

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: September 21, 2015

TO: Ronald K. Hooks, Regional Director
Region 19

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: International Longshore and Warehouse 560-2575-6713
Union, Alaska Longshore Division Unit 222 560-7520-7500
(American Presidential Lines) 560-7540-4000
Case 19-CC-144937 584-3780-6700

The Region submitted this case for advice concerning whether the ILWU, Alaska Longshore Division Unit 222 (“Union” or “ILWU”) violated Section 8(b)(4)(ii)(A) and (B) by filing a grievance against American Presidential Lines (“Employer” or “APL”) to require APL to assign certain work to ILWU-represented employees working at the Kodiak, Alaska port. We conclude that the Union did not violate Section 8(b)(4)(ii)(A) and (B) because its grievance is reasonably based under the parties’ contract and the bargaining unit has a colorable claim to perform the disputed work at issue. The Region should therefore dismiss the charge, absent withdrawal.

FACTS

The Employer is a multi-national cargo export company operating terminals along the west coast and Alaska and belongs to the Alaska Maritime Employers Association (“AMEA”), a multi-employer bargaining association. The AMEA and the ILWU are parties to a collective-bargaining agreement, the All Alaska Longshore Agreement (“AALA”), covering a multi-employer unit of longshore workers in specified Alaskan ports. Section 1 of the AALA details the nature and scope of traditional ILWU work in the Alaskan unit ports, including Section 1.9 that describes, among others, Kodiak, Dutch Harbor, and Seward, Alaska as “ILWU Port[s].” Section 7.641 contains a broad work preservation clause, stating in full:

In further consideration of the terms and conditions set forth in this Contract, the Employer hereby assures the Union that it will use its best efforts and act in good faith in preserving as much as possible all the work covered by this Contract for the registered work force.

The Employer's large ocean-going vessels cannot call at many of Alaska's small remote ports, including at Kodiak and Seward. As such, the Employer contracts with various independent barge operators, including Samson Tug and Barge ("Samson") and Horizon Lines ("Horizon;" an AMEA member and AALA signatory), to transport product from Kodiak and other smaller ports to the Employer's main Dutch Harbor, Alaska location. Pursuant to the AALA, APL employs ILWU members at Dutch Harbor to load its empty containers onto Samson and Horizon barges, which then transport those empty containers by barge to and from the smaller ports. In Kodiak, Samson employs six longshoremen, who are not ILWU members, to off and reload the containers at the Kodiak "Lash" dock.¹ The "Lash" dock is privately owned, unlike the public dock located at Kodiak's "Pier III" that is operated by Horizon and its ILWU-represented workforce. After returning to Dutch Harbor from Kodiak, ILWU-represented employees offload the containers from the Samson and Horizon barges.

Samson is not a member of the AMEA or signatory to the AALA. Although Samson has never directly employed ILWU labor in Kodiak, it relied on ILWU-signatory employers to handle containers during its first two trips to Kodiak in 1982 and again on two occasions, for a total of six hours, in 2001 and 2002.

In 2004, parties to the AALA negotiated a Letter of Understanding ("LOU") titled "Third Party Activities" in which the "Union and Employers in the Ports of Kodiak and Dutch Harbor have agreed at those ports to the following understanding which shall be effective upon ratification of this contract:

Barges worked at non-private docks shall be worked by ILWU Longshoremen under the terms of the AALA (e.g., public city docks). In the Port of Dutch Harbor[,] APL & Horizon Lines will work connecting carrier barges (e.g., Northland and Samson) at their facilities or the city docks[....]"

In 2006, the Union filed a grievance against the Employer over Samson's failure to use ILWU-represented employees at its port in Seward, Alaska.² The arbitrator concluded that the Employer had violated the AALA by using non-ILWU employees to load and unload its containers in Seward. Specifically, the arbitrator concluded that the Seward work was "fairly claimable" unit work because APL had the right to control the work and the ILWU had traditionally performed that work, e.g., through Samson's use of an AALA signatory from 2001-2003. As such, the arbitrator awarded the Seward work to the ILWU. In 2010, Advice determined that the ILWU had not

¹ Samson's employees are represented by a labor organization affiliated with the Marine Engineers Beneficial Association (MEBA).

² The Union's 2006 grievance and arbitration against the Employer are discussed in detail in *ILWU Unit 60 (American President Lines, Ltd.)*, Case 19-CE-114, Advice Memorandum dated May 21, 2010.

violated Section 8(b)(4)(ii)(A), (B), or 8(e) by grieving APL's failure to award it the Seward work, concluding that the ILWU's grievance was reasonably based and without an unlawful objective. The arbitrator's decision was eventually affirmed by the Ninth Circuit Court of Appeals.³

In March 2014, the Union filed a similar grievance against the Employer concerning its failure to use Union employees at the Lash dock in Kodiak. An arbitrator heard the grievance in November 2014 but remanded it back to the Joint Port Labor Relations Committee for a determination concerning what contractual provisions were used to refer the dispute to arbitration. The grievance remains unresolved.

ACTION

We conclude that the ILWU did not violate Section 8(b)(4)(ii)(A) and (B) by grieving the Employer's use of non-ILWU employees at the Lash dock because the grievance has a reasonable basis under the AALA and the bargaining unit has a colorable claim to the disputed Lash dock work at the Kodiak port. The Region should therefore dismiss the charge, absent withdrawal.

Section 8(b)(4)(ii)(A) prohibits a union from threatening, restraining, or coercing an employer with an object of forcing or requiring it to enter into a Section 8(e) agreement in which the employer agrees to cease doing business with any other person. Similarly, Section 8(b)(4)(ii)(B) prohibits such conduct to force or require any person to cease doing business with any other person. Sections 8(b)(4) and 8(e) do not, however, prohibit all coercion or agreements that may result in a cessation of business with another employer, but rather distinguish between lawful "primary" and unlawful "secondary" boycott activity.⁴ "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees" or instead is "calculated to satisfy union objectives elsewhere."⁵ As such, Sections 8(b)(4) and 8(e) do not prohibit conduct or agreements seeking to preserve or reacquire traditional bargaining unit work for bargaining unit

³ See *American Presidential Lines, Ltd. v. ILWU*, –F. App'x–, 2015 WL 2374161 (9th Cir. 2015).

⁴ *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 635 (1967) (contract clause with work preservation object did not violate Section 8(e), and strike against employer for allegedly violating the contract clause did not violate 8(b)(4)(B)).

⁵ *Id.* at 644-45. See also *Retail Clerks Local 1288 (Nickel's Pay-Less Stores)*, 163 NLRB 817, 819 (1967) ("provisions are secondary and unlawful if they are to have as their principal objective the regulation of the labor policies of other employers and not the protection of the unit"), *enforced in relevant part* 390 F.2d 858, 861-62 (D.C. Cir. 1968).

employees—"fairly claimable" work—so long as the contracting employer has the power to assign the disputed work to the unit employees.⁶

Fairly claimable work has been described by the Board as work that is "identical or very similar to that already performed by the bargaining unit and that bargaining unit members have the necessary skill and are otherwise able to perform."⁷ The Board has found work not fairly claimable where it has not historically been performed by unit employees.⁸ Thus, where a union's conduct has a work preservation object, it is primary, lawful activity. By contrast, where the union's object is work acquisition rather than work preservation, a secondary object will be found.

Furthermore, the Board has long held that good faith prosecution of a reasonably-based contract claim, by itself, is not coercion within the meaning of Section 8(b)(4)(ii).⁹ Rather, the validity of a grievance prosecution is generally determined under the principles of *Bill Johnson's Restaurant v. NLRB*,¹⁰ as interpreted and modified in *BE & K Construction Company*.¹¹ In this regard, a grievance is unlawful coercion only if it is both objectively and subjectively baseless at

⁶ *NLRB v. Longshoremens ILA*, 447 U.S. 490, 504 (1980).

⁷ *Newspaper & Mail Deliverers (Hudson News)*, 298 NLRB 564, 566 (1990).

⁸ *Nevins Realty*, 313 NLRB at 392 (cleaning work historically performed by outside contractors); *Sheet Metal Workers Local 27 (Thomas Roofing)*, 321 NLRB 540, 540 (1996) (unit employees had never fabricated the kitchen equipment at issue); *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303, 1304-05 (1986), (drayage work always performed by others and was never covered by union contract), *affirmed in part and remanded in part* 820 F.2d 448 (D.C. Cir. 1987).

⁹ *Teamsters Local 483 (Ida Cal)*, 289 NLRB 924, 925 (1988) (no 8(b)(4)(ii)(A) violation where union grieved and filed lawsuit to compel arbitration over whether owner-operators were covered by contract where union's contention that owner-operators were employees was reasonable, union did not strike or picket, and there had been no prior adjudication concerning owner-operators' contractual status); *Teamsters Local 83 (Cahill Trucking)*, 277 NLRB 1286, 1290 (1985) (grievance filed to enforce a colorable contract claim is not coercion within meaning of Section 8(b)(4)(ii)(A) or (B)); *Teamsters (California Dump Truck Owners Ass'n)*, 227 NLRB 269, 274 (1976) (same).

¹⁰ 461 U.S. 731 (1983).

¹¹ 351 NLRB 451 (2007).

the time it was filed¹² or if it has an unlawful object.¹³

We conclude that the Union's grievance is reasonably based under the contract and seeks a lawful primary object.¹⁴ First, it would be reasonable for the arbitrator to conclude that the Employer controls the Kodiak port work, as it does in Seward, given the Ninth Circuit's conclusion in that controversy that, "[c]onstruing the facts in the light most favorable to APL, we hold that ... APL controls the assignment of the disputed Seward stevedoring work."¹⁵ Second, it would be similarly reasonable for the arbitrator to conclude that the bargaining unit has a colorable claim to the Lash dock work even though no unit employees currently work in that part of the Kodiak port. In this regard, the AALA creates a multi-port bargaining unit that specifically lists Kodiak as "an ILWU Port" and does not exclude the Kodiak Lash (or any other) dock from the unit description. Rather, the AALA encompasses, at Kodiak and the other defined ILWU ports, the ILWU-represented employees of the employers bound by the agreement, including APL and Horizon. Currently, bargaining unit employees perform dock work at the Kodiak port for two signatory employers—i.e., Horizon, on behalf of APL. As such, the ILWU can make a reasonable argument that it has a right to attempt to preserve the unit work located at the Lash dock and controlled by APL.¹⁶

¹² *BE & K Constr. Co.*, 351 NLRB at 456. *See also ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 89, 93 (1988), *review denied* 892 F.2d 130 (D.C. Cir. 1989); *Teamsters Local 483*, 289 NLRB at 925 (union's reasonable grievance did not violate 8(b)(4)(ii)(A)); *Teamsters Local 83*, 277 NLRB at 1290 (grievance filed to enforce colorable contract claim not coercive); *Teamsters*, 227 NLRB at 274 (same).

¹³ *See, e.g., Elevator Constrs. (Long Elevator)*, 289 NLRB 1095, 1095 (1988) (grievance violated Section 8(b)(4)(ii)(A) where predicated on interpretation of contractual clause violative of Section 8(e)), *enfd.* 902 F.2d 1297 (8th Cir. 1990); *Service Employees Local 32B-32J (Nevins Realty Corp.)*, 313 NLRB 392, 392, 400-402 (1993) (grievance that had secondary object violated Section 8(b)(4)(ii)(B)), *enfd. in relevant part* 68 F.3d 490 (D.C. Cir. 1995). *See also Bill Johnson's*, 461 U.S. at 737 n.5.

¹⁴ The contract requires the Employer to "use its best efforts and act in good faith in preserving as much as possible all the work covered by th[e]" AALA. Assuming that the Lash dock work is unit work, the arbitrator could reasonably conclude that the Employer violated the contract by failing to use ILWU members to perform that work. *Compare Elevator Constructors*, 289 NLRB at 1095 (union's construction of contract clause necessarily gave it an unlawful object); *Food & Commercial Workers Local 367 (Quality Food)*, 333 NLRB 771, 771-72 (2001) (union failed to present colorable contract claim to work in controversy, which clearly was not fairly claimable).

¹⁵ *American Presidential Lines, Ltd. v. ILWU*, –F. App'x—, 2015 WL 2374161 at *2.

¹⁶ Notably, the grievance has not been accompanied by strikes, picketing, or threats to do so.

The Board's decision in *Longshoremen Local 1291 (Holt Cargo)*¹⁷ does not affect our conclusion. That case involved the longstanding dispute between the ILA and the Machinists over container maintenance and repair work at the Packer Avenue Terminal in Philadelphia that resulted in the Machinists continuing to perform the work. Although the ILA performed work at other parts of the Philadelphia port, the Board rejected the ILA's work preservation defense, premising the Section 8(b)(4)(ii)(B) violation on the fact that ILA-represented employees had never performed the disputed work at the Packer Avenue Terminal and, consequently, there was no work to preserve.¹⁸ However, in reaching this result, the Board did not consider and, therefore did not determine, the scope of the appropriate bargaining unit, the threshold issue in assessing whether the ILA's grievance sought to preserve work traditionally performed by its members or unlawfully sought to acquire new work. Moreover, subsequent to *Longshoremen Local 1291*, the Second Circuit concluded in *Bermuda Container Lines, Ltd. v. International Longshoremen's Association* that the ILA's Master Contract created a multi-port bargaining unit encompassing all the employers who were bound by the Master Contract.¹⁹ In so concluding, the court explained that those provisions had a valid work preservation objective and were specifically aimed at saving work for ILA members on a multi-port basis. Arguably, if the Board in *Longshoremen Local 1291* initially had resolved the scope of the appropriate bargaining unit under the ILA's Master Agreement when considering ILA's work preservation defense, the outcome of that case would have been different, particularly in light of the decision in *Bermuda Container Lines*.

Finally, we need not determine whether the ILWU waived its right to preserve the Lash dock work, either by agreeing to the 2004 LOU or filing the Kodiak grievance only recently.²⁰ Waiver is an affirmative defense that the Employer can only plead and attempt to prove in response to an attempt by the ILWU to claim the disputed work through, e.g., a grievance.²¹ Because the ILWU's grievance remains

¹⁷ 309 NLRB 1283 (1992).

¹⁸ *Id.* at 1285-86.

¹⁹ 192 F.3d 250, 256-57 (2d Cir. 1999).

²⁰ See *Newspaper & Mail Deliverers (B & W Distributors)*, 274 NLRB 929, 931-32 (1985) (union's failure to object for at least six years to non-unit employees' performance of work "waived any claim that the object of its actions...is the preservation of unit work[;]" also no evidence that employer with whom union had dispute had power to assign the work); *Marine Officers Ass'n (Riverway Co.)*, 260 NLRB 1360, 1360 (1982) (union engaged in limited protest after employer initially contracted out work previously performed by unit but then acquiesced for three years), *enfd. mem.* 716 F.2d 907 (8th Cir. 1983).

²¹ See *Allied Signal Aerospace*, 330 NLRB 1216, 1228 (2000) (proof of contractual waiver is an affirmative defense that must meet a high standard), *review denied sub*

unresolved and a waiver defense by the Employer, if any, remains untested, a waiver determination at this juncture would be premature.²²

Accordingly, the ILWU has not violated Section 8(b)(4)(ii)(A) and (B) by filing a grievance against APL because the grievance is reasonably based on the AALA and does not have an unlawful object.²³ The Region should therefore dismiss the charge, absent withdrawal.

/s/
B.J.K.

nom. Honeywell Int'l, Inc. v. NLRB, 253 F.3d 125 (D.C. Cir. 2001). See also Fed. Rules of Civ. Proc. 8(c)(1) (laches is an affirmative defense). In any event, Board precedent does not support the argument that passage of time, alone, is sufficient to render unit work no longer fairly claimable. See, e.g., *Retail Clerks Local 648 (Brentwood Markets)*, 171 NLRB 1018, 1020 (1968) (grocery shelf-stocking work was fairly claimable despite fact that unit employees had not performed such work for ten years, where the shelving work had continued to be performed in same manner as previously done by unit employees); *Meat & Highway Drivers v. NLRB*, 335 F.2d 709, 714 (D.C. Cir. 1964) (attempt by unit of local drivers to recapture work lost three years earlier when meat packers moved out of Chicago had primary object).

²² Indeed, a waiver defense was either not plead, or was rejected, in the Seward dispute.

²³ Cf., e.g., *ILWU Local 7*, 291 NLRB at 93 (grievances filed before Board's 10(k) determination awarding work to rival union were not coercive under Section 8(b)(4)(D) because they were arguably meritorious).