

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 IN SUPPORT OF CROSS-EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

The General Counsel's ("GC") and IBEW Local 48's ("IBEW") briefs in opposition to Respondents' cross-exceptions fail to provide adequate legal or factual support for the ALJ's decision to preclude Respondents from re-litigating whether IBEW and employer Kinder Morgan ("KM") colluded to set-up the 10(k) proceeding. For the reasons set forth herein and in Respondents' opening brief, the ALJ erred. The Board should find that IBEW and KM colluded to set up the proceeding. Alternatively, the Board should remand the matter to the ALJ to consider the evidence and permit full and fair re-litigation of the issue.

**A. General Counsel and IBEW Cannot Explain Away IBEW's and KM's Deceit,
Which Required the ALJ to Open the Record to Consider the Evidence of Collusion.**

While GC and IBEW take potshots at Respondents for accusing KM and IBEW of deceit, they fail to offer any meaningful response to the evidence. There is no denying that IBEW and KM presented a false picture of their relationship during the 10(k) proceeding. They flatly

denied colluding to set-up the proceeding. The documentary evidence now available shows that they did just that. KM suggested that IBEW “threaten” to picket it and then fed IBEW detailed instructions on how to “properly set-up a 10(k) case” against the ILWU, which IBEW followed. (See R.51-R.71). KM’s and IBEW’s fraudulent denials of these facts obligated the ALJ to re-open the issue of collusion and admit the evidence. See *Kanakis Co., Inc.*, 293 NLRB 435, 435-36 (1989) (opening record to consider new evidence that party submitted false testimony in Board hearing); *Inland Container Corp.*, 273 NLRB 1856, 1857 (1985) (opening record to consider new evidence that appeared to be inconsistent with witness’ trial testimony); *Nat’l Elec. Coil*, 268 NLRB 308 (1983) (opening record to consider evidence that witness gave false testimony in prior proceeding); *Atherton Cadillac, Inc.*, 276 NLRB 276 (1985) (opening record to consider evidence that exhibit offered in prior proceeding was a forgery).

The General Counsel claims that IBEW counsel Mr. Malbin did not perjure himself and tries to characterize his 10(k) testimony as “forgetful or ... evasive.” (GC Answering Brief in Opposition to Respondents’ Cross Exceptions (“GC Br.”), at 6). Mr. Malbin’s testimony is not the only troubling statement from the 10(k) proceeding. (See Respondents’ Brief in Support of Cross Exceptions (“Resp. Br.”) at 5). In any event, it is not for the GC to decide whether his testimony was merely forgetful as opposed to knowingly false; that is the job of an ALJ to decide based on live testimony. Because a 10(k) proceeding is resolved without live testimony and because the ALJ precluded Respondents from re-litigating collusion at trial, an ALJ never heard testimony on the subject.

More fundamentally, Respondents were not required to prove to the ALJ that Mr. Malbin in fact perjured himself in order for the ALJ to be required to open the record and permit re-litigation of collusion. Respondents were merely required to show that the newly-available evidence “raises a substantial question” about whether IBEW and KM counsel “may have” given false testimony in the 10(k) proceeding or made false statements on the record or in their

briefing. *E.g., Inland Container*, 273 NLRB at 1857 (reopening record because the new evidence “raises a substantial question whether a key witness or witnesses may have committed perjury as to a material fact”) (emphasis added). The documentary evidence available here is more than sufficient.

Under oath at the 10(k) hearing, Mr. Malbin first denied and then testified that he did not remember having spoken to counsel for KM about a 10(k) proceeding before sending a letter threatening to picket KM. (10(k) Tr. 5/3 at 367-369). He thereby successfully blocked any further questioning on the subject. KM and IBEW counsel both vehemently denied any collusion on the record and in their briefs. But, GC and IBEW now must concede that Mr. Malbin personally had at least seven written exchanges with KM’s counsel before sending the obligatory “threat” letter, including receiving lengthy legal memos from KM counsel about how to “properly set-up a 10(k) case” against the ILWU. (Exh. R.52-R.58). These documents further suggest that the two discussed the matter on other occasions during this time period, both by phone and in person. (*E.g.*, Exh. R.52 [referencing a lunch date]; R.54 [referencing an earlier “discussion”]; R.56 [planning several calls]). The notion that Mr. Malbin and KM counsel forgot about every single one of these exchanges defies credulity. At a minimum, this evidence is sufficient to raise a “substantial issue” as to whether IBEW and KM engaged in deceit. *Kanakis Co., Inc.*, 293 NLRB at 436 (“We do not permit parties to profit from perjured testimony... Instead, we reopen the record to receive newly discovered evidence showing perjury as to a material fact.”).

GC and IBEW spill much ink chiding Respondents for not subpoenaing and offering the documentary evidence at the 10(k) stage. Section 10(k) proceedings are non-adversarial, investigatory proceedings conducted with minimal notice. It is well established that “parties may put in new evidence at the 8(b)(4)(D) stage.” *ITT v. Electrical Workers IBEW Local 134*, 419 U.S. 428, 446 (1975). What is more, Respondents sought the relevant information during the

10(k) proceeding through witness examination. Respondents should not be prejudiced now because that witness chose to provide false or misleading answers under oath and because the Hearing Officer largely sustained IBEW's and KM's objections seeking to block examination on this subject. *See Inland Container Corp.*, 273 NLRB at 1858 (rejecting argument that union should be prohibited from offering evidence of possible perjury because of alleged failure to obtain the evidence through witness examination at the hearing).

B. General Counsel's and IBEW's Claim that Respondents' Evidence is Insufficient to Establish Collusion Applies the Wrong Standard and Rests on an Incorrect and Dangerous Interpretation of the Act.

GC claims that, even if considered, the correspondence between IBEW and KM does "not reveal unlawful collusion" or a sham picketing threat. (GC Br. at 5; *see also* IBEW's Resp. to Respondents' Cross-Exceptions ("IBEW Br.") at 6-8). GC and IBEW are wrong. The documentary record, particularly when combined with the evidence of IBEW's contingent relationship with KM,¹ warrants no other conclusion. In any event, GC's and IBEW's argument ignores that what Respondents seek is the mere ability to re-litigate the issue of whether KM and IBEW colluded to set-up the proceeding.

More troubling, however, is the cynical and dangerous legal position that underlies the GC's and IBEW's argument. At bottom, GC and IBEW see no problem with KM inviting IBEW to "threaten" so that KM could circumvent its collective bargaining agreement with ILWU.² GC

¹ While the ALJ refused to permit Respondents to re-litigate the issue of KM's and IBEW's collusion, he noted the suspect nature of IBEW's threat, even in the absence of documentary evidence of KM's and IBEW's communications. The ALJ noted that "KM[] is not obliged in any manner to use Accurate's employees to perform the disputed work... In this setting, the March 18, 2011, letter from Local 48's general counsel threatening to picket at the VBT if KM[] assigns the electrical M&R work to the ILWU unit strikes me as an oddity. Local 48's claim to the electrical M&R work at the VBT is grounded on its agreement with Accurate, not KM[], because it has no agreement with KM[]." ALJ Decision at 19:20-27.

² In various places, GC suggests that there is some question about whether ILWU has contractual right to perform the work in dispute and suggests that ILWU consider bargaining this issue with PMA, KM's collective bargaining representative. *See, e.g.*, GC Reply Brief in Support of Exceptions at 4. There is nothing more to be bargained because ILWU and PMA agree that ILWU already has the contractual right to perform this work and KM already has a contractual duty to assign it to the ILWU. *E.g.*, Tr. 474:12-475:8, 501:16-502:1 Exh. GC.8 (2/12/12 arbitration decision pursuant to collectively bargained grievance procedures, which held that the disputed work is covered by the PCLCD); Tr. 1039:11-13 (KM's Maunu confirming that KM has not appealed the 2/12/12 arbitration

even seems to say that it was a “natural or inevitable business step” for KM to suggest that IBEW threaten picketing when KM was facing arbitration with its union, the ILWU. (GC Br. at 5 (quotation omitted)). This position would eliminate collusion as a defense and give employers like KM license to eliminate union work altogether. There is no dispute that, while KM has a collective bargaining agreement with ILWU, KM has no collective bargaining relationship with IBEW and no obligation, contractual or otherwise, to hire an IBEW subcontractor. (ALJ Decision at 19:2-27; Tr. 129:2-6, 138:19-139:6; 10(k) 5/2 Tr. at 12:6-8; Exh. R.1 at S 3.2). KM hired IBEW subcontractor Accurate Electric on a job-by-job basis; and there is no dispute that KM has always been free to hire a non-union subcontractor instead. (*Id.*; Tr. 133:12-19; Tr. 344:7-11). Thus, IBEW’s “right” to the work has always been contingent on the whims of KM. Under the GC’s analysis, an employer like KM could lawfully solicit a sham picketing threat from the union of its subcontractor (IBEW), use a 10(k) proceeding to eviscerate the contractual promises it made to its own union (ILWU) and then simply stop hiring a union subcontractor at all, thus leaving both unions with nothing. The Act exists to protect and foster collective bargaining, 29 U.S.C. § 151, not to create escape hatches for employers seeking to avoid their collective bargaining agreements and union labor altogether.

The cases cited by GC and IBEW do not support their extreme position. The very cases cited by GC and IBEW recognize the vitality of collusion defense. (*See* GC Br. at 5-6; IBEW Br. at 7-8). The facts of those cases finding insufficient proof of collusion do not approach the facts presented here. In *Electrical Workers Local 196 (Aldridge Electric)*, 358 NLRB No. 87 (2012), the Board found no collusion because the evidence merely showed that the union and employer cooperated in advance of the hearing. KM and IBEW did not merely cooperate in advance of the hearing; the evidence shows that they purposefully set-up the threat and the entire proceeding. In *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137 (2005), the Board

decision); Exh. GC.10 (5/10/12 CLRC Minutes, agreed to by both PMA and ILWU, directing KM to assign the disputed work to ILWU pursuant to the 2/12/12 arbitration decision).

found no collusion or sham threat when the union threatened to picket an employer and then suggested to the employer that it initiate a 10(k) proceeding. Here, it was the employer KM that came up with the idea of the 10(k) proceeding, suggested to IBEW that it “threaten” picketing even though KM was free to stop hiring an IBEW subcontractor at any time, gave IBEW step-by-step instructions on how to set-up a 10(k) case and then claimed to be a victimized neutral when IBEW did as KM proposed. These facts provide far stronger evidence of a threat that was collusive and fake than the facts of the cases cited by GC and IBEW. *See also Southwest Regional Council of Carpenters (Standard Drywall)*, 348 NLRB 1250, 1254 (2006) (cited by IBEW and finding insufficient evidence of collusion where employer asked the charged union what its reaction would be if the employer reassigned the work); *Teamsters Local 6 (Anheuser-Busch)*, 270 NLRB 219, 220 (1984) (cited by IBEW and finding that unlawfulness of picketing threat was insufficient by itself to establish collusion). Indeed, if the evidence in this case is not sufficient to establish collusion, it is difficult to imagine what evidence would be.

C. GC’s and IBEW’s Arguments Disregard Board and Supreme Court Law Permitting Respondents to Re-litigate Credibility Issues.

GC and IBEW argue that collusion is irrelevant to whether Respondents violated 8(b)(4)(D) and that, therefore, the ALJ correctly denied Respondents the ability to re-litigate the issue. While agreeing with Respondents that *Warehouse Union Local 6, ILWU (Golden Grain)*, 289 NLRB 1 (1988) is the controlling case, GC and IBEW ignore the plain language of the Board’s decision. In *Golden Grain*, which has been relied on and reaffirmed by the Board again and again since it was decided, the Board held that respondents are entitled to re-litigate issues raised in the 10(k) proceeding either “when there are credibility issues to be resolved **or** when a respondent denies the existence of an element of the 8(b)(4)(D) violation.” *Id.* at 2 (emphasis added). Likewise, in *ITT*, 419 U.S. at 445 n.16, the Supreme Court noted that credibility issues cannot and need not be resolved in a 10(k) proceeding, but are left for the 8(b)(4)(D) trial. This

is because 10(k) determinations are made without live testimony and the proceedings do not comply with the procedural protections required for agency adjudications under the Administrative Procedures Act (“APA”). *Id.* at 445-46.

Thus, regardless of whether IBEW’s and KM’s collusion is relevant to proving a violation of 8(b)(4)(D) in this case, Respondents were entitled to re-litigate collusion in the APA-compliant 8(b)(4)(D) trial. “[T]here are credibility issues to be resolved” that could not be resolved in the 10(k) proceeding without live testimony – namely, the credibility of the testimony of and positions taken by IBEW and KM denying that they colluded to set-up the 10(k) proceeding and denying that IBEW’s picketing threat was a sham. *Id.* The ALJ erred by denying Respondents the ability to re-litigate this issue, including by offering new documentary and testimonial evidence. *Id.*; *ITT*, 419 U.S. at 446-47 (“Both parties may put in new evidence at the § 8(b)(4)(D) stage”). To hold otherwise would violate fundamental principles of due process by denying Respondents the right to ever properly litigate IBEW’s and KM’s collusion with live testimony. *See id.*

D. KM’s and IBEW’s Collusion is Relevant to Proving a Violation of 8(b)(4)(D).

GC and IBEW also are wrong in their claim that IBEW’s and KM’s collusion is irrelevant to proving a violation of 8(b)(4)(D). As Respondents discussed in their opening brief, 8(b)(4) protects “neutrals.” (Resp. Br. at 8-9). To be sure, the law does not require an employer to be impartial in order to maintain its status as a legal “neutral.” However, holding that an employer can be “partisan,” is a far cry from holding that an employer can intentionally rig a NLRB proceeding and still claim “neutrality” sufficient to warrant the law’s protection from its own union. GC and IBEW cite no law to support this radical notion.

IBEW argues that whether it colluded with KM to set-up the 10(k) proceeding and whether its threat to picket KM was a sham are no longer relevant because the charges at issue allege coercion by Respondents, not by IBEW. (IBEW Br. at 8-10). IBEW’s argument ignores

the essential element of the employer's neutrality discussed above and ignores the relationship between 10(k) and 8(b)(4)(D).

Whether IBEW's threat was collusive is relevant to whether Respondents' actions violated 8(b)(4)(D). This is because "Section 8(b)(4)(D) ... must be read in light of § 10(k), with which it is interlocked." *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 123 (1971). There can be no 8(b)(4)(D) violation by a union without a prior 10(k) decision awarding the work to workers represented by another union. *Id.* at 123-24, 126-27. GC and IBEW concede that collusion is relevant to determining whether a dispute can be resolved under 10(k) because it is relevant to "whether a party has used proscribed means to enforce its claim to the work in dispute." (GC Br. at 3). But, as discussed above, 10(k) hearings are limited, investigatory proceedings, decided without live testimony and do not comply with the APA. The mechanism for a union to obtain a full and fair, APA-compliant hearing on the work assignment is to continue to press its claim to the work following an adverse 10(k) decision. *Id.* at 123-24; *Golden Grain*, 289 NLRB at 1 n.3, 2; *see also NLRB v. Local 991, ILA*, 332 F.2d 66 (5th Cir. 1964) ("Since there is no independent review of § 10(k) work assignments, the only stage at which the (union) can contest the work award is on review of the § 8(b)(4)(i)(ii)(D) unfair labor practice order.").

Here, in the 10(k) proceeding, IBEW was the entity charged and found to have used "proscribed means to enforce its claim to the work in dispute."³ These means were the picketing threats that Respondents contend were collusive and a sham. The well-recognized constraints of a 10(k) proceeding discussed above prevented Respondents from being able to fully and fairly litigate KM's and IBEW's collusion. At the 10(k) hearing, KM stated a preference for IBEW, resulting in an award of work to IBEW. Respondents acted contrary to the award in order to be able to challenge it in a full and fair hearing. Because of the "interlock[ing]" relationship

³ Respondents had merely prosecuted grievances under their collective bargaining agreement with KM. These were ultimately meritorious. (Exhs. GC 8 and 10).

between 10(k) and 8(b)(4)(D), Respondents cannot now be found to have violated 8(b)(4)(D) absent a legitimate picketing threat by IBEW. To deny Respondents the right to re-litigate collusion in the 8(b)(4)(D) proceeding would be to forever deny Respondents the right to fully and fairly litigate an issue that is relevant to whether they violated 8(b)(4)(D). Thus, GC's and IBEW's arguments should be rejected.

E. GC and IBEW Have Failed to Show that Collusion is a “Threshold Issue” In This Case.

GC claims that collusion is a “threshold issue ... decided by the Board,” that cannot be re-litigated in a subsequent 8(b)(4)(D) proceeding. (GC Br. at 1-4). For the reasons discussed above, such a conclusion would violate due process.

GC cites several cases for the uncontested proposition that “threshold issues” cannot be re-litigated. (*Id.* at 2 (citing *Plasterers Local 200 (Standard Drywall)*, 357 NLRB Nos. 160 and 179 (2011); *Teamsters Local 216 (Granite Rock Co.)*, 296 NLRB 250 (1989); *Laborers Local 721 (Hawkins & Sons)*, 294 NLRB 166 (1989); *Ironworkers Local 751 (Hoffman Construction)*, 293 NLRB 570 (1989)). These cases were also cited by Respondents in their opening brief. (Resp. Br. at 11). With the exception of *Standard Drywall*, none of these cases holds that collusion is a “threshold” issue. (*Id.* (discussing these cases)). As for *Standard Drywall*, Respondents showed in their opening brief that it is not supported by the authorities on which it purports to rely, is contrary to other binding authority and is contrary to *Tile, Marble, Terrazzo Finishers & Shopworkers, Local 47-T*, 315 NLRB 520, 522 (1994). For the reasons set forth in Respondents' opening brief on their cross-exceptions (Resp. Br. at p.12-14) and given the serious due process concerns created by precluding re-litigation of issues based on non-APA compliant hearings, the Board should read the “threshold issues” exception narrowly and reject GC's and IBEW's arguments, at least as applied to collusion on the facts of this case.

The other cases GC cites in support of its position that collusion is a “threshold issue” were all decided under 10(k). Thus, they say nothing about precluding re-litigation in a subsequent ULP proceeding. (GC Br. at 3-4 (citing *Laborers Local 860 (Ronyak Paving, Inc.)* 360 NLRB No. 40 (2014); *Laborers Local 265 (AMS Constr.)*, 356 NLRB No. 57 (2010); *Carpenters (Standard Drywall)*, 348 NLRB 1250 (2006)). The undeniable fact that collusion may be addressed at the 10(k) stage does not mean that it cannot also be addressed at the ULP stage. Indeed, the law is designed to broadly permit re-litigation. *ITT*, 419 U.S. at 445-46 (explaining that parties may re-litigate in an 8(b)(4)(D) proceeding issues previously addressed in the 10(k) proceeding); *Golden Grain*, 298 NLRB at 2 (same).

GC and IBEW argue that *Tile, Marble, Terrazzo Finishers & Shopworkers, Local 47-T*, 315 NLRB 520, cited by Respondents, supports treating collusion as a “threshold” matter. (GC Br. at 2; IBEW Br. at 4-5). The Board in that case distinguished the question of collusion from “threshold” matters. *Tile, Marble, Terrazzo Finishers & Shopworkers, Local 47-T*, 315 NLRB at 522. Addressing collusion, the Board looked at the record evidence. Finding none, the Board rejected the collusion defense on the merits. *Id.* The Board then addressed a separate question – whether there was a collective bargaining agreement in place – and treated only that issue as a “threshold” matter that could not be re-litigated. *Id.*⁴

F. Conclusion

For the foregoing reasons, the Board should find that the ALJ erred in precluding Respondents from litigating KM’s and IBEW’s collusion.

⁴ IBEW also claims that Respondents have taken the position that the “entire [10(k)] proceeding is irrelevant” to determining whether Respondents violated 8(b)(4)(B) or (D). Therefore, according to IBEW, Respondents cannot here claim the right to re-litigate whether the 10(k) proceeding was a sham. (IBEW Br. at 23). IBEW misstates Respondents’ argument. There is no doubt that an adverse 10(k) decision is a necessary predicate to finding Respondents guilty of violating 8(b)(4)(D). (*See generally* Resp. Br. at 23-26). What Respondents have argued and what the ALJ correctly found is that the Board’s findings and conclusions in the 10(k) proceeding are not binding or deserving of any weight in determining whether Respondents violated 8(b)(4)(B) or (D). *Id.* (citing *e.g., Plasterers Local 79*, 404 U.S. at 122 n.10; *Int’l Typographical Union*, 125 NLRB 759, 761 (1959); *Golden Grain*, 289 NLRB at 2).

Dated: December 23, 2014

Respectfully Submitted,

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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 IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** on all interested parties in this action as follows:

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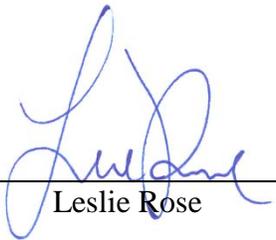
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I declare under the penalty of perjury under the laws of the State of California and the United States that the above is true and correct.

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



Leslie Rose