

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

**INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, LOCAL 12**

**and**

**Case 19-CD-144202**

**SOUTHPORT LUMBER COMPANY, LLC**

**MOTION TO TRANSFER CASE TO THE BOARD  
AND FOR SUMMARY JUDGMENT**

Counsel for the General Counsel, pursuant to §§ 102.24, 102.26, and 102.50 of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. §151 *et seq.*, hereby moves to transfer the instant case to the National Labor Relations Board ("Board") and for summary judgment against International Longshore and Warehouse Union, Local 12 ("Respondent"), based on the pleadings, related documents, and argument contained in this Motion to Transfer Case to the Board and for Summary Judgment ("Motion for Summary Judgment"). In support of the Motion for Summary Judgment, Counsel for the General Counsel submits that the pleadings in this case raise no material issues of fact or law requiring a hearing before an administrative law judge. The sole factual issues in dispute were resolved by the Board's award in this case pursuant to § 10(k) of the Act.

**I. PROCEDURAL HISTORY OF THIS CASE**

Southport Lumber Company, LLC ("Charging Party") filed the charge in this matter on January 12, 2015, alleging, *inter alia*, that Respondent violated § 8(b)(4)(ii)(D) by picketing in proximity to the Charging Party's premises with an object of forcing the

Charging Party to award work to Respondent's members, rather than to the Charging Party's employees. (Attachment 1).

On April 8 and 9, 2015, Region 19 of the Board ("Region") held a hearing pursuant to § 10(k) of the Act regarding the work assignment dispute alleged in this charge. At that hearing, documentary and testimonial evidence was submitted by Respondent (Attachment 2) and the Charging Party (Attachment 3). In addition, the Region's hearing officer submitted Board exhibits, which included party stipulations (Attachment 4). A transcript of the hearing was made by a court reporter (Attachment 5).

After the close of the hearing, all the above evidence along with the transcript was transferred to the Board as required. Respondent filed a post-hearing brief with the Board (Attachment 6), as did the Charging Party (Attachment 7).

On October 11, 2018, the Board issued its award in this case, reported at 367 NLRB No. 16 ("Board's Order") (Attachment 8). In its Order, the Board awarded the button-pushing for chip-unloading and log-unloading work at issue to the Charging Party's own employees. The Board also ordered Respondent to refrain from using proscribed means to force the Charging Party to assign Respondent's members the work.

On October 17, 2018, the Regional Director of Region 19 of the Board ("Regional Director") issued Respondent a letter giving notice that, unless the Regional Director received in writing assurances that Respondent would abide by the Board's Order by October 25, 2018, complaint would issue (Attachment 9). As Respondent failed to provide such assurances, the Regional Director issued a Complaint and Notice of

Hearing (“Complaint”) on October 30, 2018 (Attachment 10). Respondent filed an Answer to the Complaint (“Answer”) on November 13, 2018 (Attachment 11).

**II. ALL SUBSTANTIVE FACTS HAVE BEEN ADMITTED OR FOUND IN THE § 10(K) PROCEEDING**

The elements of a § 8(b)(4)(ii)(D) violation are that a union: 1) restrained a person engaged in commerce, 2) with the object of requiring an employer to assign particular work to employees in one labor organization or group rather than another. Respondent stipulated in the § 10(k) proceeding that it had picketed the Charging Party’s premises, and it conceded throughout the § 10(k) hearing and in its brief to the Board that its picketing was in furtherance of its demand for the chip loading and log unloading work. The affirmative defenses Respondent raises in its Answer were considered and rejected by the Board. Thus, there is no dispute that Respondent picketed the Charging Party’s premises with an object of requiring the Charging Party to assign the chip loading and log unloading work to Respondent’s members. This leaves no material facts in genuine dispute.

**A. The Complaint Alleges and Respondent Admits the Following In its Answer**

1. The charge in this proceeding was filed by the Charging Party on January 12, 2015, and a copy was served on Respondent by U.S. mail on about the same date.
2. A Corrected Notice of Charge Filed was issued on January 13, 2015, and a copy was served on Respondent by U.S. mail on about the same date.
3. Respondent is, and has been at all material times, a labor organization within the meaning of § 2(5) of the Act.

4. On about October 11, 2018, pursuant to § 10(k) of the Act, the Board issued an award in this case, which provides, *inter alia*:

(1) Employees of Southport Lumber Co., LLC are entitled to perform log-unloading work and button pushing for chip-loading work at the Employer's barge slip on Coos Bay in North Bend, Oregon.

...

(3) Within 14 days from this date, International Longshore and Warehouse Union, Local 12 shall notify the Regional Director for Region 19 in writing whether it will refrain from forcing Southport Lumber Co., LLC, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

5. On October 17, 2018, Region 19 issued Respondent a letter giving notice that, unless the Regional Director received in writing assurances that Respondent would abide by the Boards' Order by October 25, 2018, complaint would issue. Respondent has not provided written assurances.

**B. All Other Factual Allegations in the Complaint Are Established by the Board's Order or the Evidence Gathered at the § 10(k) Hearing**

1. The Charging Party is an Oregon limited liability company with an office and place of business in North Bend, Oregon, where it is engaged in the business of manufacturing lumber and wood products. In conducting its operations described above during the past 12-months, which period is representative of all material times, the Charging Party derived gross revenues in excess of \$500,000 and both purchased and received goods valued in excess of \$50,000 directly from entities outside the State of Oregon. The Charging Party has been at all material times an employer engaged in commerce within the meaning of §§ 2(2), (6) and (7) of the Act. (Attachment 8/Board's Order, p.1; Attachment 4, Bd Ex. 2).

2. At all material times, the following individuals held the positions set forth opposite their respective names and have been agents of Respondent within the meaning of § 2(13) of the Act:

Marvin Caldera	–	Former President
Gary Alford	–	President and/or Vice President (2015–2018)
Gene Sundet	–	Secretary Treasurer
Joe Hilding	–	LRC Chairman
Jill Jacobson	–	Secretary Treasurer

(Attachment 11/Answer admission that the named persons held these titles at given points; Attachment 5/Transcript, pp.149, 162, 221, 255; Attachment 3, ER Ex. 5, 6, 9, 21, 22; Attachment 6/U brief, p.7).

3. At all material times, the Charging Party has assigned the work of button pushing for chip loading and log unloading at its barge slip on Coos Bay in North Bend, Oregon, to its own employees. (Attachment 8/Board's Order, p.4; Attachment 5/Transcript, pp. 53–54, 71, 90–92, 103, 331–32).
4. Since on or about September 4, 2014, Respondent has demanded that the Charging Party assign the work of button pushing for chip loading and log unloading to employees who are members of, or represented by, Respondent, rather than to the Charging Party's employees, who are not members of, or represented by, Respondent. (Attachment 8/Board's Order, p.4).
5. Respondent has not been certified by the Board as the exclusive collective-bargaining representative of any of the employees performing the button pushing for chip loading and log unloading at the Charging Party's barge slip on Coos Bay in North Bend, Oregon, nor has the Board issued any order

determining that Respondent is the exclusive collective-bargaining representative of the employees performing this work. (Attachment 8/Board's Order, p.5; Attachment 4, Bd Ex.2).

6. On September 4 and December 4, 2014, and other dates thereafter, Respondent picketed at the Charging Party's Coos Bay premises in support of its demands for the work described above. (Attachment 8/Board's Order, p.5; Attachment 4, Bd. Ex.2; Attachment 6/U brief, p.13).
7. By its picketing, Respondent has threatened, coerced, or restrained the Charging Party and other persons engaged in commerce or in industries affecting commerce. (Attachment 8/Board's Order, p.5).
8. An object of Respondent's picketing has been to force or require the Charging Party to assign the button pushing for chip loading and log unloading at the Charging Party's barge slip on Coos Bay in North Bend, Oregon, to employees who are members of, or represented by, Respondent, rather than to employees of the Charging Party who are not members of, or represented by, Respondent. (Attachment 8/Board's Order, p.5; Attachment 6/U brief, p.13).

### **C. The Board's Order Rejected Respondent's Defenses**

In its Answer, Respondent asserts five affirmative defenses. First, it claims that the Complaint fails to set out any activity that would constitute threats, coercion, or restraint. This defense fails as a matter of law, as the Complaint alleges that Respondent engaged in picketing in support of its demand for the barge slip work at issue. It is well-established under Board law that picketing constitutes unlawful restraint

under § 8(b)(4)(ii)(D) unless done solely for one of a small number of lawful purposes. See, e.g., *Local 30, United Roofers (Gundle Lining Constr. Corp.)*, 307 NLRB 1429 (1992), *enf'd*, 1 F.3d 1419 (3d Cir. 1993).

At the § 10(k) hearing and in its brief to the Board, Respondent claimed that its picketing had such a lawful purpose, namely work preservation. The Board rejected that claim, noting that “the instant dispute arose after the Union’s efforts to obtain the log-unloading work, and its members have never performed that work at the Employer’s barge slip.” (Attachment 8/Board’s Order, p.4, *citing Int’l Longshoremen’s & Warehousemen’s Union, Local 14 (Sierra Pacific Indus.)*, 314 NLRB 834, 836 (1994)).

The picketing in question began on September 4, 2014, the day the very first load of logs arrived at the Charging Party’s barge slip for unloading. (Attachment 5/Transcript, p.92, 93). Respondent has never disputed this fact, and yet Respondent now reasserts the work preservation defense in its Answer, in several forms. It claims that its conduct is lawful under the work preservation doctrine and that the work is traditional longshore work and therefore fairly claimable. With the Board having already squarely rejected that defense, Respondent should not be allowed second and third bites at the same bad apple.

Respondent also claims that the Complaint fails to present a jurisdictional dispute between groups of employees under the Act. It made this same argument to the Board, claiming that the button pushing was done by a statutory supervisor and § 10(k) does not extend to disputes over work performed by supervisors. The Board rejected this claim, limiting the work in dispute to that done by statutory employees. (Attachment 8/Board’s Order, p.3; Attachment 5/Transcript, pp.331–32).

The defense also fails as a matter of law because, even if the factual claim underlying it—that a supervisor exclusively performed the chip loading work—were true, it would provide no defense to the § 8(b)(4)(D) allegation because it does not address the log unloading work.<sup>1</sup> Respondent has admitted, including in its brief to the Board, that “the dispute was triggered by Southport replacing Local 12 longshoremen for the log unloading work.”<sup>2</sup> (Attachment 6/U brief, p.1). Picketing is unlawful so long as one object is work acquisition, regardless of whether the union has any other lawful object. *Gundle Lining Constr.*, 307 NLRB at 1429.

Finally, Respondent argues that the work dispute in question is of the Charging Party’s own making, because the Charging Party chose to reassign the work in question to its own employees. But Respondent presented evidence at hearing on this same point, argued it extensively on brief (Attachment 6/U brief, pp.17–20), and the Board rejected it. (Attachment 8/Board’s Order, p.5.)

As noted above, Respondent picketed the very first time a barge arrived at the Charging Party’s slip for log unloading; the log unloading was what triggered the picketing. The log unloading was brand-new work (it had never been done by anyone at the Charging Party’s slip) that Respondent admittedly was seeking through its picketing to acquire. The reassignment of the chip-loading work occurred after Respondent had already begun picketing, so demanding that work back was not what triggered the picketing.

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<sup>1</sup> The Board’s Order mentions that Respondent challenged the veracity of witness testimony that a statutory employee performed the chip unloading. (Attachment 8/Board’s Order, p.4 n.17). However, any such credibility issue is immaterial, because the log unloading remains undisputed.

<sup>2</sup> Respondent uses the word “replaces” creatively here, given that it nowhere disputes that this was the first log barge to be unloaded at the Charging Party’s slip. Therefore, Respondent’s members had never performed this work there (nor had anyone).

But even if re-acquiring the chip loading was one reason Respondent kept picketing, another object was the acquisition of the log unloading work, and this object was unlawful. Picketing is unlawful so long as one object is a proscribed one, regardless of whether the union has any other lawful object. *Gundle Lining Constr.*, 307 NLRB at 1429. Thus, as the Board already correctly found, Respondent's defense fails as a matter of settled law.

**III. SUMMARY JUDGMENT IS APPROPRIATE AND SHOULD BE GRANTED AS A MATTER OF LAW**

"It is well settled that a party to a Board § 10(k) proceeding cannot relitigate the Board's work assignment in a subsequent § 8(b)(4)(D) case." *Marble Polishers, Local 47-T (Grazzini Bros.)*, 315 NLRB 520, 521 (1994). Consistent with this rule, a party cannot relitigate the various factors that the Board considers in making its §10(k) determination. *Id.* (barring union from relitigating the Board's §10(k) determination that there was no firm basis for finding the existence of a collective-bargaining agreement). The Board in the subsequent unfair labor practice proceeding can properly reject "attempt[s] to relitigate the jurisdictional determination that had been made by the NLRB" in the §10(k) decision. *NLRB v. Plumbers*, 704 F.2d 1164, 1166 (9th Cir. 1983).

Indeed, the Supreme Court has noted that "the impact of the § 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding." *NLRB v. Plasterers*, 404 U.S. 116, 126–27 (1971). *Accord Bricklayers v. NLRB*, 475 F.2d 1316, 1320–21 (D.C. Cir. 1973). If the "union persists in its conduct despite a §10(k) decision against it, a § 8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist." *Plasterers*, 404 U.S. at 127.

Nonetheless, the Supreme Court has determined that parties may put in new evidence at the § 8(b)(4)(D) stage, while recognizing that the parties typically stipulate the record of the § 10(k) hearing as a basis for the Board's consideration of the unfair labor practice charge. *Plasterers*, 404 U.S. at 126–27. Consistent with the Court's holding, summary judgment in a subsequent § 8(b)(4)(D) proceeding is therefore appropriate only where there is no genuine issue of material fact or the parties have stipulated the record of the § 10(k) hearing as a basis for the Board's determination of the unfair labor practice charge. *Warehouse Union Local 6, Int'l Longshoremen's & Warehousemen's Union (Golden Grain)*, 289 NLRB 1, 2 (1988). A genuine issue of fact exists and a respondent is entitled to put on facts in a hearing if there are credibility issues to be resolved or if the respondent denies the existence of an element of the § 8(b)(4)(D) violation, either directly or by raising an affirmative defense. *Id.* at 2. See also *Laborers, Local 721 (Hawkins & Sons)*, 294 NLRB 166, 167 (1989).

The Board has found that where no additional evidence was sought to be introduced respecting the prohibited activity, the Board acts within its discretion in precluding later attempts to relitigate. *Bricklayers*, 475 F.2d at 1322 (the prohibited conduct constituting the unfair labor practice was not denied by the union and the only factual dispute was whether there had been an agreed-upon method of settlement, which the Board had answered in the §10(k) proceeding; “[t]o relitigate it, as the unions sought, would not have been consistent with the plan of the statute”).

Reliance on the findings of fact from the work assignment dispute proceeding as the basis for an unfair labor practice finding is proper, where it is clear that a preponderance of the evidence standard has been applied and met, even though the

standard of proof in the work assignment dispute proceeding is the less stringent reasonable cause standard. *NLRB v. Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 433*, 549 F.2d 634 (9th Cir. 1977). Moreover, the Board has discretion concerning which evidence it considers in an unfair labor practice case and may properly prohibit the submission of additional evidence concerning certain facts already passed on in the prior §10(k) hearing. See generally *NLRB v. Local 450, Int'l Union of Operating Eng'rs.*, 275 F.2d 408 (5th Cir. 1960).

In fact, the Board recently affirmed an ALJ's decision to preclude presentation of evidence in support of a work preservation defense that the Board had previously rejected in a § 10(k) proceeding. *Int'l Union of Operating Eng'rs, Local 18 (Nerone & Sons, Inc.)*, 365 NLRB No.18 (Jan. 25, 2017). The union had admitted pursuing grievances for the work at issue and this was “essentially an admission of a violation of the Act.” *Id.*, slip op. at \*3. The rejected work preservation defense “goes to the heart of the Board’s jurisdictional award.” *Id.*, slip op. at \*11.

In *Nerone & Sons*, the union had pursued grievances after issuance of the § 10(k) award. *Id.*, slip op. at \*3. That is not the case here, but post-award conduct is not required for a § 8(b)(4)(D) violation. See *Sierra Pacific Indus.*, 314 NLRB 834 (finding violation where union picketed for proscribed aim only before § 10(k) award issued). *Sierra Pacific* involved facts nearly identical to those here: a claim for “button-man” chip-loading work that had never been done previously by the employer at the location and picketing that began the day the first barge arrived, when the employer’s own employees did the button-pushing. *Id.* at 463. As here, the union claimed a work preservation defense, based on an argument that this dock work was traditional

longshore work, and it raised this defense first during the § 10(k) proceeding and then during the ULP proceeding. *Id.*

The Board rejected this defense because it raised arguments previously considered and rejected in the § 10(k) proceeding. *Id.* “Because all material allegations either have been admitted by the Respondent in its answer, or have been decided previously by the Board, there are no matters outstanding for resolution.” *Id.* The Board noted that “failure to comply with the Board’s 10(k) determination does not per se constitute a violation of Section 8(b)(4)(D),” and that, whereas the standard in the § 10(k) proceeding is only reasonable cause, in the unfair labor practice proceeding “the Board must find by a preponderance of the evidence that the picketing union has violated” § 8(b)(4)(D). *Id.* at 464. However, it also found that, under that standard, based on the same facts established in the § 10(k) proceeding, it was reaching in the unfair labor practice proceeding the same conclusion that it had in the § 10(k) proceeding. *Id.*

Here, Respondent has never denied that it picketed in September and December 2014, that this picketing was in support of its demand for the log unloading and chip loading work, and that log unloading had never been done at the Charging Party’s barge slip before it picketed. Therefore, under well-established Board law, there are no facts in dispute or matters outstanding for resolution. Accordingly, summary judgment is eminently appropriate.

#### **IV. CONCLUSION**

Counsel for the General Counsel respectfully submits that the record evidence establishes that Respondent has violated § 8(b)(4)(ii)(D) of the Act by picketing in

support of its demand for work the Board has assigned to the Charging Party's employees. Accordingly, Counsel for the General Counsel requests that the Board grant the Motion for Summary Judgment and find that Respondent violated § 8(b)(4)(ii)(D) of the Act as alleged in the Complaint. Counsel for the General Counsel further respectfully requests that the Board issue the proposed Order and Notice to Employees and Members attached as Attachment 12.

Signed at Seattle, Washington, on December 17, 2018.

/s/Carolyn McConnell

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