissed. [Footnote 19] Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10(k) decision, but both will lose their § 8(b)(4)(D) protection against the picketing which may, as it did here, shut down the job. The employer will be under intense pressure, practically, to conform to the Board's decision. This is the design of the Act; Congress provided no other way to implement the Board's § 10(k) decision."). In sum, the proffered new evidence shows that KM had the right to control the work in dispute and assign it to ILWU-represented workers. Indeed, that is exactly what KM has done.

Finally, the General Counsel and IBEW base much of their opposition to reopening the record on mere speculation. They claim that KM assigned the disputed work to ILWU Local 4 workers for another reason, an alleged slowdown, for which there is no evidence and only self-serving speculation. At the hearing, the ALJ disallowed KM counsel from submitting evidence regarding an alleged slowdown and made clear that the evidence that had been admitted was not admitted as evidence of a slowdown.⁵ (Tr. 1028:14-18, 1058:2-7). The General Counsel, KM,

⁵ In fact, at the hearing, Respondents submitted an arbitration decision that held that the ILWU had not engaged in a slowdown. (Tr. 1038:11-20; Exhs. R.74-R.77).

and IBEW did not challenge or otherwise move for reconsideration of the ALJ's ruling.⁶ Nor did the General Counsel or IBEW challenge the ALJ's ruling in their Exceptions. Thus, the General Counsel's and IBEW's conjecture beyond the hearing record and the proffered new evidence is immaterial and has no bearing on whether the Motion should be granted and the new evidence admitted. The proffered evidence speaks for itself, and Respondents only seek to put this new and highly relevant evidence into the record to ensure it is accurate and complete.

C. The New Evidence Should Be Admitted Because It Indicates False Testimony, Fraud, and Deceit.

As shown in Respondents' Motion to Reopen the Record, KM management witnesses gave false testimony during both the 10(k) proceeding and the ULP hearing when they stated that KM's Management Agreement with the Port requires KM to subcontract electrical M&R and prohibits KM from using its own ILWU Local 4-represented workers. The General Counsel argues that no false testimony was given, but the record and the evidence show otherwise.

At the 10(k) proceeding, KM's Terminal Manager unequivocally testified that it "is currently not allowed under the terms of the management agreement" for KM to directly hire ILWU workers to perform electrical work.⁷ (10(k) Tr. 4/4 at 382:14-383:3). Likewise, at the ULP hearing KM's Director of Operations and Commercial Director of West Coast Operations both testified without qualification that the Management Agreement prohibits KM from using its own employees (ILWU workers) to perform electrical and electronic M&R. (Tr. 77:1-4; 309:4-8). Then, on May 30, 2014, KM's Director of Operations, who previously testified that the

⁶ The General Counsel claims that he and IBEW would be unduly prejudiced if the record is reopened to admit the new evidence because they were not permitted to pursue a line of questioning about a speculated slowdown that appears nowhere in the Consolidated Complaint. Besides the fact that allegations of a slowdown are not in the Complaint, neither the General Counsel nor IBEW objected to the ALJ's ruling against admission of testimony and evidence at the ULP hearing or addressed the ruling in their Exceptions.

⁷ The Board relied on this evidence in its 10(k) decision in rejecting ILWU and Local 4's arguments and awarding the work to employees represented by IBEW Local 48. *Int'l Bhd. Of Elec. Workers Local 48 (Kinder Morgan Terminals and ILWU Local 4)*, 357 NLRB No. 182 at 4 (2011).

Management Agreement did not allow KM to hire its own employees to perform electrical and electronic M&R, wrote a letter to the Port asking for clarification of the Management Agreement and whether KM could hire its own employees to perform electrical and electronic M&R under the terms of the Agreement, apparently because KM and its managers did not know whether the Agreement prohibited this. (See Exh. R.80). Yet, in two hearings KM's managers testified under oath that they knew for a fact that KM was required to subcontract its electrical work and KM could not hire its own employees to perform the work. There is no question that these witnesses gave false and misleading testimony. What is more, their testimony has now been proved false through KM's own conduct – hiring ILWU workers to perform the disputed work.

Because the new evidence reveals that false testimony was given at the hearing, the Board should reopen the record to admit the new evidence to ensure an accurate record and a full and fair hearing. *Kanakis Co., Inc. and Charles D. Frankenfield*, 293 NLRB 435, 436 (1989); *Local 259, United Auto., Aerospace and Agric. Implement Workers of Am. (Atherton Cadillac, Inc.)*, 276 NLRB 276, 276 (1985); *Inland Container Corp.*, 273 NLRB 1856, 1856 (1985); *Int'l Union of Elec., Radio and Machine Workers, AFL-CIO, Local 745 (Nat'l Elec. Coil)*, 268 NLRB 308, 308 (1983). To fail to do so “would simply allow [KM] to profit from [its] perjury and misconduct in deceiving the Board and encourage others to similarly abuse the Board's processes.” *Kanakis Co., Inc.*, 293 NLRB at 436.

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D. Conclusion.

For the reasons set forth above and in Respondents' Motion to Reopen the Record, Respondents respectfully request that the Board grant Respondents' Motion to admit and consider the proffered new evidence, Exhibits R.80-R.86.

Dated: December 23, 2014

Respectfully Submitted,

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA 94109. On **December 23, 2014**, I served a true and accurate copy of the foregoing **RESPONDENTS' REPLY TO OPPOSITIONS TO MOTION TO REOPEN THE RECORD** on all interested parties in this action as follows:

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I declare under the penalty of perjury under the laws of the State of California and the United States that the above is true and correct.

Executed on **December 23, 2014** at San Francisco, California.



Leslie Rose