

Nos. 15-1344 & 15-1428

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**INTERNATIONAL LONGSHORE & WAREHOUSE
UNION; INTERNATIONAL LONGSHORE & WAREHOUSE
UNION, LOCAL 8; INTERNATIONAL LONGSHORE & WAREHOUSE
UNION, LOCAL 40**

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

ICTSI OREGON, INC.,

Intervenor for Respondent

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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INTERNATIONAL LONGSHORE &)	
WAREHOUSE UNION; INTERNATIONAL)	
LONGSHORE & WAREHOUSE UNION,)	
LOCAL 8; INTERNATIONAL LONGSHORE)	
& WAREHOUSE UNION, LOCAL 40)	
)	
Petitioners/Cross-Respondents)	
)	
v.)	
)	Nos. 15-1344 & 15-1428
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	19-CC-082533 et al.
)	
and)	
)	
ICTSI OREGON, INC.,)	
)	
Intervenor for Respondent)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. ***Parties and Amici:*** International Longshore & Warehouse Union; International Longshore & Warehouse Union, Local 8 (“Local 8”); and International Longshore & Warehouse Union, Local 40 (“Local 40”) (collectively, “ILWU”), are the petitioners before the Court; they were the respondents before the Board. The Board is the respondent before the Court; its General Counsel was a party before the Board. ICTSI Oregon, Inc. (“ICTSI”) was the charging party

before the Board and is the respondent-intervenor before the Court. International Brotherhood of Electrical Workers Local 48 (“IBEW Local 48”) was an intervenor before the Board. The Port of Portland (“the Port”) was a charging party before the Board and filed an *amicus curiae* brief with this Court in support of the Board. North America’s Building Trades Unions and the International Association of Machinists and Aerospace Workers, AFL-CIO, have jointly filed an *amicus curiae* brief in support of the Board. Pacific Maritime Association (“PMA”) has filed an *amicus curiae* brief in support of ILWU.

B. *Ruling Under Review:* The case involves ILWU’s petition to review, and the Board’s cross-application to enforce, a final Board Decision and Order (“D&O”) issued against ILWU on September 24, 2015, and reported at 363 NLRB No. 12.

C. *Related Cases:* The ruling under review has not previously been before this or any other court. As of filing, the Board counsel are aware of the following related cases pending in or about to be presented to this Court or another court:

(1) *ILWU v. NLRB*, Nos. 15-1443 & 16-1036 (D.C. Cir.) (related case coordinated with the instant case for oral argument).

(2) *Hooks ex rel v. ILWU*, 544 F. App’x 657 (9th Cir. 2013) (affirming in relevant part the district court’s grant of a preliminary injunction against ILWU, arising from the unfair labor practice allegations in the instant case).

(3) In the instant case, the Board severed the complaint allegation that ILWU violated Section 8(b)(4)(D) of the Act, 29 U.S.C. § 158(b)(4)(D), by filing and maintaining grievances after the Board had issued a decision under Section 10(k) of the Act, 29 U.S.C. § 160(k), awarding the dockside reefer work to employees represented by IBEW Local 48. *See* D&O 1 n.3. The Board severed the Section 8(b)(4)(D) allegations in light of ongoing litigation over the Section 10(k) decision. The ongoing litigation includes, most recently, the Ninth Circuit's July 8, 2016 ruling in *Pacific Maritime Association v. NLRB*, ___ F.3d ___, 2016 WL 3648378, which reversed a district court decision vacating the Board's Section 10(k) ruling. The Ninth Circuit found that the district court lacked jurisdiction to review the ruling. *Id.* at *1, 5, 8. The severed Section 8(b)(4)(D) allegation remains pending before the Board.

(4) In *ILWU, et al. v. ICTSI Oregon, Inc.*, Case No. 3:12-cv-01058-SI (D. Oregon), ILWU and PMA brought claims under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, seeking to confirm arbitration awards issued against ICTSI and the Port of Portland. Those arbitration awards involved grievances that are the subject of the instant case. ICTSI filed counterclaims seeking to vacate the awards, and for other relief. In 2012-13, the district court issued orders staying those claims and counterclaims pending completion of litigation over the Section 8(b)(4)(D) complaint allegations that were severed from

the instant case. *See ILWU, et al. v. ICTSI Oregon, Inc.*, 932 F.Supp. 1181 (D. Oregon 2013) (explaining this procedural history).

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Dated at Washington, DC
this 25th day of October, 2016

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Act	The National Labor Relations Act (29 U.S.C §§ 151 <i>et seq.</i>)
Board	The National Labor Relations Board
Br.	The opening brief of ILWU to this Court
DCTU Agreement	Collective-bargaining agreement between the Port and District Counsel of Trade Unions
Dockside reefer work	The work of plugging, unplugging, and monitoring refrigerated shipping containers located on a dock.
IBEW	International Brotherhood of Electrical Workers
ICTSI	ICTSI Oregon, Inc.
<i>ILA I</i>	<i>NLRB v. Longshoremen Ass'n</i> , 447 U.S. 490 (1980)
<i>ILA II</i>	<i>NLRB v. Longshoremen Ass'n</i> , 473 U.S. 61 (1985)
ILWU	International Longshore and Warehouse Union
ILWU-PMA Agreement	Multi-employer agreement between ILWU and PMA
Lease	Lease between Port and ICTSI to operate Terminal 6
Local 8	ILWU Local 8
Local 40	ILWU Local 40
LOU	Letter of Understanding
PCLCD	Pacific Coast Longshore Contract Document
PMA	Pacific Maritime Association
Port	Port of Portland

Port electricians IBEW-represented electricians employed by Port to perform dockside reefer work at Terminal 6.

Terminal 6 Port-owned marine terminal on the Columbia River at Portland, Oregon

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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of International Longshore & Warehouse Union; International Longshore & Warehouse Union, Local 8 (“Local

8”); and International Longshore & Warehouse Union, Local 40 (“Local 40”) (collectively, “ILWU”) to review, and the cross-application of the National Labor Relations Board to enforce, a final Board Decision and Order issued against ILWU on September 24, 2015, and reported at 363 NLRB No. 12. (A2166-94.)¹

The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is final with respect to all parties. This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). ILWU’s petition for review and the Board’s cross-application for enforcement are timely, as the Act imposes no time limit on such filings. ICTSI Oregon, Inc. (“ICTSI”), the Charging Party before the Board, has intervened on behalf of the Board.

¹ Record citations in this final brief are to the joint appendix and are abbreviated as “A.” References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that ILWU violated Section 8(b)(4)(i) and ii(B) of the Act by engaging in threats and work stoppages against, and withholding labor from, ICTSI, a neutral employer, and by filing grievances against ICTSI and the neutral ocean carriers, in furtherance of ILWU's primary labor dispute with the Port of Portland.

2. Whether the Board properly exercised its broad discretion in denying ILWU's motions to reopen the record to admit, or take administrative notice of, evidence that was not "newly discovered" as required by Board rules; and by denying ILWU's motion to consolidate the instant Board case with another involving a different record of violations committed by ILWU during a later time period.

3. Whether ILWU's untimely challenge to Acting General Counsel Solomon's authority to issue the complaint is waived and jurisdictionally barred.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

After investigating charges filed by ICTSI, the Board's Acting General Counsel issued a complaint alleging in relevant part that ILWU violated Section 8(b)(4)(i) and ii(B) of the Act by its threats, work stoppages, and grievances filed

against neutral employers, ICTSI and the carriers, in furtherance of ILWU's primary labor dispute with the Port of Portland ("the Port"). The complaint alleged that ILWU took those actions to compel the reassignment of work historically performed by workers who were directly employed by the Port and represented by International Brotherhood of Electrical Workers Local 48 ("IBEW Local 48"). (A2168.) After a hearing, the administrative law judge found that ILWU violated the Act as alleged. (A2192.) ILWU filed exceptions. The Board (Chairman Pearce and Members Hirozawa and McFerran) affirmed, as modified, the judge's findings and recommended order. (A2166-67&nn.3-4.)²

I. THE BOARD'S FINDINGS OF FACT

A. Introduction

This dispute arises from a decades-old division of labor between two unions at a marine terminal ("Terminal 6") owned by the Port, a political subdivision of the state of Oregon. It is uncontroverted that IBEW-represented electricians employed by the Port, and not ILWU-represented employees, have performed the disputed dockside reefer work at Terminal 6 since the inception of container

² The Board did not address the judge's additional finding that ILWU violated Section 8(b)(4)(D) of the Act, 29 U.S.C. § 158(b)(4)(D), by filing and maintaining the grievances after the Board had issued a decision under Section 10(k) of the Act, 29 U.S.C. § 160(k), awarding that work to employees represented by IBEW Local 48. Rather, in light of ongoing litigation over the Section 10(k) decision, the Board severed the Section 8(b)(4)(D) complaint allegations from the case that is presently before this Court. (A2166n.3.)

operations there in 1974. ILWU accepted this division of labor until 2011. It then threatened, disrupted the operations of, and filed grievances against ICTSI and the ocean carriers—who lack control over the dockside reefer work performed by Port employees—in an effort to have the work reassigned to ILWU-represented employees. In so doing, ILWU targeted employers unable to grant its demands in its dispute with the Port.

B. The Port’s Operations at Terminal 6, Where IBEW-Represented Electricians Who Are Directly Employed by the Port Have Exclusively Performed Dockside Reefer Work for Over 40 Years

The Port owns Terminal 6, a large marine terminal on the Columbia River at Portland, Oregon. It is primarily a terminal for the loading and unloading of seagoing container vessels, and the parking of incoming and outgoing vessels while awaiting shipment by land or sea. (A2170;139,309.)

The Port commenced container operations at Terminal 6 in 1974. Since then, the Port has directly employed electricians represented by IBEW Local 48 (the “Port electricians”) who have exclusively performed the work of plugging, unplugging and monitoring of refrigerated shipping containers (“reefers”) while they are on the terminal’s dock. This work is known as dockside reefer work.³ (A2169,2171;311,448-49.)

³ In addition to the dockside reefer work, the Port electricians, among other things, maintain and repair electrical systems at the Port. (A2173.)

Since 1974, the Port electricians have performed the dockside reefer work under a collective-bargaining agreement between the Port and the District Council of Trade Unions (“DCTU”), of which IBEW is a member labor organization (the “DCTU Agreement”). The DCTU Agreement covers the electricians and various other craft workers that the Port has employed over the years at Terminal 6. The 2009-2012 DCTU Agreement provided that “all . . . maintenance assignments . . . historically and consistently performed by . . . employees under this Agreement will continue at all marine cargo handling facilities owned and operated or leased and operated by the Port.” (A2172;311-12,329,839-40,850.) The Port has long viewed this contractual language as covering the dockside reefer work because it was historically performed by Port electricians who are DCTU craft workers covered by the DCTU Agreement. (A2172;329.) In addition, the DCTU Agreement, including its provision requiring the continuation of the historic jurisdiction of the covered crafts, explicitly applied to marine cargo-handling facilities “leased by the Port to an independent operator.” (A2172;839-40.)

The dockside reefer work is part of a complicated stevedoring operation at Terminal 6 that is also manned by groups of longshore workers (mechanics, drivers, etc.) represented by ILWU Local 8, and marine clerks represented by Local 40. Those employees work under the Pacific Coast Longshore and Clerks Agreement between the ILWU and the Pacific Maritime Association (“PMA”), a

multiemployer association that bargains with ILWU on behalf of member companies, including terminal operators and carriers. The ILWU-PMA agreement applies to PMA members operating at West Coast marine terminals, and, thus, does not apply to the Port because it is not a PMA member. It consists of the Pacific Coast Clerks Contract Document (“PCCCD”) governing the marine clerks’ terms and conditions of employment, and the Pacific Coast Longshore Contract Document (“PCLCD”) governing the longshore workers’ terms and conditions of employment. The ILWU-PMA agreement applicable here ran from July 1, 2008, until July 1, 2014. (A2169,2171-72,2174;1040.)

The ILWU Local 8-represented employees’ traditional work at the terminal included operating cranes, trucks, and other stevedoring equipment used to load and unload ships, maintaining and repairing such equipment, and plugging, unplugging and monitoring reefers while they are on a vessel, but not while they are on a dock. (A2173;85,130-31,311,474-75.) These workers had never performed the dockside reefer work at Terminal 6, which, as noted, has instead been for decades performed by Port electricians. (*See id.*) Accordingly, the ILWU Local 40-represented marine clerks, who assist in checking in reefers when they arrive at the dock and transmitting temperature and ventilation settings for reefers, had historically directed dockside reefer work to the Port electricians. (A2173;474-75.)

C. The Port Leases the Terminal to ICTSI but Retains the Right To Control the Dockside Reefer Work

By 2006, the Port began soliciting proposals from private parties for a lease to operate Terminal 6. (A2170;314-17.) As early as January 2007, the Port issued a request for qualifications which notified potential lessees that the Port directly employed trade union members, including the Port electricians, pursuant to its relationship with the DCTU. (A2170;321,871.) Accordingly, in August 2008, the Port issued a lease proposal that required any lessee to honor the historic division of labor that the Port had maintained at Terminal 6 pursuant to the DCTU Agreement. (A2170-71;325-29,336,934,937,952.)

In 2009, ICTSI began negotiating with the Port for a lease agreement to take over the cargo handling operations at Terminal 6. During the negotiations, which lasted over a year, the Port insisted that ICTSI must honor the historic division of labor at the terminal, including the Port electricians' decades-long performance of dockside reefer work. (A2171;324,329-30,336.)

On May 12, 2010, ICTSI entered into a 25-year lease with the Port to operate Terminal 6 ("the Lease"). (A2169,2171-72;664.) That same day, the Port Commission (the Port's governing body whose members are appointed by the Governor of Oregon) approved the Lease at a public meeting. The Commission's membership included Local 8's Secretary-Treasurer, Bruce Holte, who voted in favor of the Lease. (A2171,2175&n.16.)

In accordance with the Port's obligations under the DCTU Agreement, the Lease reserves the Port's right (and duty) to control the assignment and performance of certain work, including the dockside reefer work. As an initial matter, the Lease requires ICTSI to acknowledge the Port's collective-bargaining relationship with IBEW Local 48 covering the work of the Port electricians, as reflected in the DCTU Agreement. (A551.) Lease Sections 2.8 and 3.23(a), in turn, provide that ICTSI cannot perform any of the work historically performed by the Port's employees under the DCTU Agreement—including the dockside reefer work—and that the Port's employees must continue to perform such work. (A2169,2171-72,2176;585,603,85,334,450-51.)

Thus, Section 2.8 makes it clear that ICTSI may not itself assign the dockside reefer work to any non-DCTU employees. Specifically, Section 2.8 requires ICTSI to “acknowledge[] that the DCTU work is subject to DCTU's jurisdiction under the DCTU Agreement.” Section 2.8 also states that ICTSI “shall not perform” or “cause to be performed” any DCTU work at the Terminal or take any action that would cause the Port to be in violation of the DCTU Agreement. (A2176;585.) In addition, Section 2.8 makes ICTSI responsible for labor claims that arise from its failure to comply with that section. *Id.* Similarly, Section 3.23(a) states that “the Port shall have responsibility for the conduct of the DCTU employees,” which includes the Port electricians, “in performing the

DCTU work,” which includes the dockside reefer work performed by Port electricians for decades. (A2176;603.) Lease Section 3.23(e)(ii) further reflects the Port’s obligation to honor the DCTU Agreement. It states that ICTSI would not “be required” to use DCTU-represented employees for DCTU work only if the DCTU Agreement was no longer in effect. (A2176;604-05.)

Accordingly, ICTSI and the Port understood that the Lease provisions were meant to preserve the specific work that the Port electricians had historically performed at Terminal 6, including the disputed work. (A2169-70,2172, 2176;85,450-51.) Thus, after signing the Lease, the Port electricians continued to perform the dockside reefer at Terminal 6 under the Port’s control and direction. (A2172,2176;110,337,430.)

D. ICTSI Establishes a Collective-Bargaining Relationship with ILWU; ILWU Claims the Dockside Reefer Work at Terminal 6 on Behalf of ILWU-Represented Employees Who Had Never Performed that Work

In about June 2010, after executing the Lease and well before commencing its operations at Terminal 6 on February 12, 2011, ICTSI became part of the PMA. (A2171;373.) As a PMA member, ICTSI became bound by the 2008 ILWU-PMA agreement, including the PCLCD governing longshoremen’s work. (A2171;1040.)

In February 2011, two days before ICTSI was scheduled to begin operations at Terminal 6, Local 8 demanded that ICTSI reassign the dockside

reefer work at the terminal to ILWU-represented longshore workers employed pursuant to the terms of the PCLCD. (A2175-76;107-10,1038-39.) As noted, those longshore workers had never performed dockside reefer work at Terminal 6, which had instead been for decades performed by Port electricians.

ICTSI told ILWU that it could not reassign the dockside reefer work to ILWU-represented employees because the work “is not within ICTSI’s control.” (*Id.*) As ICTSI explained, its Lease with the Port, which ICTSI had signed before becoming a PMA member, required that IBEW-represented Port electricians perform that work, as they had since 1974. (*Id.*)

E. ILWU Files Grievances Against ICTSI and the Carriers Seeking To Acquire the Disputed Work, and Repeatedly Threatens To Run ICTSI out of the Port Unless It Agrees to ILWU’s Demands

From March through August 2012, ILWU filed numerous grievances under the PCLCD for lost-work opportunities based on the Port’s continued assignment of dockside reefer work to IBEW-represented Port electricians. It filed the grievances against ICTSI and several carriers that call on the Port, who are PMA members subject to the PCLCD, alleging that ICTSI and the carriers were violating that agreement by using non-ILWU represented employees to perform the dockside reefer work. (A2175;109-10,114.)

On May 21, ILWU Committeeman Leal Sundet asked ICTSI’s chief executive officer, Elvis Ganda, if PMA had instructed ICTSI to express a

preference for ILWU to perform the dockside reefer work at the upcoming Section 10(k) hearing.⁴ Before Ganda answered, Sundet warned him that ICTSI “would pay the price” if it refused. Sundet added that the ILWU “can fuck you” and he was the “guy that can fuck you badly.” He further threatened that, unless ILWU’s demands were met, he would ensure that carrier Hanjin—which at the time accounted for over 80 percent of ICTSI’s business at Terminal 6—would not renew its contract with ICTSI, and that PMA could fine and expel ICTSI.

(A2177-78;69-74.)

Ganda replied that ICTSI was caught in the middle of a jurisdictional battle between two unions over which it had no control. He explained that ICTSI’s Lease with the Port required Port electricians to perform the dockside reefer work and, accordingly, he could not comply with ILWU’s demands because, if he did, the Port could claim breach of contract. Ganda said that this situation felt like he had a gun to his head. Sundet replied: “And I’m holding the other gun to your head.” When Ganda protested that the Port and ILWU both had “a gun to my

⁴ The Board scheduled this hearing to address ILWU’s and IBEW’s competing claims to the work, pursuant to Section 10(k) of the Act, 29 U.S.C. § 160(k), which provides the statutory mechanism for resolving such jurisdictional disputes. As noted above, p.4 n.2, given the ongoing Section 10(k) litigation, the Board severed from the instant case the complaint allegations that involve Section 10(k). (A2166n.3.) *See Pac. Maritime Ass’n v. NLRB*, ___ F.3d ___, 2016 WL 3648378, at *2-3 (9th Cir. July 8, 2016) (explaining procedural history of the parties’ Section 10(k) dispute).

head,” Sundet retorted that Ganda had better decide “which gun’s got the bigger bullet.” Sundet then offered to talk with the Port on ICTSI’s behalf to convince it to change the Lease terms that barred ICTSI from acceding to ILWU’s demands. He did so, but the Port did not agree. (A2178-79;74-79,406-11.)

Sundet and other ILWU agents continued to threaten ICTSI over the next few days. On May 24, for example, Sundet was speaking to John Mikan, an ILWU-represented worker at Terminal 6, in the 10(k) hearing room. Sundet told Mikan, within earshot of Port electrician Lyle Denning, that ILWU was “going to shut down ICTSI.” (A2179;229-31.)

Later that day, Sundet spoke with ICTSI’s manager for Terminal 6, James Mullen, on the street outside the hearing room. Sundet expressed his anger that the Port had not fulfilled its purported promise to give ILWU the disputed work. Mullen replied that ILWU was in a tough spot, but it did not have to “melt the place down” or “hard time” ICTSI, a reference to potential work slowdowns and other job actions. Sundet replied “yes we do,” and intimated that such job actions were possible because ILWU could not allow ICTSI to “keep ILWU workers from their work.” Mullen replied that ICTSI could not give ILWU the dockside reefer work because ICTSI had “a gun to either side of [its] head” and could not break the Lease, which requires that Port electricians perform the work. Sundet insisted that breaking the Lease was exactly what ICTSI “had to do.” He also warned that

if ICTSI failed to give ILWU the disputed work, then ICTSI “might as well tell” its two largest carrier customers “to pack up” because ILWU was “going to send them packing.” (A2179;87-91.)

The next day, May 25, ILWU Local 8 President Jeff Smith demanded during a telephone call with Ganda that ICTSI assign the disputed work to Local 8-represented workers. Smith threatened that if this demand were not met, ILWU “would put ICTSI out of business” by “running every Hanjin container out of Portland.” (A2179;93-94.) ICTSI rebuffed this demand and instead followed its contractual obligation to let Port electricians perform the work. (*Id.*)

F. After Its Repeated Threats Fail To Force Reassignment of the Disputed Work, ILWU and Locals 8 and 40 Orchestrate Systematic Slowdowns and Stoppages of ICTSI’s Operations and Continue Their Threats To Shut ICTSI Down

In early June, after their initial threats had failed to acquire the disputed work, ILWU and its Locals 8 and 40 orchestrated a systematic campaign of costly work slowdowns and stoppages of ICTSI’s operations. They also refused to provide ICTSI with labor necessary to load and unload the carriers’ ships or complete equipment repairs, encouraged Local 8 and Local 40-represented employees to prevent Port electricians from performing dockside reefer work, or to perform that work themselves, and continued to threaten and file grievances against ICTSI and the carriers. Examples of these slowdowns, work stoppages, and threats (A2179-86) include:

- On June 1, ILWU-represented employees operated their container-transport machinery so slowly that certain tasks took six to eight times longer than normal to complete. No unusual conditions justified the slowdown. (A2179-80;154-56.) Likewise, on June 3, Local 8-represented crane drivers, for no apparent reason, operated their cranes at such a snail's pace that they offloaded only 3-4 containers per hour, far below the usual 25 per hour. (A2180;302-03.) *See also* A2183-84 (detailing ILWU's continuation of similar slowdown tactics).
- On June 4, Local 8-represented employees unexpectedly stopped unloading a ship and met in a breakroom with Local 8 officials. The work stoppage cost ICTSI several thousand dollars. (A2181;183-86, 189.) On June 9, a group of Local 8-represented employees took simultaneous breaks in violation of the PCLCD's "continuous operations agreement," which required them to stagger their breaks to ensure a continuous flow of containers onto the ship. As a result, the loading of the ship was halted. (A2184-85;96-97,159-65.)
- On June 6 and 10, Local 8-represented employees took their container-loading equipment out of service based on phony safety issues. (A2183&n.26,21;141,166-82,202-09.)
- On June 9, a senior Local 8 official repeated ILWU's prior threats to "run ICTSI out of town." (A2186;95.)

Further, examples of ILWU and its locals encouraging their members to perform the disputed work themselves, or to interfere with the Port electricians' rightful performance of it, include:

- On June 4, a Port electrician observed a Local 8-represented mechanic unplugging a dockside reefer. When the electrician confronted the mechanic, he simply replied that he had no choice because his orders "came from the top down." (A2180;289-94,304-05.)
- On June 5 and 6, ILWU Local 40's officials directed Local 40-represented marine clerks to assign dockside reefer work to Local 8-represented mechanics. The clerks, in turn, directed Local 8-represented

truck drivers, who were transporting reefers, to bypass the check-in block where Port electricians normally began their work on dockside reefers. This diversion significantly delayed the reefer work. The clerks then arranged for Local 8-represented mechanics to unplug several dockside reefers instead of the Port electricians. So many mechanics refused ICTSI's directives to cease performing the electricians' work and return to their normal duties that ICTSI was left without sufficient mechanics qualified to handle necessary repairs at the terminal. (A2181-82;140,151-52,193-201,215-18,220,223-24,246-49,295-98,475,477-78, 481-82.)

- At around this time, an ICTSI manager instructed a Local 40-represented marine-clerk supervisor to direct his clerks to call the electricians for all dockside reefer work on the terminal, and to direct trucks carrying reefers to the usual check-in area. Local 40's president, who was at the supervisor's desk, told ICTSI's manager that the clerks would not call the electricians because that was Local 8's work. When the manager protested, the union president replied, "we don't care if the ships sit out here or if they don't call Portland, we're not going to call the electricians to plug in reefers." (A2182;192,221-22.)

In addition, ILWU Local 8 also repeatedly refused to provide ICTSI with requested labor from its hiring halls, which resulted in serious work disruptions and operational shutdowns. For example:

- On June 4, a Local 8 official refused ICTSI's request for a "night gang" of workers from the local's hiring hall, necessary to complete work on a Hanjin ship. He did so because Local 8 was "pissed" at ICTSI for "what's going on" with the dockside reefer work. As a result, the ship left the next morning without being loaded or unloaded. (A2180;157-58,187.)
- On June 7, Local 8 refused to provide ICTSI with requested qualified mechanics and instead sent mostly "casuals"—entry level workers who were unqualified to perform the necessary repairs. The refusal to provide qualified mechanics caused the terminal to be closed for a shift at significant expense to ICTSI and the carriers. (A2183-84;99,142-48,153,210-11.) The next day, Local 8 again refused to dispatch

sufficient mechanics, this time based on fake illnesses.⁵ (A2184;100-02, 149-50,213.)

In June, carrier Hanjin, a target of ILWU's grievances, emailed the Port and ICTSI complaining about the foregoing disruptions of service at Terminal 6, which were caused by ILWU's slowdowns and other job actions against ICTSI in furtherance of its dispute with the Port over the dockside reefer work.

(A2187,2190;507-31.) Hanjin insisted that the Port "amend the lease agreement with ICTSI" to allow ILWU-represented employees to perform the dockside reefer work, and that the failure to do so will result in legal action. (A519,531.)

Other carriers also insisted that the Port and ICTSI reassign the work to ILWU members, and issued threats to bypass the Port. (A507-31.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Hirozawa and McFerran) affirmed the administrative law judge's finding that ILWU and ILWU Locals 8 and 40 violated Section 8(b)(4)(i) and ii(B) of the Act by threatening to shut down or disrupt the operations of ICTSI, a neutral employer; failing and refusing to fulfill ICTSI's timely requests for the referral of qualified employees; encouraging ILWU-represented employees to withhold their

⁵ These mysterious, unidentified illnesses cleared up when ILWU offered that the supposedly ill mechanics would return to work if ICTSI dropped its complaints against ILWU-represented workers who were discharged for performing dockside reefer work. (See A2184n.30.)

services from ICTSI, to engage in slowdowns or work stoppages against ICTSI, and otherwise interfere with ICTSI's operations or the proper work assignments of other employees; and by filing and prosecuting grievances, or threatening to engage in such conduct, against ICTSI and the neutral carriers in order to force them or any other person to cease doing business with the Port. (A2166,2192.) The Board found that ILWU took these actions against those neutral employers with the object of pressuring the primary employer in the dispute, the Port, to relinquish control over the dockside reefer work at Terminal 6 for the benefit of Local 8-represented workers. (A2166n.3.) The Board's Order requires ILWU and Locals 8 and 40 to cease and desist from the unfair labor practices found, and to post a remedial notice. (A2166,2193.)

STANDARD OF REVIEW

The Court's review of the Board's unfair-labor-practice determinations is "quite narrow." *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). It "applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the [C]ourt might have reached a different conclusion *de novo*." *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted); accord *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 42 (D.C.

Cir. 2005). Under that test, the Board's findings are "conclusive" if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Kiewit Power Constr. Co. v. NLRB*, 652 F.3d 22, 25 (D.C. Cir. 2011).

Moreover, because the Act is ambiguous on the specific issue of how to identify unlawful secondary boycotts, the question before this Court is whether the Board's findings are "based on a permissible construction of the [Act]." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The Court will, therefore, "abide [the Board's] interpretation of the Act if it is reasonable and consistent with controlling precedent." *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002). *Accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996).

Accordingly, the Board's finding of secondary activity in violation of Section 8(b)(4)(B) warrants enforcement so long as it is supported by substantial evidence and has a reasonable basis in law. *See, e.g., NLRB v. Local 638, Enterprise Ass'n of Steam Pipefitters*, 429 U.S. 507, 528 (1977) ("The Board's reading and application of [Section 8(b)(4)(B)] are long established, have remained undisturbed by Congress, and fall well within that category of situations in which courts should defer to the agency's understanding of the statute which it administers.") *Accord Local 80, Sheet Metal Workers Union v. NLRB*, 989 F.2d

515, 521 (D.C. Cir. 1993).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that ILWU engaged in unlawful secondary activity against ICTSI and the carriers to obtain dockside reefer work that the Port had for decades assigned to IBEW-represented electricians employed by the Port pursuant to its collective-bargaining agreement with IBEW. It is undisputed that ILWU engaged in coercive conduct by threatening and organizing work slowdowns against ICTSI, and filing grievances against ICTSI and the carriers, in order to pressure them to reassign the dockside reefer work to ILWU. The record shows that ILWU did so with the prohibited secondary object of coercing neutral employers who had no right to control the dockside reefer work—ICTSI and the carriers—in order to influence the labor practices of the primary employer, the Port.

ILWU defends its conduct by claiming that its objective was merely to preserve work that ILWU-represented employees traditionally performed. As the Board reasonably found, however, ILWU failed to prove both elements of a work-preservation defense. First, it could not establish that ILWU-represented employees had traditionally performed the dockside reefer work, i.e., that the work was fairly claimable by them. Second, ILWU failed to show that the targeted employers (ICTSI and the carriers) had a right to control the work. A

failure to prove either element dooms a work-preservation defense, and in this case ILWU failed to prove both.

As the Board found, ILWU could not establish the first element because ILWU-represented employees never performed the dockside reefer work at Terminal 6. It is undisputed that for decades the Port's IBEW-represented electricians exclusively performed that work. ILWU fails in its attempt to recast this case as one where changed technology caused ILWU-represented employees to lose dockside reefer work that they had once performed. Unlike the 1980's-era cases cited by ILWU, where traditional ILWU work was eliminated by technological innovation and so was fairly claimable in its changed form, no such innovation occurred here. Rather, the dockside reefer work was performed for decades in essentially the same form by the Port's IBEW-represented electricians. As the dockside reefer work is not fairly claimable, ILWU's work-preservation claim must fail.

As the Board also found, ILWU also failed to establish the second element of its work-preservation defense because the Port, not ICTSI or the carriers, had the right to control the dockside reefer work. There is no evidence that the Port ever ceded its decades-long control over the work. Rather, the Port continued to assign the work to IBEW-represented employees, consistent with its collective-bargaining obligations to the IBEW, its 40-year practice, and its Lease with

ICTSI. There is also no merit to ILWU's overbroad assertion that carriers who own reefer containers are primary employers of any employees who perform work on their containers. ILWU mistakenly bases its claim on distinguishable cases where, unlike here, the carriers directly controlled the labor that serviced their containers. Nor can ILWU rely on its multiemployer-bargaining agreement with PMA to lawfully claim the work. That agreement does not bind the Port, the employer that controls the disputed work, because it is not a PMA member. Moreover, ILWU cannot lawfully apply the agreement to pressure ICTSI to reassign work that it does not control.

The Board did not abuse its broad discretion in denying ILWU's motions to reopen the record to admit, or take administrative notice of, evidence that was not "newly discovered" as required by Board rules. Nor did the Board abuse its discretion by denying ILWU's motion to consolidate the instant case with another involving a different record of violations committed by ILWU during a later time period. All three requests were improper attempts by ILWU to introduce evidence about post-hearing events that was created well after the hearing closed.

Finally, ILWU's untimely challenge to Acting General Counsel Solomon's authority to issue the complaint is waived and jurisdictionally barred.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT ILWU VIOLATED SECTION 8(b)(4)(i) AND (ii)(B) OF THE ACT BY ITS THREATS, GRIEVANCES, WORK STOPPAGES AND OTHER ACTIONS DIRECTED AGAINST ICTSI AND THE CARRIERS, NEUTRAL EMPLOYERS, IN FURTHERANCE OF ILWU'S PRIMARY LABOR DISPUTE WITH THE PORT

A. The Act Bars a Union From Coercing Neutral (or Secondary) Employers To Further Its Dispute With the Primary Employer

Section 8(b)(4), 29 U.S.C. § 158(b)(4), the so-called secondary boycott provision of the Act, makes it an unfair labor practice for a labor organization to “to threaten, coerce, or restrain” a person not party to a labor dispute “where ... an object thereof is ... forcing or requiring [him] to ... cease doing business with any other person.” See *NLRB v. Retail Clerks Local 1001 (Safeco Title Ins. Co.)*, 447 U.S. 607, 611 (1980); *Sheet Metal Workers v. NLRB*, 989 F.2d 515, 519 (D.C. Cir. 1993). The provision implements “the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.” *NLRB v. Denver Bldg & Trades Council*, 341 U.S. 675, 692 (1951); accord *Local 812, Softdrink Workers Union v. NLRB*, 657 F.2d 1252, 1260 (D.C. Cir. 1980.) In other words, the provision prohibits a union that has a dispute with one employer (the “primary”) from pressuring other “secondary” or “neutral” employers who deal with the primary,

where the union's objective is to force the secondary to cease dealing with the primary and thus increase the union's leverage in its dispute with the primary. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 620-27 (1967); *Sheet Metal Workers*, 989 F.2d at 519.

To identify neutrals, the Board relies on its judicially approved "right of control" test. Under that test, an employer is a neutral entitled to the protection afforded under Section 8(b)(4)(B) of the Act if "when faced with a coercive demand from [a] union, [it] is powerless to accede to [the] demand except by bringing some form of pressure on an independent third party." *Int'l Brotherhood of Elec. Workers, Local 501 (Atlas Co.)*, 216 NLRB 417, 417 (1975). *Accord NLRB v. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tub, Ice Machine Gen. Pipefitters of New York & Vicinity, Union Local No. 638 (Enterprise Ass'n)*, 429 U.S. 507, 521-27 (1977); *Nat'l Woodwork Mfrs. Ass'n*, 386 U.S. at 644-45.

Thus, when a union pressures an employer that lacks the right to control the disputed work, the Board may reasonably infer that the union has a secondary objective—namely, to influence the employer that possesses the right to control. *NLRB v. Int'l Longshoremen Ass'n*, 447 U.S. 490, 504-05 (1980). As the Board has explained, the secondary nature of the union's conduct is revealed in such situations precisely because "the pressured employer cannot himself accede to the

union's wishes," so that the union's pressure is by definition "undertaken for its effect elsewhere." *Local Union No. 438, United Pipe Fitters (George Koch Sons, Inc.)*, 201 NLRB 59, 63, *enf'd*, 490 F.2d 323, 326-27 (4th Cir. 1973). As the Board and the Supreme Court have made clear, this bar on secondary conduct against a neutral employer that lacks control over the work sought by the union applies even where the union claims to be enforcing a valid collective-bargaining agreement with the neutral. *Enterprise Ass'n*, 429 U.S. at 515-18, 531.

A Section 8(b)(4)(B) violation contains two elements. First, under subsection (i), a union must strike or refuse to handle or work on goods or perform services, or induce any employee to do likewise. Or, under subsection (ii), a union must engage in conduct that threatens, coerces, or restrains an employer or other person engaged in commerce. Second, under subsection (B), an object of the union's conduct must be to force or require an employer or person not to do business with, or handle the products of, another person. *Sheet Metal Workers*, 989 F.2d at 519; *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 742-743 (1993), *enforced mem.*, 103 F.3d 139 (9th Cir. 1996).

Threats, work stoppages, and slowdowns, as well as filing grievances against a neutral employer, constitute coercion. *SEIU Local 32B-32J v. NLRB*, 68 F.3d 490, 495 (D.C. Cir. 1995); *Teamsters Local 25 v. NLRB*, 831 F.2d 1149, 1154-55 (1st Cir.1987); *Associated General Contractors of Cal. v. NLRB*, 514

F.2d 433, 438-39 (9th Cir. 1975). Regarding the prohibited objective, it is that of forcing the targeted, secondary employer to cease doing business with any other person, which is usually the primary employer, for the purpose of influencing the primary employer's labor policies. *See Sheet Metal Workers*, 989 F.2d at 519; *NLRB v. Hotel Employees Local 531*, 623 F.2d 61, 65-66 (9th Cir. 1980).

The term "cease doing business" is liberally construed. For a violation to be found, it is not required that the union's object be the total cessation of business between the neutral and primary employer. Rather, a "cease doing business objective" may be found where the union attempts to cause disruptions and changes in the method of doing business short of total cessation. *See, e.g., NLRB v. Operating Engineers Local 825*, 400 U.S. 297, 304-05 (1971). In determining whether a union has a proscribed secondary object, the Board may draw reasonable inferences from the foreseeable consequences of the union's conduct, the nature of the acts themselves, and the totality of the circumstances. *ILA v. Allied Int'l, Inc.*, 456 U.S. 212, 224 & n.21 (1982); *Local 812, Soft Drink Workers Union*, 657 F.2d at 1261. The secondary object need not be the union's only object for the activity to violate the Act. *Longshoremen v. Allied Int'l, Inc.*, 456 U.S. 212, 224 & n.21 (1982); *District 29, United Mine Workers v. NLRB*, 977 F.2d 1470, 1471 (D.C. Cir. 1992).

Nevertheless, if a union can establish that its true objective is to preserve

for bargaining unit employees work that they have traditionally performed, it is engaged in primary activity that does not violate Section 8(b)(4)(B). *See NLRB v. Longshoremen (“ILA F”)*, 447 U.S. 490, 504 (1980). To establish this primary, work-preservation objective, the union must show two elements: that the employees it represents have traditionally performed the work, i.e., that the work is “fairly claimable” by them, and that the contracting employer has the power to give the employees the work in question, i.e., the aforementioned “right of control” test. *Id.* at 504-05. An unlawful, secondary object is found if the union cannot establish *either* element of the test. *See id.* (“if the contracting employer has no power to assign the work, it is reasonable to infer that the [union’s conduct] has a secondary objective, that is, to influence whoever does have such power over the work”); *AGC of California*, 514 F.2d at 438; *SEIU Local 32B-32J*, 68 F.3d at 495; *UFCW Local 367*, 333 NLRB 771, 773 (2001).

B. The Board Reasonably Found that ILWU Engaged in Unlawful Secondary Conduct Against ICTSI and the Carriers, and Properly Rejected ILWU’s Work-Preservation Defense

The Board reasonably concluded that ILWU’s threats, work stoppages and other job actions against ICTSI, and its grievances against ICTSI and the carriers, violated Section 8(b)(4)(i) and (ii)(B). (A2187-91.) It is undisputed that this conduct was coercive under Section 8(b)(4). Further, as shown below (pp.33-42), the Board properly found that because the Port, and not ICTSI or the carriers,

controlled the dockside reefer work, ILWU's conduct had the unlawful secondary objective of coercing neutrals (ICTSI and the carriers) to influence the Port (the primary employer) to reassign the work to ILWU.

Indeed, ILWU does not deny that it engaged in this conduct, or contest that its actions would be unlawfully coercive within the meaning of Section 8(b)(4) if motivated by an unlawful, secondary "cease doing business" objective. Rather, its sole defense to the Board's unfair labor practice finding is its claim that it had a primary, work-preservation objective. Because ILWU fails to show both elements of that defense—namely, that the employees it represents have traditionally performed the dockside reefer work, and that ICTSI or the carriers had the right to control the work—the Board properly rejected it. (A2188-89.)

1. ILWU's work-preservation claim fails because it cannot show that ILWU-represented employees traditionally performed the dockside reefer work

Initially, ILWU cannot satisfy the first element of its defense—that its employees traditionally performed the dockside reefer work. It is undisputed that, as ILWU concedes (Br.4,7-8,13-14), the Port electricians have exclusively performed the work since 1974. It is also plain that the work "has never been a function performed by the [ILWU-represented] employees at [Terminal] 6." (A2188.) Accordingly, as the Board reasonably found (A2188-89), because the ILWU-represented employees have never done the work, it is not fairly claimable

by them, and ILWU's work preservation claim fails. *See Local 32B-32J, Service Employees Int'l Union*, 68 F.3d at 494 (rejecting work-preservation claim by employees who had "not meaningfully done" the work in question).

Notwithstanding its concession, ILWU (Br.25-27,31-36) seeks to manufacture ambiguity where none exists by attempting to recast this case as one where changed technology caused ILWU-represented employees to lose work they had once performed. Thus, ILWU cites *ILA I* and *NLRB v. International Longshoremen's Association*, 473 U.S. 61 (1985) ("*ILA I*"), which dealt with the different issue of how modernization in the maritime shipping industry hastened the diminution of work traditionally done by longshoremen. In relying on those cases, ILWU asserts that it makes no difference that its members did not traditionally perform the dockside reefer work at issue here because such work purportedly represents a changed form of work they once performed.

This argument is baseless. Unlike in the *ILA* cases, where the longshoremen previously had performed work that was the functional equivalent of loading containers, the dockside reefer work at Terminal 6 neither derived from work once performed by ILWU members nor caused a reduction in the kind of work they had previously performed. Thus, *ILA I*, 447 U.S. at 496, 505, 507, 509-10, involved a "complex case of technological displacement" and "massive" technological change that drastically reduced traditional longshoremen work.

Similarly, *ILA II*, 473 U.S. at 64-65, 79-80, involved work eliminated by innovation, with the union seeking work it would have had but for the technological change. By contrast, nothing of the sort occurred here.

Accordingly, the Board reasonably found that ILWU had an unlawful, secondary object—namely, to acquire work it had never performed. *See, e.g., UFCW Local 367*, 333 NLRB 771, 773 (2001) (finding unlawful work-acquisition objective where the record was “devoid of evidence indicating any diminution of unit work”).

Simply put, unlike the *ILA* cases, the instant case does not involve the creation of new work based on technological advancement. The dockside reefer work does not stem from innovations that are the “functional equivalent” of work traditionally performed by ILWU-represented workers. *ILA I*, 447 U.S. at 510. Indeed, while *ILA I* involved a technological “revolution,” 447 U.S. at 494, this case involves the opposite—a 40-plus year practice of Port electricians performing the same dockside reefer work at Terminal 6, work never performed by ILWU-represented employees.

There is, therefore, no basis for ILWU’s further assertion (Br.25-27,31-36) that the Board erroneously failed to apply the “functional equivalence” analysis set forth in the *ILA* cases. The “complex case of technological displacement” at issue in those cases entailed a more “careful analysis of traditional work patterns”

than is required in a simple case like the instant one. *ILA I*, 447 U.S. at 507.

Here, as shown, there is no technological innovation that would necessitate a deeper analysis of the “work traditionally performed” element. Nor is there any complexity in addressing the admitted fact that, for over 40 years, the Port electricians and not ILWU workers performed the dockside work of plugging and unplugging reefers at Terminal 6. *See, e.g., SEIU Local 32B-32J*, 68 F.3d at 494 (rejecting work-preservation claim where unit employees had not performed the disputed work).

It follows that this case is also unlike *Bermuda Container Line, Ltd. v. Int’l Longshoremen’s Union*, 192 F.3d 250 (2d Cir. 1999), which ILWU incorrectly cites (Br.21,23,25,49). There, the court found a lawful work-preservation objective where the neutral employer’s proposed relocation threatened to “deplete the number of longshore jobs available to ILA workers.” *Id.* at 257. Here, in contrast, the Port electricians’ decades-long performance of dockside reefer work at Terminal 6 could not possibly threaten to “deplete the number of longshore jobs available” because it was never the ILWU’s work to begin with.

For similar reasons, ILWU fares no better in positing (Br.34) the existence of a “coast-wise” PCLCD bargaining unit that became entitled to the dockside reefer work at Terminal 6. ILWU bases its claim (Br.36,47-48) on PCLCD Section 1.72, which purportedly provides ILWU with a claim to certain work as

compensation for the diminution in traditional ILWU work due to “encroaching robotics and other labor saving devices being introduced by PMA carriers.” (A1040 §1.72.) ILWU’s reliance on this provision is misplaced. As just shown, the historic performance of the disputed dockside reefer work by the Port electricians at Terminal 6 involved no diminution of work traditionally performed by ILWU-represented employees. Nor was there any technological advance regarding the dockside reefer work that threatened to take away traditional ILWU work. Thus, the ILWU was unlawfully “reach[ing] out to monopolize jobs or acquire new job tasks when [the ILWU’s] own jobs [we]re not threatened.” *Nat’l Woodwork*, 386 NLRB at 630-31.

The fatal flaw in the ILWU’s work preservation claim is therefore plain given the facts here. Its conduct was not aimed at preventing the depletion of traditional bargaining unit work. No such depletion was threatened, or even possible, as it was not their work to begin with. *See Longshoremen Local 1291 (Holt Cargo Sys.)*, 309 NLRB 1283, 1285-1286 (1992) (finding Section 8(b)(4)(ii)(B) violation and rejecting work-preservation defense where union failed to show that targeted employer’s unit employees had ever performed the work sought).

In sum, because ILWU cannot satisfy the threshold element of a work-preservation defense by showing that its members traditionally performed the

disputed work at Terminal 6, ILWU's unlawful secondary objective is established. Accordingly, ILWU's threats, slowdowns, and grievances were not intended to preserve unit work; instead, their conduct was aimed at forcing ICTSI and the carriers to put pressure on the Port to *acquire* the dockside reefer work for ILWU members. "This is a classic secondary boycott." *SEIU Local 32-B-32-J*, 68 F.3d at 395.

2. ILWU's work-preservation claim also fails because the Port, not ICTSI or the carriers, controls the disputed work

In any event, as the Board correctly concluded (A2189), ILWU also fails to satisfy the second element needed to establish a work-preservation defense—namely, that the targeted employers control the disputed work. *See* pp.24, 27-28 above. Substantial evidence supports the Board's finding that the Port, and not ICTSI or the carriers, is the primary employer in this dispute over the assignment of the dockside reefer work at Terminal 6. (A2187-91.) Given ILWU's failure to establish that ICTSI and the carriers control the electricians' work, ILWU cannot establish its work-preservation defense.

Indeed, ILWU does not directly dispute the Board's underlying factual finding that "[t]hroughout the operation of T[erminal] 6 as a container facility, the Port has always controlled the dockside reefer work." (A2189.) Nor does it contest the Board's conclusion (*id.*) that the terms and conditions of the Port

electricians, who have performed that work for decades, are controlled solely by the Port as their direct employer.

The contractual relationships and decades-long practice in place at Terminal 6 amply support the Board's conclusion that the Port controls the dockside reefer work. As shown (pp.8-10), Sections 2.8 and 3.23(a) of the Lease between the Port and ICTSI make clear that ICTSI cannot perform any of the work done by Port employees pursuant to the DCTU Agreement. The Lease also makes it clear that Port employees must continue to perform such work. The Board reasonably concluded that the Lease, when viewed in light of the credited testimony as well as the historic practices it was intended to preserve, clearly reserves the dockside reefer work for the Port electricians, who have exclusively performed that work for decades. As the Board found, "[n]o evidence shows that the Port ever relinquished its control at any time to anyone over the historic practice of using Port electricians to use the dockside reefer work." (A2189.) The Ninth Circuit presaged the Board's finding, noting the Board was likely to (and could reasonably) find that "[t]he Port expressly retained the right to control the disputed [dockside reefer] work when it leased terminal operations to ICTSI." *Hooks ex rel*

v. *ILWU*, 544 F. App'x 657, 658 (9th Cir. 2013) (affirming in relevant part the district court's grant of a preliminary injunction in this case).⁶

ILWU fails in its fleeting, one-footnote attempt (Br.42 n.14) to avoid this substantial evidence (and the well-supported views of the Board and the Ninth Circuit) and create ambiguity in the Lease where none exists. It observes that the Lease does not explicitly reference “dockside reefer work,” which it views as an ambiguity requiring resort to extrinsic evidence. This argument fails. The plain terms of the Lease refer to DCTU employees, which admittedly includes the Port electricians, and requires the parties to preserve the traditional work of such employees—including their dockside reefer work. This view is confirmed by extrinsic evidence, namely the over 40-year practice of the Port assigning that work to those employees, which it continued after signing the Lease.

Accordingly, as the Board reasonably concluded, the Port “continued to treat the subject as one over which it had full control when it entered into the T[erminal] 6 [L]ease with ICTSI in 2010 with provisions that maintained the historic work jurisdiction over the DCTU unions.” (A2188.)⁷

⁶ ILWU tries in vain to devalue (Br.44 n.16) the Ninth Circuit's finding as the product of a “deferential standard of review.” However, this Court's review of the Board's factual findings and interpretation of the Act is also deferential. *See* pp.18-19, above. Accordingly, it is relevant to this Court's review that another court determined that the Board could reasonably make the findings it made here.

⁷ In this regard, ILWU does not attempt to rebut the credited testimony of Port Chief Commercial Officer Sam Ruda, a direct participant in the Lease

Contrary to ILWU's contention (Br.36-42), *ILA II*, 473 U.S. at 74 n.12, and related cases do not establish that the carriers have the right to control the dockside reefer work. ILWU overreaches in relying on those cases from the 1980's, which involved off-dock stuffing and unstuffing (i.e., loading and unloading) of material from containers, and the loss of traditional longshore jobs due to mechanization, neither of which is at issue here. Thus, as the Ninth Circuit aptly concluded, those cases "do not support the conclusion that the carriers control this work at this time." *Hooks*, 544 F. App'x at 659 n.2.

For example, ILWU misleadingly quotes a footnote in *ILA II*, 473 U.S. at 74 n.12, stating that "the Board and the Court of Appeals have unanimously concluded that the longshoremen employers, marine shipping companies, have 'the right to control' container loading and unloading work by virtue of their ownership of leading control of the containers." (Br.38.) ILWU, however, fails to mention that the footnote refers to factual conclusions involving a different type of work based upon a specific evidentiary record in the case before it. As noted, the *ILA II* cases involved the loading and unloading of cargo from containers within 50 miles of the dock, not the plugging and unplugging of reefers on a dock. *See Int'l Longshoremen's Ass'n (Dolphin Forwarding, Inc.)*, 266 NLRB 230 (1983).

negotiations, who testified that the Lease provisions were designed by the Port to reserve the disputed work for the Port electricians, and that, in practice, it did exactly that. (*See, e.g.*, A330-31,334-35,450-51.)

The carriers in those cases “sometimes use[d] their own employees” to perform that work, and sometimes released their containers to other companies for stuffing or unstuffing. *Id.* at 232-34. By contrast, in the instant case, there is absolutely no evidence that the carriers have ever used their own employees to perform the disputed dockside reefer work at Terminal 6. In short, the language quoted by ILWU from *ILA II* addresses a very different factual scenario involving a different job function and carriers that possessed significant direct control over assigning the work, unlike the carriers here.

Given these differences, the district court, in granting a preliminary injunction in this case, properly refused to give weight to the footnote in *ILA II*, 473 U.S. at 74 n.12, concluding that it “cannot rely on a statement in a 25-year old case that was made on the basis of different facts and different contracts to determine that the Carriers here have the right to control the [dockside] reefer work at Terminal 6 today.” *Hooks ex rel. NLRB v. ILWU*, 905 F.Supp.2d 1198, 1211 & n.7 (D. Oregon 2012). In affirming, the Ninth Circuit likewise appropriately declined to give weight to the footnote, concluding that, “[a]s the district court correctly noted, the passing comment does not alone support the factual conclusion that these carriers have the right to control the work at this port at this time.” *Hooks ex rel. NLRB*, 544 F. App’x at 658 n.2.

For similar reasons, ILWU's reliance (Br.39) on *Longshoremen ILWU (California Cartage)*, 278 NLRB 220, 221-24 (1986), is misplaced. Like the *ILA* cases, *California Cartage* involved the stuffing and unstuffing of containers onto a vessel. *Id.* at 222. The agreement between ILWU and PMA in that case required the carriers to either establish "their own container freight stations on or adjacent to the docks within the work jurisdiction of the ILWU," or to use contractors that employ ILWU members to perform the work. *Id.* at 221. As a result, the carriers, which owned or leased the containers, had the right to control the identity of the work force performing the stuffing and unstuffing. *Id.* at 223.

The facts in *California Cartage* are a far cry from the instant case, where the Port, as the owner of Terminal 6, leased the terminal to an operator, ICTSI, which is required to utilize the Port's electricians to perform the disputed work. The carriers were not, therefore, privileged to enter the Port's property and perform the disputed work with their own employees, nor are they privileged to dictate to the Port or ICTSI the employees who should perform the work. In these circumstances, the Board here, like the Ninth Circuit in *Hooks ex rel. NLRB*, 544 F. App'x at 658-59, correctly found that neither ICTSI nor the carriers controlled the assignment of the work at issue. (A2189-90.) Thus, *California Cartage* is inapposite, and says little, if anything, about the control over the disputed work in this case.

For similar reasons, ILWU errs in claiming (Br.38-41) that the carriers' ownership of the reefers gives them the right to control the dockside reefer work. In the cases cited by ILWU (Br.38-41), the shipping companies that controlled the stuffing and unstuffing of containers employed the longshoremen who had performed the traditional on-pier cargo-handling work. Indeed, the right-to-control finding in those cases stemmed from the shipping companies having created the technology that replaced their own employees' traditional work. *See, e.g., ILA (Dolphin Forwarding)*, 266 NLRB 230, 232-34 (1983), *enforced in relevant part*, 734 F.2d 966, 978 (4th Cir. 1984), *aff'd*, 473 U.S. at 74 n.12. By contrast, as shown above (pp.6, 28-29), the dockside reefer work at Terminal 6 has for decades been exclusively performed by IBEW-represented electricians working for the Port. Nor, as shown, is that work the result of any technological development that caused a reduction of the work performed by ILWU-represented employees. Because the Port reserved the dockside reefer work for its employees in the Terminal 6 Lease, ICTSI and the carriers do not have the right to control that work.

At bottom, ILWU has not identified any means by which the carriers or ICTSI directly control assignment of the disputed work to a particular group of employees. According to ILWU (Br.39-41), however, the only reason the disputed work exists is because the carriers, serving as ICTSI's customers, own or

lease the reefers that need to be serviced. ILWU's bare-bones "customer equals primary" argument would strip the Act's secondary boycott protections from every customer with physical custody or ownership of property that is the subject of work sought by a union.⁸ As the Ninth Circuit explained in rejecting this very argument, the fact that the carriers own or lease the reefers on which the Port electricians perform work in no way shows they have direct authority to assign the work to a particular group of employees. As the court aptly stated, "ILWU's argument regarding the shipping carrier's ability to bypass the Port conflates the carrier's control over their containers with the legal question whether they have the 'right to control' the assignment of the work" at the Port. *Hooks ex rel. NLRB*, 544 F. App'x at 658 (quoting *Enterprise Ass'n*, 429 U.S. at 537).

Similarly, the June 2012 email directives cited by ILWU (Br.40-41) fail to show that the carriers control the dockside reefer work. (A2187;507-31.) In those emails, several carriers simply implored the Port and ICTSI to reassign the reefer work to ILWU-represented employees. (A2187.) Indeed, the carriers' emails suggest they knew the Port controlled the disputed work. Thus, they asked the Port to modify the Lease to allow for the reassignment of the work to ILWU-represented employees. (A519,531.) Accordingly, nothing in the carriers' emails

⁸ ILWU's argument is akin to claiming that a vehicle owner is the primary employer of mechanics who service his car merely because he can bypass a particular auto-shop or refuse to "release" his car to it.

or conduct establishes that the Port relinquished its historic right to control the dockside reefer work. Indeed, if the carriers controlled the work, they presumably would not have had to ask the Port or ICTSI to reassign it.⁹

The fallacy of ILWU's argument is further laid bare by its claim that the carriers' purported right to control the disputed work lies in their "power to interfere" (Br.41) with the Port's assignment of it. This view, if adopted, would strip the Act's bar on secondary boycotts of any meaning. Indeed, as the Board observed (A2190), the carriers made no attempt to interfere with assignment of dockside reefer work until they began receiving threats and grievances from the ILWU. Thus, the "commonsense inference" is that ILWU's job actions were intended to pressure secondary employers—ICTSI and the carriers—to cease doing business with the primary employer—the Port. *Hooks ex rel. NLRB*, 905 F. Supp. at 1212 (internal citation and quotation marks omitted).

ILWU also gains no ground in relying (Br.27-31) on Section 1 of the PCLCD (its multi-employer agreement with PMA) and the 2008 Letter of Understanding ("LOU") between ILWU and PMA regarding a "red-circling process" that purportedly changed the allocation of dockside reefer work at

⁹ In addition, ILWU's conduct shows it knew the Port was the primary employer. Thus, ILWU official Sundet claimed to have a deal with the Port to get the disputed work. See p.13. And, when ICTSI said it could not give ILWU the work, Sundet said he would get the Port to change the lease to allow for the reassignment of the work to ILWU. *Id.*

Terminal 6. To make such a change, ILWU and PMA would have needed the consent of the Port, which controlled the dockside reefer work but was not a PMA member bound to the PCLCD and the 2008 LOU. As ILWU acknowledges (Br.30), it is a fundamental tenet of labor law that the authority of a multi-employer bargaining agent like the PMA is consensual in nature. *Charles D. Bonanno Linen Srv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982). Yet, as ILWU concedes (Br.28), the Port never granted its consent to the arrangement that ILWU and PMA relied on here in purporting to reassign the dockside reefer work to ILWU-represented workers. That arrangement, which is set forth in the 2008 LOU, ended the subcontracting of all maintenance and repair work, except at locations where a PMA member had an existing collective-bargaining agreement with another union to perform that work. (A2174-75, 2188.) Excepted locations, labeled as “red-circled,” did not include Terminal 6 because, as ILWU acknowledges (Br.28), the Port, as non-PMA member, was left out of the red-circling process despite having a qualifying non-ILWU agreement with the DCTU. (A2174-75, 2188.) Thus, as the Board explained (A2188-89), the red-circling arrangement was achieved through a process that ILWU and PMA invented at the bargaining table in 2008—without the Port’s involvement or consent.

It follows that ILWU and PMA had no authority to make that arrangement between themselves (and bargain away the rights of another union, the IBEW) because the Port, which clearly controlled the work at the time, was neither involved in those discussions, nor a PMA member, and its consent was not otherwise obtained. As the Board explained, the “Port never consented . . . to the LOU arrangement as to Portland terminals”; to the contrary, the Port continued to treat the performance of dockside reefer work as a subject “over which it retained full control” when it entered the Lease with ICTSI in 2010. (A2188.) Hence, the 2008 LOU red-circling arrangement is not binding on the Port and is “ineffective at the very least as to the T[erminal] 6 container operation.” (*Id.*) Simply put, ILWU errs in relying on its agreements with PMA to terminate the rights of parties not bound by those agreements; its stance cannot be squared with the consensual nature of multi-employer bargaining. (A2188-89.)

In response, ILWU ignores the foregoing facts and legal principles to make the breathtaking claim (Br.29-30) that it could, without the Port’s consent, negotiate with PMA to take work historically controlled by the Port. For this, ILWU mistakenly relies (Br.29-30) on *NLRB v. ILWU Local 50*, 504 F.2d 1209, 1215 (9th Cir. 1974) (“*Local 50*”), a case it selectively quotes in a misleading way. *Local 50*, however, undermines ILWU’s claim because it confirms the consensual nature of multi-employer bargaining.

As an initial matter, *Local 50* did not address the issue here—namely, whether a union has a valid work-preservation defense to a finding that it violated the Act’s secondary boycott provisions by targeting neutral employers. Instead, *Local 50* addressed whether the ILWU or another union should have been awarded disputed work under Section 10(k) of the Act, which involves consideration of several factors, such as the unions’ relative skill and efficiency in performing the work, that are not at issue here. *Id.* at 1213.

In any event, nothing in *Local 50* supports ILWU’s work-preservation claim. There, ILWU claimed the disputed work based on an arbitration award interpreting its agreement with PMA, and the other union relied on another agreement to claim the same work. *Id.* As ILWU observes (Br.29), the court recited the general principle that a contract should be read in light of the interpretation given by the parties to it. 504 F.2d at 1214-15. Accordingly, the court held there was no reason to ignore the parties’ interpretation of their own ILWU-PMA agreement, which included the employer as a PMA member. 504 F.2d at 1215. For this purpose it was immaterial, the court explained, that the rival union was not a party to the arbitration that interpreted the ILWU-PMA agreement. *Id.*

The court did not, however, make the much different holding, pressed by ILWU here, that ILWU and PMA could agree between themselves to reassign

work historically controlled by a non-PMA member employer without that employer's consent. To the contrary, the court emphasized the consensual nature of multiemployer bargaining and explained that the employer there was bound by the ILWU-PMA agreement because (unlike the Port) it was a PMA member. *Id.* at 1215. The court further explained that the employer could not, however, be bound to another agreement to which it was not a party and had not given its consent. *Id.* Thus, the cited case hardly supports ILWU's bold and starkly contrary assertion that it may, without the non-member Port's consent or involvement, agree with PMA to reassign work historically controlled by the Port.¹⁰

Likewise, it is of no moment whether, as ILWU claims (Br.28-29), the contract stevedores that preceded ICTSI at Terminal 6 were PMA members. Rather, the relevant fact remains that the Port, which controls the disputed work, was not a PMA member or otherwise bound by the PCLCD and the 2008 LOU. Further, as the Board explained (A2189), any claim that ICTSI became the primary employer in this dispute when it subsequently joined the PMA, and thereby purportedly became obligated to assign dockside reefer pursuant to the PCLCD, is "fatally flawed" because the parties to the PCLCD had no authority

¹⁰ Nor is the instant case one where "the only applicable collective-bargaining agreement assigns the disputed work to the Longshoremen." *Id.* at 1222. Rather, the DCTU agreement and the Lease require the Port to assign the disputed work to IBEW-represented electricians.

when they entered the 2008 LOU red-circling arrangement to restructure the Port's historic assignment of dockside reefer work to its IBEW-represented electricians. Simply put, ILWU cannot lawfully apply the PCLCD to pressure ICTSI to reassign work that it does not control.¹¹

Finally, the Board reasonably rejected ILWU's suggestion (Br.46) that ICTSI and the carriers purposely contracted away their right to control by initiating restrictions on work assignments that gave rise to ILWU's demands. (A2190.) As shown, it is undisputed that Port employees had performed the dockside reefer work for nearly 40 years before ILWU tried to lay claim to it. Moreover, ICTSI was not even a PMA member when it entered into the Lease with the Port. In these circumstances, the Board correctly found that the record

¹¹ ILWU errs in citing (Br.27 n.10) a purportedly inconsistent administrative law judge's decision, *ILWU (Kinder Morgan)*, 2014 WL 3957246 (Aug. 13, 2014). Because the Board has not reviewed that decision, it lacks precedential value. *Stanford Hospital & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003); *Colgate-Palmolive Co.*, 323 NLRB 515, 515 n.1 (1997). In any event, the case is off point. It involved ILWU's efforts to enforce the PCLCD against a PMA-member employer to get it to assign to ILWU work that the employer had the right to control and no obligation to assign to another union. *Kinder*, 2014 WL 3957246, *12-16.

ILWU likewise errs in relying (Br.48-51) on a purportedly inconsistent Advice Memorandum in *ILA (Greenwich Terminals)*, 2014 WL 3887574 (Jul. 5, 2014). Advice Memoranda issued by the Board's General Counsel do not constitute Board law or precedent. *Geske & Sons Inc.*, 317 NLRB 28, 56 (1995), *enforced*, 103 F.3d 1366 (7th Cir. 1997). *Accord Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (rejecting as "rather silly" employer's argument that the Board's decision was unreasonable because it conflicted with a General Counsel advice memorandum).

contained “absolutely no support” for any claim “that the [L]ease protections for the historical work were a subterfuge designed to avoid the PCLCD Section 1 requirement that all maintenance and repair work including the dockside reefer work be assigned ILWU workers.” (A2190.) *Accord Hooks ex rel. NLRB*, 544 F. App’x at 659 (reaching the same conclusion).

In sum, ample evidence supports the Board’s finding that the Port has the right to control the dockside reefer work. Because neither ICTSI nor the carriers controls the work, ILWU’s grievances, threats, work stoppages, and slowdowns had the unlawful secondary objective of coercing neutral parties—ICTSI and the carriers—to influence the Port to assign the work to ILWU members. *See ILA I*, 447 U.S. at 504-05; *Enterprise Ass’n*, 429 U.S. at 530; *AGC of Cal.*, 514 F.2d at 437-38 (secondary objective found where union filed grievance against neutral employer that did not control the work to cause it to cease doing business with non-signatory cleaning contractor); *Teamsters Local 25*, 831 F.2d at 1152-53 (unlawful secondary boycott where union targeted employer that did not control work to pressure that employer to influence primary employer to reassign it).

II. THE BOARD PROPERLY EXERCISED ITS DISCRETION IN DENYING ILWU’S REQUESTS TO REOPEN THE RECORD, TAKE ADMINISTRATIVE NOTICE, AND CONSOLIDATE CASES

ILWU challenges (Br.51-54) the Board’s denial of its motion to reopen the record to introduce new evidence that was created long after the close of the

hearing in this case. As shown below, this claim fails because the Board acted within its discretion, and in accordance with precedent construing applicable Board rules, in denying ILWU's request. Further, ILWU fails to show (Br.51,54) that the Board abused its discretion in denying its additional requests to take administrative notice of the transcript and evidence in *ILWU (ICTSI)*, 363 NLRB No. 47 (2015), 2015 WL 7750748 ("*ILWU II*"), and to consolidate the two cases. All three requests were improper attempts by ILWU to introduce evidence that was created well after the close of the hearing in this case.

To begin, ILWU faces an uphill battle in challenging the Board's denial of the motion to reopen the record—an "extraordinary" request. 29 C.F.R. § 102.48(d)(1). Accordingly, the Court reviews the Board's denial of such a motion only for an abuse of its discretion. *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1284 n.10 (D.C. Cir. 1999). Further, the Board's interpretation of its rules and regulations is given "controlling weight" unless it is "plainly erroneous or inconsistent with the regulation itself." *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996); accord *Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008). The Board's ruling here should be affirmed because it is consistent with Board rules and precedent applicable to motions to reopen the record, and involved no abuse of discretion.

On June 25, 2013, nearly a year after the record closed, ILWU filed a motion with the judge seeking to reopen the record so that it could submit documents that purportedly contained new evidence addressing ICTSI's and the carriers' asserted control over the disputed work. The proffered evidence, however, involved events that postdated the time period at issue in this case. Moreover, as the Board observed, the motion acknowledged that the evidence ILWU sought to introduce was "created . . . months after the close of the hearing." (A2166n.3;1668.) As the Board explained (*id.*), it is settled that evidence is not "newly discovered" under Section 102.48(d)(1) of the Board's Rules and Regulations, 29 C.F.R. § 102.48(d)(1), if, as is admittedly the case here, it came into existence after the close of the hearing. *See Allis-Chalmers Corp.*, 286 NLRB 219, 219 n.1 (rejecting request to reopen record to introduce evidence that was created after hearing closed). Instead, evidence is "newly discovered" only if it concerns facts which existed "at the time of the hearing before the Board." *NLRB v. Cutter-Dodge, Inc.*, 825 F.2d 1375, 1380-81 (9th Cir. 1987). *Accord Manhattan Ctr. Studios, Inc. v. NLRB*, 452 F.3d 813, 816 (D.C. Cir. 2006) (pursuant to Section 102.48(d)(1) evidence must be "in existence at the time of the hearing"); *Fitel/Lucent Techs., Inc.*, 326 NLRB 46, 46 n.1 (1998) (same). Accordingly, proffered evidence involving facts allegedly "arising after the hearing" cannot qualify as "newly discovered evidence." *APL Logistics, Inc.*, 341 NLRB 994, 994

& n.2 (2004), *enforced*, 142 F. App'x 869 (6th Cir. 2005); *Machinist Lodge 91 (United Techs.)*, 98 NLRB 325, 325 n.1 (1990), *enforced*, 934 F.2d 1288 (2d Cir. 1991). Thus, the Board acted well within its discretion, and in accordance with precedent, in upholding the judge's denial of ILWU's motion to introduce evidence that was created after the hearing closed and involved post-hearing events.

Given the foregoing precedent and the Board's apt analysis, ILWU errs in asserting that the Board failed to "explain why it rejected the [proffered] evidence." (Br.52.) Rather, as just shown, the Board properly followed settled law and explained why it declined to reopen the record to admit evidence that was created long after the hearing closed. None of the cases cited by ILWU (Br.52) even address this scenario, much less require the Board to admit such evidence.

ILWU gains no more ground in claiming (Br.53) that the Board should have granted its motion to reopen under Section 102.35 of the Board's Rules and Regulations, which sets forth the administrative law judge's overall hearing authority, including the power to reopen the record "subject to the [Board's] Rules and Regulations." 29 CFR § 102.35(a). Contrary to ILWU's suggestion (Br.53), Section 102.35(a), does not create a "more liberal" standard than Section 102.48(d)(1). Instead, the two sections must be read in tandem, with Section 102.35(a) recognizing the judge's general authority to reopen the record, and

Section 102.48(d)(1) addressing the standard to be applied in exercising such authority. Thus, the NLRB Division of Judge's Bench Book, Section 10-400, Motions to Reopen Record, explains this connection where it notes that the standards for ruling on motions to reopen the record pursuant to Section 102.35(a)(8) are "set out in decisions addressing the Board's similar authority under Section 102.48(d)(1)." Bench Book Section 10-400, available at www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/NLRB%20Bench%20Book%202015.pdf. Section 10-400 further notes that, to be admitted under Section 102.35, evidence must be "newly discovered"—and that "evidence that did not exist at the time of the trial because it relates to events that occurred after the close the trial is not 'newly discovered.'" *Id.* (quoting *Allis-Chalmers Corp.*, 286 NLRB at 219 n.1).

ILWU misses its mark in citing (Br.53) an administrative law judge's decision to reopen the record for evidence that the parties had "inadvertently omitted from exhibits previously introduced into evidence" at the hearing. *Sunland Constr. Co.*, 311 NLRB 685, 687 (1993). In those very different circumstances, the judge let the evidence in even though it was "not newly discovered or previously unavailable." *Id.* at 687 n.8. In any event, only the portions of a judge's decision reviewed and adopted by the Board are precedential. *See* cases cited above, p.46 n.12. As the Board's decision in

Sunland, 311 NLRB 685 (1993), contains no indication that it reviewed the judge's ruling on reopening the record, his ruling lacks precedential value.

Likewise, ILWU gains no ground in citing (Br.53) *IBEW Local 648 v. NLRB*, 440 F.2d 1184 (6th Cir. 1971), a distinguishable case where the court upheld an administrative law judge's grant of a request, made 11 days after the hearing closed, to admit an inadvertently omitted collective-bargaining agreement that indisputably existed at the time of the hearing. *Id.* at 1184-85. By contrast, ILWU sought to introduce a host of documents involving post-hearing events—documents that were created months after the hearing closed. Accordingly, the 1971 case is of no help to ILWU here.

For similar reasons, the Board properly denied ILWU's motion, which it filed months after the administrative law judge issued his decision, to take administrative notice of the transcript and evidence in *ILWU II*, a case involving a different record of violations committed by ILWU during a later time period. The Board did not abuse its discretion in denying this motion, which amounted to a further improper attempt to introduce evidence about post-hearing events that was created after the hearing closed. (A2166n.3.) *See generally Kentucky River Cmty. Care, Inc. v. NLRB*, 193 F.3d 444, 452 (6th Cir. 1999) (the Board has broad authority over its hearings and its decision to exclude evidence is reviewed only

for abuse of discretion), *aff'd in part, rev'd in part on other grounds*, 532 U.S. 706 (2001).

Nor did the Board err in denying ILWU's June 24, 2014 motion to consolidate the instant case with *ILWU II*. (A2159.) That motion likewise sought to place extra-record evidence about post-hearing events before the Board, and if granted could have unnecessarily delayed both proceedings. Moreover, ILWU fails to note that, in *ILWU II*, the Board properly took administrative notice of any evidence and findings in the instant case to the extent they were relevant in the second case. The Board also included the record in the instant case as an exhibit in the record in *ILWU II*. *See* 363 NLRB No. 47, slip op. 1 n.3, 3-4 & n.4, 2015 WL 7750748, *1 n.3, *2 n.4. *See, e.g., United Aircraft Corp.*, 180 NLRB 278, 278 n.1 (1969) (denying motion to consolidate cases and instead taking notice of prior findings). This underscores the reasonableness of the Board's finding that consolidation of the two cases was unnecessary and could have caused litigation delays. (A2159.)

III. ILWU'S UNTIMELY CHALLENGE TO AGC SOLOMON'S AUTHORITY IS WAIVED AND JURISDICTIONALLY BARRED

Nearly two years after the time for filing exceptions with the Board had passed, ILWU filed a motion with the Board to supplement its exceptions by challenging, for the first time in this case, the authority of Acting General Counsel ("AGC") Lafe Solomon to issue the unfair-labor-practice complaint because,

ILWU claims, he was improperly serving in that acting position under the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345, *et seq.* (“FVRA”). The Board properly denied the motion as untimely. As the Board noted, under Section 102.46(b)(2) of the Board’s Rules and Regulations, 29 CFR § 102.46(b)(2), “[a]ny exceptions to a ruling, finding, conclusion or recommendation which is not specifically urged shall be deemed to have been waived.” (A2164.) As the Board further explained, ILWU had “failed to raise” in its exceptions “the ‘validity’ of Mr. Solomon’s appointment as Acting General Counsel.” Accordingly, the Board concluded that the “exception/argument has been waived and may not now be raised.” *Id.*¹²

In its opening brief, ILWU offers no argument or case citations to support its fleeting and conclusory assertion, in a footnote (Br.52 n.19), that the Board “wrongly denied” the motion. Accordingly, ILWU has waived this claim.

See Dunkin’ Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB, 363 F.3d 437, 441 (D.C. Cir. 2004) (“argument portion of an appellant’s opening brief ‘must contain’ the ‘appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies’”)

(quoting Fed.R.App.P. 28(a)(9)(A)).

¹² ILWU mistakenly asserts (Br.52 n.19) that the current General Counsel issued a Notice of Ratification of the complaint in this case. Rather, he ratified the complaint in *ILWU II*, which is currently before this Court and scheduled for separate briefing and coordinated argument with this case. *See ILWU v. NLRB*, No. 15-1443 (D.C. Cir.).

Nor does ILWU explain in its brief (Br.52 n.19) why it believes that AGC Solomon lacked “authority to issue the underlying complaint.” Indeed, ILWU’s bare-bones citations to FVRA, its prior motion, and this Court’s decision in *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), *petition for cert. granted*, 84 U.S.L.W. 3679 (U.S. June 20, 2016) (No. 15-1251), without any supporting argument, are the very types of “passing assertions” that this Court has found insufficient to avoid waiver. *Greater New Orleans Fair Housing Action Ctr, et al. v. U.S. Dep’t of Housing & Urban Development*, 639 F.3d 1078, 1091 (D.C. Cir. 2011).

In any event, even putting waiver aside, the Board properly denied the motion because ILWU failed to timely raise its FVRA claim before the Board. (A2164.) Moreover, because that claim was not timely raised to the Board, it is not properly before the Court. Under Section 10(e) of the Act, “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). A reviewing court is thus barred from deciding claims not properly presented below. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982). *Accord Parkwood*, 521 F.3d at 410 (Section 10(e) foreclosed claim presented “too late” to the Board; a party must timely present its claim “in a procedurally valid way”). Section 10(e)

accords with the bedrock principle that “[s]imple fairness” requires “that courts should not topple over administrative decisions unless the administrative body . . . has erred against objection made at the time appropriate under its practice.”

United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37 (1952).

Here, the latest “time appropriate under [Board] practice” for ILWU to raise its FVRA claim was in the exceptions to the judge’s decision that it filed with the Board. ILWU, however, failed to timely raise its claim despite having multiple opportunities to do so. Even though ILWU’s challenge goes to the validity of the complaint itself, ILWU did not raise its objection in its answer to the complaint, at any time during the subsequent hearing and proceedings before the administrative law judge, or thereafter in its exceptions. Rather, ILWU contested Solomon’s authority for the first time in its untimely motion to supplement its exceptions. As the Board properly found, this attempt came too late. It follows that the untimely claim is not properly before the Court. *See Parkwood*, 521 F.3d at 410 (Section 10(e)) foreclosed judicial review of “procedurally [in]valid” claim where party bypassed its “first opportunity” to present it to the Board, and the Board thus properly denied the belated attempt to raise it as “too late”).

In its opening brief, ILWU (Br.52 n.19) does not address this finding of untimeliness. Nor does it attempt to identify any reason to depart from the fundamental rule that challenges not timely asserted are forfeited. It declined, for

example, to argue that any “extraordinary circumstances” permit the Court to hear its arguments. Should it attempt to do so in reply, the Court should “decline to entertain th[at] contention[] in order to prevent the ‘sandbagging’ of [the Board].” *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007).

Nonetheless, anticipating arguments that ILWU may improperly raise in reply, the Board notes that a FVRA challenge is not exempt from Section 10(e)’s bar against untimely claims. This Court has specifically held that its “typical NLRA exhaustion doctrine [under Section 10(e)] applies” to challenges to the validity of AGC Solomon’s service under FVRA. *Marquez Bros. Enter., Inc. v. NLRB*, __F.3d__, 2016 WL 3040501, *2 (D.C. Cir. May 19, 2016). The Third Circuit has agreed, holding that where a party “has no way around the [Section] 10(e) exhaustion requirement,” the court lacks jurisdiction to consider its FVRA claim. *1621 Route 22 West Operating Co, LLC v. NLRB*, __ F.3d __, 2016 WL 3146014, *9 (3d Cir. Jun. 6, 2016). Thus, the instant case is unlike *SW General*, 796 F.3d at 82, where the Court “address[ed] the FVRA objection . . . because the petitioner raised the issue in its exceptions to the ALJ decision.” Indeed, in *SW General*, the Court expressed its “doubt that an employer that failed to timely raise a FVRA objection”—as ILWU did here—“will enjoy the same success.” *Id.*

Nor was ILWU's failure to timely raise the issue in any way excusable. All of the facts and legal arguments necessary to challenge AGC Solomon's designation, and the issuance of the complaint during his tenure, were available to ILWU since June 24, 2012, when the AGC issued the consolidated complaint in this case. At that time, ILWU was aware, or should have been, of Solomon's designation under the FVRA, a statute that has been in effect since November 1998. Moreover, prior to this Court's issuance of its decision in *SW General*, ILWU was aware, or should have been, that it could have raised the FVRA claim because the issue was being litigated in high-profile cases and was pending before the Court in *SW General*. ILWU proffers no reason for its failure to timely raise the issue before the Board. Accordingly, the Court should reject ILWU's waived and untimely challenge to AGC Solomon's authority to issue the unfair-labor-practice complaint.¹³

¹³ Moreover, as noted above (p.55), the merits of this issue are currently being briefed to the Supreme Court on writ of certiorari in *SW General*. Accordingly, even if the Court were to find that it had jurisdiction to consider the claim now, it may exercise its discretion to wait for the Supreme Court to resolve the issue.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying ILWU's petition for review, and enforcing the Board's Order in full.

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October 2016

STATUTORY ADDENDUM

STATUTORY ADDENDUM

Sec. 8(b)(4) [§ 158(b)(4).]

(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents . . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title]: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Sec. 10(a). [§ 160(a).] [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

Sec. 10(e). [**Sec. 160(e)**] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

10(f) [**Sec. 160(f)**] [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in

the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

INTERNATIONAL LONGSHORE &)	
WAREHOUSE UNION; INTERNATIONAL)	
LONGSHORE & WAREHOUSE UNION,)	
LOCAL 8; INTERNATIONAL LONGSHORE)	
& WAREHOUSE UNION, LOCAL 40)	
)	
Petitioners/Cross-Respondents)	
)	
v.)	
)	Nos. 15-1344 & 15-1428
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	19-CC-082533 et al.
)	
and)	
)	
ICTSI OREGON, INC.,)	
)	
Intervenor for Respondent)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,804 words of proportionally-spaced, 14-point type and the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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Dated at Washington, DC
this 25th day of October, 2016

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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)	
and)	
)	
ICTSI OREGON, INC.,)	
)	
Intervenor for Respondent)	

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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