UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 12

and

SOUTHPORT LUMBER COMPANY Case 19-CD-144202

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 12's POST-HEARING BRIEF

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE FACTS 2

A. The Work in Dispute 2

1. Chip Loading Work – Operation of Spout/Chute by Remote Control. 2

2. Log Unloading Work – Operation of On-Dock Heavy Equipment to Transport Logs From the Dock to the First Place of Rest. 4

3. There Is No Other Work in Dispute 4

B. Southport Purchased and Redeveloped the Barge Slip Representing that Local 12 Longshoremen Will Perform the Disputed Work 5

1. Southport's Operations. 5

2. Southport Promised the Disputed Work to Local 12. 6

3. Southport Negotiated With Local 12 Regarding the Work in Dispute. 7

C. Local 12 Longshoremen Exclusively Performed the Chip Loading Work at the Barge Slip 9

1. Southport Selected Local 12 Longshoremen for the Work. 9

2. Southport's Manager Supervised Local 12 Longshoremen. 10

D. Southport Created a "Jurisdictional Dispute" by Removing the Work From Local 12 Longshoremen. 11

1. Southport Replaced Local 12 Longshoremen With Employees From Other Locations for the Log Unloading Work 11

2. Southport Reassigned the Chip Loading Work to a Manager. 12

3. ILWU Local 12 Picketed Southport to Preserve Its Work. 13

E. The Section 10(k) Proceeding 13

III. ARGUMENT 14

A. The Board Should Quash the Notice of 10(k) Hearing Because This Is not a Jurisdictional Dispute Within the Meaning of Section 8(b)(4)(D). 14

1. The Board Should Quash the Notice of 10(k) Hearing Because There Exists no Jurisdictional Dispute Between Two Groups of Employees 14

2. The Board Should Quash the Notice of 10(k) Hearing Because the Dispute Is of Southport's Own Making. 17

a. The dispute was triggered by Southport replacing Local 12 longshoremen for the log unloading work. 19

b. The dispute was triggered by Southport reassigning the chip loading work from Local 12 longshoremen to a supervisor. 20

c. The *Sierra Pacific* Case is distinguishable. 22

3. The Board Should Quash the Notice of 10(k) Hearing Because ILWU Local 12 Has a Valid Work Preservation Claim to the Work in Dispute. 23

B. If the Board Reaches the Merits, the 10(k) Factors Favor Awarding the Work to ILWU Local 12 Longshoremen. 25

1. The Work in Dispute. 26

2. Certifications and CBAs. 26

3. Employer Past Practice/Preference. 27

4. Area and Industry Practice. 29

5. Skills. 32

6. Economy and Efficiency of Operations. 34

7. Job Impact. 36

IV. CONCLUSION 37

TABLE OF AUTHORITIES

Federal Cases

Int'l Longshoremen's & Warehousemen's Union v. NLRB,
884 F.2d 1407 (D.C. Cir. 1989) 21

Int'l Longshoremen's & Warehousemen's Union, Local 14 v. NLRB,
85 F.3d 646 (D.C. Cir. 1996) 22

Int'l Longshoremen's and Warehousemen's Union, Local 62-B v. NLRB,
781 F.2d 919 (D.C. Cir. 1986) 17, 18, 19, 23

NLRB v. Radio & Television Broad. Engineers Union Local 1212,
346 U.S. 573 (1961) 25

NLRB Cases

Am. Fed'n of Guards, Local No. 1 (Indies Terminal Co.),
279 NLRB 1294 (1986) 29

Bldg. Material and Dumptruck Drivers, Local 420 (All Am. Asphalt, Inc.),
238 NLRB 934 (1978) 15

Chauffeurs, Teamsters & Helpers, Local 331 (Bulletin Co.),
139 NLRB 1391 (1962) 17

CNN America, Inc.,
361 NLRB No. 47 (2014) 25

Electrical Workers Local 47 (Pouk & Steinle, Inc.),
353 NLRB 1074 (2009) 34

Highway Truckdrivers & Helpers, Local 107, Int'l Bhd. of Teamsters (Safeway Stores),
134 NLRB 1320 (1961) 17, 18, 25

Int'l Longshoremen's and Warehousemen's Union, Local 14 (Sierra Pacific Indus.),
314 NLRB 834 (1994) 31

Int'l Ass'n of Machinists & Aerospace Workers Dist. 190 (SSA Terminal, LLC),
344 NLRB 1018 (2005) 17, 19, 25

Int'l Longshore Workers, Local 62-B (Alaska Timber Corp.),
261 NLRB 1076 (1982) 32

L.E. McGraw Constr.,
283 NLRB 598 (1987) 36

Laborers (Eshbach Bros.),
344 NLRB 201 (2005) 34

Laborers Local 603 (Duncan Landscape Ass'n),
241 NLRB 993 (1979) 36

Laborers Local 681 (Elmhurst-Chicago Stone Co.),
263 NLRB 980 (1982) 36

Local 236, affiliated with the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. (Maxon Constr. Co.),
194 NLRB 594 (1971) 15

Local 294, Teamsters (John V. Warren, Inc.),
203 NLRB 1255 (1973) 15

Longshoremen ILA Local 1242 (Rail Distrib. Ctr.),
310 NLRB 1 (1993) 35

Machinists Local 225 (Cessna Aircraft Co.),
246 NLRB 24 (1979) 36

Machinists Lodge 160 (SSA Marine),
347 NLRB 549 (2006) 26

Machinists Lodge 1743 (J.A. Jones Constr.),
135 NLRB 1402 (1962) 26

Plasterer's Local 180 (Jack Ebert & Co.),
226 NLRB 242 (1976) 27

Plumbers & Steam Fitters, Local No. 412 (Zia Co.),
168 NLRB 494 (1967) 27

Teamsters Local 578 (USCPWesco),
280 NLRB 818 (1986) 17, 18

Teamsters Local Union 525 (Tiger Stripers, Inc.),
241 NLRB 306 (1979) 15

Teamsters Local Union No. 170 (Henry-Lundgren Co.),
240 NLRB 649 (1979) 15

TLI, Inc.,
271 NLRB 798 (1984) 25

United Bhd. of Carpenters & Joiners of Am., Local 690 (Walter Corp.),
151 NLRB 741 (1965) 27

Woodworkers Local 3-364 (Potlatch Corp.),
247 NLRB 1465 (1980) 36

Federal Statutes

29 U.S.C. § 152(3) 14

29 U.S.C. § 152(11) 16, 17

29 U.S.C. § 158(b)(4)(D) 14

29 U.S.C. § 160(k) 14

I. INTRODUCTION

This matter is not a legitimate jurisdictional dispute requiring intervention and resolution by the Board; rather, it is a dispute engineered by the unilateral decision of the Employer, Southport Lumber Company ("Southport"), to replace longshoremen, represented by International Longshore and Warehouse Union Local 12 ("ILWU Local 12" or "Local 12") with others to perform the disputed work. Granting the relief Southport seeks would not only go far afield of the power the Board has under Sections 8(b)(4)(D) and 10(k) to decide jurisdictional disputes, but it would also mean that employers can avail themselves of protection under the Act by simply reassigning work, which the Board has never countenanced.

The Board need not and should not reach the merits of the alleged jurisdictional dispute here but should instead quash the Notice of 10(k) Hearing. First and foremost, the evidence irrefutably shows that one piece of the disputed work, the loading of chip barges, is not subject to a dispute between two groups of employees, but instead is currently being performed by a supervisor. Thus, there is no jurisdictional dispute within the meaning of the Act for the Board to decide. In addition, the record reflects that Southport represented that the work in dispute would be performed by Local 12, negotiated with Local 12 about the work, had Local 12 perform the work, and then unilaterally reassigned the work. A "dispute" arising out of such circumstances cannot appropriately be decided by the Board because it is entirely of the employer's own making. Furthermore, Local 12 has historically performed and currently performs the work at issue and has a legitimate work preservation claim to the work. Local 12, thus, has the right to engage in conduct to preserve its work. For these reasons, the Board must quash the Notice of 10(k) Hearing.

Even if the Board were to address this matter and evaluate the customary 10(k) factors, the Board would find that the factors weigh in favor of awarding the disputed work to ILWU Local 12. The employer's past practice, including bargaining and assignment of the work to Local 12; area and industry practice of performing the work; greater skills and efficiency; and job impact all require that the work be awarded to longshoremen represented by ILWU Local 12.

II. STATEMENT OF THE FACTS

A. The Work in Dispute.

The work in dispute in this case is related to the loading of chip barges and the unloading of log barges. Specifically, the work in dispute is: (1) the operation of the spout to load wood chips onto barges at the barge slip operated by Southport Lumber Company in North Bend, Oregon (hereinafter referred to as "chip loading work"), and (2) the operation of on-dock heavy equipment to transport logs from the dock to the first place of rest (i.e., the decks in the yard) at the barge slip operated by Southport Lumber Company in North Bend, Oregon (hereinafter referred to as "log unloading work").[1]

1. Chip Loading Work – Operation of Spout/Chute by Remote Control.

At Southport's barge slip, wood chips are loaded onto a barge using a radial stacker chip conveyor. (Tr. 47:24-48:4; Ex. ER-1).[2] First, chip dozers and wheel loaders push chips into the chip reclaim chute, a large concrete hole near the dock. (Tr. 51:3-6; 324:20-22; Exs. ER-3, ER-12). A series of four chains convey the chips from the reclaim chute and through the hopper onto a belt inside a tube. (Tr. 50:25-51:6; 324:22-24; 326:18-22; Exs. ER-1, ER-3, ER-12, ER-

[1] The Notice of 10(k) Hearing defines the disputed work in broad terms that encompass work that is not in dispute. As discussed in more detail below, the facts, including what work has been and is being performed at the barge slip, as well as Southport's own statements at the hearing, establish that the definition above more appropriately identifies the work in dispute. (Tr. 8:15-20).

[2] "Tr." refers to the transcript of the hearing. The number before the colon refers to the page number of the transcript and the number after the colon refers to the line number on that page. Exhibits are identified as either "Bd. Ex." for the Board's Exhibits, "Ex. ER-" for employer Southport's Exhibits, and "Ex. U-" for ILWU Local 12's exhibits.

13). The belt transports the chips to a spout (or chute)[3] that hangs down from the end of the conveyor. (Tr. 52:1-6; 326:18-22; Exs. ER-4, ER-13). The spout hangs over the barge and is approximately 50 feet above the dock. (Tr. 48:1-4; 53:17-21). An electric actuator attached to the spout moves the spout in and out to direct the flow of chips as they are discharged into the barge – either toward the off-shore or toward the on-shore side of the barge. (Tr. 52:1-6; Ex. ER-4). The electric actuator on the spout is operated by a remote control box. (Tr. 69:23-70:1).

The barge loading process at Southport's barge slip is a continuous operation, without breaks or pauses. (Tr. 126:15-21). Depending on the size of the barge, the loading process can take anywhere from 6 hours and 45 minutes to 10 hours. (Tr. 330:14-17). In order to ensure the barge is correctly loaded, the loading process must be continually monitored. (Tr. 226:25-227:17 [Hilding]; *see* Tr. 329:1-3 [Coleman]). The individuals operating the spout are in contact with the barge crew to receive draft numbers, which they use to load the barge to the appropriate height. (Tr. 222:9-22; 235:5-17). They have to operate the spout as well as monitor the draft numbers on the bow and stern of the barge to do this. (Tr. 228:13-21; 235:5-17). In addition to operating the spout from the dock, they also operate it from the tower located next to the spout or from on the barge itself.[4] (Tr. 224:8-12; 229:9-13). As the loading process occurs, the individuals operating the spout must also monitor the flow of chips and the creation of piles in the hull to determine when the barge must be fleeted (moved along the dock). (Tr. 239:13-23). Accuracy is key because an improperly loaded barge, i.e., an unevenly loaded or overloaded barge, will not tow properly and risks tipping over during its ocean travel. (Tr. 222:20-22;

[3] The terms "spout" and "chute" refer to the same piece of equipment located at the end of the radial stacker conveyor through which chips are discharged onto a barge. (*Compare* Tr. 52:1-6, *with* Tr. 114:5-8).
[4] At Southport's barge slip, there is also a shack that has a monitor showing video of on-shore and off-shore angles of the barge. (Tr. 324:15-25; *see* Ex. ER-12). Individuals operating the spout by remote control can work from the shack but also need to work from other locations to monitor the draft numbers and to get a better visual of the operation that cannot be provided by the monitors. (Tr. 224:8-12; 228:13-21; 229:9-13; 235:5-17).

228:18-21).

2. Log Unloading Work – Operation of On-Dock Heavy Equipment to Transport Logs From the Dock to the First Place of Rest.

When a log barge comes into Southport's barge slip, bundled logs are unloaded by a crane located on the barge and placed on the dock. (Tr. 63:20-64:5). Two workers driving on-dock heavy equipment transport the bundled logs from the dock to decks in the log yard. (Tr. 66:18-23). While Southport uses LeTourneau brand machines,[5] the particular heavy equipment used to transport logs can vary and are generally referred to as "log loaders," "snapper grabbers," "log grapplers," etc. (*See* Tr. 158:18-20; 193:14-25; 246:10-12; 271:18-24). These are large wheeled machines that pick up and transport the logs with grabbers or forks on the front of the machine. (*Id.*) Different brands, models, and types include Wagners, Volvos, LeTourneaus, CATs, front-end loaders, snapper grabbers, etc. (Tr. 272:11-18; 273:16-20, 294:2-10).

As Southport's owner described, a LeTourneau brand machine is "a large wheeled loader. . . . [I]t has four wheels . . . with forks on the front." (Tr. 62:4-9). This description equally applies to other log loaders or snapper grabbers. (*See* Tr. 294:2-14). The only differences are a Letourneau is diesel electric rather than diesel hydraulic and is controlled by toggle switches rather than by a steering wheel, joystick, and gas pedal. (Tr. 341:4-22). Despite these differences in the set-up and configuration of controls, all types of log loaders, including LeTourneaus, perform the same task – transporting logs. (Tr. 294:11-12).

3. There Is No Other Work in Dispute.

At the hearing Southport agreed that the only work in dispute is the work described in

[5] Southport's owner Mr. Smith testified that the reason Southport uses LeTourneaus is because the dock at the barge slip is concrete and can therefore bear the weight of the machines. Other docks do not use this particular brand of machine simply because the docks are not concrete and can only support lighter machines, not because the function being performed – log unloading – is different. (Tr. 44:14-18; 68: 14-20). For example, Ocean Terminals dock has been refurbished with a concrete dock, and Local 12 will be operating LeTourneaus on that dock in the near future. (Tr. 217:11-22; *see* Ex. U-7).

Sections II.A.1. and II.A.2. above, and the other work about which it presented testimony is not in dispute. Southport agreed that the unloading of logs onto the dock by cranes located on the barges is *not* part of the work in dispute (Tr. 65:3-8 ("HEARING OFFICER HARVEY: Okay. Let – let me ask if – is the unloading of logs from the barges part of the work in dispute? MR. GARONE: It is because there was – well, it's not part of the work in dispute . . . . We're not saying that that's part of the disputed work . . . . It's background.); *see also* Tr. 65:25-66:10)) and confirmed that the only work in dispute related to log unloading is the operation of on-dock heavy equipment to transport logs (Tr. 61:12-16 ("MR. GARONE: You have to understand the whole picture to get the whole transport, because they're claiming the LeTourneau driver jobs of transporting the – the logs once they're laid to rest, but you have to understand the entire process to understand any of that.")). Southport likewise agreed that any work related to lumber barges is not part of the work in dispute. (Tr. 242:25-243:24 (Southport's counsel vigorously objecting to testimony regarding lumber loading work, stating such testimony is "way afield")).

Thus, the only work in dispute is: (1) the operation of the spout to load wood chips onto barges and (2) the operation of on-dock heavy equipment to transport logs arriving by barge from the dock to the first place of rest.

B. <u>Southport Purchased and Redeveloped the Barge Slip Representing that Local 12 Longshoremen Will Perform the Disputed Work.</u>

1. Southport's Operations.

Southport is owned by two individuals, Jason Smith and Jim Lyons. (Tr. 33:15-23). It is a subsidiary, along with Southport Forest Products, LLC, of Southport Investments. (Tr. 36:5-9). Mr. Smith and Mr. Lyons are also each half owners of Southport Investments and Southport Forest Products. (Tr. 36:10-13).

Southport Forest Products began operating a saw mill south of Coos Bay in 1999. (Tr.

35:18-23). In 2004, the Port of Coos Bay ("Port") sold 32 acres of its land on the North Spit, including a barge slip, to Southport Forest Products. (Ex. U-1; Tr. 18:24-19:2; Tr. 37:2-13). By 2005, Southport Forest Products had built and begun operating a new mill on the property, and the Port developed a rail spur into the property to serve the mill. (Tr. 44:25-45:1; Ex. U-1). Chips and logs were trucked to and from the mill facility. (Tr. 45:6-9, 19-21). With regard to the barge slip, Southport's long-term plans were to handle inbound logs, outbound chips, and outbound lumber by barge. (Tr. 40:11-15).

Today, the property on the North Spit consists of the mill, a lumber storage yard, a log storage yard, a rail spur, and the barge slip. (Tr. 46:15-47:2). Southport operates the barge slip loading chip barges and unloading log barges. (Tr. 34:23-35:9; 83:4-11). Southport Forest Products operates the small-log saw mill manufacturing lumber and wood chip byproduct. (Tr. 34:23-35:9) Southport Forest Products also operates a whole-log chipping and log-sorting facility south of Coos Bay ("Sumner facility"). (Tr. 35:10-12). That facility sorts logs, sending high-value logs to the saw mill, and converts the remaining logs into wood chips. (Tr. 35:14-17).

2. Southport Promised the Disputed Work to Local 12.

In 2005, Southport and the Port partnered to apply for a $506,000 grant from *Connect*Oregon I, a program funded by public money with the purpose of investing in Oregon's transportation infrastructure, to redevelop the barge slip. (Tr. 19:7-10; Exs. U-1, U-3). One of the factors considered in order to secure *Connect*Oregon I funding was job creation. (Ex. U-2, at pg. 5). The application submitted by Southport and the Port stated:

> Creating an intermodal transportation hub at the Southport Forest Products sawmill in the North Bay Marin Industrial Park **will provide additional work opportunities for the local longshore labor force** and for other persons employed in marine trades in the Coos Bay harbor.

(*Id.*) (emphasis added). They received the grant and entered into a Grant Agreement with the

Oregon Department of Transportation. (Tr. 19:11-17; Ex. U-4). The Agreement also affirmed: "The Project will also provide additional employment for local longshore labor force and for other people employed in the marine trades in the Coos Bay harbor." (Ex. U-4, at exhibit A). Throughout the application process and the barge slip redevelopment itself, Southport told the Port that the redevelopment would result in increased jobs for local longshoremen. (Tr. 21:3-15, 26:12-15 [Callery]).

In February 2013, the barge slip became operational for loading chip barges; and on February 19, 2013, Southport received its first chip barge. (Tr. 54:22-24). In a news release the Port put out immediately after ILWU Local 12 workers loaded that first chip barge, the Port explained that the operation of the barge slip "is expected to increase employment in Southport's local operations, and in maritime services and the longshore labor sectors." (Ex. U-3). The news release also quoted Marvin Caldera, ILWU Local 12 president at the time, expressing his support for the barge slip because it created local jobs. (*Id.*; *see* Tr. 23:8-10).

3. Southport Negotiated With Local 12 Regarding the Work in Dispute.

In 2012, Southport and Local 12 engaged in negotiations regarding loading and unloading work at the barge slip. (Tr. 59:1-17; 159:23-160:5; 160:12-17; Exs. U-5, ER-5). These negotiations were precipitated by Southport's desire load a log barge in spring 2012. (Tr. 55:6-14; 76:15-16 ("We were working diligently to try to reach an agreement with the union.") [Smith]). The parties were unable to reach an agreement about log loading/unloading manning quickly enough so the logs were sold locally instead. (Tr. 76:12-77:1). After this, Southport and Local 12 continued to negotiate. (*See* Ex. U-5).

The first meeting between the parties was held at Southport's saw mill on the North Spit. (Tr. 57:5-6; 161:4-7). On behalf of Southport, Mr. Smith, Mr. Lyons, Greg Chineworth, and Richard Coleman were present. (Tr. 57:9-10). For Local 12, Marvin Caldera, Gene Sundet, Joe

Hilding, and Gary Alford were present. (Tr. 57:6-7; 160:6-9). Southport indicated that it planned to have chip, log, and lumber loading/unloading work at its barge slip in the future; and the parties negotiated regarding manning for this work. (Tr. 159:25-160:1; 160:12-17). They agreed almost immediately on the manning for loading chip barges – two Local 12 longshoremen, referred to as "button pushers," would operate the spout by remote control. (Tr. 163:14-17).

On May 8, 2012, Southport wrote to Local 12 with a manning proposal for loading and unloading work at the barge slip, which offered, among other things, two button pushers for loading chip barges. (Ex. U-5; Tr. 162:5-8). On May 14, 2012, Local 12 responded with a counter-proposal, which in part agreed to the two button pushers for loading chip barges. (Tr. 162:9-13; 163:5-7; Ex. ER-5). At the last meeting between Southport and Local 12, Mr. Smith assured Local 12 that although the parties had not yet agreed on all manning, Southport would not do any loading or unloading work at its barge slip without Local 12 labor.[6] (Tr. 171:6-18 [G. Sundet]; 225:20-25 [Hilding]; 256:17-20 [Alford]). Southport then wrote to Local 12 on July 16, 2012, stating that no barges were due to arrive at the barge slip at that time and that Southport had entered into an agreement with stevedore company Ports America to assist in negotiating an agreement with Local 12 for work at its barge slip.[7] (Ex. U-12). Mr. Lyons confirmed that Southport entered into the arrangement with Ports America so that "Ports America would assist

[6] At the hearing, Mr. Smith testified that he did not recall stating this, but his testimony is outweighed by Mr. Sundet's, Mr. Alford's, and Mr. Hilding's testimony that Mr. Smith did in fact state that Southport would not perform loading or unloading work at its barge slip without Local 12 labor. Southport offered testimony from Mr. Lyons, who was also present at the meeting, but did not elicit any testimony to corroborate Mr. Smith's claim. The documentary evidence also shows that Southport repeatedly indicated that it would use Local 12 to do the loading and unloading work at its barge slip. Southport made this representation to the Port and the Oregon Department of Transportation (*see supra* Section II.B.2.) and indicated this to Ports America and Local 12 in writing (Exs. U-5, U-12).

[7] The June 4, 2012 letter from Attorney Triplett (Ex. ER-7) in which he stated that Southport will use non-ILWU personnel for future work at its barge slip, must be ignored. It is completely contradicted by the later July 16 letter directly from Southport to Local 12, which states that Southport has engaged Ports America to assist with obtaining an agreement with Local 12. (Ex. U-12). Indeed, Southport used Local 12 labor at its barge slip from February 2013 to August 2014.

Southport in pursuing a relationship with the ILWU, Local 12." (Tr. 303:14-304:4). Mr. Smith also testified that Southport engaged Ports America to facilitate Southport getting an agreement with Local 12. (Tr. 366:4-25; *see* Tr. 77:5-11).

C. Local 12 Longshoremen Exclusively Performed the Chip Loading Work at the Barge Slip.

On February 19, 2013, the first chip barge arrived at Southport's barge slip, and pursuant to its agreement with Local 12, workers represented by Local 12 loaded the barge. (Tr. 91:9-15; 162:9-13; *see* Ex. U-5). Thereafter, and until August 2014, each time a barge came to the barge slip Local 12 performed the chip loading work. (Tr. 91:9-15). Local 12 loaded more than 40 barges at the barge slip. (Tr. 165:12-21; 166:10-21; *see* Ex. U-6).

1. Southport Selected Local 12 Longshoremen for the Work.

Consistent with its agreement with Local 12, Southport used two Local 12 longshoremen to load chips at its barge slip. (Ex. U-5; Tr. 162:9-16; 163:14-17). Southport secured Local 12 workers through Ports America, which served as the payroll agent for Local 12 longshore labor. (Tr. 303:14-304:4; 363:6-9; *see* Exs. U-12, U-13). Southport communicated with Ports America regarding specifics about Local 12 labor orders, such as the time of barge arrival and for which shifts labor was needed. (Tr. 128:2-9). Southport also received invoices from Ports America for Local 12 labor. (Tr. 368:16-369:1; 370:9-12).

Southport had three chip customers utilizing barge transportation during the time Local 12 worked at the barge slip: Georgia-Pacific, Weyerhauser, and Capstone Paper. (Tr. 84:7-11). Mr. Smith testified that for customers Georgia-Pacific and Weyerhauser, Southport provided services FAS ("free along side"), by which Southport would bring the chips to the dock and put them in the conveyor but it was Georgia-Pacific's and Weyerhauser's responsibility to load the chips onto the barge. (Tr. 84:12-17). Mr. Smith testified that Georgia-Pacific and Weyerhauser

hired Ports America, who in turn provided ILWU Local 12 workers to load the chip barges.[8] (Tr. 84:17-21; 85:8-16). Southport sold chips "on a delivered basis" to Capstone Paper, whereby Southport was responsible for delivering the chips to Longview, Washington. (Tr. 84:22-85:5). To do this, Mr. Smith testified that Southport hired tug and barge companies, who agreed to obtain Local 12 labor through Ports America. Southport got Dunlap Towing to agree to hire the button pushers through Ports America and give Southport a rate that included these expenses. (Tr. 134:19-135:6). Southport also instructed Brusco Tug and Barge to secure Local 12 labor as shown by its April 16, 2013 letter to Ports America stating:

> This letter is to inform you that Southport Lumber Company has engaged the services of Busco [sic] Tug & Barge to provide transportation services for our wood chips . . . . Under our direction, Brusco may engage the services of Ports America who will provide two Longshore laborers to run the spout on the chip loading conveyor to trim the barge out.

(Ex. U-13; Tr. 305:16-18; 305:25-306:17 (Lyons confirming that Southport participated in the decision to use Local 12 and approved of using Local 12 to perform the chip loading work)).

2. Southport's Manager Supervised Local 12 Longshoremen.

When Local 12 longshoremen performed chip loading work at the barge slip, they were supervised by and received instruction from Southport's log yard supervisor/manager,[9] Richard Coleman. (Tr. 86:23-87:3). Mr. Coleman has "complete responsibility for all of the aspects of the loading operation." (Tr. 87:2-3; 120:6-7 [Smith]; *see also* Tr. 319:8-11 [Coleman]). He is also in charge of overseeing the yard operations at both the mill on the North Spit and the Sumner facility. (Tr. 319:14-23). Mr. Coleman provided direction and instruction to Local 12 longshoremen. (Tr. 86:23-87:3 [Smith]; 320:2-4 [Coleman]). They took this direction and also

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[8] As the evidence and testimony cited above shows, even if this was the case, Southport was intimately involved in deciding to retain and retaining Local 12 workers to perform chip loading work at its barge slip. (*See supra*).
[9] Mr. Smith identified Mr. Coleman's title as both "log yard supervisor" and "log yard manager." (Tr. 87:2-3; 120:6-7).

went to Mr. Coleman with any issues that arose during the course of the chip loading operation. (Tr. 86:23-87:3; 119:22-120:5; 223:10-21; 319:24-320:4).

D. Southport Created a "Jurisdictional Dispute" by Removing the Work From Local 12 Longshoremen.

On September 4, 2014, a log barge arrived at Southport, but Southport used its unrepresented employees rather than Local 12 workers to unload the barge. (Tr. 93:1-7). Thereafter, Southport ceased using Local 12 workers to perform any barge loading or unloading work, whether chip or log, at the barge slip. (Tr. 103:16-19).

1. Southport Replaced Local 12 Longshoremen With Employees From Other Locations for the Log Unloading Work.

Since September 4, 2014, every time Southport has unloaded a log barge, it has used Southport Forest Products' log yard and Sumner facility employees to do the log unloading work. (Tr. 128:23-129:2). They operate LeTourneaus to pick up logs that have been placed on the dock and transport the logs to decks in the yard. (Tr. 66:18-23). The log barges coming to Southport carry Southport and Herbert Lumber Company logs. (Tr. 309:4-10). Prior to the log barges unloading at Southport's barge slip, they unloaded at Ocean Terminals dock, which is owned by Mr. Lyons.[10] (*See* Tr. 307:9-24; 309:4-10). Local 12 workers performed the log unloading work at Ocean Terminals dock, including the operation of log loaders. (Tr. 312:22-313:6). Ocean Terminals has an agreement with Local 12 that Local 12 longshoremen will operate heavy machinery to transport logs in loading and unloading operations.[11] (Tr. 312:16-25; Ex. U-14; *see also* Ex. U-9 (1999 letter stating that Local 12 will operate heavy machinery to transport bundled logs at Ocean Terminals); Ex. U-15).

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[10] Mr. Lyons confirmed that the log barges that went to Ocean Terminals dock also carried Herbert Lumber Company and Southport logs. (Tr. 307:9-24; *see also* Tr. 131:18-132:7 [Smith]).

[11] In anticipation of the completion of the new concrete dock at Ocean Terminals, in 2012 Mr. Lyons wrote to a stevedore company that Ocean Terminals intended to continue using Local 12 workers to operate log loaders on the new dock. (Tr. 316:12-18; Ex. U-15). This new concrete dock allows for use of heavy equipment, including LeTourneaus. (*See* Ex. U-7; Tr. 216:22-217:22).

2. Southport Reassigned the Chip Loading Work to a Manager.

Mr. Coleman has been the log yard supervisor at Southport for 12 years. (Tr. 318:19-25). He oversees the operations at the barge slip, the log yard at the mill, and the Sumner facility. (Tr. 319:14-23). He is salaried, supervises multiple employees, and has the power to hire, fire, and discipline employees. (Tr. 143:9-144:6; 319:8-23; 361:15-16). Between February 2013 and August 2014, Mr. Coleman oversaw the barge loading operations at Southport's barge slip while Local 12 performed the chip loading work; and since then he has continued to oversee those operations as well as perform the chip loading work. (Tr. 120:8-13).

At the hearing, Mr. Smith explained that Mr. Coleman is the only individual who has performed the chip loading work since Southport stopped using Local 12:

> Q: And the – the – the supervisor that you have, what's his name?
> A: His name is Richard Coleman.
> Q: And does he push the buttons?
> A: Yes, he does.

(Tr. 71:24-72:3).

> Q: Who is loading the chips onto the chip barges at Southport currently?
> A: Southport's same supervisor that worked with the button pushers. He's doing all the jobs himself.

(Tr. 116:11-14).

> Q: Okay. And so is Richard the only person who has been operating the chute–
> A: Yes.
> Q: --via remote?
> A: Yes.
> Q: No one else has done it since –
> A: No.
> Q: --August 2014?
> A: No.

(Tr. 120:22-121:3). Since August 20, 2014, there have been five chip barges at the barge slip,

and Local 12 has not received any labor requests to do the chip loading work.[12] (Tr. 178:8-9, 13-15). Instead, Mr. Coleman has performed the chip loading work. (Tr. 330:25-331:5).

3. ILWU Local 12 Picketed Southport to Preserve Its Work.

Southport and Local 12 had engaged in extensive negotiations in 2012, had come to an agreement regarding chip loading work that Southport honored for 18 months, and Southport committed to using Local 12 labor at its barge slip. Then, Southport reneged on its agreement and commitment to hire Local 12 workers to perform loading and unloading work at its barge slip and reassigned the work. In response, Local 12 picketed outside Southport in order to preserve Local 12's work.[13] (*See* Bd. Ex. 2).

E. The Section 10(k) Proceeding.

On March 19, 2015, the Regional Director for Region 19 issued a Notice of 10(k) Hearing. The hearing took place on April 8 and April 9, 2015, in North Bend, Oregon. ILWU Local 12 orally moved to quash the Notice of 10(k) Hearing on the grounds that the dispute at issue is entirely of Southport's own making and Local 12 has a valid work preservation objective; and, thus, the dispute is not a genuine jurisdictional dispute appropriate for resolution through Sections 8(b)(4)(D) and 10(k) of the Act. (Tr. 11:15-13:11). The hearing officer declined to rule on the motion, deferring the matter to the Board. (Tr. 15:3-6). During the hearing, Southport's witnesses testified that the chip loading work has been exclusively performed by a company supervisor since Southport reassigned the work, which is yet another basis for the Board to quash the Notice of 10(k) Hearing. (Tr. 71:24-72:3, 116:11-14, 120:22-121:3). The parties were unable to stipulate to the work in dispute because the definition set

[12] Mr. Smith gave hearsay testimony claiming that Ports America told him that Local 12 had said it would not perform the chip loading work. To the contrary, Mr. Sundet testified that he told Ports America that Local 12 would perform the work. (Tr. 177:2-178:6; 178:9-12). Mr. Sundet's direct testimony must be credited.

[13] Mr. Smith gave hearsay and double hearsay testimony that Local 12 made threats to various tug and barge companies, but Local 12's direct testimony to the contrary must be credited. Local 12 did not threaten any tug and barge companies. (Tr. 175:14-177:1; *see* Exs. ER-9, ER-21).

forth in the Notice of 10(k) Hearing is overbroad and vague. Local 12 stated for the record the appropriate description of the disputed work, which is also set out above in Section II.A. (Tr. 8:15-20).

III. ARGUMENT

A. The Board Should Quash the Notice of 10(k) Hearing Because This Is not a Jurisdictional Dispute Within the Meaning of Section 8(b)(4)(D).

It is improper for the Board to consider this matter pursuant to Section 10(k) because there is no reasonable cause to believe there has been a violation of Section 8(b)(4)(D) for several reasons: (1) with regard to the chip loading work, there is no jurisdictional dispute between two groups of statutory employees because the work is being performed by a statutory supervisor; (2) there is no valid jurisdictional dispute because Section 10(k) does not protect employers who have intentionally created the dispute, such as Southport here; and (3) Local 12 has a valid work preservation objective and, thus, Local 12's conduct is not a violation of 8(b)(4)(D). Any of these reasons are sufficient to quash the Notice of 10(k) Hearing.

1. The Board Should Quash the Notice of 10(k) Hearing Because There Exists no Jurisdictional Dispute Between Two Groups of Employees.

Section 10(k) provides that "the Board is empowered and directed to hear and determine the dispute" out of which a Section 8(b)(4)(D) unfair labor practice charge arises." 29 U.S.C. § 160(k). Under Section 8(b)(4)(D), it is an unfair labor practice for a labor organization to engage in conduct where the object is "forcing or requiring any employer to assign particular work to *employees* in a particular labor organization or in a particular trade, craft, or class rather than to *employees* in another labor organization or in another trade, craft, or class." 29 U.S.C. §158(b)(4)(D) (emphasis added). The Act defines "employee" to specifically exclude "any individual employed as a supervisor." 29 U.S.C. §152(3). Thus, if an alleged dispute is between

a group of employees and a supervisor as defined by Section 2(11), there is no 8(b)(4)(D) violation and no authority for the Board to decide a jurisdictional dispute pursuant to Section 10(k). *Local 236, affiliated with the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. (Maxon Constr. Co.)*, 194 NLRB 594 (1971) (quashing the notice of 10(k) hearing because the work in dispute was performed by a supervisor and an independent contractor); *Local 294, Teamsters (John V. Warren, Inc.)*, 203 NLRB 1255 (1973) (holding that where the work in dispute is being performed by supervisors, the Board will not decide the assignment of work); *Teamsters Local Union 525 (Tiger Stripers, Inc.),* 241 NLRB 306, 307, fn.6 (1979) (same); *Teamsters Local Union No. 170 (Henry-Lundgren Co.)*, 240 NLRB 649, fn.2 (1979) (same); *Bldg. Material and Dumptruck Drivers, Local 420 (All Am. Asphalt, Inc.)*, 238 NLRB 934, 935, fn.5, 6 (1978) (same).

In this case, the record evidence shows that any dispute over chip loading work is not a jurisdictional dispute within the meaning of Section 8(b)(4)(D) because a supervisor is currently performing the work. Southport's owner Mr. Smith emphatically testified on the first day of the hearing that Southport's yard supervisor Richard Coleman is the *only* individual who has performed the chip loading work since Southport reassigned the work away from Local 12:

> Q: Okay. And so is Richard the only person who has been operating the chute –
> A: Yes.
> Q: -- via remote?
> A: Yes.
> Q: No one else has done it since –
> A: No.
> Q: -- August 2014?
> A: No.

(Tr. 120:22-121:3; *see also* Tr. 71:24-72:3; 116:11-14). He also testified that the only individual who has "demanded" to perform the chip loading work is Mr. Coleman because he is the only

one who has performed the work:

> Q: And who is it that – what Southport employees demanded that Southport have – allow them to operate the buttons for –
> A: Richard –
> Q: -- the chip loading?
> A: --Coleman
> Q: And so – so Richard has come to you and said that he – he claims that work?
> A: He does.
> . . .
> Q: And he's a manager at your facility?
> A: Yes.
> Q: Okay. And – and anyone else who – who believes that at Southport that they should be – be operating the spout for the chip loading?
> A: Well, there's no other person that has operated the spout. So we haven't had any requests from anybody else to operate the spout.

(Tr. Tr. 129:9-17; 129:20-130:2).[14] There is no question that Mr. Coleman is a statutory supervisor under Section 2(11) of the Act. He has the authority to hire. (Tr. 335:19-336:5; *compare* 29 U.S.C. § 152(11) (supervisors have authority to "hire")). He has the authority to discipline employees and does not need approval to do so. (Tr. 143:25-144:6; *compare* 29 U.S.C. § 152(11) (supervisors have authority to "discipline"). He has the authority to discharge and does not need any approval. (Tr. 143:25-144:6; *compare* 29 U.S.C. § 152(11) (supervisors have authority to "discharge"). He supervises and directs employees at the barge slip, the mill yard, and the Sumner chipping facility. (Tr. 119:22-120:5; 143:22-24; 319:14-320:4; *compare*

[14] The Board should discount the testimony of Mr. Coleman, which Southport elicited in an attempt to contradict the unequivocal testimony of Mr. Smith. Mr. Smith gave repeated testimony that Mr. Coleman is a supervisor and has on his own performed the chip loading work in dispute since Southport reassigned that work. On the second day of hearing, Mr. Coleman claimed that a millwright from Southport Forest Products' Sumner facility would assist him with the chip barge operations and would perform the chip loading work when Mr. Coleman had to leave early or deal with another issue. This is contrary to Mr. Smith's testimony from the first day of hearing and his testimony that the millwright performed repairs to the radial stacker conveyor, and if he has ever done the chip loading work, it was "very seldom" because, for example, if Mr. Coleman needs to use the restroom, he will do so when he does not need to be operating the remote to control the spout. (Tr. 71:17-23; 72:6-8; 135:25-136:5). Mr. Smith also testified that Mr. Coleman has arranged his vacations around the arrival of chip barges to ensure that he does the chip loading work. (Tr. 136:18-21). Only after Southport realized that there was no jurisdictional dispute within the meaning of Section 8(b)(4)(D) because Mr. Coleman performs the work in dispute, did Southport try to muddy the facts to cover up this fatal flaw. This is yet another example of Southport's modus operandi – to orchestrate a jurisdictional dispute so it can illicitly use Sections 8(b)(4)(D) and 10(k)'s protections to its own end.

29 U.S.C. § 152(11) (supervisors have authority to "responsibly direct" employees)). Moreover, he was present at and participated in Southport's negotiations with Local 12. (Tr. 57:9-10).

Thus, because there is no dispute over the chip loading work between two groups of employees, the Board is without authority to decide any dispute regarding this work and must quash the Notice of 10(k) Hearing.

2. The Board Should Quash the Notice of 10(k) Hearing Because the Dispute Is of Southport's Own Making.

In order to trigger the Board's duty under Section 10(k), there must be a valid jurisdictional dispute. *Int'l Longshoremen's and Warehousemen's Union, Local 62-B v. NLRB (Alaska Timber),* 781 F.2d 919, 929 (D.C. Cir. 1986); *Int'l Ass'n of Machinists & Aerospace Workers Dist. 190 (SSA Terminal, LLC)*, 344 NLRB 1018, 1020 (2005); *Teamsters Local 578 (USCPWesco)*, 280 NLRB 818, 820-21 (1986); *Highway Truckdrivers & Helpers, Local 107, Int'l Bhd. of Teamsters (Safeway Stores)*, 134 NLRB 1320, 1322 (1961). A "jurisdictional dispute," within the meaning of Sections 8(b)(4)(D) and 10(k), does not exist "every time an employer elects to reallocate work among his employees or supplant one group of employees with another." *Safeway Stores*, 134 NLRB at 1323. The Board must look beyond the fact that a dispute may fall within the literal terms of Sections 8(b)(4)(D) and 10(k) of the Act to determine the "real nature and origin of the dispute." *USCPWesco*, 280 NLRB at 820. Where the real nature of the dispute is not jurisdictional but is instead a dispute between an employer and a union, the Board will quash the notice of 10(k). *Chauffeurs, Teamsters & Helpers, Local 331 (Bulletin Co.),* 139 NLRB 1391, 1395 (1962) (quashing the notice where the employer's decision to terminate a contract created the dispute); *SSA Terminal, LLC*, 344 NLRB at 1021 (quashing the 10(k) notice where the employer "by its own unilateral actions" of assigning work exclusively performed by one group of workers to another group "created a work preservation

dispute"); *USCPWesco*, 280 NLRB at 823 (quashing notice where the employer created the dispute by cancelling its subcontract); *Safeway Stores,* 134 NLRB at 1323 (quashing the notice where the employer created the dispute by transferring work); *see Alaska Timber,* 781 F.2d at 925-26 (stating that the Board should not have issued a 10(k) decision because the dispute was created by the employer's decision to change its method of business).

In a case with facts very similar to the facts here, the D.C. Circuit held that the Board had improperly intervened through a Section 10(k) ruling and prosecution of a Section 8(b)(4)(D) charge. In *Alaska Timber*, 781 F.2d 919, Alaska Timber Corporation ("ATC") sold lumber products "free along side" to its customers at a dock ATC owned. ATC delivered the lumber to its dock and the customer was responsible for loading the lumber onto ships. The customers contracted with SES, who employed ILWU union members to perform the loading. ATC later changed its "free along side" process to a "free on board" process by which ATC would both deliver the lumber to its dock and load the lumber onto ships for its customers. As a result, SES was no longer hired to perform the loading work. When ATC performed its "free on board" services with its own employees, the ILWU union members who had previously loaded the lumber picketed outside ATC's facility. Subsequently, ATC filed charges, the Regional Director gave notice of a Section 10(k) hearing whereby the Board held that ATC's employees were entitled to perform the lumber loading, and the Board later found the union in violation of Section 8(b)(4)(D) for failure to comply with the Section 10(k) ruling. The D.C. Circuit explained:

> [T]he central problem [Sections 8(b)(4)(D) and 10(k)] aim to solve embodies two characteristics: first, the employer faces a jurisdictional dispute that is not of his own making and in which he has no interest; second, the dispute is between two employee groups. . . . The Labor Board must decide whether cases that do not precisely fit the model of a jurisdictional dispute [] are nevertheless sufficiently like that two-part

model to warrant intervention by the Board.

Id. at 924. Applying this model, the Court determined that the dispute lacked the first essential characteristic because "[t]he dispute was entirely of the employer's making, and the employer was not a neutral in the dispute" due to the fact that ATC made the decision to change its services, which "effectively reassign[ed] the work from [SES, who hired ILWU,] to its own employees." *Id.* at 925. The Court went on to explain that it could not consider one of the factors in isolation from the other because "[w]ere that the rule, an employer could always create a jurisdictional dispute between employee groups by reassigning work." *Id.* Thus, the Court concluded that "[where] the employer created the dispute, § 8(b)(4)(D) and § 10(k) do not apply." *Id.*; *see SSA Terminal, LLC*, 344 NLRB at 1020, fn.9 (citing *Alaska Timber*).

This case also fails to present a valid jurisdictional dispute because the "dispute" is of Southport's own making. Southport's own unilateral conduct – its decision to reassign the work at its barge slip – created the dispute.

a. <u>The dispute was triggered by Southport replacing Local 12 longshoremen for the log unloading work.</u>

When Southport secured wood chip customers and began loading chip barges in February 2013, Local 12 longshoremen performed the chip loading work and continued to do so for 18 months. (Tr. 91:9-15; 162:9-16). Then, on September 4, 2014, Southport reneged on its commitment to use Local 12 at its barge slip and unloaded a log barge without Local 12 longshoremen.[15] (Tr. 128:23-129:2; *see supra* Sections II.B.2. & II.B.3.).

[15] Having Local 12 longshoremen perform the chip loading work was in line with what Southport represented to the Port, the Oregon Department of Transportation, and Local 12. (Exs. U-2.U-3, U-4; Tr. 21:23:8-10; 26:12-15). At the hearing, Local 12 representatives Mr. Sundet, Mr. Hilding, and Mr. Alford, all testified that Mr. Smith told them Southport would not engage in loading or unloading work at its barge slip without using Local 12 labor. (Tr. 171:6-8; 225:20-25; 256:17-20). Mr. Smith *chose* to make this promise and, indeed, engaged in further conduct consistent with this promise (Tr. 303:14-304:4; 366:4-25; Ex. U-12). *See generally supra* Sections II.B.2. & II.B.3.

The log barges that have since been unloaded at Southport's barge slip were previously unloaded at Ocean Terminals dock. Mr. Lyons, an owner of both Southport and Ocean Terminals, confirmed that the barges unloaded at Ocean Terminals dock and the barges that have been unloaded at Southport carry the same product – Herbert Lumber Company and Southport logs. (Tr. 307:9-24; 309:4-10). When those barges went to Ocean Terminals dock, Local 12 unloaded the logs; but now the barges are unloaded at Southport's barge slip by Southport Forest Products' unrepresented employees. (Tr. 312:22-313:6; 128:23-129:2; *see* Exs. U-9, U-14, U-15). Southport chose to use these employees from Southport Forest Products' other facilities rather than hire Local 12 to perform the log unloading work, as it had committed. In response to Southport's decision to renege on its promise, Local 12 picketed Southport while it unloaded log barges. These facts show that Southport created the dispute by its own actions. Thus, the dispute is not a valid jurisdictional dispute within the meaning of Sections 8(b)(4)(D) and 10(k).

b. <u>The dispute was triggered by Southport reassigning the chip loading work from Local 12 longshoremen to a supervisor.</u>

The record evidence shows that before September 2014, whether directly or through Dunlap Towing or Brusco Tug, Southport employed Local 12 longshoremen to perform the chip loading work at its barge slip.[16] (Tr. 84:22-85:5; 134:19-135:6; 305:16-18; Ex. U-13). Then, Southport ended this arrangement and reassigned the chip loading work to its log yard supervisor Mr. Coleman.[17] (Tr. 120:8-24).

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[16] It is undisputed that Southport and Local 12 agreed on manning for chip loading work (Tr. 91:9-15; Ex U-5, ER-5; Tr. 163:14-17), that Southport decided to use Local 12 labor to load chip barges at its barge slip (Ex. U-5), and that Local 12 exclusively performed the chip loading work from its inception in February 2013 through August 2014. (Tr. 91:9-15). It is also undisputed that after August 2014, Southport reassigned this work to its own supervisor. (Tr. 120:8-13).

[17] Only chip loading related to customer Capstone Paper is relevant here because Mr. Smith testified that the only chip customer Southport continued to have after September 2014 was Capstone Paper. (Tr. 117:1-11). The other two customers ceased buying chips from Southport because Southport reassigned the chip loading work to its supervisor. (Tr. 116:22-25). Hence, Southport's unilateral reassignment of the chip loading work not only created the dispute but also caused it to lose its other customers. Even if the chip loading work related to Southport's other

Southport's claim that it stopped using Local 12 for chip loading work because it believed Local 12 would refuse to provide labor is immaterial and illogical. It is immaterial because all that matters for work preservation purposes is that Local 12 longshoremen had performed the work before it was taken from them. The asserted reason for replacing longshoremen is illogical because Local 12 picketed only in response to Southport taking away the work.[18] In fact, Local 12's Secretary-Treasurer testified that he told Ports America that Local 12 would do chip loading work at Southport's barge slip if Local 12 received a request to do so.[19] (Tr. 177:2-178:6; 178:9-12). Local 12 never received a labor request to work at the barge slip after August 20, 2014. (Tr. 178:8-9, 13-15). Moreover, Southport's very position in this matter – that it prefers to have its supervisor do the work – shows that Southport chose to reassign the chip loading work, thus, creating the dispute.

Just as in *Alaska Timber,* Southport's decision to change its business practice – here, reassigning the chip loading work to its supervisor rather than continuing to use Local 12 labor through Ports America – created the dispute. *See Int'l Longshoremen's & Warehousemen's Union v. NLRB*, 884 F.2d 1407, 1411 (D.C. Cir. 1989) (discussing the *Alaska Timber* Case: "The *Alaska* employer's shift in business practice seems to have been designed totally to supplant the Longshoremen with its own employees. Thus, that dispute could properly be described as one created by the employer."). As a result, one of the two characteristics required for there to be a valid jurisdictional dispute is not met.

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two customers is considered, the evidence shows that Southport approved of having Local 12 perform the chip loading work for those barges as well. Southport certainly had the power to insist on another arrangement since it was Southport's own equipment being operated to perform the chip loading work (i.e., the radial stacker conveyor), yet Southport agreed to have Local 12 workers operate its equipment (the spout) for 18 months.

[18] Local 12 picketed Southport when it loaded chip barges because it had reassigned the work to its supervisor. Had Southport used Local 12 labor, Local 12 would not have picketed when chip barges came to the barge slip.

[19] Mr. Smith gave hearsay testimony claiming that Ports America told him that Local 12 would refuse to load chip barges. Southport presented no direct evidence to support this. This testimony must be discounted and Mr. Sundet's direct testimony credited.

c. The *Sierra Pacific* Case is distinguishable.

At the hearing, Southport argued that the *Sierra Pacific* case mandates finding a valid jurisdictional dispute here, but that case is clearly distinguishable and inapplicable. *Int'l Longshoremen's & Warehousemen's Union, Local 14 v. NLRB*, 85 F.3d 646 (D.C. Cir. 1996). There, Sierra Pacific Industries ("SPI") sold wood chips to dock operator LP, who in turn engaged company Westfall to load the chip onto barges at LP's dock. Westfall hired ILWU Local 14 workers. SPI decided to lease a dock for itself and use its own employees to load wood chips, and in response, Local 14 picketed SPI's dock. The Court held that there was a valid jurisdictional dispute because SPI had no relationship with Local 14 and Local 14 was not "supplanted" because it had never done the work before. *Id.* at 653. Here, the facts reveal just the opposite. As shown above, Southport has an extensive relationship with Local 12 – they bargained over the disputed work and Southport represented that Local 12 would do the work. Local 12 then did the chip loading work for 18 months at Southport's barge slip, and Local 12 did the log unloading work at Mr. Lyons' Ocean Terminals dock before those barges started going to Southport's barge slip.[20] The *Sierra Pacific* Court also distinguished the case before it from *Alaska Timber* explaining that SPI had simply leased a dock while Alaska Timber unilaterally decided to change its business practices, a decision "designed totally to supplant Longshoremen with its own employees." *Id.* The same distinction applies in this case. Southport unilaterally reneged on its commitment to use Local 12 labor at its barge slip and unilaterally changed its business practice with regard to chip loading work. Southport's decision to reassign the disputed work was "designed totally to supplant [Local 12] Longshoremen with its own employees." *See id.*

[20] Merrill and Ring Forest Products currently leases the Ocean Terminals dock, but Mr. Lyons provides labor to Merrill and Ring through his company Industrial Steel.

Southport is the orchestrator of the dispute; and thus, there is no valid jurisdictional dispute before the Board. To conclude otherwise would mean that "an employer could always create a jurisdictional dispute between employee groups by reassigning work," but this is not the intent of Section 8(b)(4)(D) or Section 10(k). *Id.* at 925. The Act is intended to protect employers who have disputes thrust upon them, not employers who create disputes through their own actions. Thus, Southport cannot avail itself of this protection, and the Board must quash the Notice of 10(k) Hearing.

3. The Board Should Quash the Notice of 10(k) Hearing Because ILWU Local 12 Has a Valid Work Preservation Claim to the Work in Dispute.

Another reason the Board must quash the Notice of 10(k) Hearing is that Local 12 has acted with the sole objective of work preservation and, thus, has not run afoul of the Act. It is well-established that the Board distinguishes between work preservation and jurisdictional disputes, and only the latter falls within the scope of Section 10(k): "Section 8(b)(4)(D) (and, implicitly, 10(k)) were not designed to authorize the Board to arbitrate disputes between an employer and a union, particularly regarding the union's attempt to retrieve the jobs of employees the employer chose to supplant by reallocating their work to others." *SSA Terminal, LLC,* 344 NLRB at 1020, quoting *USCPWesco*, 280 NLRB at 820-21 (internal quotations omitted). "[I]f a dispute is fundamentally over the preservation, for one group of employees, of work they have historically performed, it is not a jurisdictional dispute." *Id.* at 1021; *see Indus. Prof'l & Technical Workers Int'l Union, SUINA (Recon Refractory & Constr., Inc.)*, 339 NLRB 825, 827 (2003), aff'd *Recon Refractory & Constr. v. NLRB*, 424 F.3d 980 (9th Cir. 2005); *Seattle Bldg. & Constr. Trades Council (Seattle Olympic Hotel Co.)*, 204 NLRB 1126, 1127 (1973); *Teamsters Local 331 (Bulletin Co.),* 139 NLRB 1391, 1395-96 (1962); *Safeway Stores*, 134 NLRB at 1322; *see also Electrical Workers, IBEW Local 292 (Franklin Broad. Co.)*, 126

NLRB 1212, 1215 (1960); *Broad. Employees & Technicians (Gordon Broad., Inc.)*, 127 NLRB 1070, 1073 (1960).

The Board's decision in *Bulletin Co.* is of particular significance here. In that case, Bulletin had contracted with Coast News to have Coast News perform local newspaper deliveries for a number of years, and Coast News employed members of Teamsters Local 331. Bulletin then started using its own employees to do the local deliveries. As a result, Local 331 picketed Bulletin, and the Regional Director issued a notice of 10(k) hearing. The Board quashed the notice reasoning that there was no jurisdictional dispute because the picketing "was not engaged in, in the course of a work assignment dispute, within the meaning of Sections 8(b)(4)(D) and 10(k), but was rather an attempt to regain employment." *Id.* at 1396. The Board explained that it could "perceive no valid reason for not according [the union and its member] the [] right to protest his loss of employment to the *party really responsible* therefor . . ." *Id.* (emphasis added).

In this case too, Local 12 picketed Southport to protest its members' loss of work. Local 12 exclusively performed the chip loading work at Southport's barge slip from February 2013 until August 2014, but lost that work when Southport reassigned it to Mr. Coleman. (Tr. 91:9-15; 120:8-13; 165:12-21; 166:10-21; 177:2-178:6; 178:9-12; Ex. U-6). Local 12 also performed the log unloading work at Ocean Terminals dock before the barges started going to Southport's barge slip and the work was reassigned to Southport Forest Products' unrepresented employees.[21] (*See* Tr. 307:9-24; 309:4-10; 312:22-313:6). Just as Local 331 did in *Bulletin Co.*,

[21] Southport will argue that because the log unloading work has never been performed by Local 12 at its barge slip, Local 12 does not have a valid work preservation claim to that work. This is incorrect. The mere fact that a union has not performed work at a particular location does not foreclose a valid work preservation objective. The union may have a valid work preservation objective if the union previously performed the work at another location before it was transferred to a new location. *SSA Terminal, LLC,* 344 NLRB at 1020 (a union may have a work preservation claim to work it performed at one location before the work was transferred to another location); *see Cal. Cartage Co. v. NLRB,* 822 F.2d 1203, 1207 (D.C. Cir. 1987) (explaining that "the fact that longshoremen have never

Local 12 picketed Southport with the objective of regaining the work its members lost.[22] Thus, "[Southport] by its own unilateral actions – assigning to [its unrepresented employees and supervisor] work historically performed by ILWU [Local 12]-represented longshoremen – has created a work preservation dispute." *See SSA Terminal, LLC,* 344 NLRB at 1021. The Board must quash the Notice of 10(k) Hearing for this reason.

B. **If the Board Reaches the Merits, the 10(k) Factors Favor Awarding the Work to ILWU Local 12 Longshoremen.**

Once it has been determined that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that the dispute is properly before the Board, the Board must decide which group of employees is entitled to the disputed work and make an award accordingly. *Safeway Stores*, 134 NLRB at 1322 (citing *NLRB v. Radio & Television Broad. Engineers Union Local 1212*, 346 U.S. 573, 585 (1961)). "The determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the

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previously performed work at the exact same location" does not foreclose a valid work preservation claim to the work).

[22] As the Board's decision in *Bulletin Co.* shows, Local 12 longshoremen do not have to be directly employed by Southport in order to have a valid work preservation claim to the disputed work. Nonetheless, the record evidence demonstrates that Southport was a joint employer of Local 12. Under current Board law, joint employers are found "where two separate entities share or codetermine those matters governing the essential terms and conditions of employment" where both employers "meaningfully affect[] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *TLI, Inc.*, 271 NLRB 798, 798 (1984); *see CNN America, Inc.*, 361 NLRB No. 47 (2014). Here, Southport exercised control over the hiring, staffing, and hours of Local 12 longshoremen through its negotiations with Local 12, its control over work start times and need for overtime or second shifts, and its supervision and direction of Local 12 workers. *See CNN*, 361 at *4-7. Southport also hired and fired Local 12 workers by requiring that they be used to perform the work and later reassigning the work. *Id.* Moreover, Southport affected and determined essential terms and conditions of Local 12 members' employment through its active negotiations with Local 12. *TLI, Inc.*, 271 NLRB at 799. Under the joint employer test currently advocated by the General Counsel, it is even clearer that Southport was Local 12's joint employer. In an Amicus Brief in *Teamsters Local 350 v. Browning Ferris Indus., Inc.*, Case No. 32-RC-109684, the General Counsel has argued that the Board should adopt a broader joint employer test that takes into account the totality of the circumstances, which would consider direct and indirect control over working conditions, unexercised potential control over working conditions, and "industrial realities." Under such a standard, it is even more apparent that Southport is a joint employer. In addition to direct control, Southport also exercised significant indirect control over such things as wages, benefits, safety, and discipline. *Id.* at 20-21. Likewise, consideration of the "industrial realities" of the business relationships among Southport, the tug and barge companies, Ports America, and Local 12 indicate that Southport is a joint employer under this broader standard because Southport's control over the work, its volume, how much Southport charged its customers, etc., gave it control over the terms and conditions of Local 12 members' employment. *Id.* at 21-22.

factors in the particular case." *Machinists Lodge 160 (SSA Marine)*, 347 NLRB 549, 553 (2006) (citing *Machinists Lodge 1743 (J.A. Jones Constr.)*, 135 NLRB 1402, 1410-11 (1962)). Among the factors relevant to determine which group of employees is entitled to the disputed work are: (1) applicable certifications or collective-bargaining agreements; (2) employer past practice and preference; (3) area and industry practice; (4) relative skills and experience; (5) economy and efficiency of operations; and (6) job impact. In this case, these factors, taken as a whole, compel awarding the work in dispute to ILWU Local 12 longshoremen.

1. The Work in Dispute.

As discussed above in Section II.A., the work in dispute in this matter is: (1) chip loading work (operation of the spout on the radial stacker chip conveyor by remote control to load chip barges) and (2) log unloading work (operation of on-dock heavy equipment to transport logs arriving by barge from the dock to the first place of rest). As shown below, the 10(k) factors require that this work be awarded to ILWU Local 12 longshoremen.

2. Certifications and CBAs.

Neither group of workers has a certification or a collective-bargaining agreement with Southport. But, Southport and Local 12 extensively negotiated regarding the work in dispute. (*See supra* Section II.B.3.; Tr. 59:1-17; 159:23-160:5; 160:12-17; *see* Ex. U-5, U-12, ER-5). Southport's owners admit that they engaged in these negotiations because they wanted Local 12 to perform the disputed work at the barge slip and intended to secure an agreement with Local 12 to that end. (Tr. 303:14-3-4:4; 366:4-25). In fact, they did agree to manning for the chip loading work and Local 12 exclusively performed that work at the barge slip from February 2013 until August 2014. (Tr.162:9-13; 163:14-17; Exs. U-5, ER-5). Southport also committed that it would use Local 12 members for all loading and unloading work performed at its barge slip. (Tr. 171:6-18 [G. Sundet]; 225:20-25 [Hilding]; 256:17-20 [Alford]). Although Mr. Smith denied

this, his own written communications to Local 12 on behalf of Southport reveal that Southport did make this commitment.[23] (Exs. U-5, U-12).

By its conduct and communications, Southport made agreements, although not collective bargaining agreements, with Local 12 that Local 12 longshoremen would perform the work in dispute at its barge slip. In light of these facts and circumstances, a judgment based on commonsense and experience requires a finding that this factor favors awarding the disputed work to ILWU Local 12 longshoremen.

3. Employer Past Practice/Preference.

The employer's preference in work assignment is given significant weight, but "cannot be made the touchstone in determining a jurisdictional dispute." *Plasterer's Local 180 (Jack Ebert & Co.)*, 226 NLRB 242, 245 (1976). When an employer's past practice and conduct is contrary to its preference, the Board has given little weight to the employer's newfound preference. *See, e.g.*, *Plumbers & Steam Fitters, Local No. 412 (Zia Co.)*, 168 NLRB 494, 496 (1967); *United Bhd. of Carpenters & Joiners of Am., Local 690 (Walter Corp.)*, 151 NLRB 741, 747-48 (1965).

This is especially the case here, where Southport's owner Mr. Smith testified that he prefers his own employees to perform the work in dispute over ILWU Local 12, but Southport's past conduct indicates that it wanted Local 12 to perform the disputed work and Local 12 longshoremen in fact performed the work until Southport unilaterally reassigned it. Southport represented that the redevelopment and operation of its barge slip would create work for longshoremen, indicating Local 12 members would perform loading and unloading work at the barge slip. Mr. Callery, who on behalf of the Port was involved in securing public funding for

[23] Southport also represented to the Port of Coos Bay and Oregon state agencies, including the Oregon Department of Transportation, that Local 12 longshoremen would work at its barge slip. (Ex. U-2, at pg. 5; Ex. U-4; Tr. 21:3-15; 26:12-15 ; *see* Ex. U-3).

redevelopment of Southport's barge slip, testified that Southport told the Port that operation of the barge slip would create new jobs for the local longshore labor force. (Tr. 3-15; 26:12-15). This understanding is further evidenced by the application the Port and Southport submitted for public funding, the Grant Agreement securing the funding, and a news release the Port put out regarding the barge slip, which all stated that operation of the barge slip would result in more work for Local 12 longshoremen.[24] (Exs. U-2, U-3, U-4). Southport and ILWU Local 12 also engaged in negotiations regarding Local 12 performing the work in dispute. The parties had multiple meetings and exchanged written proposals, in which Southport asserted that it wanted to use Local 12 labor. (Tr. 59:1-17; 159:23-160:5; 160:12-17; Exs. U-5, ER-5). During those negotiations, Southport told Local 12, both in person and in writing, that it would not do loading or unloading work at its barge slip without Local 12 labor. (Tr. 171:6-18 [Sundet]; 225:20-25 [Hilding]; 256:17-20 [Alford]; Exs. U-5, U-12). At the hearing, both Southport owners confirmed that they wanted Local 12 to perform the work in dispute. (Tr. 303:14-304:4 [Lyons]; 366:4-25 [Smith]). Despite Southport's current "preference," Local 12 workers performed the chip loading work at Southport's barge slip for 18 months, loading more than 40 barges. (Tr. 91:9-15; 165:12-21; 166:10-21; *see* Ex. U-6). Likewise, before September 2014, Local 12 members unloaded log barges carrying the same product at Mr. Lyons' Ocean Terminals dock. (Tr. 307:9-24; 309:4-10).

Southport has argued that it did not choose to use Local 12, but the evidence shows otherwise. It is undisputed that for barges carrying chips for customer Capstone Paper,

[24] There was testimony that "longshore" and "longshoremen" refers to anyone who does work on the waterfront or the docks. This testimony cannot be given any weight because testimony given throughout the hearing shows that the terms "longshore" and "longshoremen" are used to refer to Local 12 members. During his testimony, Mr. Smith repeatedly used "longshore" and "longshoremen" when referring to ILWU Local 12 and Local 12 members. (Tr. 77:10-14, 86:23-87:2, 88:13-15, 93:10-11, 95:12-13, 95:19-20, 96:17, 104:2-3, 120:13-18, 123:13, 123: 19-21; 363:20-21).

Southport made the decision to have Local 12 do the chip loading work as shown by Southport's direction to Dunlap Towing and Brusco Tug to use Local 12 labor.[25] (Tr. 134:19-135:6; 305:16-18; 305:25-306:11; Ex. U-13). The evidence also shows that Southport interacted directly with Ports America regarding Local 12 workers performing the chip loading work and received and paid bills from Ports America for Local 12 labor. (Tr. 128:2-9; 368:16-369:1; 370:9-12). Moreover, Southport's manager supervised and directed Local 12 workers as they operated Southport's equipment. (Tr. 86:23-87:3; 320:2-4). Through all of this conduct, Southport accepted and utilized Local 12 labor to perform the work in dispute, and only later reassigned the work and "preferred" to have its unrepresented workers and a supervisor perform the work.

Based on the evidence, employer past practice clearly favors awarding the disputed work to Local 12 longshoremen. Employer preference also favors Local 12 longshoremen because Southport's representations and past conduct show that it preferred Local 12. Even if the Board declines to so conclude, where an employer's preference is "mixed and inconclusive," the factor "does not favor either of the competing groups" and must be disregarded. *Am. Fed'n of Guards, Local No. 1 (Indies Terminal Co.)*, 279 NLRB 1294, 1296 (1986). Thus, at a minimum, employer past practice favors an award of the disputed work to Local 12 longshoremen.

4. Area and Industry Practice.

There is no dispute that there is an area and industry practice of ILWU-represented longshoremen, including Local 12 longshoremen, performing the disputed work throughout the Port of Coos Bay and along the west coast.

Chip loading work is traditional longshore work that has been performed by longshoremen, including Local 12, dating back to the 1960's. (Tr. 285:7-18; 291:19-292:5; Exs.

[25] Southport had two other chip customers prior to September 2014. Local 12 also did all the chip loading work for barges carrying chips purchased by these customers.

U-10, U-11). In 1965, the ILWU and the PMA entered into an agreement regarding manning for the first chip loading operation on the west coast, which was performed by Local 12 in Coos Bay. (Tr. 284:12-285:6; Ex. U-10). The agreement, known as T-Letter 104, established that chip loading work was ILWU longshore work and would be performed by ILWU longshoremen in Coos Bay as well as coastwide.[26] (Ex. U-10; *see* Tr. 285:19-286:7). A 1978 supplemental memorandum of understanding confirmed that T-Letter 104 equally applied to the coastwise barge trade. (Ex. U-11; Tr. 289:14-291:8). Since T-Letter 104, ILWU longshoremen have performed chip loading work up and down the west coast. (Tr. 285:7-18).

In the Port of Coos Bay, Local 12 currently loads chip ships at Roseburg Forest dock and Ocean Chip Terminal dock, historically loaded chip ships at those locations since the 1960's, and also exclusively loaded chip ships at Georgia-Pacific, Weyerhauser, and Champion, facilities that either are closed or stopped loading chip ships.[27] (Tr. 151:17-152:12; 155:5-14; 261:6-17). Local 12 unloaded the first chip barge at Georgia-Pacific dock in 1995 and has exclusively loaded chip barges there since the mid-1990's. (Tr. 151:3-16; 258:11-21; 260:12-22). Similarly, Local 12 has exclusively loaded chip barges at Roseburg Forest dock since 1998. (Tr. 151:3-16; 260:23-25; 261:1-5; Ex. U-8 (1999 agreement between Local 12 and Roseburg Forest Products, Inc. confirming that Local 12 will exclusively perform chip loading work on barges at its dock)). No other workers, whether represented by another union or unrepresented, load chip barges in

[26] While T-Letter 104 only applies to companies party to the Pacific Coast Longshore Contract Document ("PCLCD"), a collective bargaining agreement with the ILWU, T-Letter 104 shows that chip loading work has been recognized as ILWU longshore work for more than five decades on the West Coast. (Tr. 285:7-13; 286:13-19; Ex. U-10). Additionally, the evidence presented at hearing shows that many employers not party to the PCLCD have also recognized this and use ILWU longshoremen to perform chip loading work. (*See infra.*).

[27] Chip loading work on ships is nearly identical to barge chip loading work – longshoremen operate the spout on the chip conveyor by remote control to load chips into the hull of the ship, rather than into the hull of a barge. (Tr. 154:1-10). The only difference is that loading chip ships requires the spout be maneuvered under the ship's wings to ensure that chips are optimally loaded. (Tr. 154:18-155:4).

the Port of Coos Bay (except at Southport, but only after August 2014). This evidence shows the industry and area practice of ILWU longshoremen performing chip loading work.[28]

ILWU and Local 12 also have historically performed and currently perform log unloading and loading work. Local 12 has unloaded log barges at Georgia-Pacific dock[29] and Ocean Terminals dock and has loaded log barges and log ships at Ocean Terminals dock.[30] (Tr. 155:15-156:11; 261:18-23; 272:19-273:12; *see* Exs. U-7, U-9, U-14, U-15). In performing log loading and unloading work, Local 12 members have operated on-dock heavy machinery, i.e., log loaders or snapper grabbers, to transport logs. (Tr. 158:12-20; 270:20-276:5). Many Local 12 members have operated log loaders and snapper grabbers to unload and load logs both in the Port of Coos Bay at Ocean Terminals dock and the former Portland dock, and in Longview, Washington, at Weyerhauser and Port Dock 8. (Tr. 158:18-25; 159:2-15; 244:24-245:3; 272:22-275:19; 312:13-313:13; 313:18-22; 314:19-316:18; *see* Exs. U-9, U-14, U-15). ILWU longshoremen in the Ports of Longview and Astoria also operate on-dock heavy machinery to perform log loading and unloading work. (Tr. 159:7-15; 272:22-24; Exs. U-7, U-15). The record evidence, thus, demonstrates that there is an area and industry practice of ILWU and

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[28] In *Int'l Longshoremen's and Warehousemen's Union, Local 14 (Sierra Pacific Indus.)*, 314 NLRB 834, 837 (1994), the Board found that area and industry practice favored ILWU Local 14 because Local 14 provided evidence that Local 14-represented workers performed chip loading work at another location in the area and that ILWU-represented workers also performed chip loading work up and down the west coast, including in the Port of Coos Bay.

[29] In fact, approximately two weeks before the hearing in this matter, Local 12 unloaded a log barge at the Georgia-Pacific dock. (Tr. 156: 2-6).

[30] In 2000, Ocean Terminals and Local 12 entered into an agreement that Local 12 would operate on-dock heavy equipment (i.e., log loaders or snapper grabbers) to transport logs for barge unloading and loading operations, whether the logs were transported from the dock or from the water. (Tr. 312:13-313:6 ; Ex. U-14; *see* Tr. 313:8-13, 18-22; Ex. U-9 (December 22, 1999 letter from Ocean Terminals to Local 12 memorializing Ocean Terminal's intent to have Local 12 longshoremen operate on-dock heavy machinery to transport bundled logs arriving by barge)). In July 2012, Ocean Terminals wrote to local stevedore Jones Stevedoring Company stating that it intended to have Local 12 operate on-dock heavy machinery to transport logs for log loading and unloading operations once its dock expansion was completed. (Ex. U-15; Tr. 314:19-316:18). The company that is currently leasing Ocean Terminals dock, Merrill & Ring Forest Products, has communicated to Local 12 that it will use Local 12 to operate LeTourneaus – two Local 12 operators per LeTourneau – to transport logs between bunks for log operations. (Ex. U-7; Tr. 216:22-217:22).

Local 12 longshoremen performing log unloading work. *See Int'l Longshore Workers, Local 62-B (Alaska Timber Corp.)*, 261 NLRB 1076, 1078 (1982) (finding that area practice favored Local 62-B because testimony showed that employers used longshoremen employed through stevedoring company to perform disputed work and employer produced no evidence to show there was no industry or area practice).

It follows that area and industry practice weigh entirely in favor of awarding the disputed work to ILWU Local 12 longshoremen.

5. Skills.

Local 12 longshoremen have extensive experience performing the disputed work. They regularly perform chip loading work at multiple docks in the Port. (*See supra* Section III.B.4.). This experience includes loading approximately 40 chip barges at Southport's barge slip between February 2013 and August 2014. (Tr. 91:9-15; 165:12-21; *see* Ex. U-6). In contrast, Mr. Coleman, Southport's supervisor to whom Southport reassigned the chip loading work, conceded that he had never performed chip loading work until it was reassigned to him in September 2014. (Tr. 336:2-7). Since then, he has only performed this work on five occasions. (Tr. 330:25-331:5). Although the skills required to perform chip loading work are not extensive, many Local 12 members have significant and constant experience doing the work so that they are fully aware of what the job entails. For example, at the hearing Local 12 member Mr. Hilding, who has substantial chip loading experience, explained the importance of having constant contact with the barge crew to obtain and monitor draft numbers in order to ensure that the barge is loaded to the proper height for ocean travel. (Tr. 222:9-22; 228:13-21; 235:5-17). When Mr. Coleman testified, he failed to even mention these important aspects of the work and stated that he simply turns on the chips and leaves the spout unattended for significant periods of time. (*See* Tr. 328:23-25; 330:2-8). Local 12 members, additionally, take safety very seriously and abide by

official union safety rules, including the use of hard hats and life vests, when performing the disputed work. (Tr. 170:13-21; 223:22-224:19). When asked about safety at the hearing, Southport responded that its employees sometimes used safety equipment but did not identify any specific safety requirements its employees follow. (Tr. 123:8-12; 123:22-124:2; *see* Tr. 169:17-25; 225:7-9).

Similarly, many Local 12 members have extensive experience operating log loaders and snapper grabbers to transport logs. (Tr. 158:12-159:6; 270:20-276:5; *see supra* Section III.B.4.). They have done this work at multiple docks in Coos Bay as well as in Longview, Washington, for many years. (*See supra* Section III.B.4.). Southport's unrepresented employees do not have such experience because they work at Southport Forest Products' Sumner chipping facility and mill log yard, where they do not transport logs to or from a dock for barge unloading operations. (*See* Tr. 128:23-129:2). Southport attempted to make hay out of its LeTourneau machines, which it claims are very specialized. But, the hearing testimony reveals that the differences between the machines for transporting logs, including LeTourneaus, are minimal; and in fact, from the photos of the machines offered by Southport, the LeTourneau appears to be the simpler machine. (Tr. 341:2-22; 294:11-12; *see* Exs. ER-16, ER-17; Tr. 62:4-9; 294:2-14). When asked what experience is required to operate a LeTourneau, Mr. Smith explained that "heavy machine experience is preferable" and "training on a log LeTourneau is, you know, on-the-job training." (Tr. 142:10-12). Thus, Local 12 members' breadth of experience operating all kinds of log loaders and snapper grabbers demonstrates that they have the skills to operate any machine that transports logs, including a LeTourneau.[31] (*See supra* Section III.B.4.).

[31] In fact, Mr. Smith admitted that when Southport and Local 12 were negotiating in 2012, Local 12 stated that if for some reason it did not have members with training or experience operating LeTourneaus, it could either bring in skilled operators from outside the area or train members locally. (Tr. 146:25-147:8).

Local 12 longshoremen have greater skills by regularly performing the disputed work at many docks for many years and should, therefore, be awarded the work. [32]

6. Economy and Efficiency of Operations.

Using ILWU Local 12 labor is more efficient and economical for Southport. As the evidence shows, log yard supervisor Mr. Coleman had never performed the chip loading work until September 2014, and since then has only performed the work for five chip barges. (Tr. 330:25-331:5; 336:2-7). Southport presented no evidence to show that any of the unrepresented employees currently doing the log unloading work had previous experience doing log barge unloading work. With their extensive and continuous experience performing the disputed work, Local 12 members are able to perform the work more efficiently. *See, e.g.*, *Electrical Workers Local 47 (Pouk & Steinle, Inc.),* 353 NLRB 1074, 1077 (2009) (the factor of economy and efficiency of operations favored an award of the work in dispute to employees who had been doing the disputed work for many years). In addition, Southport's current assignment of the work to unrepresented employees and a supervisor pulls labor from other operations. Mr. Coleman supervises three separate operations and now performs the chip loading work. (Tr. 120:8-13; 319:8-23). Likewise, the employees who currently perform the log unloading work are pulled from their jobs for Southport Forest Products at the log yard and Sumner facilities. (Tr. 128:23-129:2). If Southport assigned the work to Local 12, Local 12 workers would arrive at the barge slip, perform the work, and leave upon completion without interrupting any other operations.

Southport may argue that having Local 12 perform the work in dispute is not economical because of the inflexibility of Local 12's shifts. It is true that Local 12 has set shift times that

[32] If despite the evidence, the Board finds that both groups of workers have the necessary skills and training, this factor should not favor an award to either group. *Laborers (Eshbach Bros.)*, 344 NLRB 201, 204 (2005).

may not match up with the arrival time of a barge; but Local 12 has been flexible with its start times for Southport when Local 12 loaded chip barges at the barge slip, and Local 12 has shifts that cover all hours of the day or night. (Tr. 122:20-123:2; 178:16-179:19). Southport may also argue that Local 12 labor is more expensive, but it failed to present an evidence to support this contention. What is more, in assessing the factors of economy and efficiency, the Board does not consider wages to be relevant. *Longshoremen ILA Local 1242 (Rail Distrib. Ctr.)*, 310 NLRB 1, 5 fn. 4 (1993). Finally, Southport may argue that using Local 12 is not economical because Southport will have to use two workers to do the chip loading work (which Local 12 already did for 18 months) and three operators for two LeTourneaus.[33] (*See* Tr. 67:25-68:3). This level of manning is a result of Southport's insistence that it have continuous operations, i.e. operations that do not stop for any rest breaks or lunches. (Tr. 126:15-21). To have such operations and comply with the law, which requires that workers receive rest and meal breaks, it is necessary to have multiple workers for these continuous operations. (Tr. 172:9-16; 228:1-4). A desire to ignore wage and hour law in order to use fewer workers is not a more efficient and economical practice, but instead a violation of the law.

For all of these reasons, the factor of efficiency and economy favors awarding the disputed work to ILWU Local 12 longshoremen.

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[33] At the hearing, Mr. Smith testified that during negotiations Local 12 had demanded four positions for log unloading (2 crane operators and 2 log loader operators). As an initial matter, the crane operators are irrelevant here because that work is not in dispute. Additionally, Southport was the one to offer crane operator positions to Local 12. (Ex. U-5). As Mr. Sundet testified, Local 12 wanted to perform the log loader operator jobs. These jobs are what initially sparked the parties' negotiations because in the spring of 2012, Southport wanted to have Local 12 perform log loading work at its barge slip. (Tr. 55:6-14, 76:15-16). The last manning proposal Local 12 made regarding log unloading work was three operators – one operator for each of the two machines and a third operator to run the machines when the others took their breaks and lunches. (Tr. 172:9-174:5). Thus, Local 12 offered three operators rather than two because Southport insisted on having a continuous operation without any breaks or lunches. (*See id.*). Southport may also argue that having Local 12 perform the log unloading work would duplicate work because Local 12 members would transport the logs from the dock to decks at the edge of the yard and then the unrepresented employees would transport the logs to decks in the log yard. This is nonsense because Local 12 offered to transport the logs from the dock directly to the decks in the log yard. (Tr. 174:6-175:10).

7. Job Impact.

Job impact is a relevant 10(k) factor favoring the group of workers who will endure a work opportunity loss if they are not awarded the disputed work. *Laborers Local 681 (Elmhurst-Chicago Stone Co.)*, 263 NLRB 980, 982-83 (1982) (finding that the factor of job impact favored one group of employees because they lost work opportunities due to the employer's reassignment of the work in dispute); *L.E. McGraw Constr.*, 283 NLRB 598, 600 (1987); *Woodworkers Local 3-364 (Potlatch Corp.)*, 247 NLRB 1465, 1468 (1980); *Machinists Local 225 (Cessna Aircraft Co.)*, 246 NLRB 24, 28 (1979); *Laborers Local 603 (Duncan Landscape Ass'n)*, 241 NLRB 993, 995 (1979).

The undisputed evidence shows that Local 12 longshoremen have suffered lost work opportunities due to Southport's reassignment of the work in dispute. Prior September 2014 Local 12 members unloaded log barges at the Ocean Terminals dock. (Tr.312:22-313:6; *see* Tr. 307:9-24; 309:4-10). Since these log barges started going to Southport's barge slip and Southport reassigned the log unloading work to its unrepresented employees, Local 12 members have lost the work they previously had. Likewise, since September 2014, Local 12 members have lost chip loading work at Southport's barge slip. From February 2013 until August 2014, Local 12 members performed the chip loading work at the barge slip for approximately 40 barges. (Tr. 91:9-15; 165:12-21; 166:10-21; Ex. U-6). Two Local 12 members were hired for each shift. (Tr. 91:9-15). Local 12 members lost this work when Southport reassigned the chip loading work to its supervisor Mr. Coleman.

If the disputed work is awarded to Local 12, Southport's unrepresented workers will not suffer any job loss. With regard to the chip loading work, Southport reassigned the work to its 12-year supervisor Mr. Coleman, who oversees Southport's barge slip operations, log yard operations, and whole log chipping operations at the Sumner facility. (Tr. 318:19-25; 319:14-

23). Awarding the chip loading work to Local 12 will not result in job loss for Mr. Coleman because his extensive supervisory duties will not be affected. As for the log unloading work, Mr. Smith testified that Southport has used Southport Forest Products' pre-existing unrepresented employees at the mill log yard and Sumner facility. (Tr. 128:25-129:3). Since these employees performed other work prior to being assigned the disputed work, they will not suffer job loss if the work in dispute is returned to Local 12.

Thus, the factor of job impact favors an award of the work to Local 12 longshoremen.

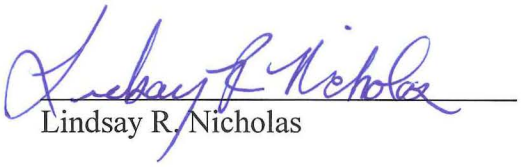
IV. CONCLUSION

For the reasons set forth above, the Notice of 10(k) Hearing should be quashed. Alternatively, the Board should award the work in dispute to ILWU Local 12 longshoremen because the factors weigh in their favor.

Respectfully submitted,

Dated: May 22, 2015

LEONARD CARDER, LLP

By: 

Lindsay R. Nicholas

Attorneys for ILWU LOCAL 12

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA 94109.

I hereby certify that on **May 22, 2015,** I caused the foregoing document(s):

ILWU LOCAL 12's POST-HEARING BRIEF

to be filed electronically with the National Labor Relations Board, Office of the Executive Secretary, and a true and correct copy of the same was served on all interested parties in this action as follows:

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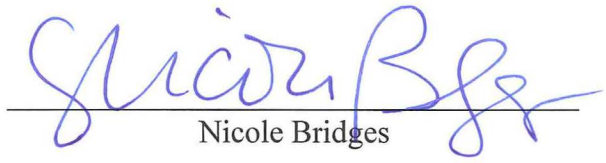
☑ **BY E-MAIL:** I caused the documents to be sent to the person at the electronic notification address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on **May 22, 2015**, at San Francisco, California.



Nicole Bridges

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 12	)	
	)	Case No. 19-CD-144202
Charged Party,	)	
	)	
and	)	
	)	
SOUTHPORT LUMBER COMPANY	)	
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Charging Party.	)	
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POST-HEARING BRIEF OF THE EMPLOYER – CHARGING PARTY

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

A. Background of Southport's Ownership, Management and Operations 3

B. Southport's Initial Efforts to Use its Barge Slip and the ILWU Reaction 8

C. Southport's Use of its Barge Slip to Load Wood Chips 15

D. Southport's Use of its Barge Slip to Unload Logs and the ILWU Reaction 20

E. The Inefficiencies Involved In Using ILWU Labor for Log Unloading 24

F. The Baselessness of the ILWU's Jurisdictional Claim to the Southport Slip 27

III. DISCUSSION 27

A. The ILWU's Motion to Quash Should Be Denied Because the Jurisdictional Dispute Is Not of Southport's Own Making 27

B. The ILWU Is Not Acting with a Work Preservation Purpose 34

C. Traditional Factors Applied by the Board in Section 10(k) Proceedings, Including Employer Preference and Efficiency of Operations, Favor Assignment of this Work to Southport Employees 38

1. Certifications and Collective Bargaining Agreements 38

2. Employer Preference and Practice 39

3. Economy and Efficiency of Operations and Relative Skills and Training 39

4. Industry Practice 43

IV. CONCLUSION 43

TABLE OF AUTHORITIES

Page(s)

Cases

Bloomsburg Graphic Communications Union, Local No. 732-C, 308 NLRB 1190 (1992).....30

Colorado Building & Construction Trades Council (Utilities Service Engineering Inc.), 239 NLRB 253 (1978).....37

Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, *AFL-CIO*, 421 U.S. 616 (1975).....37

District 2, Marine Engineers Beneficial Ass'n-Associated Maritime Officers, AFL-CIO (Grand Bassa Tankers, Inc.), 261 NLRB 345 (1982).....37

Electrical Workers Local 48 (Kinder Morgan Terminals), 357 NLRB No. 182 (2011).....34

Glens Falls Bldg. & Constr. Trades Council, 350 NLRB 417 (2007).....37

Int'l Longshore & Warehouse Union, AFL-CIO (ICTSI Oregon, Inc.), 2013 NLRB LEXIS 573 (Aug. 23, 2013).....35

Int'l Longshoremen's & Warehousemen's Union, Local No. 8, 231 NLRB 179 (1977).....33

International Longshoremen's & Warehousemen's Union v. NLRB, 884 F.2d 1407 (D.C. Cir. 1989).....29, 30

International Longshoremen's and Warehousemen's Union, Local 14, 314 NLRB 834 (1994).....29, 43

International Longshoremen's and Warehousemen's Union, Local 14, AFL-CIO v. National Labor Relations Board, 85 F.3d 646 (D.C. Cir. 1996).....28, 29, 30, 33, 43

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International Union of Operating Engineers, Local 926,
254 NLRB 994 (1981) 33

Ironworkers District Council of the Pacific Northwest (Hoffman Construction),
292 NLRB 562 (1989), *enf'd* 913 F.2d 1470 (9th Cir. 1990) 37

James Julian, Inc. v. Raytheon Co.,
499 F. Supp. 949 (D. Del. 1980) 37

Local 1235, Int'l Longshoreman's Ass'n,
362 NLRB No. 76 (2015) 34

National Woodwork Mfrs. Ass'n v. NLRB,
386 U.S. 612 (1967) 36

United Food & Commercial Workers Local 367 (Quality Foods),
333 NLRB 771 (2001) 35

Statutes

9 U.S.C. § 158(e) 37

29 U.S.C. § 158(b)(4)(A) 37

29 U.S.C. § 158(b)(4)(D) 2, 29, 33, 38, 43

29 U.S.C. § 160(k) 2, 13, 28, 29, 31, 34, 38, 39

I. INTRODUCTION

This jurisdictional dispute arose as the result of persistent and coercive efforts by the International Longshore and Warehouse Union, Local 12 ("ILWU" or "Local 12") to acquire certain work to be performed at a brand new barge slip constructed and operated by Southport Lumber Company ("Southport or "the Employer") in North Bend, Oregon as part of Southport's sawmill operation at the same location. Despite the fact that Southport has no collective bargaining or other contractual relationship whatsoever with the ILWU, the ILWU, commencing in the spring of 2012 and continuing to date, has repeatedly claimed that Southport's privately owned barge slip is somehow within the ILWU's "jurisdiction."

As part of this misplaced jurisdictional claim, a claim untethered to any contractual obligation, the ILWU demanded grossly inefficient manning for the work that Southport planned to perform at its new barge slip. For example, the ILWU demanded that two "ghost" ILWU crane operators be paid for log loading and unloading operations at Southport's barge slip, despite the fact that any crane operation is performed by employees of the tug and barge companies which own the cranes and ILWU members would perform no necessary crane operation functions. The ILWU also demanded that unneeded and unqualified ILWU heavy equipment operators be used, in a total duplication of effort, to transport unloaded logs from the point of first rest to a position on the Southport dock just a short distance away where the logs would then be picked up by Southport employees and transported to Southport's sawmill. Finally, the ILWU demanded that unnecessary and, in some cases, woefully inexperienced "button pushers" be used in connection with chip loading operations at the barge slip.

When Southport refused to agree in advance to the ILWU's wasteful and costly package of demands to perform work to which the ILWU possessed no colorable contractual claim, the ILWU began picketing Southport's new barge slip even before the barge slip became operational. And when Southport elected to conduct operations without the use of ILWU labor, the ILWU resumed its picketing and, in addition, began contacting tug and barge companies for the admitted purpose of convincing these neutral companies not to continue their business

relationships with Southport, for example, to cease calling on Southport's barge slip until such time as Southport acceded to the ILWU's baseless jurisdictional demands.

As a result of this conduct, Southport filed unfair labor practice charges under Section 8(b)(4)(D) of the Act, 29 U.S.C. § 158(b)(4)(D). The Regional Director of Region 19 found reasonable cause to believe that the ILWU's actions violated Section 8(b)(4)(D) and a hearing under Section 10(k), 29 U.S.C. § 160(k), was conducted on April 8 and 9, 2015. The evidence at hearing established beyond doubt that a jurisdictional dispute exists and that numerous important factors considered by the Board in deciding such disputes overwhelmingly favor an award of the disputed work to employees of Southport and not to members of the ILWU. For example, the evidence established that it is grossly inefficient to assign the disputed work to ILWU members, that ILWU members do not have sufficient skill, training, or experience to adequately perform the disputed work, and that Southport holds a strong preference that the work continue to be performed by its own employees.

For its part, the ILWU was unable to establish that the work at issue was "fairly claimable" since it was unable to point to any contractual or other basis upon which Southport would be obligated to assign the disputed work to its members. All that the ILWU was able to show was that similar work has been performed by ILWU members for other consenting employers in the Coos Bay area in the past. However, this evidence is insufficient to establish a claim to the work performed by Southport at its own private dock. The Board should, after consideration of all relevant factors, award the disputed work to employees of Southport.

II. STATEMENT OF FACTS

Southport presented three witnesses at hearing, its two owners, Jason Smith and Jim Lyons, and its log yard supervisor, Richard Coleman. Each of these witnesses testified in a credible, forthright, and consistent manner regarding matters on which they were knowledgeable and had first-hand experience. In contrast, the ILWU presented seven witnesses. One of these witnesses, Martin Callery, an official from the Port of Coos Bay, failed to support the ILWU's claims.

The other six witnesses, all ILWU officials or members, were not credible. For the most part, the testimony of these witnesses was evasive, inconsistent, conclusory, hostile, and unconvincing. By way of example, several ILWU officials testified to the ease of learning to operate a piece of heavy equipment called a Letourneau, despite the fact that they had never operated or even sat in the cab of such a machine. They also made claims that were simply incredible, for example, that Southport's owners, and not ILWU officials, were the ones who demanded the opportunity to pay two ILWU "ghost crane" operators who would not be performing any work. In other instances, the testimony of ILWU witnesses was definitively proven wrong by the documentary evidence. For example, one ILWU official, Gene Sundet, testified that, after September 2012, the ILWU no longer displayed picket signs stating that the Southport barge slip was ILWU "jurisdiction" even though photographs of ILWU picketers well after that time establish just the opposite.

The bottom line is that the testimony of Southport's witnesses was worthy of belief and should be accepted while much of the testimony of the ILWU witnesses was suspect and should be disregarded or given little weight.

A. Background of Southport's Ownership, Management and Operations

Jason Smith and Jim Lyons are each one-half owners of Southport Investments. (Tr. 96.) Smith has a bachelor's of science degree from Oregon State University in forest engineering, and is a licensed engineer. (Tr. 33-34.) Smith has been involved in the wood products industry since 1991. (Tr. 34.) Smith acts "as a general manager overseeing the day-to-day operations of all aspects and facets of the Southport group of companies," while Jim Lyons, another industry veteran, is primarily involved with overall business strategy and administration. (Tr. 338, 360.) While Smith and Lyons interact on "almost a daily basis" regarding the strategic goals of the companies, Smith has primary responsibility over labor issues and issues involving contracts or business arrangements with other business entities, such as tug and barge companies. (Tr. 360.)

Southport Investment owns several subsidiary companies. The two primary companies are Southport Forest Products and Southport Lumber Company. (Tr. 36, 338.) The Southport

group of companies commenced operations in approximately 1998 when Southport Forest Products constructed a sawmill in a location two miles south of Coos Bay, Oregon.[1] (Tr. 35-36.) This sawmill became operational in 1999 and continued until it was closed in 2008 as a result of the global economic downturn. (Tr. 36.) Since then, the Southport Forest Products facility in Coos Bay has been a whole log shipping and log sorting operation. (Tr. 35-36.) At the Coos Bay location, Southport Forest Products brings logs in, sorts them for grade, extracts high-value logs, and converts the remaining logs into wood chips. (Tr. 35.)

In 2004, Southport made the decision to invest in a new sawmill. Smith and Lyons exerted substantial effort looking for suitable property in Coos County. They identified property in North Bend, Oregon on the north spit that was owned by the Port of Coos Bay ("the Port'). After engaging in negotiations with the Port, they came to an agreement to buy a 35-acre parcel of industrial property where the Southport Lumber Company sawmill is located today. (Tr. 37.) When the North Bend property was purchased in 2004, it was mostly undeveloped. There was the remainder of a barge slip that had been built approximately 20 years earlier by the Port which had never been used. (Tr. 38.) The rest of the property consisted of sand dunes and undeveloped land. (Tr. 37.) The barge slip that was in existence on the property was in a state of disrepair. (Tr. 38.) The slip had only been dredged to a depth of approximately five feet and, over time, the area had become silted in, making it impossible for vessels to move in and out of the slip. (Tr. 38-39.) There was a sheet pile bulkhead wall on the north side of the slip which was approximately 175 feet long. (Tr. 39, 41.)

Purchasing the property for approximately $550,000, Smith and Lyons planned to improve the barge slip and to build a new sawmill. (Tr. 40.) They intended to use the barge slip

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[1] Southport requests that the Board take administrative notice that Coos Bay and North Bend are separate cities in the State of Oregon along the Oregon Coast. However, Coos Bay also refers to a large body of water off of the Pacific Ocean. When referring to the City of Coos Bay, Southport will use the term "Coos Bay." When referring to the body of water, Southport will use the term "the Bay." When referring to the entire area in which Coos Bay and North Bend are located, Southport will use the term "the Bay Area."

to handle inbound logs for processing at the new sawmill and to ship outbound wood chips and lumber to be produced at that location. (Tr. 40.)

After purchasing the property from the Port, Southport began construction of the new sawmill, which became operational in 2005. (Tr. 45.) The sawmill is a high-production, small-log sawmill which manufactures lumber from small-diameter Douglas fir and Western Hemlock logs. (Tr. 34-35.) The lumber produced is generally used for home construction. (Tr. 35.) The mill also produces wood chips as a by-product of the lumber manufacturing process. (Tr. 35.) The sawmill site includes several buildings totaling approximately 200,000 square feet. (Tr. 46.) There is also a 15-acre paved lumber storage yard and an additional ten-acre log storage yard. (Tr. 46.) The sawmill can be accessed by a road entering the property on its northwest corner as well as a rail spur. (Tr. 46-47.) The barge slip is on the east side of the sawmill property. (Tr. 45.)

At the time the sawmill became operational, no improvements had yet been completed on the barge slip and the barge slip was unused. Preliminary steps to improve the barge slip commenced in 2005, when applications were made to the U.S. Army Corps of Engineers for necessary permits. (Tr. 40.) The first phase of the barge slip improvement project involved driving a new sheet pile bulkhead wall on the north side of the barge slip of approximately 340 feet, double the size of the existing wall, backfilling the new wall, and laying gravel down adjacent to the wall. (Tr. 41.)

Southport and the Port jointly applied for state assistance in completing this portion of the project through a State of Oregon program called *Connect*Oregon. (Tr. 41.) The application for the grant called for the State to contribute $506,000 with $140,000 to be contributed by Southport. (Union Ex. 2.) The application noted that the project was needed because Southport was currently having to double-handle inbound whole logs by receiving them at an upper Coos Bay marine terminal and moving them by truck to its North Bend sawmill. In addition, Southport was required to truck finished lumber to another upper bay facility for barge shipping to domestic West Coast markets. (Union Ex. 2, p. 2.) The rehabilitation of Southport's barge

slip would permit inbound whole logs to be directly shipped into and utilized at Southport's North Bend mill site and would further allow outbound wood chips to be shipped directly from that site. (Union Ex. 2, p. 4.)

The application further noted that barging of wood products was the most cost-effective method of moving them between North American West Coast destinations and recognized the importance of West Coast barge transportation firms in the Bay such as Brusco Tug & Barge. (Union Ex. 2, pp. 3, 5.) The application also stated that rehabilitation of the Southport slip would create jobs for the sawmill employees of Southport and would provide "additional work opportunities for the local longshore labor force and for other persons employed in marine trades in the Coos Bay harbor." (Union Ex. 2, p. 5.) The grant was approved by the State of Oregon in October 2006. *See* Union Ex. 4 (setting forth the terms in a signed "Grant Agreement").

Martin Callery, Chief Commercial Officer for the Port, was directly involved with the *Connect*Oregon application. (Tr. 17-18.) Callery testified that the grant application did not mention the ILWU in any way. (Tr. 28.) He also testified that there was nothing in the grant agreement that dealt with the issue of who would perform work at the Southport barge slip. (Tr. 28-29.) Callery stated that the reference to the "local longshore labor force" referred to any person involved in handling cargo on a waterfront and was <u>not</u> confined to members of the ILWU. (Tr. 29.) Callery testified that this was the Port's understanding of the meaning of the term when the Port entered into the grant application with Southport. (Tr. 29-30.) Jason Smith's understanding was essentially the same. He testified that, in applying for the grant, Southport made no promise to utilize ILWU members for any particular jobs. (Tr. 41-42.)[2]

The first phase of the barge slip improvement project was completed just prior to the economic downturn of 2008. (Tr. 42.) Because housing starts went from 2 million per year to approximately one-half million, Southport decided to discontinue for a time its efforts to rehabilitate the barge slip. (Tr. 42.) However, when it appeared that the economic downturn was

[2] Nor did the Grant Agreement itself contain any such requirement. (Union Ex. 4.)

coming to an end in 2011, Southport decided to restart the process of making the barge slip viable for future use. Southport hired a dredging contractor to remove approximately 40,000 yards of material and made further investments in building a concrete bulkhead adjacent to the sheet pile wall. (Tr. 42.) The purpose of installing the concrete was to allow heavy machinery such as large log Letourneaus to load and unload product to the edge of the dock. (Tr. 44.)[3]

Southport also made substantial structural and other improvements to the barge slip in order to permit it to start handling inbound and outbound cargo. For example, it constructed a "bow rail" and put in "bits." A "bow rail" is a wooden curb adjacent to the dock and "bits" are large steel structures intended to tie up barges, tug boats or other marine vessels. (Tr. 42-43.)

The barge slip became operational in the spring of 2012. (Tr. 53.) At that point, the barge slip was operational only for inbound logs or outbound lumber and was not yet operational for outbound wood chips because Southport had not yet completed construction of a chip loading conveyor. (Tr. 54-55) Employer Exhibits 1 and 2 represent depictions of the Southport barge slip in its completed form. After the barge slip became operational for logs and lumber, Southport began other substantial and costly improvements so that the slip could be utilized for the loading of chip barges.

In order for Southport to perform chip loading operations, it needed to install a conveyor system so that the chips could be moved from the sawmill and loaded onto a barge. To fulfill that need, Southport constructed, at a cost of approximately $300,000 and with its own employees and contractors, a radial stacker conveyor. (Tr. 54.) The radial stacker conveyor transports the chips from the sawmill where they are deposited by Southport employees driving wheel loaders or "chip dozers" into a large hole feeding from the sawmill into the conveyor system. (Tr. 50-51.) The chips are then transported up the conveyor into a chute that hangs from the top of the conveyor system. (Tr. 52.) The chute is then positioned over a barge and moves in

[3] A Letourneau is a large diesel electric machine used to grab and move logs which has much different operational controls than a conventional log loader or "snapper." (Tr. 340-46.)

a fairly limited range back and forth in order to direct the chips down into the hold of the barge. The chute is activated by a remote control device. (Tr. 51-52.) The radial stacker conveyor can be moved on large wheels along the dock face as needed for positioning over the barge. (Tr. 52.) Photographs depicting the radial stacker conveyor and the chip chute (including its range of motion) can be found at Employer Exhibit 4 and Employer Exhibits 13-15. The radial stacker conveyor system became operational in February of 2013. (Tr. 54.)

The improvements made to the barge slip, which cost Southport approximately two-and-a-half million dollars, enabled ocean-going barges to enter Southport's barge slip to load and unload logs and to load wood chips and lumber to fulfill Southport's future operational needs. However, in order for ocean-going barges to access Southport's barge slip for loading or unloading operations, it is necessary to employ an "assist" tug in addition to the tug towing the barge. "Assist" tugs are more maneuverable than the tugs that normally tow the ocean-going barges. They are designed to help push the barges into "tight-quarter locations" that the ocean-going tugs have trouble maneuvering into. (Tr. 49.) "Assist" tugs are used to bring ocean-going barges into the Southport slip and to help them exit the slip as well. (Tr. 50.) They are necessary as a safety precaution. (Tr. 94.)

B. Southport's Initial Efforts to Use its Barge Slip and the ILWU Reaction

In early 2012, Southport had an opportunity to handle some export logs for Weyerhaeuser Company. Weyerhaeuser requested to bring its logs into the Southport mill in North Bend by truck, where Southport would roll the logs out, scale them, sort them, bundle them, and load them onto barges for transport to Weyerhaeuser's facility in Longview, Washington. (Tr. 55.) Shortly after being presented with this opportunity, Jim Lyons was contacted by Local 12's President, Marvin Caldera. (Tr. 349.) Caldera heard there was going to be a log barge calling on

the Southport facility and was interested in setting up a meeting to discuss potential ILWU manning for the operation. (Tr. 349.)[4]

A meeting was held at the Southport sawmill in North Bend. Marvin Caldera, Gary Alford, Gene Sundet, and Joe Hilding were present for ILWU Local 12. Jason Smith, Jim Lyons, Greg Chineworth, and Richard Coleman were present for Southport. (Tr. 57.) During the meeting, the ILWU stated that it wanted to be involved in any future work at Southport's barge slip, involving both inbound and outbound commodities. (Tr. 57-58.) The discussions at the first meeting were not specific regarding proposed manning levels. (Tr. 58.) Rather, the parties generally discussed log and wood chip shipments that might be handled at the Southport barge slip in the future. (Tr. 59.)

More specific discussions about manning occurred at subsequent meetings. In addition to representatives from Southport and the ILWU, a representative from Jones Stevedoring attended the subsequent meetings. Jones Stevedoring was invited to engage as a facilitator regarding manning issues because it was a member of the Pacific Maritime Association ("PMA"), a multi-employer bargaining association with a labor agreement with the ILWU, and would likely be the direct employer for any ILWU personnel used to conduct loading and unloading operations at the Southport barge slip. (Tr. 59-60, 360.) It was never Southport's intent to directly hire or employ ILWU labor at its barge slip and it has never done so. (Tr. 77.)

The ILWU's initial demand regarding manning for log barges was to utilize two "ghost" crane operators and three Letourneau operators. (Tr. 60.) Jason Smith for Southport felt that this was a very inefficient proposal. (Tr. 60.) The tug and barge companies that would be calling on the Southport barge slip had their own employees, and these employees operated the shipboard

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[4] Although at least one ILWU witness claimed that Southport made the initial contact with the ILWU to discuss manning, his testimony was hearsay and not based upon personal knowledge. *See*, *e.g.*, Tr. 160 (Gene Sundet claimed that Jones Stevedoring contacted the union and advised the union that Southport was interested in meeting). Marvin Caldera, Local 12's President, did not testify at hearing to rebut Lyons' direct testimony that Caldera was in fact the individual that made the first direct contact with Southport on behalf of the ILWU.

cranes to conduct log loading and unloading operations. (Tr. 60-62.) The cranes on the barges are very specialized and the tug and barge companies do not want individuals who are inexperienced on these specialized cranes operating them. (Tr. 62, 64.)[5]

Southport also objected to the ILWU's manning requirements regarding Letourneau operators. Once the crane operators employed by the tug and barge companies set logs down on the dock face, the logs then need to be transported from the dock to the log decks in the Southport sawmill complex. (Tr. 66.) Southport owns three Letourneaus, two of which are generally operational at any given time. (Tr. 67.) The ILWU proposed that three ILWU machine operators would pick up the logs where the crane operator from the barge company set them down on the dock and then transport them to a second point of rest approximately 100 feet away from where they were first set down. At this point, the ILWU proposal called for the Southport employees to then pick the logs up and transport them to the log decks in the sawmill complex. (Tr. 67.)

Smith objected to this proposal on several grounds. First, there was no reason for the ILWU to demand three Letourneau operators when only two machines were being operated. Second, the ILWU's proposal caused redundant steps in the process of log unloading because there was no reason to have two sets of employees transporting the logs from the dock to the log decks. (Tr. 68.) The ILWU proposal also would have required Southport to purchase two additional Letourneaus, machines which can cost up to $1 million each. (Tr. 69.)[6]

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[5] The demand to utilize two unnecessary crane operators was initially made by the ILWU, contrary to the ILWU's suggestion that it was Southport who first made this demand. (Tr. 374.) It begs credulity to argue that Southport would demand the right to pay two ILWU crane operators who would perform no work.

[6] The ILWU claimed that at some point it proposed that, instead of having Southport employees pick up the logs and transport the logs to the log decks in the sawmill, ILWU members could do so. Jason Smith denied that any such proposal was made and, even if it had been made, it would have been completely unacceptable to Southport because its sawmill employees had the knowledge and skills to perform this work and Southport would not have agreed to assign ILWU members to perform sawmill work in place of its own employees. (Tr. 367.)

With regard to any future chip loading operations at the Southport barge slip, the union proposed that two ILWU button pushers be used. The sole function of the button pusher would be to operate the remote control device which directs the chip chute on the radial conveyor system. (Tr. 69-70.)[7] Southport felt that it was extremely inefficient to have two button pushers because the act of pushing the button to direct the chute was an intermittent job at best, and during the first several hours of loading, the chip chute may not need to be moved at all. (Tr. 70-71.)

Despite the fact that Southport has no labor contracts at all with any labor organization, including the ILWU, it was willing to go along, to some degree, with the ILWU's proposal about manning at the Southport slip. (Tr. 73-74.) On or about May 7, 2012, Jason Smith sent a letter to Marvin Caldera. The letter indicated that, because Southport and the ILWU were unable to come to an agreement on acceptable manning at their previous meetings, Weyerhaeuser decided not to ship its logs out of the Southport slip "due to the potential for problems." (Tr. 113-114; Union Ex. 5.)[8] The letter went on to emphasize Southport's intention to utilize its barge slip to handle logs, lumber, and wood chips. Southport envisioned a "facility that is both cost efficient, competitive and capable of handling the combination of potential commodities." (Union Ex. 5.) However, Southport expressed its concern that it might not be practical to realize these opportunities at its new barge slip unless it came to an understanding with the ILWU regarding manning. In order to resolve the situation, Southport proposed that wood chip loading operations be conducted with two ILWU button pushers and that the loading or unloading of logs be manned with two ILWU crane operators. (Union Ex. 5.) However, Southport was unwilling to

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[7] The remote control device operated by the button pushers is depicted on the right side of the photograph entered into evidence as Employer Exhibit 10. (Tr. 137-38.) Only one button is operational on this remote control device, the one stating "tilt up, tilt down." (Tr. 138.)

[8] Weyerhaeuser expressed that, without a manning agreement, it was "nervous about disruptions in their log export facility at Longview" and instructed Southport to break the bundles of logs that Southport had prepared for eventual loading onto barges at the Southport barge slip so that the logs could be sold domestically to log buyers in the Bay Area. (Tr. 76-77.)

employ any ILWU log loader or Letourneau operators in conjunction with log loading and unloading operations. (Tr. 75.)

On or about May 14, 2012, Caldera sent Jason Smith a letter which set forth in writing the ILWU's position regarding manning. (Tr. 75; Employer Ex. 5.) The letter stated that Southport's May 7, 2012 letter had been read to the ILWU membership at the most recent union meeting and that the ILWU membership had unanimously approved manning as follows: (a) two button pushers for wood chip loading operations; (b) two crane operators and two log loader operators for inbound and outbound log barges; and (c) additional manning for any future lumber barge loading and unloading. (Employer Ex. 5.)[9] In this letter, the ILWU reduced its previous demand from three log loader or Letourneau operators on log loading and unloading operations to two such operators. (Tr. 75.) However, the ILWU did not reduce its demand that two crane operators be used despite the fact that employees of the tug and barge companies would be the ones actually operating the cranes. (Tr. 184.)[10]

According to Jason Smith, the ILWU's manning proposal was presented on an "all-or-nothing" and "take-it-or-leave-it" basis and at no time did the ILWU change or modify its May

[9] Because lumber barge loading and unloading has never been performed at the Southport barge slip and is currently not at issue in this proceeding, a description of the specific manning proposal of the ILWU regarding lumber barges is unnecessary.

[10] ILWU official Gene Sundet admitted that, while there is a practice in the Coos Bay area for two ILWU members to be paid to operate cranes on log loading and unloading operations, ILWU members rarely operate the ship-board cranes which are instead operated by employees of the tug and barge companies. Sundet testified that the last time he witnessed an ILWU member operating a barge crane was in 2004 or 2005. (Tr. 184-87.) Sundet implausibly claimed that the ILWU crane operators are not accurately described as "ghost" crane operators because the ILWU's intention is that they will be trained by the barge crews to operate cranes or will perform other work duties not involving crane operation. (Tr. 191-94.)

14, 2012 proposal. (Tr. 78.)[11] Southport advised the ILWU that it was unwilling to agree to its manning proposal. On June 4, 2012, Southport's attorney, Thomas Triplett, wrote a letter to the ILWU responding to its May 14, 2012 letter. Mr. Triplett stated: "Southport Lumber has no collective bargaining agreement with the ILWU. In consequence, it is free to utilize its own personnel in loading and offloading vessels at its dock." (Tr. 81-82; Employer Ex. 7.) Mr. Triplett went on to say that Southport "had hoped that Local 12 and the PMA could come to an accommodation allowing Jones Stevedoring to provide modified crewing to this facility." (Ex. 7.) In light of the fact that the ILWU's manning proposals foreclosed that possibility, Triplett notified the ILWU that Southport would "utilize non-ILWU personnel for its future requirements except where the customer elects to contract with Jones Stevedoring." (Ex. 7.)

After receiving Mr. Triplett's letter, Mr. Caldera sent Southport a letter on or about June 27, 2012 stating that the union believed that Southport was paying substandard wages and benefits to "employees who perform longshore and related work" at the Southport barge slip in North Bend. (Tr. 80; Employer Ex. 6.) On or about July 9, 2012, Mr. Triplett responded to the ILWU's letter on behalf of Southport, pointing out that, to date, Southport had not utilized <u>any</u> employees to perform <u>any</u> longshore work at the barge slip. (Tr. 82-83; Employer Ex. 8.)

At or about the time that Mr. Triplett's July 9, 2012 letter was sent to Local 12, Southport had been pursuing the possibility of bringing a barge full of logs that it had purchased from a Canadian company into its new barge slip. (Tr. 364.) Southport was working with Brusco Tug & Barge to have Brusco transport the logs. Apparently, word got out to the ILWU that a shipment of logs would be arriving at the slip. (Tr. 364.) Accordingly, on July 9, 2012, more

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[11] The ILWU also implausibly claimed that at some unidentified time it modified its May 2012 proposal to eliminate its demand that two "ghost" crane operators be used. (Tr. 174.) However, the ILWU offered nothing in writing to confirm its claim that its prior written demand was ever modified. The ILWU's May 14, 2012 letter was its last written offer and ILWU members never voted on another offer as they had on the offer set forth in that letter. (Tr. 197-98, 257, 268.) Jason Smith testified that, prior to the Section 10(k) hearing, he was never advised by the ILWU that it was withdrawing its demand for two "ghost" crane operators. (Tr. 371-72.)

than 20 ILWU picketers picketed the barge slip, displaying picket signs indicating that the ILWU claimed jurisdiction over Southport's barge slip. (Tr. 364-65.) At this point, Southport still had not used its barge slip for any type of barge operations. (Tr. 350.)

On July 16, 2012, Jim Lyons sent a letter to Caldera in which he informed Local 12 that "Southport Lumber Company has disengaged in attempting to utilize the barge loading facility at our North Spit sawmill for any marine cargo handling operations." (Tr. 365; Union Ex. 12.) The letter went on to state that Southport had entered into an agreement with PMA member Ports America to work directly with Local 12 to "create a mutually-beneficial working arrangement for increased marine cargo activities in Coos Bay." (Union Ex. 12.) Southport sent this letter because, after the preemptive picketing of its barge slip by the ILWU on July 9, 2012 even before any loading or unloading activities had taken place, Southport concluded that it wasn't able to effectively bring logs into its facility. (Tr. 364-365.) Accordingly, Southport sold the logs that it had purchased back to its Canadian supplier. Because Southport was concerned about additional picketing in the future, it decided to inform the union that it was disengaging from further attempts to utilize the barge slip in the hope that a mutually acceptable agreement could be reached. (Tr. 365-366.) Southport decided not to work in conjunction with Jones Stevedoring and to instead work with another PMA member, Ports America, in the hope that Ports America

could "reach a labor manning agreement" with the ILWU that was acceptable. (Tr. 366.) However, it is undisputed that no such manning agreement was ever reached. (Tr. 263.)[12]

C. Southport's Use of its Barge Slip to Load Wood Chips

After its aborted attempt to use its new barge slip for log loading and unloading operations in the spring and summer of 2012, Southport made no use of its barge slip until September 2013 when it began to load wood chips. Between February 2013 and August 2014, Southport exported wood chips from its North Bend barge slip under circumstances in which ILWU members performed to some degree the button pusher function. (Tr. 83-84.)

Southport serviced three customers in connection with its chip loading operations, Weyerhaeuser, Georgia-Pacific, and Capstone Paper. (Tr. 84.) Southport's arrangement with both Weyerhaeuser and Georgia-Pacific was to sell wood chips "free alongside" ("FAS") whereby Southport's employees would deposit the chips in the conveyor and it was the responsibility of the customer to direct the chip chute and to hire, or not hire, ILWU personnel or a PMA stevedore to perform that function. (Tr. 84, 116.) Southport's arrangement with Capstone was different. It sold chips to Capstone on a delivered basis whereby Southport was

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[12] The ILWU claimed that Jason Smith promised in May 2012 that no barges would be loaded or unloaded without ILWU labor. (Tr. 171-72, 196.) However, even assuming *arguendo* that such a statement was made, the statement was clearly conditional on reaching a mutually acceptable manning agreement, an agreement that both sides agree was never reached. (Tr. 171-72, 196, 367.) Thus, when asked whether Smith's alleged comment was "conditioned on you reaching some kind of an agreement on manning," Joe Hilding, chairman of the Local 12 labor relations committee, responded "of course." (Tr. 234.) Moreover, the existence of any such claimed verbal commitment is wholly inconsistent with the July 2012 letter from Mr. Triplett, Southport's attorney, to the ILWU, which stated in <u>no uncertain terms</u> that Southport intended to use non-ILWU personnel because of the parties' inability to reach a manning agreement. (Tr. 266; Employer Ex. 7.) Although Triplett's letter was forwarded by Local 12 to the ILWU's attorneys in San Francisco, no response was ever made to the letter. (Employer Ex. 21.) It is unsurprising that no response was made because even Leal Sundet, an ILWU International coast committeeman, agreed that an owner of a private dock, such as Southport, which has no contractual relationship with the ILWU has the right to use whomever it wants to perform loading and unloading services at that dock. (Tr. 296.)

responsible for arranging delivery of the wood chips to Capstone's facility in Longview, WA. (Tr. 84-85.)

Georgia-Pacific was the first customer that Southport sold chips to. Southport was initially reluctant for ILWU button pushers to be used but Georgia-Pacific was "concerned about negative implications at their chip loading facility in Coos Bay" if ILWU button pushers were not used. (Tr. 118.) Accordingly, Georgia-Pacific made its own discretionary decision to use ILWU button pushers "in order to eliminate any potential problems in the future." (Tr. 118.) Weyerhaeuser followed suit, making the same discretionary decision. Both Georgia-Pacific and Weyerhaeuser made the decisions to utilize a PMA stevedore, Ports America.[13] Ports America utilized ILWU labor and used two button pushers for the operations. (Tr. 85, 115-16.)

In contrast, Capstone was not interested in purchasing chips on an FAS basis; it only wanted to purchase them as delivered. Southport had discussions with Dunlap Towing to provide barge and towing services for delivery of Southport's wood chips to Capstone's facility in Longview. Again, Southport did not want to use ILWU button pushers. (Tr. 134.) However, Dunlap Towing was of the opinion that it needed to use two ILWU button pushers "because they were afraid that if they didn't do it, there would be retribution * * * at other aspects of their operation." (Tr. 90, 134.) Like Georgia-Pacific and Weyerhaeuser, Dunlap made the decision to hire Ports America to provide two button pushers at the Southport barge slip. (Tr. 90.) Dunlap then included the extra costs of utilizing the ILWU button pushers into the rate it charged Southport for transport of the chips to Longview. (Tr. 134-35.) These facts demonstrate that Southport was not the entity which decided to initially use ILWU button pushers. Rather, it was Southport's customers, Georgia-Pacific and Weyerhaeuser, and the tug and barge company contracted with to transport chips to Capstone, Dunlap Towing, which made these decisions.

[13] Both Georgia-Pacific and Weyerhaeuser could have elected not to use button pushers to load the chips they purchased from Southport. (Tr. 115-16.)

The use of ILWU button pushers to perform the chip loading function was very inefficient. Richard Coleman, Southport's log yard supervisor, oversaw the performance of the ILWU button pushers. According to both Coleman and Smith, not all of the ILWU button pushers were competent; Coleman had to show them how to do their job. (Tr. 137, 320.)[14] The ILWU button pushers made multiple mistakes, for example, plugging the chip chute and dumping chips into the bay. (Tr. 323.)

There was little or no need for two button pushers as opposed to one.[15] According to Coleman, the two ILWU members assigned to the job generally worked two hours on, two hours off. On multiple occasions, the ILWU member who was off duty left the Southport premises and drove into town. On other occasions, the button pusher who was off duty simply sat in his car while the other ILWU member operated the remote control. (Tr. 323.)

The job barely supported the need for one full-time person. For example, at the beginning of the chip loading operation, once the chute is positioned over the barge and the flow of chips starts, there is virtually nothing for the button pusher to do for about 45–90 minutes other than to "keep an eye on things." (Tr. 328-329.) After the first pile is loaded in the barge, the barge is then "fleeted" (moved along the dock) by Southport employees.[16] The second pile is

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[14] ILWU official Joe Hilding supported the notion that not all of the employees dispatched by the ILWU to work as button pushers were competent. Hilding testified that the ILWU normally dispatched an "experienced man and an inexperienced man," who was often a causal longshoreman. (Tr. 236.) According to Hilding, the inexperienced button pusher would watch and try to learn from the experienced button pusher, who would provide "a bit of on the job training." (Tr. 236.)

[15] Local 12 officers Gene Sundet and Gary Alford admitted that a company called Coastal Fiber was permitted by the ILWU for a period of time to use only one ILWU button pusher during chip loading operations in the Bay Area, lending further support for the proposition that two button pushers are unnecessary. (Tr. 269, 297.)

[16] On one occasion, ILWU members engaged in a work stoppage at the Southport barge slip because the ILWU claimed the work of "fleeting" the barge. The PMA arbitrator was called out and, after a six-hour work stoppage, the arbitrator ordered the ILWU button pushers to return to work. (Tr. 322.) This constitutes additional evidence of ILWU inefficiency.

then started and there is another 45–90 minute period of time in which there is very little work for the button pusher to do. (Tr. 329-330.)[17]

As a result of the ILWU's efforts to convince tug and barge companies, including companies providing barge assist services, not to do business with Southport and the ILWU's refusal to dispatch workers, ILWU button pushers were no longer utilized for chip loading operations at the Southport barge slip. Instead, commencing in December 2014, Southport employees have performed the button pushing function. During the five or so chip loading operations since December 2014 during which no ILWU button pushers were used, Richard Coleman and millwright Mike Puls have exclusively performed the button pusher function. (Tr. 331.) All of these loading operations were conducted for Southport's customer, Capstone Paper. Tr. 116-17.)[18] Whenever Coleman had to leave the barge slip site, he turned over the remote control unit to Puls, who then performed the button pusher function. On one occasion, Coleman had to leave a couple of hours early and Puls completed the chip loading operation. (Tr. 331-32.) Puls, an hourly employee, performed the button pusher function to some degree on each of the five chip loading operations conducted without the use of ILWU members since December 2014. (Tr. 333.)[19] Should Coleman be sick or absent, Puls would take over the button pushing function from Coleman. (Tr. 332.)

It is much more efficient to use Coleman and Puls to perform the button pushing function than it is to use two ILWU members. (Tr. 103-08, 332-33.) This is true for several reasons.

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[17] Hilding again supported Southport's evidence by agreeing that, for at least the first hour, the button pusher's job was mostly to monitor the flow of wood chips. (Tr. 237-38.)

[18] Southport has not sold chips to either Georgia-Pacific or Weyerhaeuser since August 2014. (Tr. 116.)

[19] Both Coleman and Puls work at both the Southport Forest Products facility south of Coos Bay and the Southport Lumber Company facility on the north spit in North Bend. When Puls works in North Bend, his wages are charged to Southport Lumber Company and he is an employee of that company. He is also covered under the federal Longshore and Harbor Workers Compensation Act while he is employed in North Bend as opposed to being covered under the Oregon state workers compensation program while employed in Coos Bay. (Tr. 361-62.)

First, Coleman and Puls both oversaw and "kept an eye" on the ILWU employees when they performed the button pushing function. (Tr. 332-33.) It is simply more efficient and saves money to have two Southport employees, Coleman and Puls, perform the entire chip loading function without the addition of two additional and unnecessary ILWU button pushers. (Tr. 72, `332-33.)

Additionally, it is sometimes difficult to predict when a chip barge will arrive at the barge slip. For example, if a barge arrives at the slip at 4:00 a.m., Coleman and Puls can get started with chip loading immediately on the barge's arrival while the ILWU button pushers have to be ordered from the dispatch hall in advance and are governed by the shift start and end times of the PMA-ILWU labor agreement. (Tr. 333.) Similarly, if a barge is delayed until 2:00 p.m. and the ILWU button pushers were dispatched to work day shift, they would simply be doing nothing while waiting for the barge to arrive while Southport employees could stay busy performing other tasks. (Tr. 104.) And if the work is not completed during day shift because of the late arrival, ILWU members might have to be called back for the swing shift at premium pay rates while Southport employees could work through and complete the loading operation. (Tr. 105.) Additionally, calling the ILWU members back for a second shift might delay the departure of the barge causing additional costs. (Tr. 106.)

The flexibility inherent in having Southport's own employees perform the button pushing function also is helpful when weather or wind conditions delay the start of the operation. For example, in the months between July and September, heavy winds often arise at the noon hour in the Bay which delays chip loading operations due to environmental concerns caused by chips beings blown into the water. (Tr. 107.) Accordingly, in order to ensure efficiency, Southport is best served by starting chip loading at about 2 or 3 in the morning so that the operation can be concluded before the winds kick up. (Tr. 107.) When Southport presented this idea to Ports America, the PMA stevedore employing ILWU button pushers on behalf of Southport's

customers, PMA advised that the ILWU was unwilling to agree to the earlier start time because it was inconsistent with the PMA-ILWU contract. (Tr. 108.)[20]

As a result of the gross inefficiencies of performing the button pusher function with ILWU members, Southport expressed its strong preference at the hearing that its own employees continue to perform this work. (Tr. 111.)[21]

D. Southport's Use of its Barge Slip to Unload Logs and the ILWU Reaction

Southport first brought a load of logs into its North Bend barge slip on September 4, 2014. (Tr. 91-92.) Because Southport was unwilling to hire ILWU members to drive Letourneaus as the ILWU demanded, Southport elected not to utilize ILWU labor. Southport contracted with Boyer Tug & Barge, a company based out of Seattle, to bring the load of logs into the Bay and with Knutson Towboat to provide the assist tug services to bring the barge into the slip. (Tr. 92, 94.) Brusco Tug & Barge had previously advised Southport that it was unwilling to transport logs into the Bay as a result of pressure by the ILWU because of Southport's unwillingness to use ILWU machine operators to assist in offloading. (Tr. 88-90.)

Shortly after the Boyer tug and barge arrived at the Southport slip and unloading operations commenced, a large congregation of ILWU members commenced picketing of the Southport barge slip, again holding signs which claimed the barge slip as ILWU jurisdiction. (Tr. 93.) Later in the day, a contingency of ILWU members in picket boats harassed the Boyer employees, yelling insults at them. (Tr. 94.)

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[20] The use of ILWU button pushers also involves increased costs in the form of PMA tonnage assessments as well as a "gearman" charge that must be paid even though no "gearman" reports to work at the barge slip. (Tr. 368-70; Employer Ex. 20.)

[21] The ILWU suggested at the hearing that Southport employees performing the button pushing function were unsafe because they did not wear hardhats and safety vests during chip loading operations. Aside from the fact that the ILWU produced no evidence that this equipment was required, the evidence established that Coleman sometimes wore such equipment while ILWU button pushers most often did not. (Tr. 123.) The ILWU's suggestion is a classic "red herring."

As a result of Southport's initial log unloading operation without ILWU members, the ILWU continued its pressure on tug and barge companies to cease doing business with Southport. Jason Smith was told by John Erickson at Knutson Towboat that the ILWU had threatened that, if Knutson continued to supply an assist tug for Southport, the ILWU would cause delays at the Roseburg Forest Products dock in Coos Bay where Knutson was scheduled to perform assist tug work. (Tr. 95.) Erickson also told Smith that the ILWU also threatened to picket Knutson's office if Knutson continued to supply tug assist work to Southport. (Tr. 95.) As a result of this pressure by the ILWU, Knutson ultimately informed Southport that it was no longer willing to provide further tug assist work at the Southport barge slip. (Tr. 99.)

Brusco Tug & Barge and Dunlap Towing were also unwilling to bring their tugs and barges into the Southport slip as a result of their concerns about the ILWU's claim to the disputed log unloading work. Brusco did not feel comfortable bringing a tug and barge into the Southport slip for two reasons. One, Brusco was concerned that Knutson was unwilling to provide an assist tug. (Tr. 97.) Second, Brusco officer Dave Callentine told Jason Smith that Brusco, which has operations in ports up and down the West Coast, was concerned about "negative retribution" and "hard timing" by the ILWU at these other operations. (Tr. 98.) For its part, Dunlap Towing was also unwilling to bring a tug and barge into the Southport slip because of its concern that the ILWU would place a water picket at the Southport facility, which Dunlap's union-represented employees would refuse to cross. (Tr. 97-98.)

Southport was also advised by Marvin Pulliam, operations manager for Ports America, that the ILWU notified Ports America that the ILWU was no longer willing to provide button pushers for chip loading at the Southport barge slip "because Southport unloaded a log barge without utilizing the ILWU." (Tr. 96, 98-99, 367-68.) Pulliam told Smith that the ILWU would no longer dispatch labor to Ports America for it to perform services at the Southport slip associated with chip loading. (Tr. 99.)

The ILWU did not deny that its officers took steps to convince tug and barge companies to cease doing business with Southport. For example, Local 12's secretary-treasurer, Gene

Sundet, testified that he spoke to John Erickson at Knutson and asked Knutson "if there was any chance that they would not be willing to work for Southport." (Tr. 175.) Sundet admitted that he was trying to get Knutson to forego performing ship assist work at the Southport slip and that this included the ship assist work for both log barges and chip barges. (Tr. 202.)[22] Sundet's message to Knutson was that "Southport is a bad guy" and that the ILWU would be grateful if Knutson "wouldn't work for Southport." (Tr. 202.)

Sundet and/or other ILWU officers also spoke to employees of Boyer Tug to convince them not to come into the Southport slip because of the ILWU's "labor dispute" with Southport. (Tr. 176, 203-204.) Sundet also told representatives from Dunlap Towing and Brusco that, if they came to Southport, "there could be a picket" and they might not want "to spend all their money to come down there." (Tr. 204.) Contradicting Sundet's statement that there "could" be a picket, Gary Alford, Local 12's vice president, testified that any attempt by Southport to use its barge slip to handle logs without ILWU members "would" have been met by an ILWU picket line. (Tr. 270.)

When Knutson, Brusco, and Dunlap refused to come into Southport's barge slip because of their concerns about ILWU pressure, Jason Smith testified that Southport was initially in a state of "panic because we had commitments with our chip customers to provide them with chips." (Tr. 99.) Accordingly, Southport commenced efforts to find barge companies that were willing to haul chips into its North Bend barge slip and, in addition, to provide tug assist services. (Tr. 99-100.) In mid-November 2014, Southport reached an agreement with Island Tug & Barge for Island to bring a chip barge into Southport sometime in early December. (Tr. 100.) Southport also reached agreement with Pacific Tug & Barge to do the tug assist work for that chip barge. (Tr. 100.)

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[22] This testimony from Gene Sundet is completely at odds with his testimony that it was not the ILWU's intent to interfere with chip loading at the Southport slip. (Tr. 178.) Without an assist tug, a chip barge could not safely enter or exit the barge slip. (Tr. 94.) So whether or not the ILWU would agree to provide button pushers for chip loading operations, there would be no work to perform because no ocean-going chip barges could safely call on the Southport slip.

Island's tug and barge came into the Southport barge slip on December 4, 2014 and chip loading operations commenced without the use of ILWU button pushers. (Tr. 101.) Because of the ILWU's implied threats to tug and barge companies such as Knutson, Brusco, and Dunlap and the fact that the ILWU refused to dispatch labor for chip loading due to its failure to reach agreement with Southport regarding log unloading operations, Southport had little or no alternative except to go forward without the use of ILWU labor. (Tr. 100-101.)

The ILWU responded strongly by picketing both on water and on land at the entrance to the Southport sawmill. ILWU members trespassed onto Southport property and yelled insults at Southport employees engaged in the chip loading work. (Tr. 101-02.) ILWU members displayed picket signs containing statements that the ILWU claimed jurisdiction over the Southport barge slip. (Tr. 102.) Southport loaded an additional barge with wood chips in mid-December 2014 as well as a third barge on December 29, 2014. On each occasion, the ILWU picketed Southport's facility. (Tr. 102.) Southport handled two additional chip barges in February and March 2015. (Tr. 103.) As stated above, Southport's chip loading operation is much more efficient without the use of ILWU button pushers since Southport's two employees can perform the entire chip loading function, without the need for two additional ILWU members whose only substantial function is to intermittently operate the chute. (Tr. 103-110.)

While ILWU secretary-treasurer Gene Sundet claimed that the ILWU no longer displayed picket signs claiming the Southport barge slip as ILWU jurisdiction after September 2014 when the first log shipment was unloaded, the documentary evidence flatly contradicted that testimony. (Tr. 207.) Thus, photographs of ILWU picketers during the December 2014 picketing conducted by the ILWU demonstrates that the ILWU continued to claim the Southport barge slip as somehow within ILWU jurisdiction. (Tr. 353-54; Employer Exs. 17-18.)[23]

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[23] During the ILWU's picketing of Southport conducted in December 2014, the picketers on one occasion moved from Southport's North Bend barge slip and picketed a dock in Coos Bay owned by Ocean Terminals and operated by its lessee, Merrill & Ring. The picketers carried the same picket signs they had previously carried while picketing Southport's premises, claiming jurisdiction over the Southport barge slip. (Tr. 353-54.)

After the ILWU became aware that Island Tug and Pacific Tug had assisted Southport regarding the December 2014 chip loading operations, the ILWU took steps to keep these companies from calling on Southport's barge slip. Thus, on December 22, 2014, the ILWU sent Island Tug a letter requesting that it not cross the ILWU's picket lines at the Southport facility. (Tr. 375; Employer Ex. 21.) A similar letter was sent to Billeter Marine, a company related to Pacific Tug by common ownership. (Tr. 109-110; Employer Ex. 9.)

E. The Inefficiencies Involved In Using ILWU Labor for Log Unloading

Southport has never utilized ILWU members to conduct log unloading operations at its barge slip. It has refused to use ILWU members because of the gross inefficiencies that would result. Aside from the fact that utilizing ILWU heavy equipment operators to move discharged logs was both redundant and unnecessary, the evidence at hearing established that ILWU operators are not qualified to operate the Letourneaus owned by Southport to perform this function. Jim Lyons, Southport's part owner with 29 years of experience, is very familiar with the rolling stock used in the wood products industry. (Tr. 339.) As a company owner, Lyons has purchased multiple pieces of heavy equipment, including Letourneaus. (Tr. 340.) Unlike the ILWU witnesses who testified, Lyons has himself driven a Letourneau. (Tr. 340.)

Lyons is very familiar with the substantial differences between Letourneaus and front-end log loaders, which are typically referred to in the industry as "snappers" or "snapper grabbers." (Tr. 340-341.) "Snappers" are diesel hydraulic machines with controls that are very similar to an automobile, with a steering wheel, and foot-operated gas pedal and brakes. (Tr. 341.) The lift, tilt, and grab functions, enabling the machine to pick up logs, typically are operated by a joystick or cluster of joy sticks. (Tr. 341-342; Employer Ex. 16.)

A Letourneau is a diesel electric machine. It is very different machine than a "snapper" with "a very different set of controls and functions." (Tr. 341.) A Letourneau has a device called a potentiometer, a large handle that runs the forward and reverse functions as well as the speed and braking. The steering, lift, tilt and clamp functions are all controlled by a set of toggle

switches, as opposed to levers or a steering wheel, as on a "snapper." (Tr. 341-343; Employer Ex. 17.)

Lyons testified that he would never hire a Letourneau operator who did not have experience operating that particular machine. (Tr. 345.) The Letourneau company itself recommends that an operator has to spend close to 1,000 hours in the cab of a Letourneau in order to become a true expert on the machine. (Tr. 345.) Lyons testified that he would never place someone in a Letourneau operator position who had never operated a Letourneau before. (Tr. 346.)

Richard Coleman, Southport's log yard supervisor, supported Lyons' testimony. Coleman testified that he has hired Letourneau operators and it is very difficult to locate an experienced one. (Tr. 333-334.) Coleman testified that prior experience on snappers and other log handling equipment did not immediately transfer to being a Letourneau operator. (Tr. 334.) When Southport hires a Letourneau operator, it looks for prior experience running that particular type of machine and will only hire individuals with such prior experience. (Tr. 130-31; 334.) Southport has several employees who have substantial experience operating Letourneaus. (Tr. 130-31; 334-35.) Each of these employees has been given special training to run this "very specialized machine." (Tr. 131, 142-43.) One of Southport's current employees has 25 years' experience operating this equipment. (Tr. 334-35.)

While the ILWU claimed that its members have the skills to operate Letourneaus, it failed to provide any substantial evidence supporting that conclusion, as none of the witnesses it offered had any first-hand experience operating a Letourneau or even appreciated the differences between a Letourneau and a "snapper." For example, Gene Sundet erroneously testified that "snappers" and Letourneaus were "the same machinery" and were "almost identical." (Tr. 193.) While Sundet claimed that four ILWU members had experience driving Letourneaus, he did not know how recent that experience was. (Tr. 194.) Although he initially testified that he knew they had driven Letourneaus by looking at written records demonstrating that fact, he quickly admitted on cross-examination that no such written records existed and that his testimony about

other ILWU members' experience was based on what he had heard and not personal knowledge. (Tr. 195-196.)

In fact, not only was the ILWU unable to establish that any of its members had recent experience operating Letourneaus, it was unable to even establish that its members had recent experience in the Coos Bay area operating "snappers." Thus, John Huber, a member of Local 12's labor relations committee, testified that, although he had never operated a "snapper," he knew of other Local 12 members who had done so. (Tr. 246.) However, he testified that their experience probably occurred "at least ten years" ago at Ocean Terminal's location in Coos Bay. (Tr. 246-247.) Jim Lyons, part owner of Ocean Terminals, testified that, in fact, the last log unloading at that facility occurred in the 1990's and Letourneaus were not used because Ocean Terminals did not own them and the Ocean Terminals dock did not have the weight capacity in order to utilize this heavier piece of equipment. (Tr. 347-348.)

Ross Leibelt, another ILWU member, testified that he had never operated a Letourneau, had never been in one, and did not know how long it would take to be trained and capable on that machine. (Tr. 276.)[24] Leibelt admitted that log unloading work was not usually available in the Bay Area and hadn't been generally available since the 1990's. (Tr. 277.) Over the last ten years or so, Leibelt worked six to nine days a year in Longview, Washington, where he did have occasion to operate "snappers," although he hadn't worked on one for about a year. (Tr. 276-77.) This testimony, and the testimony of other ILWU witnesses, was clearly insufficient to

[24] Although he testified he did not know how long it would take to become fully trained and capable on a Letourneau and did not know anything about the controls on that machine, Leibelt nonetheless testified without foundation that he could "figure out how to operate that machine relatively quickly" because he "can run anything" he gets on. (Tr. 279, 280.) This unsubstantiated opinion testimony was similar to the testimony of Leal Sundet, who boastfully testified without ever having been in the cab of a Letourneau, that the learning curve on a Letourneau would be about "five to fifteen minutes." (Tr. 294, 296.) This self-serving testimony should be given no weight as it was not based on personal knowledge but was instead based on mere surmise and conjecture. In contrast, the testimony of Lyons and Coleman was based on first-hand knowledge of Letourneaus and the significant differences between Letourneaus and other log loading equipment.

establish that ILWU members possessed anywhere close to the skills, abilities, and experience of Southport employees to operate Letourneaus.

F. The Baselessness of the ILWU's Jurisdictional Claim to the Southport Slip

When asked to describe the basis of the ILWU's claim to the chip loading and log unloading work at issue in this case, Gene Sundet testified that the claim was not based on any written contract with Southport but on "past practice in the Port of Coos Bay" and the fact that Southport allegedly first contacted the ILWU about the work, a fact that the evidence does not support. (Tr. 181-83.) That was all that the ILWU could conjure up to support its claim to the work at issue. (Tr. 183.) Distilled to its essence, the ILWU's position appears to be that, because it has loaded chips onto barges and ships for other companies in the Bay Area based on the consent of those companies to use ILWU labor, it has the right to force Southport to also agree to utilize ILWU members for these same functions. (Tr. 151-52, 269.) The ILWU's position seems to be the same for the unloading of log barges. (Tr. 155.) However, Leal Sundet, a high-ranking officer of the ILWU International, testified that Southport is not a PMA member, is not a signatory to the ILWU-PMA labor contract, and is not bound to that labor contract. (Tr. 287.) Nor was Leal Sundet aware of any verbal commitments for Southport to use ILWU labor. (Tr. 287-88.) The bottom line is that Leal Sundet admitted that a private dock operator such as Southport with no contractual obligation to the ILWU has the right to use any labor force it wants for loading and unloading operations at its dock and is under absolutely no obligation to use ILWU members. (Tr. 296.)

III. DISCUSSION

A. The ILWU's Motion to Quash Should Be Denied Because the Jurisdictional Dispute Is Not of Southport's Own Making

At the outset of the hearing, the ILWU made a motion to quash the notice of hearing in this case on the dual grounds that (1) the jurisdictional dispute at issue here was solely of Southport's making; and (2) the ILWU acted with a valid work preservation purpose. (Tr. 11-

13.) As demonstrated by Southport at the hearing and as amplified herein, both arguments are without merit and should be rejected. (Tr. 13-15.) The ILWU's motion to quash should be denied.

The ILWU's first argument is made in reliance on the decision of the District of Columbia Circuit Court of Appeals in *International Longshoremen's and Warehousemen's Union, Local 62-B v. National Labor Relations Board*, 781 F.2d 919 (D.C. Cir. 1986) ("*Alaska Timber*"). In relying so heavily on that case, the ILWU ignores the fact that, in *International Longshoremen's and Warehousemen's Union, Local 14, AFL-CIO v. National Labor Relations Board*, 85 F.3d 646 (D.C. Cir. 1996) ("*Local 14*"), under facts closely analogous to the present case, the D.C. Circuit distinguished its prior decision in *Alaska Timber* and upheld the Board's Section 10(k) determination.

In *Local 14*, the employer, Sierra Pacific Industries ("SPI") previously sold wood chips to a "middleman" at a dock in Eureka, California; the "middleman" then used a stevedore which employed ILWU members to load the chips onto barges and ships at the dock. *Id.* at 649. After engaging in this arrangement for several months, SPI "decided that it would be more economically advantageous for it to sell its wood chips directly to a pulp manufacturer under a long-term agreement than to continue to sell its chips to a middleman," and, to that end, it leased its own dock, the 14th Street Dock, across the bay from the dock where its chips had previously been loaded. *Id.* To enable the 14th Street Dock to handle chip loading operations, SPI, like Southport, "invested substantial capital to install wood chip-loading machinery." *Id.* SPI elected to utilize "its own, unrepresented employees to load the wood chips," in an operation that is very similar to the wood chip loading aspect of Southport's business. *Id.* In response, the ILWU demanded that the wood chip loading functions be subcontracted to the same stevedore that had

previously employed ILWU members to load chips at the other dock. SPI refused and the ILWU, as in this case, proceeded to picket SPI's dock and interfere with tug and barge activity in the area. *Id.*

SPI filed charges against the ILWU under Section 8(b)(4)(D) and the Board, after holding a Section 10(k) hearing, found that SPI's "assignment of the chip-loading work to its unrepresented employees was an original assignment of new work," and, thus, the ILWU's actions could not be considered efforts to preserve bargaining unit work. *International Longshoremen's and Warehousemen's Union, Local 14*, 314 NLRB 834, 836 (1994). Based on the factors of employer preference and practice, and economy and efficiency of operations, the Board awarded the work to SPI's employees. *Id.* at 837.

After refusing to comply with the Section 10(k) determination and being found guilty of a Section 8(b)(4)(D) violation, the ILWU petitioned for review to the D.C. Circuit, arguing that the jurisdictional dispute at issue was of SPI's "own making" and primarily relying as it does now on the *Alaska Timber* decision. *Local 14*, 85 F.3d at 652. The D.C. Circuit rejected the ILWU's arguments. First, the court held that the fact that an employer "has an interest in the outcome of a jurisdictional dispute" and preferred one group of employees over another did not mean that the employer instigated the dispute. *Id.* at 653. Thus, the employer "need not be indifferent to the outcome of a labor dispute in order for the dispute to be deemed jurisdictional." *Id.* Second, the court held that the fact that an employer makes "a business decision to expand its operations in a search for profits, and thereby prompted a labor dispute" does not meant that the employer is deprived of the protections afforded by Section 8(b)(4)(D). *Id.* Third, citing its previous decision in *International Longshoremen's & Warehousemen's Union v. NLRB*, 884 F.2d 1407, 1412 (D.C. Cir. 1989) ("*Sealand*"), the court held that, when SPI decided to move to a new dock,

it was "free to choose either its own employees or Local 14 members to operate the chip loading machinery once it made the unassailable decision to relocate." *Local 14*, 85 F.3d at 653. The fact that SPI's decision to assign the work to its own employees was made to "save money" made no difference as the ILWU "was not 'supplanted' because the work it sought was not work that it had ever done before." *Id.*

In deciding based on these factors that a valid jurisdictional dispute existed, the court distinguished its prior decision in *Alaska Timber*. The court stated that "one critical difference" between the two cases was that, in *Alaska Timber*, "the employer unilaterally changed the long-standing loading practices at its own dock, thereby replacing longshoremen with its own employees." *Id.* This "shift in business practice seems to have been designed totally to supplant the Longshoremen with its own employees" and to avoid the union. *Id.* (quoting *Sealand*, 884 F.2d at 144). In contrast, the court stated: "Here, there is no evidence that SPI changed its operations in order to avoid the Union. Indeed, SPI had no direct relationship with the Union in this case." *Id.* at 653-54.

The *Local 14* case has obvious relevance here. With regards to the log unloading component of the work at issue, the evidence was uncontradicted that ILWU members have never performed that work at the Southport slip. While the ILWU is now claiming the work of transporting logs discharged from barges from the first point of rest to another point close by on the dock, it has no contractual or other claim to this "new work" at Southport's new location. *See, e.g.*, *Bloomsburg Graphic Communications Union, Local No. 732-C*, 308 NLRB 1190, 1192 n. 4 (1992) (where an employer moved to a new location for business reasons, assignment of certain work constituted "an original assignment of new work" and the dispute over said work "was properly before the Board in a 10(k) proceeding"). Clearly, where the ILWU claims work

at a specific location that it has never performed before, a jurisdictional dispute exists, which the Board has the statutory obligation to resolve under Section 10(k).

The same is true of the button pushing work on the chip loading operations at the new facility. Although that work was initially assigned to the ILWU due to discretionary decisions of Weyerhaeuser, Georgia-Pacific and Dunlap Towing to load wood chips with a PMA-member stevedore, Southport's decision in December 2014 to utilize its own employees on certain loads for its customer, Capstone, was not of Southport's "own making" within the meaning of the Board's cases. Instead, Southport was compelled to make changes in how it handled its chip loading work in connection with its sale of chips to Capstone because of the ILWU's actions in pressuring tug and barge companies not to do business with Southport and in refusing to provide labor for chip loading operations until Southport agreed to also use ILWU labor for log loading operations.

A review of the uncontradicted facts makes this point clear. Both log barges and chip barges need an ocean-going tug to tow the barges from the Pacific Ocean into the Bay. Similarly, both log barges and chip barges need an assist tug to help the ocean-going tug and barge to safely enter and exit the Southport barge slip. After Southport brought its first load of logs into its barge slip on September 4, 2014, the ILWU proceeded to pressure the few tug and barge companies doing business in the Bay Area to cease doing business with Southport. Central to this strategy was the ILWU's efforts to convince Knutson Towboat to no longer provide tug assist services. John Erickson from Knutson advised Jason Smith from Southport that the ILWU threatened to interfere with Knutson's work for another customer in the area and to picket Knutson's offices if Knutson continued to work with Southport to provide tug assist services. Although Gene Sundet for the ILWU denied these threats, he tellingly admitted that the ILWU

attempted to convince Knutson to forgo the future provision of ship assist services to Southport and, importantly, that the withholding of these services by Knutson applied both to log barges and chip barges. The ILWU's efforts succeeded when Knutson advised Southport that it would no longer be able to provide ship assist services to Southport.

The ILWU's efforts extended to virtually all the tug and barge companies doing business in the Bay Area. It is uncontradicted that the ILWU contacted Boyer, Brusco, and Dunlap as well. Even taking the ILWU's unpersuasive testimony about the mildness of their officers' messages at face value, ILWU witnesses admitted that they informed the tug and barge companies that there would be picketing at the Southport barge slip if they elected to service Southport and they might not want "to spend all their money to come down there." (Tr. 204.)

According to Jason Smith, Southport was also informed by Ports America, the PMA stevedore that had previously been used to load chips at the Southport barge slip, that the ILWU would no longer agree to provide labor for chip loading operations in light of Southport's failure to use ILWU members for the log unloading operation that took place on September 4, 2014. While the ILWU denies any intent to refuse to provide labor for future chip-loading operations, its strenuous attempts to convince tug and barge companies not to service the Southport slip, whether in connection with log deliveries or chip loading, demonstrates its intent to interfere with all vessels coming into or out of the slip until Southport acceded to its demands and agreed to use unnecessary ILWU labor on future log unloading operations.

The ILWU's successful efforts to dissuade tug and barge companies from coming into Southport's barge slip for any purpose, including chip loading, put Southport into a "panic" because it had existing contracts with chip customers that it needed to fulfill. Southport was thus forced to search for different barge companies that were willing to haul chips into its North Bend

barge slip and, in addition, to provide tug assist services. (Tr. 99-100.) By mid-November 2014, Southport reached an agreement with Island Tug & Barge to bring a chip barge into Southport and with Pacific Tug & Barge to perform the assist work. (Tr. 100.) Because Dunlap, which had previously conditioned its provision of services to Southport on its contracting with Ports America, was no longer willing to provide such services and because Ports America had advised Southport that Local 12 would not dispatch labor to work at Southport while the dispute over the log unloading operations was ongoing, Southport used its own employees to perform the button-pushing functions on approximately five occasions when chip barges were loaded commencing in December 2014.[25]

Southport's decision to use its own employees for the button-pushing function was thus not solely of its own making as the ILWU would have it. Nor was Southport's decision "designed totally to supplant the Longshoremen with its own employees" and to avoid the ILWU, with which Southport has no contractual relationship with. *Local 14*, 85 F.3d at 653-54. Instead, Southport made a good-faith decision that was compelled by the fact that the ILWU had convinced several tug and barge companies to cease doing business with Southport while the log unloading dispute was ongoing, had threatened to picket Southport's barge slip, and had advised

[25] It is anticipated that the ILWU will argue that no jurisdictional dispute exists regarding the button pushing function because Richard Coleman, who has performed much of this work since December 2014, is a statutory supervisor. However, this argument ignores the uncontroverted evidence that, in addition to Coleman, button-pushing work on each of the five loading operations since December 2014 was also performed by a statutory employee, Mike Puls. Accordingly, there are clearly two groups of "employees" competing for the disputed button-pushing work within the meaning of Section 8(b)(4)(D). The ILWU may also argue that no Southport employees have made express written or verbal claims to any of the disputed work at issue here. However, the law is clear that the mere fact that Southport's employees are performing the disputed work at issue constitutes such a claim. *See, e.g.*, *Local 14*, 85 F.3d at 652; *International Union of Operating Engineers, Local 926*, 254 NLRB 994, 996 (1981); *Int'l Longshoremen's & Warehousemen's Union, Local No. 8*, 231 NLRB 179, 179-80 (1977).

Ports America that it would no longer provide ILWU labor.[26] Unlike the employer in the *Alaska Timber* case, which unilaterally changed its business practices voluntarily and without any coercion by the ILWU, Southport's actions in December 2014 were the direct product of ILWU coercion. *Alaska Timber*, 781 F.2d at 920. Under these circumstances, in addition to the jurisdictional dispute regarding the log unloading work at the Southport barge slip, there is also a legitimate jurisdictional dispute regarding the chip loading work.

B. The ILWU Is Not Acting with a Work Preservation Purpose

The second prong of the ILWU's motion to quash is its contention that it is acting with a work preservation purpose. With regards to the log unloading functions at issue here, this argument can be dispatched quickly because the ILWU has never once performed this work at the Southport barge slip and, in addition, has no contractual claim to the work. *See Local 1235, Int'l Longshoreman's Ass'n*, 362 NLRB No. 76 (2015) (where a union claims work "that has not been previously performed by employees it represents," its objective is not work preservation but work acquisition); *Electrical Workers Local 48 (Kinder Morgan Terminals),* 357 NLRB No. 182 (2011) (the same).

The ILWU is also not acting with a work preservation intent regarding the button-pushing work performed during chip loading operations. Work preservation cases deal with attempts to preserve bargaining unit work. The ILWU has no legitimate work preservation purpose in this case because the work at issue conducted at Southport's private dock is not

[26] While Smith's testimony that he was advised by Ports America that Local 12 would no longer provide labor for chip loading until the log unloading dispute was resolved is hearsay, hearsay is admissible in Section 10(k) hearings. But in any event, even if the hearsay rule was applicable, the testimony has relevance not only for the truth of the matter asserted but to show Smith's state of mind and to support the good faith nature of Southport's decision to address the difficult circumstances caused by the ILWU's actions to interfere with its business.

bargaining unit work. It is uncontradicted that Southport is not a PMA member, the ILWU does not represent Southport's employees and, of course, the ILWU is not a party to any labor agreement with Southport. As admitted to by Leal Sundet, a high-level official of the ILWU International, the ILWU-PMA contract has no application to Southport's operations. Thus, a private dock owner such as Southport is free to use whatever labor force it chooses and has no legal obligation to utilize the services of ILWU members. Without any contractual underpinning for the ILWU's claim to the button pushing work at Southport's private dock, there can be no work preservation intent. *See Int'l Longshore & Warehouse Union, AFL-CIO (ICTSI Oregon, Inc.)*, 2013 NLRB LEXIS 573, *113 (Aug. 23, 2013). Put another way, the button pushing work is not "fairly claimable" when the union "has failed to present a colorable contractual claim to the work in controversy." *United Food & Commercial Workers Local 367 (Quality Foods)*, 333 NLRB 771, 772 (2001).

The fact that Southport's customers Georgia-Pacific and Weyerhaeuser decided for reasons wholly of their own to utilize a PMA-member stevedore to load wood chips they had already purchased from Southport does not change this result. Nor does the fact that Dunlap, the tug and barge company that Southport initially used to deliver chips to Capstone, required that the chips be loaded on its barge by a PMA-stevedore change the result. The decisions by these companies to use ILWU labor were not decisions made by Southport nor were these decisions required by any labor agreement between these companies and the ILWU. They were simply *ad hoc* decisions to subcontract work to a PMA-member company based on concerns regarding labor troubles and possible retribution by the ILWU if the companies did not comply.

Notwithstanding these facts, the ILWU will still try to craft a work preservation argument out of decisions by companies other than Southport to hire a PMA contractor. However, we

have found no cases which uphold a work preservation defense regarding union actions directed solely against an employer with which the union has no contractual relationship. The seminal case regarding the work preservation defense is *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967). In that case, the determination of whether a union's actions are motivated by a work preservation purpose is whether the union's actions "are addressed to the labor relations of the contracting employer *vis-à-vis* his own employees" or whether the union's actions were "tactically calculated to satisfy union objectives elsewhere." *Id.* at 644-45. Thus, in *National Woodwork*, the Court held that the union's actions in refusing to hang prefabricated doors on the jobsite of the employer with which it had a collective bargaining agreement was related solely to the preservation of the work of bargaining unit members under that agreement. *Id.* at 646. The key here is that the union must have as its purpose the preservation of work to which it has a contractual claim.

The ILWU's actions in this case were not designed to preserve bargaining unit work and were not addressed to the labor relations of any employer with which the ILWU has a contractual relationship. Rather, the ILWU's actions were designed to put economic pressure on Southport, a company with which the ILWU has no contractual relationship, to subcontract only with PMA members or with non-PMA members who were nonetheless willing to abide by the ILWU-PMA contract and inefficient work practices which the ILWU has coerced companies to agree to in the past. As such, the ILWU's actions were designed to coerce Southport into not doing business with companies such as Island Tug & Barge and Pacific Tug & Barge, which were willing to perform services connected with the offloading of logs and/or the loading of wood chips without the use of ILWU members, but rather to do business with other companies which would only perform such services with ILWU labor.

Union coercion of an employer with which the union does not have a contractual agreement to only subcontract work to employers with which the union does have an agreement is clearly unlawful. *See, e.g.*, *District 2, Marine Engineers Beneficial Ass'n-Associated Maritime Officers, AFL-CIO (Grand Bassa Tankers, Inc.)*, 261 NLRB 345, 350 (1982) (seeking an agreement from a company that the union has no bargaining relationship with to only contract with companies that have such a bargaining relationship violates Section 8(e), 29 U.S.C. § 158(e)); *Colorado Building & Construction Trades Council (Utilities Service Engineering Inc.),* 239 NLRB 253, 256 (1978) (even under construction proviso to Section 8(e), the union violated Section 8(b)(4)(A), 29 U.S.C. § 158(b)(4)(A), by picketing a general contractor who did not have a collective bargaining agreement with the union, and who did not employ employees represented by the union unless it agreed to execute an agreement which provided in substance that the general contractor would not subcontract out certain electrical work to any subcontractor who failed to pay its employees the prevailing industry wages).[27] In fact, requiring such an agreement from a non-signatory employer to do business only with signatory employers also constitutes an antitrust violation. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada*, *AFL-CIO*, 421 U.S. 616, 628 (1975); *James Julian, Inc. v. Raytheon Co.*, 499 F. Supp. 949, 958 (D. Del. 1980).

Under the circumstances presented herein, it is abundantly clear that the ILWU has no work preservation purpose regarding the log unloading work at the Southport barge slip, work

[27] There are more recent decisions supporting the same proposition as these cases. *See, e.g., Glens Falls Bldg. & Constr. Trades Council*, 350 NLRB 417, 421 (2007); *Ironworkers District Council of the Pacific Northwest (Hoffman Construction)*, 292 NLRB 562, 580 (1989), *enf'd* 913 F.2d 1470, 1475 (9th Cir. 1990).

which ILWU members have never performed. Nor does the ILWU possess a valid work preservation purpose regarding the button pusher work required in the chip loading process because the ILWU's efforts are nothing more than a blatant attempt to require Southport to do business only with PMA members or non-PMA members who are willing to abide by the PMA-ILWU labor contract. Such an illegal purpose cannot form the basis of a legitimate work preservation defense.

Because there is reasonable cause to believe that (1) there are competing claims to the disputed work in this case, including both the log unloading work and the chip loading work; (2) the ILWU has clearly used the proscribed means of picketing to enforce its claims to this work; and (3) the parties have not agreed on a method of voluntary adjustment of the dispute, the Board clearly possesses the authority to address the Section 8(b)(4)(D) charge filed by Southport and to hear and determine the jurisdictional dispute raised by that charge under Section 10(k).

C. Traditional Factors Applied by the Board in Section 10(k) Proceedings, Including Employer Preference and Efficiency of Operations, Favor Assignment of this Work to Southport Employees

With the requirements for the Board's determination of a jurisdictional dispute under Section 10(k) of the Act having been established, the inquiry turns to the factors traditionally applied by the Board in such cases. An analysis of these factors, particularly the factors of employer preference, efficiency of operations, and relative skills and abilities, leads inexorably to the conclusion that the work associated with both log unloading and chip loading should be assigned to employees of Southport.

1. Certifications and Collective Bargaining Agreements

There are no Board certifications or collective bargaining agreements covering the disputed work in this case. Because the ILWU does not possess even a colorable contract claim to the disputed work while Southport has the inherent right as owner of a private dock to assign

the work to whatever group of employees that it wants, this factor favors assignment of the work to Southport's employees.

2. Employer Preference and Practice

Southport has expressed a strong preference in this case that both the disputed log unloading and chip loading work be assigned to its own employees. (Tr. 111.) With regards to the operation of Letourneaus in connection with its log unloading operations, it has always utilized its own employees. ILWU members have never performed this work at the Southport barge slip.

With regards to the button pusher functions in connection with the chip loading operations at the slip, Southport has assigned its own employees, including employee Mike Puls, to perform this work from December 2014 until the time of hearing. Between February 2013 and August 2014, Southport's customers Georgia-Pacific and Weyerhaeuser elected to contract with a PMA-member to load chips that these companies had already purchased from Southport. These decisions were controlled by Southport's customers and were not made by Southport. The PMA member utilized two ILWU button-pushers but Southport employees assisted and oversaw the work of these ILWU members. Additionally, during this time frame, Southport's contracted tug and barge company, Dunlap Towing, also elected to contract with a PMA-member to load chips on Dunlap's barge for delivery to Southport's customer, Capstone. This decision was also not made by Southport. Again, the PMA-member utilized two ILWU button pushers who worked under the direction of Southport employees.

The factor of employer preference strongly supports assignment of the disputed work to Southport's employees. Historically, this factor has been given great weight by the Board and the Board has made Section 10(k) determinations that are contrary to employer preference only in the most unusual circumstances, not present here.

3. Economy and Efficiency of Operations and Relative Skills and Training

These factors strongly favor assignment of the work to Southport's employees. With regards to the log unloading operations, the ILWU made an extremely inefficient manning

proposal to Southport. According to the ILWU's written "all-or-nothing" proposal, the ILWU demanded to use two ILWU "ghost" crane operators who would essentially perform no required work because the cranes used to offload logs from the barges are owned by the tug and barge companies and are operated by the employees of those companies.

In addition to the use of two "ghost" crane operators performing no crane operation or other necessary work, the ILWU also demanded that Southport assign three log loader operators. The ILWU ultimately reduced that demand to two log loader operators. The ILWU's proposal, which was never agreed to by Southport, was that ILWU members would pick up the logs offloaded from the barge by the tug and barge company's employees and transport them from the point of first rest on the dock to another location just a short distance away where Southport's heavy equipment operators would then pick up the logs and transport them to the log decks on Southport's sawmill property. This proposal injected an unnecessary step in the log unloading process that is both wasteful and costly. Rather than simply having Southport employees pick up the logs and transport them to the log deck in one move, the ILWU proposed, solely to further its own work acquisition purposes, that Southport use a two-step process whereby two groups of employees perform a function that could be easily and efficiently performed by one group.

The ILWU's proposal also ignored the fact that Southport owned only three Letourneaus, two of which were operational at any given time. Thus, had Southport acceded to the ILWU's demands, the ILWU members would operate the Letourneaus to pick up the logs and drop them off in a nearby location in the vicinity of the dock. At that point, the ILWU members would presumably exit the machines, Southport's employees would then get into the machines, pick the logs up again, and then transport them to the log deck. In order to avoid the extra and inefficient step of having the two groups of employees sharing the same machine, Southport would have had to purchase two new Letourneaus, which can cost as much as one million dollars each.

The ILWU's proposal also ignores the fact that its members have little or no experience operating Letourneaus. While Southport has several well-trained, experienced, and skillful Letourneau operators, one with over 25 years' experience, not one ILWU witness had any

experience operating this type of machinery. Nor could they identify by personal knowledge even one ILWU member with any recent experience operating this specific type of equipment. Instead, the ILWU witnesses erroneously claimed that Letourneaus are identical to other log loaders, which their members have some limited and remote experience operating. Moreover, in making this claim, the ILWU witnesses betrayed a complete lack of knowledge about how a Letourneau is operated and seemed woefully ignorant of the special controls and functions of these machines as contrasted to other log-loading equipment.

It is also extremely inefficient to have two ILWU members perform the button-pushing function. The evidence established that the remote control device operated by the button-pusher is part of a fully-automated chip conveyor system which transports chips from the sawmill up to a chute which drops the chips onto the barge. The entire system is overseen by Southport employees, including Richard Coleman and Mike Puls, who have easily and efficiently performed since December 2014 all of the necessary chip loading functions by themselves, including the button pushing function, without the assistance of any ILWU members. The button pushing function is not one which requires two full-time employees; in fact, it does not even require one full-time employee. After the chute is initially placed over the barge and the flow of chips begins, there is often little or nothing for the button-pusher to do for between 45 to 90 minutes while the chips pile up in the barge. And when the barge is repositioned so that another chip pile can be started, the button-pusher again has little or nothing to do for an additional 45 to 90 minutes.

The inefficiency inherent in using two ILWU button pushers is also evidenced by the fact that the ILWU button-pushers usually worked two hours on and two hours off. While one button pusher operated the remote control device, the other off-duty but on-the-clock ILWU member usually left the Southport facility entirely or simply sat in his car waiting for his turn.

The ILWU members also do not have the same level of skill positioning the chute as do Southport's employees. On several occasions, the ILWU button pushers jammed the chute or dumped chips into the bay. The ILWU admitted at hearing that it often dispatches one

experienced button pusher along with an inexperienced "casual" longshoreman, who needs to be shown how to do the job. Richard Coleman testified without contradiction that he often had to show the ILWU member how to operate the chute at the beginning of the shift.

Utilizing ILWU button-pushers also meant that chip loading operations could only be conducted during shift times permitted under the ILWU-PMA labor contract and based on the availability of ILWU labor through the Local 12 hiring hall. This creates several different types of inefficiencies. For example, barge arrival times are often hard to predict because of weather conditions and other circumstances. If a barge is delayed and arrives in the middle of the night, Coleman and Puls can get started loading the barge at once while Southport would have to wait for the arrival of ILWU labor at the next scheduled shift start time. In addition, in the summer months, it is most efficient for chip loading operations to start at 2 or 3 in the morning so the operation can conclude before high winds pick up around noon, a condition which may cause chips to be blown into the Bay and resulting environmental concerns. However, the ILWU is unable to accommodate such an early start time.

Similarly, if a barge arrives late during a recognized ILWU shift for which ILWU labor was ordered, the ILWU workers get paid to do nothing and simply wait for the barge to arrive, while Southport employees can be assigned to perform other needed tasks at the Southport facility. Additionally, if the chip loading operation is not finished by the end of the ILWU-recognized shift, the loading operation has to stop and wait for the next shift at which ILWU labor is available, which might delay the tug and barge from leaving the barge slip, causing additional expense. However, under these circumstances, Southport employees can remain and finish the job. Finally, using ILWU button pushers carries with it excessive costs that have nothing to do with their performance of the required work; for example, the user of the ILWU labor has to pay tonnage assessments to the PMA as well a "gearman" fee despite the fact that no "gearman" is dispatched.

It is clearly much more efficient for Southport to use its own employees to perform both the Letourneau driving required for log unloading and the button pushing required for chip loading.

4. Industry Practice

The ILWU's claim to the disputed work relies entirely on industry practice in the Bay Area. However, this factor cannot serve to override the factors of employer preference, efficiency of operations, and relative skill and ability discussed above. *See International Longshoremen's and Warehousemen's Union, Local 14*, 314 NLRB at 837. However, the ILWU's industry practice claims are nowhere near as strong as it makes them out to be. For example, with regards to log unloading and the operation of log loaders, the evidence was that such work has not been available in the Coos Bay area since the 1990's and even then the work did not involve the operation of Letourneaus.

Nor was the evidence regarding chip loading uniform. For example, chip loading has been done by Sierra Pacific with non-ILWU employees in Eureka, California, for many years. *See Local 14*, 85 F.3d at 654 (affirming the Board's assignment of button pushing work to non-ILWU employees of Sierra Pacific in Eureka even though area and industry practice generally favored the ILWU). Sierra Pacific also loads woods chips at its Hoquiam, Washington facility without ILWU labor. (Tr. 356.) Additionally, chip barges on the Columbia River are also loaded with wood chips without using ILWU labor. (Tr. 295.)

IV. CONCLUSION

Reasonable cause clearly exists in this case to conclude that the ILWU has violated Section 8(b)(4)(D) by its picketing and other activities seeking to gain the disputed work for its members. After considering all relevant factors, including employer preference, efficiency of operations, and the relative skills and abilities of the employees involved, the Board should award the work of operating Letourneaus in connection with log unloading activities at the Southport barge slip to employees of Southport and not to employees represented by the ILWU. Similarly, the Board should, after consideration of the same factors, award the disputed button

pushing work in connection with chip loading activities at the Southport barge slip to employees of Southport and not to employees represented by the ILWU.

Dated: May 22, 2015.

Respectfully submitted,
SCHWABE, WILLIAMSON & WYATT

/s/ Michael T. Garone
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 22nd day of May, 2015, I electronically filed the foregoing SOUTHPORT LUMBER'S POST-HEARING BRIEF with the National Labor Relations Board with the eFiling system.

I further certify that on the 22nd day of May, 2015, I caused to be served a copy of the foregoing document by electronic mail or via U.S. first class mail, postage prepaid, to the following as indicated below:

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International Longshore and Warehouse Union, Local 12, *and* Southport Lumber Co., LLC. Case 19–CD–144202

October 11, 2018

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). The Employer, Southport Lumber Co., LLC, filed a charge on January 12, 2015, alleging that the Respondent, International Longshore and Warehouse Union, Local 12 (the Union), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to the Employer's unrepresented employees. On April 8 and 9, 2015, a hearing was held before Hearing Officer Rachel Harvey. At the hearing, the Union orally moved to quash the notice of hearing. The hearing officer referred the Union's motion to the Board. Thereafter, the Employer and the Union filed posthearing briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer is an Oregon limited liability corporation engaged in the manufacture of lumber and wood products at its facility in North Bend, Oregon, and that during the year preceding the filing of the charge, it derived gross revenues in excess of $500,000 and purchased and received at its North Bend facility goods valued in excess of $50,000 directly from points outside the State of Oregon. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer manufactures and sells lumber and wood products at its sawmill and barge slip facilities in North Bend, Oregon. In 2004, the Employer's sister company, Southport Forest Products (SFP), purchased 32 acres of industrial land and a dilapidated barge slip on Coos Bay in the city of North Bend.[2] SFP built a sawmill on the property, which the Employer operates. SFP and the Port of Coos Bay jointly applied for and received a grant to renovate the barge slip.[3] In the spring of 2012, the renovated barge slip became operational for inbound logs and outbound lumber. That same year, the Employer began constructing a radial stacking chip conveyor for loading chip barges. The chip conveyor became operational in February 2013.

The Employer currently receives and unloads logs shipped in on barges and loads wood chips onto barges at the slip.[4] To accomplish the chip loading, bulldozers or "chipdozers" push wood chips from the sawmill into a large concrete hole with a hopper that feeds the conveyor. A series of belts moves the chips up the conveyor, and the barges are loaded through a chute at the top of the conveyor. The position of the chute is controlled by a push-button remote control device. With respect to unloading logs, most barges have on-board cranes, operated only by barge personnel. When a log barge comes into the slip, barge personnel off-load the logs, placing them dockside. The Employer's employees then use special forklifts, called LeTourneau machines, to move the logs from dockside to the log yard at the sawmill.[5] As used here, "log unloading" refers to moving logs from the dock to the log yard.

[1] On February 10, 2016, the Union filed a motion requesting that the Board take administrative notice of the Sec. 8(b)(4)(B) charge filed by the Employer against the Union in Case 19-CC-156772, alleging unlawful picketing in May and July 2015, and the General Counsel's letter sustaining the dismissal of the charge. The Employer filed an opposition to the motion. We grant the Union's motion because the documents are official records of the Board. However, they do not affect this decision and determination of dispute. See *Independent Stave Co.*, 278 NLRB 593, 593 fn. 1 (1986). On March 1, 2016, the Union filed a second motion to take administrative notice of the underlying Advice Memo in Case 19-CC-156772. We deny the motion because advice memos have no precedential value or dispositive effect before the Board.

[2] The Employer and SFP are subsidiaries of Southport Investments. Jason Smith and Jim Lyons own the three companies. Smith manages the day-to-day operations of the Employer and SFP. Neither the Employer's nor SFP's employees are represented by a union.

[3] The joint application stated that the rehabilitation of the slip would create jobs for the Employer's employees and would provide "additional work opportunities for the local longshore labor force and for other persons employed in marine trades in the Coos Bay harbor." Martin Callery, Chief Commercial Officer for the Port, testified that he was involved in filing the joint application and that he understood the term "longshore labor" as a generic term that applies equally to members of the Union and "anyone who handles cargo on the waterfront."

[4] The Employer planned to load logs and lumber for shipping by barges but had not done so as of the date of the hearing in this matter.

[5] Operators maneuver the LeTourneau machines using toggles rather than levers.

In early 2012, the Employer arranged to export logs by barge for Weyerhaeuser Company. The Union learned of the arrangement and met with the Employer to discuss using union labor to perform loading and unloading work at the Employer's slip. The Employer contacted the Pacific Maritime Association (PMA) and ultimately invited PMA member Jones Stevedoring Company to attend the meetings with the Union.[6] The parties discussed work involving pushing the remote buttons that control the chip conveyor chute, operating the LeTourneau machines to move logs from dockside to the log yard of the sawmill or to an interim point, and operating cranes to load and unload logs. The Employer, the Union, and Jones Stevedoring failed to reach an agreement, and Weyerhaeuser decided to transport the logs by truck instead of by barge from the Employer's slip.

Afterwards, the Employer again attempted to reach an agreement with the Union on manning. In a May 7, 2012 letter to the Union, the Employer's co-owner Smith wrote in relevant part:

> We would like your consideration of the following manning scenarios:
>
> - Wood Chip Loading – 2 Button Pushers
> - Inbound and Outbound Logs – 2 Crane Operators
> - Lumber Barge Loading and Unloading – 4 Forklift Operators and 2 Extra Men
>
> As to others, we suggest working out the details through your employers when opportunities come up.

On May 14, 2012, the Union responded that its membership unanimously approved the following:

- Wood Chip Loading – 2 Button Pushers
- Inbound and Outbound Log Barges – 2 Crane Operators and 2 Log Loader Operators
- Lumber Barge Loading and Unloading – On the coastal barges: 1 Working Foreman, 4 Fork Lift Drivers, and 1 Extra Man; 2 Fork Lift Drivers or more as needed on face. On Hawaiian barges: 4 Fork Lift Drivers and 2 Hold Men; (1 Walking Boss – Local 92, and 1 Super Cargo – Local 40); 2 Fork Lift Drivers or more as needed on face.

By letter dated June 4, 2012, the Employer responded that the Union's letter foreclosed the possibility of reaching an agreement. The letter also stated that as the Employer had no collective-bargaining agreement with the Union, it would use nonunion personnel in its future work except where its customers elected to contract with Jones Stevedoring.[7]

In February 2013, the barge slip became operational for loading chip barges, and Weyerhaeuser, Georgia-Pacific, and Capstone Paper began purchasing wood chips from the Employer.[8] The arrangement with Weyerhaeuser and Georgia-Pacific, which purchased the chips "free alongside" (FAS),[9] was that they would hire a barge company, and they had the option to use or not use union labor to operate the Employer's chip chute. The arrangement with Capstone was for chips and delivery, or "free on board" (FOB), so the Employer contracted with Dunlap Towing, a barge company that in turn contracted for union stevedores through Ports America. For approximately 14 months, two employees represented by the Union and supplied by Ports America performed the push-button work involved in loading chips onto barges. Each employee worked 2 hours on and 2 hours off during a shift. Richard Coleman, the Employer's sawmill yard manager, supervised their work, and millwright Mike Puls, a sawmill employee, assisted Coleman with the chip-loading operation.

In September 2014, the Employer imported its first shipment of logs by barge. It initially arranged with Brusco Tug & Barge to bring the logs to the slip and planned to use its own employees to unload them. Brusco bowed out of that arrangement after the Union advised that it had a dispute with the Employer and that "there could be a picket line." On September 4, 2014, another company, Boyer Towing, brought the logs into the slip with Knutson Towboat providing barge assistance, and the Employer's employees unloaded the logs.

[6] The PMA is a multiemployer association of stevedoring companies that has a collective-bargaining agreement with the Union. The Employer is not a member of the PMA nor signatory to any agreement between the PMA and the Union.

[7] Around this time, the Employer was also pursuing an opportunity to acquire log-unloading work at a Canadian company's slip. Upon hearing the news, the Union picketed the Employer's slip. Subsequently, the Employer informed the Union that it was no longer seeking this work and that it had entered into an agreement with Ports America, a PMA member, to create a mutually beneficial working arrangement with the Union.

[8] A February 27, 2013 news release by the Port of Coos Bay stated that the Port's partnership with the Employer "is expected to increase employment in Southport's local operations, and in maritime services and the longshore labor sectors." The news release also quoted Union President Marvin Caldera saying, "We appreciate the fact that the Port was able to partner with [the Employer] to get these funds for the barge slip and create much-needed family wage jobs locally."

[9] "Free alongside" (FAS) is a commercial term used in the shipping industry and means the seller is responsible for transporting goods to the boarding area next to a ship, and the buyer is responsible for ensuring that the goods are loaded onto the ship and conveyed from there. The counterpart of FAS is "free on board" (FOB), which means the seller is responsible for transporting and loading the goods onto the ship and delivering them to the buyer's destination. See https://www.law.cornell.edu/ucc/2/2-319 (last accessed on September 12, 2018).

The Union picketed at the front gate of the Employer's facility and near the barge with signs reading, "Shame on Southport" and "Barge slip ILWU Local 12 jurisdiction."[10]

Thereafter, the Employer's employees, rather than Ports America's union stevedores, began loading wood chips. The reason for the change is disputed: the Employer asserts that the Union refused to supply Ports America with button pushers because the log-unloading work was not given to employees it represented; the Union asserts that the Employer stopped working with Ports America.[11] In any event, on December 4, 2014, the Employer engaged Island Tug & Barge and Pacific Tug to provide towing and ship assistance for Capstone Paper's inbound chip barges. The Employer's yard manager, Coleman, operated both the chip conveyor and chip chute. Millwright Puls relieved Coleman when he took breaks and for 2 hours on one occasion when Coleman left work early. The Union picketed the Employer's barge and sawmill. Subsequently, the Employer handled four additional chip barges, and each time the Union engaged in picketing.[12]

B. Work in Dispute

The notice of hearing describes the disputed work as "the loading and unloading of logs and wood products at the barge slip operated by [the Employer] in North Bend, Oregon." At the hearing, the Union asserted that this description is overly broad and that the disputed work is limited to the control of the spout during chip loading and operating the LeTourneau machines for log unloading. The Employer asserted that the use of crane operators in log unloading is also at issue because the Union had demanded that work in the past and had not withdrawn its claim, but it later agreed to the Union's description of the disputed work. Indeed, in its posthearing brief, the Employer asserts that button pushing (to control the spout during chip loading) and the operation of the LeTourneau machines should be awarded to its employees, without mentioning other work.[13]

However, the Union argues that the Employer's yard manager Coleman is a statutory supervisor, and as stated above, Coleman did the lion's share of the button-pushing work involved in loading chips. Jurisdictional disputes under Section 10(k) of the Act do not include disputes over work performed by statutory supervisors. Accordingly, we find that the work in dispute consists of button pushing for chip loading and operation of LeTourneau machines in log unloading at the Employer's barge slip in North Bend, Oregon, excluding those times, if any, when the button-pushing work is performed by an individual who is a supervisor under the Act.[14]

C. Contentions of the Parties

The Employer contends that there is reasonable cause to believe that the Union violated Section 8(b)(4)(D) of the Act because it demanded the chip-loading and log-unloading work, picketed the Employer and its customers, and threatened the Employer's customers with similar conduct at other locations where they do business, all in furtherance of its claim to the disputed work.[15] It also contends that the Union refused to supply employees to Ports America to perform chip-loading work in order to pressure the Employer to accept its terms for providing union labor to unload logs from barges. On the merits, the Employer contends that the work in dispute should be awarded to its employees based on the factors of employer preference, relative skills, and economy and efficiency of operations.

The Union contends that the Board should quash the notice of hearing. It argues that there is no valid jurisdictional dispute because the Employer effectively created the dispute by reassigning the chip-loading work previously performed by union personnel to its own employees. In this connection, the Union contends that its picketing was a lawful effort to preserve chip-loading work that the employees it represents previously performed and to get the Employer to follow through on commitments to use union labor to unload logs. Finally, the Union contends that if the Board does not quash the notice of hearing, the work in dispute should be awarded to employees it represents based on the factors of past practice, area and industry practice, relative skills, economy and efficiency of operations, and job impact.

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[10] After the picketing, Union Officer Gene Sundet asked Knutson Towboat "if there was any chance that [Knutson Towboat] would not be willing to work for" the Employer. Sundet also told Dunlap Towing that the Union had a labor dispute with the Employer and that there could be a picket line. As a result, Knutson Towboat and Dunlap Towing declined to provide further services for the Employer.

[11] No representative from Ports America testified.

[12] On January 12, 2015, the Employer filed the charge in this case.

[13] In its posthearing brief, the Union seeks to further specify the scope of the disputed work, in part, as "the operation of on-dock heavy equipment to transport logs from the dock to the first place of rest (i.e., the decks in the yard)." Because the record establishes that the operation of LeTourneau machines is at issue, we decline to adopt that description. Nonetheless, we note that the Employer's LeTourneau operators move logs from the dock to log decks in the yard, and that one of the Union's manning proposals covered that work.

[14] See *Teamsters Local Union 525 (Tiger Stripers, Inc.)*, 241 NLRB 306, 307 (1979); *Building Material & Dump Truck Drivers Local 420 (All American Asphalt, Inc.)*, 238 NLRB 934, 935 (1978).

[15] The Employer also relies on the Union's attempt to secure log-loading work in 2012; however, this conduct occurred well before the Sec. 10(b) period.

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work, and that a party has used proscribed means to enforce its claim to the work in dispute. Additionally, there must be a finding that the parties have not agreed on a method for the voluntary adjustment of the dispute. See, e.g., *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). As explained below, we find that these requirements have been met.

1. Competing claims for work

We find reasonable cause to believe that there are competing claims for the work in dispute. The Union admits that it has claimed the disputed work. As discussed below, the Employer's employees also claimed the disputed work by performing that work.[16] To begin, no party disputes, and we find, that the Employer's employees were performing the log-unloading work. Also, contrary to the Union's contention, we find that the Employer's employee(s) were performing the chip-loading work. The record establishes that although alleged statutory supervisor Coleman did the lion's share of the button-pushing work involved in loading chips beginning in December 2014, employee Puls relieved Coleman during Coleman's breaks and once substituted for him when he had to leave early. The record does not quantify how often and for what period of time Puls relieved Coleman. The Union challenges Coleman's veracity, arguing that his testimony regarding the frequency of Puls' button-pushing work is not worthy of belief, but it does not challenge Puls' status as a statutory employee.[17]

We reject the Union's argument that this is a work-preservation dispute outside the scope of Section 10(k) of the Act. As discussed above, 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. See *Longshoremen ILWU Local 14 (Sierra Pacific Industries)*, 314 NLRB 834, 836 (1994) (rejecting work-preservation claim where union never previously performed chip-loading work at employer's new location but rather was seeking to acquire new work), affd. 318 NLRB 462 (1995), enfd. 85 F.3d 646 (D.C. Cir. 1996). Where, as here, a union is claiming work that has not previously been performed by employees it represents, the "objective is not work preservation, but work acquisition," and the Board will resolve the dispute through a 10(k) proceeding. *Laborers Local 310 (KMU Trucking & Excavating)*, 361 NLRB 381, 383 (2014); *Electrical Workers, Local 48 (Kinder Morgan Terminals)*, 357 NLRB 2217, 2219 (2011), and cases cited therein.

Highway Truckdrivers & Helpers, Local 167, etc. (Safeway Stores, Inc.), 134 NLRB 1320, 1323 (1961), and its progeny, cited by the Union, is distinguishable. There, the Board quashed the notice of hearing where a union was "attempting, in essence, to enforce a clear and indisputable contract claim to the work in dispute." *Teamsters Local 107 (Reber-Friel Co.)*, 336 NLRB 518, 520–521 (2001). Here, however, no such contract claim exists. The Union contends otherwise, citing its correspondence with the Employer and a press release from the Port of Coos Bay regarding the joint application for funding to renovate the barge slip. But the Employer's June 4, 2012 letter clearly rejected the Union's counterproposal for a manning agreement and stated that the Employer would use nonunion personnel except where its customers elected to contract with Jones Stevedoring. Similarly, the joint application and the press release also do not establish an agreement between the Employer and the Union, as both refer to increased employment opportunities for local "longshore labor," which, according to Chief Commercial Officer for the Port of Coos Bay Callery, is a generic term that does not distinguish between represented and unrepresented longshore workers.[18]

[16] See *Seafarers District NMU (Luedtke Engineering Co.)*, 355 NLRB 302, 303 (2010); *Operating Engineers Local 513 (Thomas Industrial Coatings)*, 345 NLRB 990, 992 fn. 6 (2005).

[17] The Board does not make credibility findings in a Sec. 10(k) proceeding. However, a conflict in testimony does not prevent the Board from proceeding with a determination of the dispute. "In this regard, the Board is not charged with finding that a [Sec. 8(b)(4)(D)] violation did in fact occur, but only that reasonable cause exists for finding such a violation." *Bricklayers Local 5 (Jersey Panel Corp.)*, 337 NLRB 168, 169 fn. 7 (2001) (citing *Laborers Local 334 (C. H. Heist Co.)*, 175 NLRB 608, 609 (1969)). In any event, Employer co-owner Jason Smith's testimony corroborates Coleman's testimony that a statutory employee, Puls, occasionally performed the button-pushing work. Moreover, circumstantial evidence further supports Coleman's testimony. The record indicates that the chip-loading process can take anywhere from 6 hours and 45 minutes to 10 hours, and prior to December 2014, two button pushers supplied by the Union took turns performing the work.

[18] We recognize that union-represented employees previously performed the button-pushing work, and this may, in certain circumstances, support a valid work-preservation claim for that work. However, the Board looks to the "real nature and origin of the dispute" in determining whether a jurisdictional dispute exists. *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818, 820 (1986), affd. sub nom. *USCP-Wesco, Inc. v. NLRB*, 827 F.2d 581 (9th Cir. 1987). As discussed above, the instant dispute arose only after the Union attempted to expand its work jurisdiction by obtaining the log-unloading work—work that went beyond the button-pushing work that its members had been performing.

We further reject the Union's contention that the dispute is of the Employer's own making because it unilaterally reassigned the disputed work at its barge slip to its own employees. As discussed above, the Employer did not create the dispute by reassigning existing work. Rather, the dispute was precipitated by the Union's attempt to acquire the log-unloading work—in the absence of any agreement that mandated assigning that work to employees represented by the Union—when that work first became available at the Employer's barge slip.

The Union's reliance on *Longshoremen ILWU Local 62-B (Alaska Timber Corporation) v. NLRB*, 781 F.2d 919, 924-925 (D.C. Cir. 1986), is likewise misplaced with respect to the chip-loading work. In that case, the court found that the Board erred in failing to quash a 10(k) notice of hearing because, the court reasoned, the employer had created the dispute by changing from selling timber FAS to purchasers, who in turn contracted for loading with a union stevedoring company, to FOB services using its own employees to load the timber. 781 F.2d at 925. The court found that the employer changed its business model by reassigning the work from the stevedoring company to its own employees, and that it was not a disinterested party because it admitted that it made the change to retain its mill employees who otherwise faced layoff. Id. Here, in contrast, the parties dispute which one is responsible for discontinuing the use of union-represented button pushers supplied by Ports America. It is not clear on this record whether the Employer stopped working with Ports America despite the Union's willingness to continue supplying union labor for the chip-loading operation, as the Union contends, or whether the Union informed Ports America that it would stop supplying Ports America with labor, as the Employer contends.[19] Thus, unlike in *Alaska Timber*, the record evidence is insufficient to establish that the Employer changed its business practice in order to avoid hiring union-represented stevedores for the button-pushing work. Based on the foregoing, we find that there are competing claims for the work in dispute, and we decline to quash the notice of hearing.

2. Use of proscribed means

We find reasonable cause to believe that the Union used proscribed means to enforce its claims to the disputed work. The Union admits that, in furtherance of its claim to the disputed work, it picketed the Employer on September 4, 2014, when the Employer imported its first shipment of logs by barge, and on December 4, 2014, and other dates thereafter, when the Employer loaded chip barges without union-represented labor.[20] See, e.g., *Longshoremen Local 19 (Seattle Tunnel Partners)*, 361 NLRB 1031, 1034 (2014).

3. No voluntary method for adjustment of dispute

The parties stipulated that there is no agreed-upon method for the voluntary adjustment of the work in dispute that would bind them.

Based on the foregoing, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that there is no agreed-upon method for the voluntary adjustment of the dispute. We accordingly find that the dispute is properly before the Board for determination, and we deny the Union's motion to quash the notice of hearing.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. See *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. See *Int'l Association of Machinists, Lodge No. 1743 (J. A. Jones Construction Company)*, 135 NLRB 1402, 1410–1411 (1962). We have considered the following factors, which we find relevant, and, for the reasons set forth more fully below, we conclude that the Employer's employees are entitled to perform the work in dispute.

1. Board certifications and collective-bargaining agreements

The Board has not certified any union as the collective-bargaining representative of the Employer's employees involved here, and the Employer is not a party to any collective-bargaining agreement covering those em-

[19] The Union argues that Smith's "double hearsay" testimony about his conversation with Ports America regarding the Union's unwillingness to provide button-pushers for the Employer's next chip barge should be disregarded on the ground that it was directly denied by Union President Sundet. We find that Smith's testimony, albeit hearsay on which we do not rely for the truth of the assertion, sheds some light on his motivation for having the Employer's employees perform the button-pushing work rather than waiting for union labor referred and supplied by Ports America. See *Continental Can Co.*, 291 NLRB 290, 294 (1988). Further, recall that the Employer secured union-represented operators of the remote-control chip-loading device by contracting with Dunlap Towing, which in turn contracted for union stevedores through Ports America, and that Sundet told Dunlap Towing that the Union had a labor dispute with the Employer and that there could be a picket line, after which Dunlap Towing declined to provide further services for the Employer. We find Smith's testimony consistent with this evidence.

[20] In light of the Union's acknowledged picketing, we find it unnecessary in assessing proscribed conduct to rely on testimony that the Union also threatened barge and assist boat operators with picketing.

ployees. For the reasons stated above, we reject the Union's contentions that the parties reached agreement on loading logs and that the Coos Bay press release and joint application constituted an agreement. Accordingly, these factors are neutral in determining the dispute.[21]

2. Employer preference, current assignment, and past practice

"The factor of employer preference is generally entitled to substantial weight." *Laborers Local 265 (Henkels & McCoy, Inc.)*, 360 NLRB 819, 824 (2014). The Employer's owner Smith steadfastly testified that the Employer prefers that its own employees perform the work in dispute, and those employees are currently performing this work. See *Laborers Local 265 (AMS Construction)*, 356 NLRB 306, 310 (2010) (according weight to employer's stated preference and also considering its current assignment of work in dispute).[22]

We reject the Union's contention that the Employer's preference should be disregarded because it is inconsistent with its past practice. In support of this claim, the Union cites *Plumbers Local 412 (Zia Co.)*, 168 NLRB 494 (1967), and *Carpenters Local 690 (Walter Corp.)*, 151 NLRB 741 (1965). In those cases, the Board accorded little weight to employer preference where that preference was not supported by any other legitimate, traditional factors. Here, in contrast, although the Employer's preference is inconsistent with its past practice of assigning the chip-loading work to union labor,[23] we find that the Employer's preference is supported by consideration of relative skills and economy and efficiency of operations, which are legitimate, traditional factors relevant to awarding work in dispute, as discussed below. Cf., e.g., *Graphic Communications Workers Local 508M (Jos. Berning Printing)*, 331 NLRB 846, 848 (2000) (declining to assign substantial weight to the employer's preference based on preference for "a stronger union" rather than traditional factors); *Steelworkers Local 3-U (Greyhound Exposition)*, 302 NLRB 416, 420 & fn. 8 (1991) (declining to give substantial weight to the employer's preference where it was not supported by traditional factors). Accordingly, we find that this factor favors awarding the disputed work to the Employer's unrepresented employees.

3. Industry and area practice

The Union contends that its members perform the work in dispute locally and along the Pacific Coast. The Employer acknowledges that employees represented by the Union perform chip loading and log unloading at various ports along the Pacific Coast from Eureka, California to Longview, Washington. The Employer points out, however, that not all coastal log, lumber, and wood product companies employ union labor, citing Sierra Pacific Industries as an example. The Employer also asserts that there had been no log unloading and loading operations work in Coos Bay for 25 years prior to the work at issue and that it was the first company locally to use the LeTourneau machines for log unloading.[24]

Accordingly, although area practice is inconclusive with respect to unloading logs, we find that industry practice favors awarding the button pushing for chip loading and log unloading to employees represented by the Union.

4. Relative skills

The Employer argues that its employees are more adept at operating the chip conveyor and chute and that it employs several employees who are skilled at operating the LeTourneau machines, including one with 25 years of experience. It cites Coleman's testimony that, on an unspecified number of occasions, union-represented employees supplied to Ports America jammed the chute and dumped chips into the bay.[25]

Smith testified that he worked with an engineer to design the chip loader and that Coleman and Puls were "in on" its construction and helped with design changes and alterations. The Employer also emphasizes that its LeTourneau machines are unique and require training and experience to operate properly and that the Union acknowledged it would have to train employees or bring them in from outside the geographical region to operate the machines.

The Union asserts that its members along the Pacific coast have the requisite button-pushing experience to operate chip conveyors and chutes. The Union dismisses the Employer's assertions that the LeTourneau machines

[21] See *Carpenters (Overhead Door)*, 277 NLRB 1385, 1386 (1985) (no Board awards or collective-bargaining agreements).

[22] For the reasons discussed above, we find no merit in the Union's contention that the Employer preferred using its members for the disputed work, which the Union supports by citing the parties' correspondence and the press release regarding the joint application for funding to renovate the barge slip.

[23] The Union cites testimony of the Employer's co-owner Lyons that as late as 2011, members of the Union unloaded logs at the Ocean Terminals' dock as evidence of the Employer's past practice of using employees represented by the Union to unload logs. While Lyons has some ownership interest in Ocean Terminals along with his three siblings, the Union does not argue, nor does the record suggest, that Ocean Terminals and the Employer constitute a single employer. Therefore, we give no weight to the Union's argument in this regard.

[24] The Employer appears to be mistaken with respect to log unloading. Lyons testified that, as recently as 2011, log barges were unloaded at Ocean Terminals, which is also on Coos Bay.

[25] The Employer's witnesses also testified that workers supplied by the Union frequently failed to wear appropriate safety gear, such as life vests and hard hats.

are specialized and require more training than other log transport machines that its members are adept at operating. The Union states that its members are adept at communicating by radio with barge crews during chip loading. The Union also contends that its members are trained in the use of safety equipment during these operations.

The record establishes that millwright Puls and union-supplied stevedores are skilled at operating the push-button controls for the chip conveyor. However, Puls' knowledge of the conveyor's construction and participation in fine-tuning that machine militates in favor of awarding the work to the Employer's employees. The record also establishes that the Employer's employees have experience operating the LeTourneau machines used in log unloading, and that union-supplied labor lacks that experience. Accordingly, we find that this factor favors awarding the disputed work to the employees of the Employer.

5. Economy and efficiency of operations

The Employer characterizes the use of union-supplied button pushers to load chips as wasteful and inefficient because the Union insists on supplying two employees at a time who alternate working 2 hours on and 2 hours off during a shift. Moreover, the record shows that Coleman has to be available to oversee and supervise the chip loading by union labor.[26] Generally, upon advance notice, the Union supplies button pushers in three shifts—day, evening, and graveyard—but with little flexibility in starting and ending times, according to the Employer. This arrangement adversely affects chip loading if a barge arrives early or late owing to weather or water conditions, or if loading has to be paused during periods of strong seasonal winds that blow chips from the chute into the bay.

The Union asserts that its members work more efficiently and economically and cites evidence showing that union labor loaded 40 chip barges in 14 months, while Coleman loaded 5 chip barges in approximately 4 months. The Union also asserts that the chip loading takes Coleman away from his duties managing the sawmill yard. Finally, the Union contends that it based its manning requirements on the Employer's insistence on continuous operations and the Union's attempts to ensure the Employer's compliance with wage and hour laws.

[26] Again, the record indicates that Coleman does the most of the button-pushing work. Whether he is or is not a statutory supervisor cannot be clearly determined on the record before us, but we reiterate that it need not be: the dispute we resolve here does not include chip loading when it is performed by supervisors under Sec. 2(11) of the Act.

Only one employee is needed to load chips onto barges. Although employees represented by the Union are skilled at button pushing, Puls can do that work and also has the capacity to make mechanical adjustments to the chip conveyor. Coleman oversees the union-supplied button pushers, but can attend to other tasks when Puls performs this work. Significantly, scheduling is easier when the Employer uses its own employee to load chips.

Accordingly, we find that this factor favors awarding the button-pushing and log-unloading work to the employees of the Employer. See, e.g., *Luedtke Engineering Co.*, 355 NLRB at 305 (finding economy and efficiency favors awarding work to employees who can perform all aspects of work in dispute over employees who can perform only one aspect); *R&D Thiel*, 345 NLRB at 1141 (considering additional costs associated with one group of employees sitting idle while another group works); *Laborers Local 113 (Michels Pipeline Construction)*, 338 NLRB 480, 484 (2002) (observing that "[h]aving fewer employees accomplishing the same task . . . reduces costs in time, money, and personal safety").

6. Job impact

Citing *Laborers Local 681 (Elmhurst-Chicago Stone Co.)*, 263 NLRB 980, 982-983 (1982), the Union asserts that the Board should consider job impact in making its determination. The Union contends that prior to September 2014, its employees unloaded log barges at the Ocean Terminals' dock on Coos Bay. It contends that its members have lost this work because the log barges now go to the Employer's slip to be unloaded. The Union also points out that its members lost chip-loading work when Coleman began performing that function. Further, it points to co-owner Smith's testimony that the Employer uses employees who were already at the mill yard to unload logs and that these employees will not lose their jobs if that work is assigned to union-represented employees.

The Employer's co-owner Lyons, whose family also owns the Ocean Terminals docks, testified that Ocean Terminals last received a load of logs in 2011 and that, in July 2013, it leased its facility to Merrill and Ring Corporation. Despite some common ownership of the Employer and Ocean Terminals, there is no evidence that the two companies' operations are intertwined. Accordingly, the fact that employees represented by the Union may have lost jobs when Ocean Terminals leased its facility to Merrill and Ring Corporation does not favor awarding the work to those employees.

Conclusion

After considering all of the relevant factors, we conclude that employees of the Employer are entitled to per-

form button pushing in the chip-loading process[27] and to move logs from dockside to the sawmill yard in the log-unloading process. We reach this conclusion relying on the factors of employer preference and past practice, relative skills, and economy and efficiency of operations. Our determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute:

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.

2. International Longshore and Warehouse Union, Local 12 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Southport Lumber Co., LLC to assign the disputed work to the employees it represents.

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.

Dated, Washington, D.C. October 11, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[27] As noted above, our award does not apply to the work involved when the button-pushing work is performed by an individual who is a statutory supervisor.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2nd Ave Ste 2948
Seattle, WA 98174-1006

Agency Website: www.nlrb.gov
Telephone: (206)220-6300
Fax: (206)220-6305

Agent's Direct Dial: (206)220-6321

October 17, 2018

ELEANOR MORTON, ATTORNEY
LINDSAY R. NICHOLAS, ATTORNEY
LEONARD CARDER, LLP
1188 FRANKLIN STREET
SUITE 201
SAN FRANCISCO, CA 94109-6852

Re: International Longshore and Warehouse Union, Local 12 (Southport Lumber Company)
Case 19-CD-144202

Dear Ms. Morton and Ms. Nicholas:

Enclosed is a copy of the Board's Decision and Determination of Dispute in the above matter that issued on October 11, 2018. The Board determined that the 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.

Further, the Board's Determination requires that within 14 days from the date of its Decision and Determination, International Longshore and Warehouse Union, Local 12, 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. In the event you do not notify me by October 25, 2018, as to the intentions of International Longshore and Warehouse Union, Local 12, I will recommend to the Regional Director that a complaint issue.

Very truly yours,

TRAVIS WILLIAMS
Board Agent

pr

Enclosures: Board Decision and Determination

cc: THOMAS M. TRIPLETT, ESQ.
SCHWABE, WILLIAMSON & WYATT
360 SW BOND ST-STE. 500
BEND, OR 97702-3540

MICHAEL T. GARONE, ESQ.
SCHWABE WILLIAMSON & WYATT
1211 SW 5TH AVE-STE. 1900
PORTLAND, OR 97204-3719

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

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Southport Lumber Company, LLC (Charging Party), herein identified by its correct name. It is issued pursuant to § 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 *et seq*., and § 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board), and alleges that International Longshore and Warehouse Union, Local 12 (Respondent), has violated the Act as described below.

1.

(a) 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.

(b) 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.

2.

(a) 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.

(b) The Charging Party, in conducting its operations described above in paragraph 2(a) during the past 12-months, which period is representative of all material times, derived gross revenues in excess of $500,000.

(c) The Charging Party, in conducting its operations described above in paragraph 2(a) during the past 12-months, which period is representative of all material times, purchased and received goods valued in excess of $50,000 directly from entities outside the State of Oregon.

(d) 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.

3.

Respondent is, and has been at all material times, a labor organization within the meaning of §2(5) of the Act.

4.

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

5.

(a) 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.

(b) Since on or about September 4, 2014, Respondent has demanded that the Charging Party assign the work referred to above in paragraph 5(a) 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.

(c) Respondent has not been certified by the Board as the exclusive collective-bargaining representative of any of the employees performing the work described above in paragraph 5(a), nor has the Board issued any order determining that Respondent is the exclusive collective-bargaining representative of the employees performing this work.

(d) On about October 11, 2018, pursuant to § 10(k) of the Act, the Board issued an award in Case 19-CD-144202, reported at 367 NLRB No. 16 (the Board's Order), which provides:

> (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.

6.

(a) 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 described above in paragraph 5(b).

(b) By the conduct described above in paragraph 6(a), Respondent has threatened, coerced, or restrained the Charging Party and other persons engaged in commerce or in industries affecting commerce.

(c) An object of Respondent's conduct described above in paragraph 6(a) has been to force or require the Charging Party to assign the work described above in paragraph 5(a) to employees who are member of, or represented by, Respondent, rather than to employees of the Charging Party who are not members of, or represented by, Respondent.

7.

(a) 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.

(b) To date, Respondent has failed and refused to provide the written assurances required by the Board's Order.

(c) By the conduct described above in paragraphs 6 and 7 Respondent, has failed and refused to comply with the Board's Order.

8.

By the conduct described above in paragraph 6, Respondent has been violating § 8(b)(4)(ii)(D) of the Act.

9.

By the acts described above, Respondent has been engaged in unfair labor practices affecting commerce within the meaning of §§ 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to §§ 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before November 13, 2018, or postmarked on or before November 12, 2018**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. *See* § 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer

to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT, at 9 am on the **15th day of January, 2019,** at a location to be determined in or around Coos Bay or North Bend, Oregon, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Seattle, Washington, this 30th day of October, 2018.

Ronald K. Hooks

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
915 2nd Ave., Ste. 2948
Seattle, WA 98174-1006

Attachments

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative**. If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlrb.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.

- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence**: At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits: Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in evidence.** If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing.

If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts**: An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief**: Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

- **Exceptions to the ALJ's Decision**: The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

FORM NLRB 4338
(6-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE

Case 19-CD-144202

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

CERTIFIED MAIL
7014 2120 0002 1823 2209

Gene Sundet, Secretary-Treasurer
ILWU, Local 12
2064 Sheridan Ave.
North Bend, OR 97459

FIRST CLASS MAIL

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Southport Lumber Company, LLC
90800 Trans-Pacific Pkwy
North Bend, OR 97459

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

ANSWER OF INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 12 TO THE COMPLAINT

Comes now International Longshore and Warehouse Union, Local 12 ("ILWU Local 12" or "Local 12") and files this Answer to the Complaint filed by the Regional Director on October 30, 2018, in the above-captioned cases. Respondent answers as follows to the below-referenced paragraphs of the Complaint in this case.

1. (a) Admitted.

   (b) Admitted.

2. (a) Local 12 is without sufficient information or belief and, therefore, denies.

   (b) Local 12 is without sufficient information or belief and, therefore, denies.

   (c) Local 12 is without sufficient information or belief and, therefore, denies.

   (d) Local 12 is without sufficient information or belief and, therefore, denies.

3. Admitted.

4. Admitted only that the individuals identified by name have held the referenced positions at some times. Denied that they have held those positions at all material times. This paragraph is otherwise denied.

5. (a) Denied.

(b) Denied.

(c) Denied.

(d) Admitted that the Board issued an award and that the Complaint quotes a part of the award. This subparagraph is otherwise denied.

6. (a) Denied.

(b) Denied.

(c) Denied.

7. (a) Admitted that Region 19 issued a letter dated October 17, 2018, to Respondent. This subparagraph is otherwise denied.

(b) Admitted that Respondent has not provided written assurances to Region 19. This subparagraph is otherwise denied.

(c) Denied.

8. Denied.

9. Denied.

AFFIRMATIVE DEFENSES

1. The Complaint on its face fails to set out or describe any activity of ILWU Local 12 that would constitute unlawful "threats", "coercion", or "restraint" within the meaning of Section 8(b)(4).

2. The Complaint should be dismissed because it fails to present a jurisdictional dispute between groups of employees under the Act.

3. ILWU Local 12's conduct alleged in the Complaint constitutes lawful, primary activity pursuant to the work preservation doctrine.

4. The work identified in paragraph 5(a) of the Complaint is under the control of Southport Lumber Company, LLC and is the functional equivalent of traditional longshore work and is fairly claimable by ILWU Local 12.

5. The Complaint should be dismissed because Southport Lumber Company, LLC is not a neutral and is not wholly unconcerned and the dispute is of Southport's own making because, among other things, it assigned the work identified in paragraph 5(a) of the Complaint to employees represented by ILWU Local 12, bargained with ILWU Local 12 over that work, and stopped assigning the work to ILWU Local 12 for its own business reasons.

Dated: November 13, 2018

Respectfully submitted,

By: /s/ Lindsay R. Nicholas

Eleanor Morton
Lindsay R. Nicholas
LEONARD CARDER, LLP
1188 Franklin Street, Suite 201
San Francisco, CA 94109
Tel: (415) 771-6400
Fax: (415) 771-7010
emorton@leonardcarder.com
lnicholas@leonardcarder.com

Attorneys for Respondent
International Longshore and Warehouse Union, Local 12

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA 94109.

On **November 13, 2018**, I served a true and accurate copy of the foregoing document(s):

ANSWER OF INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 12 TO THE COMPLAINT

on all interested parties in this action as follows:

Michael T. Garone, Esq.
Schwabe, Williamson & Wyatt
1211 SW 5th Ave., Ste. 1900
Portland, OR 97204

Thomas M. Triplett, Esq.
Schwabe, Williamson & Wyatt
360 SW Bond St., Ste. 500
Bend, OR 97702

Jason Smith
Southport Lumber Company, LLC
90800 Trans-Pacific Pkwy
North Bend, OR 97459

Gene Sundet
ILWU, Local 12
2064 Sheridan Ave.
North Bend, OR 97459

☑ **BY U.S. MAIL:** I enclosed the document(s) above in a sealed envelope or package addressed to the persons at the addresses above. Following ordinary business practices, the envelope was sealed with postage fully prepaid and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date at San Francisco, CA.

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

Executed on **November 13, 2018** at San Francisco, California.

Leslie Rose

ORDER

The National Labor Relations Board orders that the Respondent, International Longshore and Warehouse Union, Local 12, North Bend, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from picketing Southport Lumber Co., LLC,, the object of which is to force or require Southport Lumber Co., LLC, to assign the work of button pushing for chip loading and log unloading at Southport Lumber Company, LLC's barge slip in Coos Bay, Oregon, to employees represented by the Respondent, rather than to the Employer's unrepresented employees, except insofar as such conduct is permitted under Section 8(b)(4)(ii)(D) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at office and meeting halls copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of the notice to the Regional Director for Region 20 for posting by Southport Lumber Co., LLC, if it is willing, in all places where notices to its employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;

Choose representatives to bargain with us on your behalf;

Act together with other employees for your benefit and protection; and

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT picket Southport Company, LLC, or otherwise threaten, coerce or restrain Southport Company, LLC, or any other person in order to force Southport Company, LLC, to assign the work of button pushing for chip loading and log unloading at Southport Lumber Company, LLC's barge slip in Coos Bay, Oregon, to employees who are members of, or represented by International Longshore and Warehouse Union, Local 12, rather than to employees who are unrepresented.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of your rights under Section 7 of the Act.

International Longshore and Warehouse Union,
Local 12