

Nos. 15-1443 & 16-1036

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

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

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 &)	
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LONGSHORE & WAREHOUSE UNION,)	
LOCAL 8)	
)	
Petitioners/Cross-Respondents)	
)	
v.)	
)	Nos. 15-1443 & 16-1036
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	19-CC-100903
)	
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; and International Longshore & Warehouse Union, Local 8 (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. The Port of Portland filed an *amicus curiae* brief with this Court in support of the Board.

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 issued against ILWU on November 30, 2015, and reported at 363 NLRB No. 47.

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. 15-1344 & 15-1428 (D.C. Cir.) (related case separately briefed, but coordinated with the instant case for oral argument).

(2) *Hooks v. ILWU*, 72 F.Supp.3d 1168 (D. Or. 2014) (holding ILWU in contempt of the district court's July 19, 2012 injunction, based on ILWU's engagement in additional work-slowdown activities against ICTSI during the subsequent period at issue here).

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Dated at Washington, DC
this 25th day of January, 2017

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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.
JA	The parties' Joint Appendix
<i>ILWU I</i>	The Decision and Order issued by the Board on September 24, 2015 (363 NLRB No. 12), on review before this Court in D.C. Cir. Nos. 15-1344 & 15-1428
<i>ILWU II</i>	The Decision and Order issued by the Board on November 30, 2015 (363 NLRB No. 47), on review in the instant case before the Court
ILWU	International Longshore and Warehouse Union
ILWU-PMA Agreement	Multi-employer agreement between ILWU and PMA
Lease	Lease between the Port and ICTSI to operate Terminal 6
Local 8	ILWU Local 8
Local 40	ILWU Local 40

PCLCD	Pacific Coast Longshore Contract Document
PMA	Pacific Maritime Association
Port	Port of Portland
Port electricians	IBEW-represented electricians employed by the 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
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of International Longshore & Warehouse Union, and International Longshore & Warehouse Union, Local 8 (“Local 8”) (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 November 30, 2015, and reported at 363 NLRB No. 47. (JA1842-52.)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.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board’s finding that ILWU violated Section 8(b)(4)(i)(B) of the Act by inducing and encouraging its members

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

to engage in a deliberate work slowdown against ICTSI, a neutral employer, in furtherance of ILWU's primary labor dispute with the Port of Portland.

2. Whether ILWU waived its claims that the Board abused its broad discretion in denying ILWU's meritless motions to reopen the record and to consolidate the instant case with *ILWU I*, which involves violations committed during an earlier time period.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

This appeal involves the second of two Board cases arising from a decades-old division of labor between two unions at a marine terminal ("Terminal 6") owned by the Port of Portland ("the Port"), a political subdivision of the State of Oregon. It is uncontroverted that electricians represented by International Brotherhood of Electrical Workers Local 48 ("IBEW Local 48") and employed by the Port ("the Port electricians") have exclusively performed the work of plugging, unplugging, and monitoring refrigerated shipping containers ("reefers") on the dock ("the dockside reefer work") since the inception of container operations there in 1974. ILWU, which had never performed the dockside reefer work at Terminal 6, accepted this division of labor until May of 2011. It then orchestrated a series of threats and work slowdowns, and filed grievances against ICTSI and the ocean

carriers that call on Terminal 6, in an effort to have the dockside reefer work reassigned to ILWU-represented employees. In *ILWU (ICTSI)*, 363 NLRB No. 12 (2015) (“*ILWU I*”), petition for review pending, D.C. Cir. Nos. 15-1344 & 15-1428, the Board found that ILWU engaged in an unlawful secondary boycott by taking those actions against ICTSI and the carriers—neutral employers who do not control the work and therefore could not grant ILWU’s demands in its primary dispute with the Port. These findings, which the Board relied on in the instant case, serve as a predicate for the Board’s finding here that ILWU repeated similar work slowdowns during a second period, from September 2012 through June 2013, with the same unlawful objective of forcing ICTSI to pressure the Port into reassigning the disputed work to the longshoremen.

After investigating the charges filed by ICTSI in the instant case, the Board’s Acting General Counsel issued a complaint alleging in relevant part that ILWU violated Section 8(b)(4)(i)(B) of the Act during the second period by inducing and encouraging work stoppages against a neutral employer, ICTSI, in furtherance of ILWU’s primary labor dispute with the Port. As in *ILWU I*, the complaint alleged that ILWU took those actions to compel the reassignment of work historically performed by the Port electricians. (JA1844.) After a hearing, the administrative law judge found that ILWU violated the Act as alleged. (JA1850.) ILWU filed exceptions. The Board (Chairman Pearce and Members

Hirozawa and McFerran) affirmed the judge's findings and recommended order.

(JA1842 nn.3-4.)

In the meantime, while *ILWU I* was being litigated, the United States District Court for the District of Oregon issued a temporary restraining order on July 3, 2012, followed by a preliminary injunction on July 19. (JA1843; 508.) The injunction, which the court issued pursuant to Section 10(l) of the Act, 29 U.S.C. §160(l), enjoined ILWU from engaging in work slowdowns and other unlawful secondary boycott activities pending a final decision by the Board in *ILWU I*. (JA508.) The court required ILWU to provide its officers, locals, and members with a copy of the injunction order, and to give them a "clear directive" to refrain from engaging in the secondary activity barred by the order. (JA508.)

In the instant case, the Board found that, despite the July 19 injunction, ILWU continued, from September 2012 through June 2013, to induce and encourage its members to engage in work slowdowns against ICTSI in furtherance of its dispute with the Port over the assignment of dockside reefer work. (JA1845-50.) The Board also found that many of the slowdown tactics ILWU used in the second period, such as operating equipment unusually slowly and refusing to work based on non-existent safety claims, closely mirrored those found unlawful in *ILWU I*. (JA1845-48.) In so concluding, the Board adopted its finding in *ILWU I* that the Port retained control over the disputed work, and found no change in that

control during the second period at issue here. The Board also concluded that the dispute over the dockside reefer work remained an object of ILWU's continued slowdowns. Accordingly, the Board found that during the second period, ILWU continued to engage in unlawful secondary boycott activities against ICTSI, a neutral employer unable to meet its demands in its dispute with the Port.

(JA1850.) The relevant Board findings of fact in the instant case, including those adopted from *ILWU I*, are summarized below.

I. THE BOARD'S FINDINGS OF FACT

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

As noted, the Port owns Terminal 6, a large marine terminal that primarily handles the loading and unloading of seagoing container vessels, and the parking of incoming and outgoing vessels while awaiting shipment by land or sea.

(JA1817; 863, 886.) Since 1974, when the Port commenced container operations at Terminal 6, it has directly employed the IBEW-represented electricians, who have exclusively performed the dockside reefer work. (JA1816, 1818; 888, 913-14.)

From the outset, the Port electricians 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. Most recently, 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.” (JA1819; 1225-26, 1236; *see* JA 888-89, 901.) 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. (JA1819; 901.) 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.” (JA1819; 1225-26.)

The dockside reefer work is part of a complicated stevedoring operation at Terminal 6 that is also manned by groups of longshore workers (crane operators, drivers, etc.) represented by ILWU Local 8, and marine clerks represented by ILWU 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 governing the marine clerks' terms and conditions of employment, and the Pacific Coast Longshore Contract Document ("PCLCD") governing the longshoremens' terms and conditions of employment. The ILWU-PMA agreement at issue here ran from July 1, 2008, until July 1, 2014. (JA1816, 1818-19, 1821; 1422.)

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. (JA1820; 868, 882-83, 888, 917-18.) These workers had never performed the dockside reefer work at Terminal 6, which, as noted, has instead been performed by Port electricians for decades. (JA1820; 868, 882-83, 888, 917-18.) 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. (JA1820; 864-66, 917-18.)

B. 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. (JA1817; 891-94.) Thereafter, the Port notified potential lessees that it directly employed trade union members, including the Port electricians, pursuant to its relationship with the DCTU. (JA1817; 895, 1258.) 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. (JA1817-18; 897-901, 903, 1322, 1325, 1340.)

In 2009, ICTSI began negotiating with the Port for a lease agreement to assume the cargo handling operations at Terminal 6. During the negotiations, which lasted over a year, the Port insisted that ICTSI honor the historic division of labor at the terminal, including the Port electricians' decades-long performance of dockside reefer work. (JA1818; 896, 901-03.) On May 12, 2010, ICTSI entered into a 25-year lease with the Port to operate Terminal 6 ("the Lease"). (JA1816, 1818-19; 1049.)

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. Thus, 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. (JA1816, 1818-19; 919, 936.) 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. (JA1816, 1818-19, 1823; 868, 902, 916-17, 970, 988.) Thus, the Lease makes it clear that ICTSI may not itself assign the dockside reefer work to any non-DCTU employees such as the ILWU-represented longshoremen.

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. (JA1816-17, 1819, 1823; 868, 911-12.) Thus, after signing the Lease, the Port electricians continued to perform the dockside reefer at Terminal 6 under the Port's control and direction. (JA1819, 1823; 880, 904, 912.) In the instant case, the Board found no evidence of any changed circumstances regarding the Port's right to control that work in the second period at issue here, from September 2012 through June 2013. (JA1843-45.)

C. 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 before commencing its operations at Terminal 6 on February 12, 2011, ICTSI became part of the PMA. (JA1818; 905.) As a PMA member, ICTSI became bound by the 2008 ILWU-PMA agreement, including the PCLCD governing longshoremen's work. (JA1818; 1422.)

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 longshoremen employed pursuant to the terms of the PCLCD. (JA1822-23; 877-80, 1418-21.) As noted, those longshoremen 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 was "not within ICTSI's control." (JA1822-23; 877-80, 1418-21.) 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. (JA1822-23; 877-80, 1418-21.)

D. ILWU Threatens To Run ICTSI Out of the Port Unless It Agrees to ILWU's Demands; When Its Threats Fail To Force Reassignment of the Disputed Work, It Orchestrates Systematic Slowdowns of ICTSI's Operations

As noted, the Board's decision in *ILWU I* sets forth the underlying threats and coercive conduct that form the backdrop against which the findings of additional violations in the second period should be assessed. In *ILWU I*, the Board found that, although the lease between the Port and ICTSI barred ICTSI from exercising control over the dockside reefer work, which had been for decades performed by the Port's IBEW-represented electricians, ILWU nevertheless embarked on a concerted campaign to pressure ICTSI to reassign that work to ILWU-represented employees. *See* JA1826-33, 1836-39.

In *ILWU I*, the Board found that, as an opening salvo in their campaign of unlawful secondary coercion, ILWU Committeeman Leal Sundet and other ILWU agents repeatedly threatened to run ICTSI out of the Port unless it met ILWU's demands for the disputed work. For example, on May 21, 2012, 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. Before Ganda answered, Sundet warned him that ICTSI "would pay the price" if it refused, and that ILWU "can fuck you" and Sundet would "fuck [ICTSI] badly." (JA1824-25; 852-57.) Sundet further threatened that, unless ILWU's demands were met, he would ensure that carrier Hanjin—which 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. (JA1824-25; 852-57.) In late May, even after Ganda replied that ICTSI's Lease with the Port barred it from granting ILWU's demands, Sundet and other ILWU agents continued to threaten ICTSI. (JA1826; 857-62, 869-76, 883-85, 906-11.)

As the Board further found in *ILWU I*, when these direct threats did not bring about the desired result of forcing ICTSI to breach its Lease with the Port and reassign the work, ILWU resorted to orchestrating systematic slowdowns and stoppages of ICTSI's operations. ILWU did so in June 2012 by various means. For instance, ILWU directed its members to operate trucks and container cranes in a deliberately slow manner; it devised excuses for members' work slowdowns, such as refusing to operate cranes and taking equipment out of service based on non-existent safety claims; it had its members unexpectedly stop unloading a ship and meet in a breakroom with Local 8 officials; and it refused to refer qualified members from its hiring hall. (See JA1826-33.)

E. ILWU Fails To Notify Longshoremen of the District Court's July 19 Injunction Barring the Slowdowns, and Does Not Clearly Direct Them To Cease Those Activities

As noted, the district court issued an injunction on July 19, 2012, ordering ILWU to cease engaging in work slowdowns at Terminal 6 and otherwise threatening or coercing ICTSI with the object of forcing it to stop doing business

with the Port. The injunction further required ILWU to provide its officers and members with a copy of the order, and to give them a clear written directive to refrain from the conduct barred by the court. (JA1843; 508.)

ILWU did not notify all longshoreman of the injunction or clearly direct them to refrain from the prohibited activities. Instead, on July 20, the day after the injunction issued, ILWU emailed a press release to its locals, claiming that ILWU was “vindicated” by the district court’s decision. The email and press release did not mention the July 19 injunction or direct ILWU members to refrain from the work slowdowns and other activities barred by the court. (JA1848 & n.23; 608.)

At the unfair-labor-practice hearing in the instant case, only one witness, a crane operator, had any recollection of an injunction being posted anywhere. (JA1848; 132-33.) However, he could not identify the injunction notice he claimed to see, or recall when he saw it. (JA1848; 132-33.) Although ILWU Local 8 Business Agent Craig Bitz testified, without corroboration, that he posted an injunction “all over the Terminal,” he identified it as the November 21 injunction, which enjoined the filing of grievances against ICTSI at issue in *ILWU I*—not the slowdowns at issue here. *See Hooks ex rel. NLRB v. ILWU*, 905 F. Supp. 1198, 1213 (D. Or. Nov. 21, 2012), *aff’d*, 544 F. App’x 657 (9th Cir. 2013). Moreover, as Bitz admitted, ILWU did not post the November 21 injunction until January 2013. (JA1848 & n.24; 378-82, 789.) None of the Local 8 members who

testified recalled any discussion of the July 19 injunction during mandatory union meetings. (JA1848 & n.25; 109-111, 122, 135, 144-46, 159, 162, 176-77.)²

Although a notice dated July 23 was apparently drafted by ILWU's counsel regarding the July 19 injunction, it was not posted or distributed to ILWU members. (JA1848-50; 517.) Nor did the document clearly exhort ILWU members to cease engaging in slowdown activities or otherwise stop pressuring ICTSI in furtherance of ILWU's quest for the dockside reefer work. While the document stated that ILWU members should "refrain from engaging in any conduct inconsistent with the injunction," it did not specify what conduct, such as work slowdowns, was prohibited. In addition, the document opined that the injunction was "wrong" and that ILWU had a "right" to engage in such conduct against ICTSI. It ended with the rallying cry that ILWU and its members "will win this dispute." (JA1848-50; 517.)

F. Despite the District Court's July 19 Injunction, ILWU Continues To Engage in Work Slowdowns Against ICTSI

Even after the district court's July 19 injunction, ILWU agents and Local 8 members continued to deliberately work in a less-productive manner. Much as

² Although the minutes of a July 11 union meeting mention an injunction, they could not have been referring to the July 19 injunction, which issued a week after the meeting. (JA1848; 824.)

they had done in *ILWU I*, they operated their equipment at greatly reduced speeds and refused to operate equipment based on non-existent safety concerns.

For example, beginning in the summer of 2012 and continuing into at least late fall, crane operators and truck drivers refused to continue their longstanding practice of moving more than one 20-foot container at a time on older trailers or carts. They asserted shifting “safety” reasons for their refusal—initially claiming that the older trailers could not hold the weight, then asserting there were problems with the tires, then saying they could not trust the weights listed for the containers. Prior to the dispute over the dockside reefer work, it had been their normal practice to move such containers in pairs, without incident. (JA1846; 39-44, 97-100, 169-70, 206-07.) Although Local 8 Business Agent Bitz spoke to crane operators about their refusal to perform the work, he did not tell them to stop refusing. It took ICTSI several months to investigate the matter and resolve the issue. (JA1846; 40-44, 97-100, 169-70, 206-07, 425-27.)

Additionally, beginning in September 2012, the Local 8-represented crane operators worked unnecessarily slowly for no apparent reason. ICTSI’s logs confirmed that they were performing only about 15 net container moves per hour, far below the normal rate of about 27 per hour. (JA1845; 168-69, 519, 521-523, 643.) *See* pp. 18-19 below (discussing the established pre-labor dispute rates for net and gross moves per hour).

Similarly, in late 2012, crane operators worked in a slow “box” pattern rather than the smoother arc pattern they typically used. (JA1845; 212-14.) In addition, Local 8-represented truck drivers operated their vehicles at three miles per hour, far below the typical rate of 15 miles per hour. They also often took the “long way” or “scenic route” around Terminal 6, rather than the shorter, more direct route they had typically taken in the past. Many drivers refused ICTSI’s directives to take the direct route until threatened with discharge. (JA1845; 24-31, 217-20, 221-23, 506.)

In November 2012, ICTSI terminal manager Brian Yockey overheard a crane operator declare over the radio that crane operators were no longer “allowed” to use “bypass” mode to hoist their cranes past a certain limit to discharge high containers, as they had in the past. When Yockey inquired about this, Local 8 Business Agent Bitz claimed, contrary to the parties’ longstanding agreement and practice, that it was an OSHA violation to operate in bypass mode. Bitz also stated that ILWU “wasn’t going to work in a manner to help [ICTSI] as it had in the past.” (JA1845; 33-38, 81-87.) Bitz acknowledged telling crane operators and drivers to refuse to operate in bypass mode. (JA1846 & n.14; 425-27.) As a result, work on the carrier ship being serviced was delayed several hours as ICTSI had to lower it to a level that could be reached without operating the cranes in bypass mode. (JA1845; 33-38, 81-87.)

Bitz acknowledged that the crane operators and drivers were less productive during the period from September 2012 through June 2013 because they were “upset” and would not “go the extra mile” like they used to. (JA1846; 430.) Crane operator Steven Cox likewise admitted that the crane operators did not work as productively during this period because they would no longer “babysit” or “take care of” ICTSI. (JA1846; 113, 117-19.)

Consistent with these admissions, the area arbitrator for grievances under the PCLCD found that three Local 8 crane operators engaged in a work slowdown on April 6, 2013, in light of their exceptionally low production figures. She also observed that ILWU’s engaging in work slowdowns at the Terminal had been a chronic concern during the labor dispute. (JA1846 & n.16; 685-86.)

G. The Productivity of ILWU Workers Remains Significantly Depressed, Most Likely Due to the Labor Dispute

Dr. Bryce Ward, an economist who testified as an expert witness at the unfair labor practice hearing, conducted a microeconomic analysis of productivity at Terminal 6, and concluded that productivity decreased significantly during the parties’ labor dispute, including from September 2012 through June 2013. As Dr. Ward explained, both average gross moves per hour (total moves divided by total hours paid) and net moves per hour (total moves divided by total hours actually worked, i.e., not including downtime or delays caused by late arriving vessels, equipment breakdowns, etc.) were substantially lower during the relevant period.

(JA1846-47; 224-344, 527-602.) Specifically, the number of moves had averaged 23.1 gross and 27.3 net moves per hour during the 29 months preceding the beginning of the labor dispute on June 1, 2012, but dropped significantly during the first six weeks thereafter to 16.9 gross and 19.7 net moves per hour. They rose somewhat, to 19.4-20 gross and 23.1-23.8 net moves per hour, after ICTSI began filing slowdown complaints under the PCLCD and the district court issued the July 19 injunction, but that production level was still significantly below the pre-June 2012 levels. In other words, between September 2012 and June 2013, overall production remained at about 3-4 moves below the pre-labor dispute gross and net averages, a statistically significant and economically meaningful difference.

(JA1847; 224-344, 527-602.) Moreover, Dr. Ward's analysis found that the productivity of every crane and nearly every crane operator remained depressed throughout this period. (JA1850; 532-34, 544, 550, 570-71, 583, 589.)

Dr. Ward also conducted a statistical regression analysis of various internal and external productivity factors, and concluded that a deliberate labor slowdown was the most probable cause of the decline in productivity during the relevant period from September 2012 through June 2013. (JA1847; 527-602.) Although his analysis accounted for other potential causes, such as dock congestion when two ships simultaneously berth at Terminal 6, changes in shipping schedules and Terminal policies, and turnover in ICTSI's management, he determined that none

of them explained the drop in productivity. (JA1847 & nn.19-21; 244, 295, 543-45, 586.) All of these considerations were captured in Dr. Ward's analysis of net moves per hour or specifically considered in his regression analysis. (JA1847 & nn.19-21; 244, 295, 543-45, 586.)

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 violated Section 8(b)(4)(i)(B) of the Act by inducing and encouraging ILWU-represented longshoremen employed by ICTSI to engage in a deliberate work slowdown. (JA1842 n.3, 1845-50.) The Board found that ILWU took these actions with the unlawful object of forcing a neutral employer, ICTSI, to pressure the Port, the primary employer in the dispute, to relinquish control over the dockside reefer work at Terminal 6 for the benefit of Local 8-represented workers. (JA1842 n.3, 1848-50.)

The Board's Order requires ILWU to cease and desist from the unfair labor practices found. Further, the Order requires ILWU to post a remedial notice at its offices and at Local 8's hiring hall; mail copies of the notice to all members employed at Terminal 6 since September 2012; and distribute the notice electronically. (JA1851.)

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). *See Soft Drink Workers Union Local 812 v. NLRB*, 657 F.2d 1252, 1261 (D.C. Cir. 1980) (observing that Section 8(b)(4) is “neither obvious nor intuitive” as to how to identify unlawful secondary boycotts). 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

1. Substantial evidence supports the Board’s finding that ILWU unlawfully induced its members to engage in work slowdowns with the prohibited secondary object of pressuring ICTSI, a neutral employer, into supporting ILWU’s claim to dockside reefer work controlled by the primary employer, the Port. This is the second of two cases finding that ILWU engaged in such unlawful conduct against ICTSI. The first case provides background for the second one.

In *ILWU I*, ILWU was caught red-handed engaging in unlawful secondary activity in May and June of 2012. Indeed, ILWU admittedly made overt threats and organized work slowdowns against ICTSI in its quest to obtain the disputed work. It defended that conduct by claiming its objective was merely to preserve work traditionally performed by ILWU-represented employees, and that ICTSI

controlled the work. The Board, however, reasonably found that ILWU failed to prove both of those elements of a work-preservation defense.

This case involves a second period, from September 2012 through June 2013, during which ILWU engaged in a mirror image of the slowdowns it had admittedly orchestrated in May and June 2012. Just as they did previously, ILWU-represented employees continued, during the second period, to operate their equipment unusually slowly and to refuse work based on phony safety reasons. There is, however, a twist to this sequel: the second time around, ILWU avoided overtly threatening ICTSI and announcing what it was doing or why. Even so, ILWU's unlawful objective was plain, as the Board reasonably found. ILWU's prior threats and admitted slowdowns, the fact that longshoremen continued the same type of slowdowns so close in time to the first period, and the admissions of an ILWU agent that the union was encouraging the slowdowns during the second period, all show that ILWU repeated the same conduct for the same reason as before—namely, to pressure neutral-employer ICTSI into forcing the Port to reassign the disputed work.

As the Board further found, ILWU's unlawful objective was also exposed by its failure to follow a district court order enjoining the slowdowns and directing ILWU to notify its members of the injunction's directives. Flouting the court's order, ILWU neither clearly instructed its members to stop the slowdowns nor told

them about the injunction. Instead, ILWU rallied its members with a vow to win the dispute.

The record amply supports the Board's further finding that during the second period, ILWU induced, encouraged, or ratified the slowdowns, and was therefore responsible for them. In so finding, the Board reasonably relied, not only on ILWU's non-compliance with the injunction, but also on its prior misconduct in *ILWU I*, its agent's admitted involvement during the second period, and the coordinated nature of the slowdowns. Indeed, an expert's microeconomic analysis established that the productivity of nearly every crane and crane operator remained significantly below historic levels. This would be a remarkable coincidence absent the other evidence that the slowdown was orchestrated and therefore intentional.

ILWU simply cannot show that the Board's findings are unsupported by substantial evidence. Its opening brief waives any challenge to the Board's findings that ICTSI was a neutral employer and that the subsequent slowdowns occurred. It implausibly claims that it was not responsible for those slowdowns and that, even if it were, the dockside reefer dispute was not an object of that conduct. ILWU would have the Court believe that after unapologetically making overt threats, and openly encouraging slowdowns, all with the unlawful objective of getting the disputed work from neutral ICTSI, it abruptly realized the error of its ways and cleaned up its act. The Board rightly saw through ILWU's protestations

that it did not encourage the subsequent slowdowns with a wink and a nod, and so should this Court. Simply put, ILWU ignores the overwhelming direct and circumstantial evidence that it continued to orchestrate or condone the slowdowns with an unlawful objective, and therefore bears responsibility for them.

2. The Board properly exercised its discretion in denying ILWU's motion in the instant case to reopen the record to admit an arbitration ruling involving an incident that occurred nearly a year after the second period ended. As the Board reasonably found, that ruling would not have required a different result here. Nor did the Board abuse its discretion by denying ILWU's motion to consolidate the instant case with *ILWU I*. The Board did not need to consolidate the two cases. Instead, it took the simpler and entirely appropriate route of relying here on the record and its findings in the prior case.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT ILWU VIOLATED SECTION 8(b)(4)(i)(B) OF THE ACT BY INDUCING AND ENCOURAGING ITS MEMBERS TO ENGAGE IN WORK SLOWDOWNS TARGETING ICTSI, A NEUTRAL EMPLOYER, 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 strike, refuse to perform services for, or otherwise “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, Soft Drink 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, *enfd*, 490 F.2d 323, 326-27 (4th Cir. 1973).

A Section 8(b)(4)(i)(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. 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 constitute forms of coercion prohibited by Section 8(b)(4)(i)(B). *Sheet Metal Workers*, 989 F.2d at 519; *Teamsters Local 25 v. NLRB*, 831 F.2d 1149, 1153-55 (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); *Soft Drink Workers*, 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).

The Board may rely on both direct and circumstantial evidence in finding that a union acted with a proscribed secondary object, or called for, induced, or encouraged its members’ secondary conduct, and was therefore responsible for it. Indeed, circumstantial evidence alone suffices to show such intent and responsibility. *See United Scenic Artists, Local 829, Broth. of Painters and Allied Trades v. NLRB*, 762 F.2d 1027, 1035 & n.26 (D.C. Cir. 1985) (collecting cases); *Soft Drink Workers*, 657 F.2d at 1262 (even absent direct evidence of intent, “the

Board would have been entitled to use simple logic to infer an object of the union's conduct from the practical realities of the situation"); *NLRB v. Iron Workers Local 272 (Peerless Erectors)*, 427 F.2d 211, 213 (5th Cir. 1970) (finding union responsible for work stoppages based on circumstantial evidence alone).

Moreover, a union's secondary conduct in a prior proceeding may constitute circumstantial evidence of its responsibility for subsequent unlawful secondary activity against the same employer. *See Local 3, IBEW (Northern Telecom)*, 265 NLRB 213, 213 n.2 (1982), *enforced*, 730 F.2d 870, 877-78 (2d Cir. 1984) (Board may rely on union agent's harassing employer in prior proceeding as evidence of union's inducement and encouragement of subsequent unlawful secondary activity).

Further, the Board may hold a union accountable for secondary activities if it condones or ratifies the actions, even if it did not affirmatively direct them. *See Am. Airlines Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 581 (5th Cir. 2000) (union may be held accountable if it ratifies or condones the improper conduct by failing to halt it, or by attempting only minimal efforts such that approval or encouragement can be reasonably inferred); *Iron Workers Dist. Council of Pac. N.W. v. NLRB*, 913 F.2d 1470, 1477 (9th Cir. 1990); *Seattle Times Co. vs. Seattle Mailer's Union Local 32*, 664 F.2d 1366, 1369 (9th Cir. 1982); *NLRB v. Bulletin Co.*, 443 F.2d 863, 865-67 (3d Cir. 1971).

B. The Board Reasonably Found that ILWU Engaged in Unlawful Secondary Work Slowdowns Against ICTSI During the Second Period

In the instant case, *ILWU II*, the Board adopted its finding in *ILWU I* that the Port was the primary employer, and that ICTSI and the carriers were neutrals because they did not control the disputed work, which Port electricians had performed for nearly 40 years. In *ILWU II*, the Board also found that, despite ample opportunity to do so, ILWU presented no evidence of changed circumstances in the second period that would warrant a different result on this issue. (JA1844-45.)

The Board also adopted its further finding in *ILWU I* that during the first period (May-June 2012), ILWU admittedly engaged in conduct that included direct threats and slowdown tactics against ICTSI with an avowed object of acquiring the disputed work. In the instant case, however, ILWU denied engaging in similar conduct with an unlawful objective during the second period (September 2012 through June 2013), and it disclaimed responsibility for the conduct. Accordingly, in the instant case the Board had to resolve the following issues: (1) whether ILWU-represented workers continued to engage in unlawful slowdowns; (2) whether an object of those slowdowns was to continue pressuring ICTSI to reassign the disputed work; and (3) whether ILWU was responsible for the slowdowns. (JA1845.) The Board answered all three questions affirmatively, and

therefore found that ILWU violated Section 8(b)(4)(i)(B) during the second period as well. (JA1845-48.)

As explained below, in its opening brief ILWU has waived any challenge to the Board's amply supported findings that ICTSI was a neutral and that the slowdowns continued during the second period. Instead, ILWU pins its hopes on challenging the Board's two remaining findings. As further shown below, however, substantial evidence supports those findings as well.

1. ILWU waived any challenge to the Board's well-supported finding that ICTSI lacked the right to control the electricians' dockside reefer work, and was, therefore, a neutral employer in ILWU's primary dispute with the Port

As shown, 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 primary employer that possesses the right to control. *Int'l Longshoremen Ass'n*, 447 U.S. at 504-05. 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.” *George Koch Sons, Inc.*, 201 NLRB at 63.

In this case, the Board adopted its finding in *ILWU I* that the Port, and not ICTSI or the carriers, controlled the disputed work, which Port electricians had performed since 1974, and therefore that the Port was the primary employer.

(JA1843-44.) The Board also found no evidence of any change in that control during the second period at issue here. (JA1844-45.) ILWU has waived any challenge to those findings, which, in any event, are well-supported.

In its opening brief, ILWU makes only the conclusory assertion that the Board's decision must be vacated because its conduct against ICTSI was purportedly "primary." (Br.26.) Its brief, however, contains no argument or citations to the record or caselaw supporting its bare-bones claim. Instead, it improperly attempts to "incorporate[] by reference the arguments in its appellate proceedings in [*ILWU*] *I*." (Br.26.) As this Court has explained, however, the "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.'" *Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (quoting Fed.R.App.P. 28(a)(9)(A)). ILWU's opening brief clearly fails to meet this requirement because it does not "contain" any arguments on the "primary" employer issue, or any citation to authorities or parts of the record on which it relies.

Moreover, the wholesale incorporation of a brief from a separate case³ contravenes Rule 28(a)(9)(A). See *Peterson v. Archstone Communities LLC*, 595

³ The two cases were separately briefed by order of the Court after ILWU voluntarily withdrew its motion to consolidate them. The parties filed a joint

F. App'x. 1, 2 (D.C. Cir. 2015) (“appellant may not incorporate by reference into her opening brief arguments made in other submissions”); *Ahern v. Jackson Hosp. Corp.*, 351 F.3d 226, 240 (6th Cir. 2003) (“The incorporation by reference of arguments . . . does not comply with the Federal Rules of Appellate procedure and therefore such arguments are waived.”); *Albrechtsen v. Bd. of Regents of Univ. of Wisconsin Sys.*, 309 F.3d 433, 436 (7th Cir. 2002) (“appellate briefs may not incorporate other documents by reference”).

There are sound policy reasons for strictly applying the rule that claims not fully made in an opening brief are waived. As the Seventh Circuit has explained, “[j]udges are not like pigs, hunting for truffles buried” in documents incorporated by reference. *Albrechtsen*, 309 F.3d at 436 (internal quote and citation omitted.) Here, beyond the oblique reference to incorporating “the arguments in its appellate pleadings” in *ILWU I*, ILWU does not specify which particular arguments it seeks to incorporate from its 54-page brief in that case, what other unspecified “pleadings” it wants to incorporate, or which pages of those pleadings contain the supposedly relevant arguments. Nor does it explain how those arguments would apply to the Board’s findings here in a separate case addressing additional violations based on conduct occurring during a subsequent time period.

motion to set separate briefing schedules in the two cases, and coordinate them for argument before the same panel, which the Court granted.

This is no academic matter. In *ILWU II*, the Board did more than simply adopt its findings in *ILWU I* that the Port controlled the disputed work. It further found that while afforded the opportunity to do so, ILWU presented no evidence of changed circumstances in the second period—the timeframe at issue here—to warrant a different finding on the right to control. (JA1844-45.) ILWU, however, fails even to mention that finding in the argument section of its opening brief.⁴ It has therefore waived any challenge to that finding. Nor, in any event, could it possibly incorporate arguments on this point from its brief in *ILWU I*, which did not address the right to control in the second period.⁵

In any event, ample evidence supports the Board’s finding that the Port, not ICTSI, is the primary employer with the right to control the disputed work. As the Board found in *ILWU I*, and as shown (*see pp. 6-11*), the Port has, since the onset of container operations in 1974, exclusively assigned all dockside reefer work to the Port electricians pursuant to its collective-bargaining agreement with the DCTU. This work was admittedly never performed at Terminal 6 by ILWU-

⁴ ILWU’s passing reference to the issue in its *fact* section (Br.4) is plainly insufficient to preserve the issue for review.

⁵ Moreover, allowing ILWU to adopt its brief in the prior case “would provide an effective means of circumventing the page limitations on briefs.” *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 624 (10th Cir. 1998). *See Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1167 (D.C. Cir. 2013) (declining to allow litigants to incorporate by reference into their brief arguments from a motion, “as this would circumvent the court’s rules regarding the length of briefs”) (internal citation omitted).

represented longshoremen. Consistent with that practice and the DCTU agreement, the terms of the Port's Lease with ICTSI clearly provided that the Port, not ICTSI, must retain control over that work, and that the Port electricians would continue to perform it. There is no evidence that the Port ever ceded its decades-long control over that work. Rather, the Port continued to assign the work to IBEW-represented employees, consistent with the Lease and its contractual obligations to the DCTU. Thus, substantial evidence supports Board's finding in *ILWU I*, which the Board adopted here, that the Port, not ICTSI, controlled the disputed work.

Moreover, as the Board found here, ILWU presented no evidence of changed circumstances in the second period that would warrant a different finding on the right to control. (JA1844-45.) The only evidence proffered by ILWU was ICTSI's negotiation of new stevedoring contracts with the carriers beginning in summer of 2012 to replace ones that were due to expire. (*Id.*) As the Board reasonably found, however, these events failed to establish a material change in the right to control the disputed work. Per the stevedoring contracts in both periods, ICTSI charged carriers for dockside reefer services and then, pursuant to the terms of its Lease with the Port, reimbursed the Port for its cost in providing that labor. (JA1844-45 & n.10; 352, 356-57.) There was no evidence that the Lease was modified in any way during the second period, and no evidence that the Port

relinquished its control over the dockside reefer work. Nor was there any significant change in how the Port paid and employed its electricians during the second period. (JA1845 & n.11; 355-57.)

Accordingly, consistent with its findings in *ILWU I*, the Board concluded that the Port electricians, not the ILWU-represented longshoreman, historically performed the disputed work at Terminal 6, including during the second period. The Board further found that the Port, not ICTSI, continued to have the right to control the work during the second period, and therefore remained the primary employer regarding that work. Under settled law, when a union pressures a secondary (neutral) employer like ICTSI to assign it work that the employer has no power to give, the Board may infer that the union's object was to further its dispute with the primary employer (here, the Port) that controlled the work. *See Int'l Longshoremen Ass'n*, 447 U.S. at 504-05, and cases cited at pp. 28-29.

2. ILWU also waived any challenge to the Board's amply supported finding that additional work slowdowns occurred in the second period

In the instant case, the Board found that Local 8-represented longshoremen engaged in additional work slowdowns at Terminal 6 from September 2012 through June 2013. These tactics—which included operating trucks and cranes unusually slowly, taking the “scenic route” around the Terminal, and refusing to operate equipment based on phony safety concerns—closely mirror those that

ILWU had recently (and admittedly) orchestrated in June of 2012. (JA1845-48.)

In its opening brief, ILWU does not dispute that these slowdowns occurred during the second period. It has, therefore, waived any such claim. *See Dunkin' Donuts*, 363 F.3d at 441 (arguments not made in opening brief are waived).

In any event, substantial evidence supports the Board's finding of additional slowdowns. Thus, credited, unrebutted testimony and unchallenged documentary evidence establish that, with no apparent justification, ILWU-represented longshoremen operated their equipment at greatly reduced speeds and took the long way around the Terminal until threatened with discharge. They also relied on safety gimmicks and shifting explanations to refuse to operate their cranes in bypass mode and to move twin 20-foot containers—blatant departures from established practice. Local 8 Business Agent Bitz acknowledged encouraging or condoning these refusals, and told ICTSI that ILWU would no longer “work in a manner to help [ICTSI] as it had in the past.” He further admitted that the longshoremen were less productive during the second period because they were “upset” and would not “go the extra mile” for ICTSI. Crane Operator Cox likewise admitted that they did not work as productively because they would no longer “babysit” or “take care of” ICTSI. (*See pp. 16-18.*)

Further supporting the Board's finding of additional slowdowns, Dr. Ward's statistical report and expert testimony demonstrate that, during the second period,

the longshoremen's productivity was reduced by a statistically significant and economically meaningful amount. Indeed, he found that the productivity of every crane and nearly every operator remained depressed throughout this period, which would be a "remarkable coincidence" absent an intentional slowdown. Consistent with these findings, the area arbitrator for PCLCD grievances found that three crane operators engaged in a work slowdown on April 6, 2013, in light of their exceptionally low production figures. She also observed that ILWU's work slowdowns at Terminal 6 had been a chronic concern during the labor dispute.

ILWU does not challenge the Board's reliance—as one of many examples of slowdowns during the relevant nine-month period—on the arbitrator's finding regarding the April 6 slowdown. Instead, ILWU mistakenly faults the Board for declining to defer to her findings that slowdowns did not occur on other specific dates. As the Board explained, however, the arbitrator's failure to find slowdowns on those dates says nothing about whether the longshoremen engaged in slowdowns on other dates she did not consider.⁶ (JA1846 & n.16.) Nor, as the

⁶ In her March 20, 2013 decision, for example, the arbitrator ruled in ILWU's favor, despite finding that the production figures for the shift at issue were lower than they were prior to June 2012 and even bordered on being "well below normal." In so ruling, she noted that a single shift was "too small a window" on which to determine whether a slowdown occurred. (JA1846 & n.16; 688.) In this case, as shown, the Board based its findings on a much larger window of evidence of repeated, organized slowdowns during the period from September 2012 to June 2013.

Board observed, do the arbitrator's rulings rebut the mountain of other evidence showing a pattern of slowdown activity across the relevant time period.⁷ (*Id.*)

In sum, substantial evidence—including unrebutted, credited testimony, the admissions of an ILWU official, an arbitration finding, and an expert's statistical analysis—amply support the Board's conclusion that ILWU-represented longshoreman continued to engage in slowdown tactics during the second period.

3. Substantial evidence supports the Board's finding that an object of the slowdowns was to pressure ICTSI to reassign the dockside reefer work to Local-8 represented longshoremen

Although ILWU does not seriously dispute that additional slowdowns occurred during the second period, it does challenge the Board's finding that an object of the slowdowns was to pressure neutral ICTSI into forcing the Port to assign the disputed work to the longshoremen. As shown below, ample direct and circumstantial evidence support the Board's finding. As shown, under settled principles, the Board need only find that pressuring ICTSI was "an" object of the slowdown. Moreover, circumstantial evidence alone—including the targeting of a neutral employer—may support such a finding.

⁷ For example, the arbitrator found no slowdown on June 3, 2013 because external factors caused extensive downtime on that particular shift. (JA703.) By contrast, in the instant case, Dr. Ward's statistical analysis controlled for such external factors and demonstrated that an intentional slowdown was the most likely cause for the overall depression in productivity during the relevant nine-month period.

To begin, in *ILWU I*, ILWU explicitly threatened to run ICTSI out of the Port and send its biggest customers packing in May and June 2012, unless ICTSI agreed to reassign the disputed work to ILWU-represented employees. When those threats failed to achieve the desired results, ILWU admittedly orchestrated slowdowns, concocted safety gimmicks, and engaged in other secondary activities to pressure ICTSI to assign the work. These findings in *ILWU I*, which the Board adopted here, and ILWU does not contest, provide strong circumstantial evidence that acquiring the disputed work remained an object of the slowdown tactics during the second period. *Accord Hooks v. ILWU*, 72 F.Supp.3d 1168, 1184 (D. Or. 2014) (holding ILWU in contempt of the July 19 injunction, based in part on finding that ILWU's direct threats provided circumstantial evidence that obtaining the disputed work remained an object of the slowdowns during the second period). Moreover, the slowdowns and safety gimmicks cited by crane operators and drivers in the second period came swiftly on the heels of, and closely resembled, the tactics that ILWU admittedly orchestrated during the first period.

The microeconomic and statistical regression analysis performed by Dr. Ward further supports the Board's reasonable inference that ILWU was engaging in the slowdowns to pressure ICTSI into supporting ILWU's quest for the disputed work. *Accord Hooks*, 72 F.Supp.3d at 1185 (Dr. Ward's analysis supported a finding that obtaining the disputed work was an object of the slowdowns). As

shown, Dr. Ward concluded that production never fully recovered and remained significantly below historic levels during the second period. He further concluded, based on a statistical regression analysis of various internal and external productivity factors, that a deliberate labor slowdown was the most probable cause of the productivity decline during this period. His analysis accounted for other potential causes proffered by ILWU before the Board and here (Br.17-20)—such as dock congestion (resulting from having two ships simultaneously berthed at the Terminal), changes in shipping schedules and Terminal policies, and changes in ICTSI's management and supervisory practices—and determined that none of them explained the drop in productivity. All these considerations were effectively incorporated into Dr. Ward's analysis of net moves per hour.⁸

Moreover, the Board noted (JA1849), some of the changes relied on by ILWU (Br.19, 25, 42 n.13), such as installing video cameras in the yard and undertaking closer supervision, were implemented by ICTSI in response to ILWU's work stoppages and slowdowns in June 2012. Thus, as indicated by Crane Operator Cox, to the extent that longshoremen reduced their productivity in

⁸ The drop in productivity could not be explained by having two ships berthed at Terminal 6, because it was configured to accommodate three vessels at a time. (JA1847; 15, 218, 518, 826.) Other developments, such as requiring longshoremen to work 10 rather than 15 minutes before their shift ended, which ILWU claimed upset employees and negatively impacted their productivity, did not occur until after June 2013. Accordingly, those events could not explain the drop in production that began months earlier. (JA1847 n.21; 386-90, 429-30, 701.)

response to those changes, their actions were in response to the labor dispute.

Indeed, Cox acknowledged that the longshoremen's refusal to "babysit" ICTSI in the second period was a "direct result" of the labor dispute in June of 2012.

(JA1849; 118.) As the Board aptly explained: "To disregard such a connection or relationship in evaluating the object of union action would ignore industrial realities and potentially discourage employers from engaging in self-help efforts to prevent or document continued unlawful conduct." (JA1849.)⁹ *Accord Hooks*, 72 F.Supp.3d at 1185.

Further, ILWU Business Agent Bitz admitted encouraging the slowdowns during the second period. Bitz, like Cox, also admitted that ILWU members were not working as productively anymore because they were "upset" and would no longer "take care of" ICTSI. *See* p. 18. Given these admissions, the Board could reasonably infer that an object of the longshoremen's conduct was ICTSI's refusal to take their side in their quest for the disputed work. *Accord Hooks*, 72 F.Supp.3d at 1185.

Additionally, ILWU's improper object is revealed by its stubborn refusal to take the steps ordered by the district court in its July 19 injunction. The injunction

⁹ In any event, as the Board accurately noted, a Section 8(b)(4) violation only requires that *an* object of the conduct is secondary. (JA1849); *see* cases cited at pp. 29-30. Thus, even viewing ICTSI's post-June 2012 changes as separate events unrelated to the dockside reefer dispute, ILWU has failed to rebut the "strong inference," discussed above, that pressuring ICTSI to support ILWU in that dispute continued to be an object of the slowdowns during the second period. (JA1849.)

directed ILWU to clearly instruct its members to stop the slowdowns and to post the injunction in prominent places. Far from informing its members that the district court had enjoined their slowdowns, and directing them to stop such activity, ILWU sent its locals a press release the next day asserting that it had been “vindicated” by the district court’s decision.¹⁰ The press release did not even mention the injunction or direct members to refrain from the work slowdowns and other activities barred by the court order. As the Board explained, ILWU’s failure to carry out the court’s directives provides further circumstantial evidence that an object of the continued slowdowns and low productivity during the second period was to keep putting pressure on ICTSI. (JA1848.)

ILWU fails to show that it complied with the court’s directives. Thus, as shown (pp. 14-15), none of the Local 8 members who testified could recall any

¹⁰ Citing Section 8(c) of the Act, 29 U.S.C. § 158(c), and the First Amendment, ILWU erroneously asserts (Br.29-34) that the Board found it liable for exercising its right to express that view in a press release. ILWU, however, failed to raise this claim in the exceptions that it filed with the Board. Accordingly, the Court lacks jurisdiction to consider it. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (Section 10(e) of the Act, 29 U.S.C. § 160(e), bars consideration of claims not made to the Board); *Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008) (same). In any event, ILWU misunderstands the Board’s finding, which is simply that the Union failed to clearly direct its members to stop the prohibited slowdowns. As the Board explained, regardless of whether ILWU had a right to post the press release, the document “certainly [was] not drafted to maximize the impact of the court’s orders.” (JA1849 & n.26.) That finding involved no impingement on Section 8(c) or First Amendment rights.

discussion of the July 19 injunction at mandatory union meetings.¹¹ Although Bitz claimed, in his uncorroborated and discredited testimony,¹² that he posted an injunction “all over the Terminal,” he identified the posting as one involving a subsequent injunction issued by the district court in November 2012. That injunction addressed ILWU’s filing of grievances against ICTSI—unlawful conduct that was at issue only in *ILWU I*. See p. 14. In any event, ILWU did not post the November 2012 injunction until January 2013. Likewise, only one witness, a crane operator, testified that he saw an injunction being posted. As noted, however, the district court issued several injunctions, and the operator could not say which injunction he saw, or when he saw it.¹³

¹¹ The only purported documentary evidence that the injunction was discussed at union meetings was the minutes of a July 11 meeting, which occurred a week before the July 19 injunction issued. ILWU has waived any challenge to the administrative law judge’s decision to discredit Bitz’s testimony that the July 19 injunction was discussed at union meetings. (JA1848-49.) ILWU never challenged the judge’s ruling in the exceptions that it filed with the Board. Indeed, ILWU’s opening brief to this court makes no credibility challenges whatsoever. ILWU is therefore barred from making any such claim. See cases cited at p. 34 & n.10. In any event, the judge reasonably discredited that testimony because it was uncorroborated by any meeting meetings and contradicted by the Local 8 members who testified, none of whom recalled any such discussion.

¹² In discrediting Bitz’s testimony that he posted an injunction “all over the Terminal,” the administrative law judge noted that his claim was uncorroborated and contrary to the weight of the evidence. (JA1848.) As noted, ILWU has waived any challenge to the administrative law judge’s credibility determinations.

¹³ ILWU implausibly claims that its members were “completely unaware” of the dockside reefer dispute, which undermines its claim that they were fully informed

While a document dated July 23 regarding the July 19 injunction was apparently drafted by ILWU's counsel, there was no credited evidence in this case that it was posted or distributed to ILWU members.¹⁴ In any event, the Board reasonably found that, even assuming the document was timely and prominently posted, it was "hardly an exhortation to cease pressuring ICTSI." (JA1848-49.) Instead, the document stressed, not that the injunction should be followed, but that the court's order was "wrong" and would eventually be overturned. Moreover, the attorney's draft proclaimed ILWU's "right" to pressure ICTSI, and it concluded with the rallying cry that ILWU and its members "will win this dispute." (*Id.*)

4. ILWU is responsible for the slowdowns

Substantial evidence also supports the Board's finding that ILWU was responsible for the continued slowdown tactics in the period from September 2012 through June 2013. To begin, as the Board explained (JA1850), and the district court agreed, *Hooks*, 72 F.Supp.3d at 1185, ILWU's explicit threats in May and June 2012, and its admitted orchestration of slowdowns and reliance on safety

about the July 19 injunction barring secondary activity arising from that dispute. (Br.16-17.)

¹⁴ ILWU errs in claiming that the Board's finding that it failed to timely notify members of the injunction is belied by the "dramatic" productivity increase following the July 19 injunction. (Br.30) To the contrary, ILWU elsewhere acknowledges that productivity did not reach its pre-June 2012 levels (Br.43), and, as shown, Dr. Ward's microeconomic analysis confirmed that productivity remained significantly depressed following the injunction.

gimmicks to avoid work during that period, provide strong evidence that it likewise coordinated the continuation of similar conduct just a few months later. *See, e.g., Local 3, IBEW (Northern Telecom)*, 265 NLRB 213 n.2 (1982), *enforced*, 730 F.2d 870, 877-78 (2d Cir.) (the Board may rely on a union agent's harassment of an employer in a prior proceeding as evidence of union's inducement and encouragement of subsequent secondary activity).

To be sure, ILWU was careful not to utter explicit threats during the second period. Nevertheless, the ruses employed during the second period, such as operating equipment unusually slowly and refusing to work based on non-existent safety concerns, closely mimicked those coordinated by ILWU just a couple months earlier. Against this backdrop, the Board was fully warranted in rejecting ILWU's professed indifference to its members' activities in the second period. Indeed, ILWU's tactics provide a textbook example of how unions can use subtle signs—a “nod or a wink”—to signal their approval of members' unlawful job actions. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 418 n.1 (1981) (Powell, J., concurring).

Indeed, as shown (pp. 16-18), ILWU Business Agent Bitz's admissions directly establish that ILWU overtly supported the slowdowns by encouraging longshoremen not to operate their cranes in bypass mode and not to move twin 20-foot containers based on pretextual safety grounds. In an apparent reference to

Bitz's and ILWU's directives, the crane operators themselves declared that they were "no longer allowed" to operate cranes in bypass mode. Bitz also acknowledged that the longshoremen did not work as productively during the relevant time period because they were "upset" with ICTSI.

Other circumstantial evidence strongly supports the Board's finding that ILWU continued to coordinate and encourage work slowdowns in the second period. As the Board observed (JA1850), this is laid bare by the orchestrated appearance of multiple truck drivers and crane operators engaging in the same conduct at the same time, such as taking the "scenic" route around the Terminal, operating their equipment unusually slowly without any justification, and refusing to operate cranes in bypass mode. Also striking in this regard is Dr. Ward's unrebutted finding that the production of every crane and nearly every crane operator was down during the relevant period—a "remarkable coincidence" best explained by the ILWU's continued coordination of the slowdown activities.

As the foregoing shows, both direct and circumstantial evidence support the Board's finding that ILWU was responsible for the continued slowdowns in the second period. Moreover, even if ILWU did not affirmatively direct the slowdowns, it is properly held accountable because it effectively condoned or ratified them. (JA1850.) *Accord Hooks*, 72 F.Supp.3d at 1186.

Thus, as shown, not only did ILWU fail to notify its members of the July 19 injunction and clearly direct them to refrain from the prohibited slowdowns, it plainly knew those activities continued after the July 19 injunction. ILWU's knowledge of the ongoing slowdowns is readily apparent from Bitz's statements and the increasing number of contractual complaints filed by ICTSI regarding the slowdowns. Yet, ILWU took no measures to stop the conduct. (JA1846, 1848-50; 122-23, 133-34, 143-45, 159, 177, 425-27.) Thus, at a minimum, ILWU ratified and condoned its members' conduct by "permitting a situation which it had created to continue." *NLRB v. Bulletin Co.*, 443 F.2d 863, 867 (3d Cir. 1971).

In response, ILWU erroneously relies (Br.26-30) on the district court's finding in a subsequent contempt proceeding—issued months after ILWU filed its exceptions with the Board in the instant case—that "clear and convincing evidence" failed to show that the July 19 injunction notice was not posted. *Hooks v. ILWU*, 72 F.Supp.3d 1168 (D. Or. 2014). On that basis, the court declined to hold ILWU in contempt of that particular aspect of the injunction. *Id.* at 1184. As an initial matter, ILWU never raised before the Board, in a motion for reconsideration or otherwise, its off-the-mark contention that this aspect of the court's ruling makes a difference here. ILWU is therefore barred from relying on that decision now. *See Parkwood*, 521 F.3d at 410 (Section 10(e) foreclosed claim by party that bypassed opportunity to present it to the Board.)

In any event, ILWU's reliance on this aspect of the contempt ruling is misplaced. The court based its notice-posting finding on "additional evidence," including photos and declarations by union officials, that was not before the Board.¹⁵ *Hooks*, 72 F.Supp.3d at 1184. Moreover, the court conducted a *de novo* review in determining whether the considerably more onerous test for civil contempt had been met. *Id.* at 1183-84. Needless to say, the court's ruling on that issue has no bearing on whether substantial evidence on the record here supports the Board's finding that ILWU failed to post the notice.¹⁶

Moreover, ILWU fails to acknowledge that the court judged ILWU in contempt on the ultimate issue, finding that ILWU induced and encouraged its members to engage in slowdowns from July 20, 2012 through August 13, 2013, with an object of obtaining the disputed work. *Id.* at 1184-87. Accordingly, the Court's finding on the subordinate notice-posting question is of no moment. In

¹⁵ ILWU essentially asks the Court to reverse the Board based on evidence that is not in the record before the Board (and, therefore, not before the Court), and which ILWU never sought to put before the Board.

¹⁶ ILWU also errs in relying (Br.42-44) on distinguishable cases like *John's Valley Foods*, 273 NLRB 425 (1978). There, the Regional Director "relied on an unsupported presumption" that the union's pre-injunctive unlawful object continued, and failed to consider the "substantial hiatus" following the injunction. *Id.* at 426. Here, in contrast, there was virtually no hiatus between the pre- and post-injunctive slowdowns, and the Board relied on strong circumstantial evidence that the secondary motive continued in the second period. Thus, the Board did exactly what ILWU says it should do: it conducted an "inquiry into the union's later activity to establish liability." (Br.41) (citations omitted).

short, the court's overall finding of "ample circumstantial evidence" that ILWU and its agents encouraged, coordinated or ratified the slowdowns during this period seriously undermines ILWU's assertion of noninvolvement. *Id.* at 1184-86.¹⁷

Nor can ILWU evade responsibility for the slowdowns based on the arbitrator's finding that slowdowns did not occur on certain dates during the second period. (*See* Br.34-39.) Rather, as the Board explained, the arbitrator assessed ILWU's responsibility for the slowdowns based on a PCLCD provision requiring ILWU to ensure that its members do not engage in slowdowns. She did not, however, address whether ILWU actually called for, ratified, or condoned the slowdown as found here. Nor did she address the additional factual issue presented here of whether the slowdown was motivated in part by the dockside reefer dispute. (JA1846 & n.16.) Accordingly, in these circumstances, the Board properly declined to accord her decisions any weight on these factual issues, or on the ultimate legal issue presented in this case. *See generally Olin Corp.*, 268 NLRB 573, 573-74 (1984).

¹⁷ Although the court declined to adjudge ILWU in contempt for slowdowns during time periods extending through June 30, 2014 and beyond, those periods are outside the timeframe at issue in the instant case. *Id.* at 1187-88.

II. ILWU WAIVED ITS MERITLESS CLAIMS THAT THE BOARD ERRED IN DENYING ITS MOTIONS TO REOPEN THE RECORD AND CONSOLIDATE THE INSTANT CASE WITH *ILWU I*

The Board properly exercised its discretion in denying ILWU's motion to reopen the record to admit an arbitration award, which found that a refusal by certain longshoremen to operate cranes in bypass mode on May 25, 2014, involved a "bonafide safety dispute." (*See* JA1842 n.1.) As the Board explained, an arbitration ruling about events on a single day in May 2014—nearly a year after the second period ended—does not undermine its finding here that ILWU's purported safety concerns were pretextual in November 2012. (*Id.*) Accordingly, the Board properly denied ILWU's motion, "as the evidence sought to be adduced would not require a different result in this case." (*Id.*) *See* Section 102.48(d)(1) of the Board's Rules and Regulations, 29 C.F.R. § 102.48(d)(1) (movant must show that the proffered evidence "would require a different result"); *Transit Mgmt of SE Louisiana*, 331 NLRB 248, 248 n.2 (2000) (applying this requirement).

ILWU has plainly waived any challenge to the Board's denial of its motion. In its opening brief, ILWU offers no argument or citation to authority to support its bare, conclusory assertion that the "award is highly material," and therefore that the Board's refusal to consider it was "clear legal error." (Br.46.) Such a passing reference is insufficient to preserve the issue for judicial review. *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). Moreover, a party waives an argument where, as here, its opening brief fails to contain its arguments and citation to the authority upon which it relies. *See* cases cited at p. 34. Indeed, ILWU does not even mention, much less refute, the Board’s explanation that “the evidence sought to be adduced would not require a different result in this case.” (JA1848 n.1.) Nor, as shown (pp. 33-34), is it appropriate for ILWU to simply assert, without elaboration, that the Board erred for “the same reasons set forth” in its brief in the *ILWU I* case, and leave it to the Court to discern which “reasons” are incorporated and how they apply here. (Br.46.) Indeed, ILWU fails to note that the motion denied by the Board in *ILWU I* involved a request to admit entirely different evidence on the very different ground that it was not “newly discovered” under Section 102.48(d)(1) of the Board’s Rules and Regulations. Accordingly, the brief in *ILWU I* does not even address the issue presented here, and therefore cannot serve as a substitute for argument in the instant case.

In any event, ILWU’s claim would fail on the merits even if it were not waived. To begin, ILWU faces an uphill battle in challenging the Board’s denial of the motion to reopen the record—an “extraordinary” request under 29 C.F.R. § 102.48(d)(1) that this Court reviews only for an abuse of 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). Here, as shown, the Board properly denied the motion because the evidence sought to be introduced would not have required a different result.

ILWU has likewise waived any claim (Br.47) that the Board erred in denying its June 24, 2014 motion to consolidate the instant case with *ILWU I*. (JA 1675.) Once again, ILWU offers no argument or case citation to support its bare-bones assertion. Nor, as shown, can it simply “adopt[] and incorporate its argument from its opening brief in [*ILWU I*].” (Br.47.)

In any event, the Board did not abuse its discretion in denying the motion. ILWU fails to note that the Board properly took administrative notice of the evidence and findings in *ILWU I* that are relevant in the instant case. *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). The Board also appropriately included the record in *ILWU I* as an exhibit in the record in the instant case. (JA1844 n.4.) Both rulings underscore the reasonableness of the Board’s finding that consolidation of the two cases was unnecessary and could have caused litigation delays. (JA1675.)

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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January 2017

STATUTORY ADDENDUM

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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; . . . where . . . 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)	
)	
Petitioners/Cross-Respondents)	
)	
v.)	
)	Nos. 15-1443 & 16-1036
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	19-CC-100903
)	
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 12,948 words of proportionally-spaced, 14-point type and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 25th day of January, 2017

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)	
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)	
Intervenor for Respondent)	

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2017, 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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