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International Longshore and Warehouse Union and International Longshore and Warehouse Union, Local 4 *and* International Brotherhood of Electrical Workers, Local 48, AFL–CIO. Cases19–CC–092816, 19–CC–115273, 19–CD–092820, and 19–CD–115274

January 31, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On August 13, 2014, Administrative Law Judge William L. Schmidt issued the attached decision. The General Counsel, the Respondents, and the Charging Party filed exceptions and supporting briefs, answering briefs, and reply briefs. The Respondents also filed a motion to reopen the record. The General Counsel, the Charging Party, and Kinder Morgan Bulk Terminals ("Kinder Morgan") filed oppositions to the Respondents' motion, and the Respondents filed a reply.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board has considered the decision and the record in light of the exceptions, briefs, motion to reopen the record, and oppositions, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I.

This case involves a jurisdictional dispute over electrical maintenance and repair work performed at the Vancouver Bulk Terminal (VBT) for Kinder Morgan Bulk Terminals. In December 2011, the Board issued a Section 10(k) decision awarding the disputed work to employees represented by the Charging Party, the International Brotherhood of Electrical Workers, Local 48 (IBEW), who were then employed by Accurate Electric of Oregon, Inc. See *Electrical Workers, Local 48*, 357 NLRB 2217 (2011). Despite this award, the International Longshore and Warehouse Union (ILWU) continued to maintain that employees it represents should be performing the work. To that end, ILWU pursued and obtained an arbitration award under the grievance-arbitration procedures of its contract with the Pacific Maritime Association (PMA), a multiemployer association, finding that Kinder Morgan is contractually obligated to assign ILWU-represented employees the electrical work.

The complaint alleges that ILWU has engaged in unlawfully coercive conduct in order to obtain the disputed work and to force Kinder Morgan to cease doing business with Accurate Electric, the contractor that employed the IBEW-represented employees who were awarded the disputed work. The judge found that ILWU did not violate the Act as alleged because its actions were taken in pursuit of a lawful work preservation objective. For the reasons discussed below, we reverse the judge and find that certain of ILWU's actions violated Section 8(b)(4)(ii)(D) and (B) of the Act.

II.

Kinder Morgan has operated a terminal facility at the Vancouver Bulk Terminal in Vancouver, Washington, since July 1998. Kinder Morgan is a member of the multiemployer bargaining association PMA and utilized longshore workers represented by ILWU to perform its principal operation of loading and unloading bulk materials. The terms and conditions of employment for those workers are governed by the Pacific Coast Longshore Contract Document (PCLCD) between PMA and ILWU, a document which applies to a coastwide, multiemployer unit of ILWU-represented workers. The applicable PCLCD was effective for a term beginning on July 1, 2008, and continuing through June 30, 2014 (the 2008 PCLCD).

Since beginning operations at the VBT, Kinder Morgan has utilized its own workers represented by ILWU to perform the mechanical maintenance and repair (M&R) work at the facility. However, it has always used a vendor to perform its electrical M&R work on an as-needed basis. These vendors have been local electrical contractors whose workers are represented by IBEW. At all relevant times, Accurate Electric was the vendor utilized for the electrical M&R work and, on average, an Accurate Electric electrician spent 1 or 2 days a week performing electrical M&R work at the VBT.

The parties dispute whether electrical M&R work was included in the 2008 PCLCD. Section 1.71 of the 2008 PCLCD says that the agreement "shall apply to the maintenance and repair of all stevedore cargo handling equipment." Section 1.72 addresses the parties' understanding about the introduction of new technologies and potential displacement of traditional longshore work and workers. Section 1.73 states that "the scope of work shall include . . . maintenance and repair, and associated cleaning of all present and forthcoming technological equipment related to the operation of stevedore cargo handling equipment . . . and its electronics that are controlled or

[1] In addition, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondents filed a postbrief letter calling the Board's attention to recent case authority.

[2] Chairman Ring is recused and took no part in the consideration of this case.

interchanged by PMA companies, in all West Coast ports." The 2008 PCLCD also contains two Letters of Understanding (LOU) that exempt certain facilities, contract stevedores, and bulk facilities from the requirements of section 1.71-1.73.

Between July and September 2010, longshore workers filed lost-work grievances against Kinder Morgan over six instances where Accurate Electric electricians performed electrical M&R work for Kinder Morgan. On May 31, 2011, Area Arbitrator Jan R. Holmes rendered a decision finding that the six grievances "were not payable" because the Bulk Terminal Past Practice LOU exempted Kinder Morgan from the requirements of PCLCD section 1.71 et seq.

ILWU appealed Holmes' decision and, on December 28, 2011, Coast Arbitrator John Kagel vacated Holmes' finding, concluding that Kinder Morgan did not qualify for an exemption under the Bulk Terminal Past Practice LOU. Arbitrator Kagel referred the case back to Arbitrator Holmes to resolve any remaining issues.

Meanwhile, on December 31, 2011, the Board issued its 10(k) decision and determination awarding the disputed electrical M&R work to workers that IBEW Local 48 represents. *Electrical Workers, Local 48*, 357 NLRB 2217 (2011). The Board found that the factors of employer preference, current assignment and past practice, relative skills and training, and economy and efficiency of operations favored an award of the work to employees represented by IBEW. The Board found that the factors of certifications and collective-bargaining agreements and of area and industry practice did not favor an award to either group of employees.

The Board rejected ILWU's argument that the proceeding involved a contractual dispute between Kinder Morgan and ILWU over preservation of bargaining unit work for ILWU-represented employees. Because IBEW-represented employees had performed the work during the more than 15 years since Kinder Morgan took over terminal operations, as well as during the term of Kinder Morgan's predecessor, the Board found that employees represented by ILWU had not historically performed the disputed work and that ILWU's objective was therefore work acquisition, not work preservation. Id. at 2220.

The Board also rejected ILWU's argument that the 2008 PCLCD, combined with the two LOUs, provided that the work in dispute was within ILWU's jurisdiction. Id. at 2220–2221. The Board found that the 2008 PCLCD's jurisdictional work description was very general, making no explicit mention of electrical work or any similar work arguably described in ILWU's contractual grievances. The Board further found that the LOUs did not apply to the work at issue and that both the testimony and the language of sections 1.72 and 1.73 of the 2008 PCLCD demonstrated that these provisions were directed at new work based on the introduction of new technologies. The Board found that these provisions were not applicable to the disputed electrical M&R work because there was no evidence the disputed work was any different from when Kinder Morgan took over the terminal in 1995, nor was there evidence of new equipment with more sophisticated technology installed in those 15-plus years. The Board found that the applicable collective-bargaining agreement provisions have remained the same, "as has the work and who performs the work." Id. at 2221.

Following the issuance of the Board's decision, Area Arbitrator Holmes issued her second decision involving the six grievances. Holmes concluded that the work described in each of the grievances constituted unit M&R work under the PCLCD, and further concluded that Kinder Morgan did not qualify for an exception that would permit it to outsource such work. Holmes referred the question of how to implement her decision to a bilateral committee of PMA and ILWU representatives.

From May through November 2012, the committee, ILWU, and Kinder Morgan engaged in a variety of actions to implement Holmes' decision, including preparing a qualifications list which was posted at ILWU's union hall. ILWU also requested that Kinder Morgan interview interested ILWU candidates. The complaint alleges that a number of actions taken by ILWU during this time were unlawfully coercive.

Meanwhile, Kinder Morgan continued to call Accurate Electric when it needed employees to perform electrical M&R work. On October 18 and 21, 2013,[3] ILWU-represented employees prevented IBEW-represented employees dispatched by Accurate Electric from performing work for Kinder Morgan. On October 18, Accurate Electric employee Jeff Andrews was prevented from working for approximately 4 hours. On October 21, Accurate Electric employee Ken Sweo was physically prevented from performing the electrical M&R work that Kinder requested.

III.

The administrative law judge found that the General Counsel had failed to prove that ILWU violated Section 8(b)(4)(ii)(D) and (B) as alleged in the complaint. The judge found that ILWU's conduct was primary work preservation[4] activity aimed at compelling Kinder Morgan

[3] The judge inadvertently places these incidents in 2012.

[4] The secondary boycott provisions of the Act do not prohibit agreements or activity to preserve for employees work traditionally done by

to assign the electrical M&R work to ILWU as required by the 2008 PCLCD and that none of ILWU's actions therefore constituted unlawful secondary activity.

In support of his finding, the judge found that employees represented by ILWU performed both electrical and mechanical M&R work at numerous West Coast ports in the coastwide multiemployer unit represented by ILWU. The judge also found that the 2008 PCLCD defined all M&R work, whether electrical or mechanical, as work to be performed by employees who belonged to the coastwide unit represented by ILWU, unless an employer qualified for an exception. The judge, agreeing with Arbitrator Kagel, found that Kinder Morgan did not qualify for an exception and that Kinder Morgan was therefore bound by the PCLCD to assign the work in dispute to employees represented by ILWU.[5]

The judge acknowledged in his decision that treating ILWU's actions as being in furtherance of a primary work-preservation object was at odds with the conclusion reached by the Board in the 10(k) proceeding. The judge nevertheless reasoned that the "far more expanded record" before him supported his conclusion that some of the Board's findings and conclusions in the 10(k) decision merited reconsideration. Citing the Supreme Court's decisions in *NLRB v. Longshoreman ILA*, 447 U.S. 490 (1980) ("*ILA I*"), and *NLRB v. Longshoreman ILA*, 473 U.S. 61 (1985) ("*ILA II*"), the judge also found that the Board's application of the work preservation doctrine in the 10(k) case was too restrictive and failed to recognize that the 2008 PCLCD embodied the parties' agreement to permit PMA employers to install innovative equipment and technologies on the West Coast ports in exchange for strictly defined limitations on the use of nonunit employees by those employers, including to perform their traditional M&R work on cargo handling equipment.

IV.

A.

As discussed above, in the 10(k) proceedings the Board rejected ILWU's arguments that the proceeding involved a dispute between Kinder Morgan and ILWU over preservation of bargaining unit work for ILWU-represented employees and that the 2008 PCLCD, combined with the LOUs, provided that existing electrical M&R work was within ILWU's jurisdiction. 357 NLRB at 2220–2221.

The General Counsel excepts to the judge's contrary conclusions in the present unfair labor practice proceeding and argues that the judge improperly substituted his own analysis for that of the Board. ILWU, on the other hand, argues that it can relitigate all of the issues involved in the 10(k) proceeding and that the 10(k) decision deserves "no weight" as to whether ILWU violated 8(b)(4)(ii)(D).

We find merit to the General Counsel's exceptions. For the reasons discussed below, we find the Board's 10(k) decision dispositive of the question whether ILWU had a valid work preservation objective. We further find that, even assuming that ILWU properly reasserted arguments it made in the 10(k) proceedings, the evidence presented by ILWU in the unfair labor practice proceeding does not warrant reversing any of the Board's 10(k) findings.

When an unfair labor practice complaint is issued related to a prior 10(k) proceeding, a respondent may relitigate factual issues concerning the elements of the 8(b)(4)(ii)(D) violation that were raised in the underlying 10(k) proceeding; that is, a respondent may litigate the issue of whether it has engaged in forbidden conduct with a forbidden objective. See *Teamsters Local 216 (Granite Rock Co.)*, 296 NLRB 250, 250 (1989), enfd. 940 F.2d 667 (9th Cir. 1991). But it is well settled that a party to a Board 10(k) proceeding cannot relitigate the Board's ultimate work assignment in a subsequent 8(b)(4)(ii)(D) case. *Marble Polishers Local 47-T (Grazzini Bros.)*, 315 NLRB 520, 522 (1994), citing *Longshoremen ILA Local 1566 (Holt Cargo)*, 311 NLRB No. 166, slip op. at 2 (1993) (not reported in Board volumes). From this, "[i]t logically follows that a party cannot relitigate the various factors . . . that the Board considers in making its 10(k) determination." Id.

The current unfair labor practice proceeding involves the same work and the same unions as the 10(k) proceedings, in which ILWU was a full participant. ILWU became a party to the 10(k) proceedings after it intervened and filed a motion to quash the notice of hearing. In support of its motion, ILWU made the same arguments to the Board that it makes here, and it had a full opportunity to introduce evidence in support of these arguments at the 10(k) hearing. By arguing again that the 2008 PCLCD covered the disputed work, that employees represented by ILWU had performed the work in dispute throughout the coastwide unit, and that its actions were in support of a primary work preservation objective, ILWU is simply

the employees. See *National Woodworker Mfrs. Assn. v. NLRB*, 386 U.S. 612, 635 (1967). To be lawful "work preservation" activity, the activity must pass two tests. First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give employees the work in question (i.e., the "right of control"). See *NLRB v. Longshoreman ILA*, 447 U.S. 490, 504 (1980).

[5] The judge also found that Kinder Morgan had the right of control over the disputed work. In this respect, the judge found that Washington State law did not require that Kinder Morgan subcontract any electrical work to a licensed electrical contractor. The judge also found that Kinder Morgan controlled the assignment of the electrical M&R work and exercised that control by contacting Accurate Electric when it was in need of employees to perform electrical M&R work.

attempting to relitigate the Board's assignment of the disputed electrical M&R work to IBEW-represented employees. This it cannot do. See *Grazzini Bros.*, above, 315 NLRB at 522.[6] It follows that, because the Board fully considered and rejected the same arguments made by ILWU in the 10(k) proceeding, the judge erred by considering ILWU's arguments de novo and substituting his own judgment of the merits for the Board's.

B.

Moreover, even assuming that ILWU properly reasserted arguments it made in the 10(k) proceeding, we further find that the evidence presented by ILWU in the unfair labor practice proceeding does not warrant reversing any of the Board's 10(k) findings.

In finding that ILWU had a lawful work preservation objective, the judge made three findings which conflicted with the Board's 10(k) decision. First, the judge found that employees represented by ILWU in the coastwide unit performed electrical M&R work at employers other than Kinder Morgan. Second, the judge found that the 2008 PCLCD applied to the disputed electrical M&R work. Third, the judge found that the Supreme Court's decisions in *ILA I* and *ILA II* support ILWU's work preservation claim. There is no sound basis for these findings.

1.

In determining whether employees represented by ILWU traditionally performed the disputed electrical M&R work, the judge improperly looked at whether ILWU-represented employees had ever performed electrical M&R work in the coastwide unit as a whole, rather than specifically for Kinder Morgan at the VBT, as the Board did in the 10(k) proceeding.[7] In assessing an asserted "work preservation" defense, the Board looks at which employees have performed work for the specific employer, not whether employees in the multiemployer bargaining unit as a whole have performed the disputed work. See, e.g., *Longshoremen ILWU Local 19 (Seattle Tunnel Partners)*, 361 NLRB 1031, 1035, 1036 (2014); *Laborers Local 310 (Donley's, Inc.)*, 360 NLRB 903, 907, 908–909 (2014). Further, although ILWU claims that employees it represents have performed electrical M&R work at other PMA-member employers, the evidence ILWU presented[8] is insufficient to establish that employees in the coastwide unit have traditionally performed electrical M&R work. See *Laborers Local 310*, 360 NLRB at 907 ("isolated assignments . . . provide[] [the union] no basis to raise a valid work preservation claim regarding the disputed work"), quoting *Stage Employees IATSE Local 39 (Shepard Exposition Services)*, 337 NLRB 721, 723 (2002).

2.

The judge also erroneously construed the 2008 PCLCD to include electrical M&R work within ILWU's jurisdiction. In the 10(k) proceeding, the Board read the 2008 PCLCD to the contrary, and the judge's reasons for coming to a different conclusion are not persuasive.

First, the judge believed that the Board underestimated the importance of the LOUs. We disagree. As explained in the 10(k) decision, the scope of work is defined in the 2008 PCLCD itself. 357 NLRB at 2219–2220. Therefore, the 2008 PCLCD, not the LOUs, determines whether electrical work is covered by the PCLCD. It is undisputed that Kinder Morgan does not qualify for an exemption under either LOU, thus rendering the LOUs irrelevant to the analysis.

The judge also found that the parties' agreement about M&R work in section 1.71 et seq. was not limited to that work resulting from the future introduction of robotics and other new technologies, but also included existing electrical M&R work. The Board rejected this conclusion in the 10(k) decision, and we note that the testimony in the current proceeding supports the Board's finding.[9]

Last, the judge found that the most "notable support" for finding that the Board's construction of the 2008 PCLCD failed to reflect the parties' intent was the fact that the PMA never claimed in the arbitration proceedings that the M&R work reserved to ILWU employees was limited to future electrical work. The PMA was not in any way involved in the 10(k) proceedings, and PMA's position in

[6] We also reject ILWU's argument that the judge should have allowed it to introduce additional evidence to show that Kinder Morgan colluded with IBEW to set up the 10(k) hearing, an issue the Board also previously resolved against ILWU. See *Longshoremen ILWU Local 6 (Golden Grain)*, 289 NLRB 1, 2 fn. 4 (1988). See also *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB 1921, 1923 fn. 12 (2011), enfd. 547 Fed.Appx. 809 (9th Cir. 2013).

[7] It is undisputed that employees represented by ILWU have never performed electrical M&R work for Kinder Morgan since Kinder Morgan began operations at the VBT in 1998.

[8] This evidence consisted of testimony from a handful of current or former ILWU-represented employees that they performed some electrical M&R work for PMA employers and job postings from eight other PMA companies seeking to hire ILWU members for positions that require electrical skills.

[9] Richard Marzano, Coast Director of Contract Administration and Arbitration for PMA, testified about the 2008 negotiations and PCLCD that, "in exchange for the right to eliminate longshore workers, and the contract is specific, to the extent that longshore workers are necessarily replaced through automation,. . . longshoremen would be brought along to perform [] maintenance and repair work on this new equipment that would exist in 2014, 2024, 2034 . . . ." There was no evidence in the 10(k) record, and there is none before us now, that any longshoremen have been displaced or that any new equipment has been introduced at the VBT.

arbitration has no relevance to the Board's reasoning in its own proceedings.

3.

Finally, we disagree with the judge that the Supreme Court's ILA I and ILA II decisions support the ILWU's position. In those cases, the Supreme Court examined one aspect of the work preservation doctrine—identifying the "work in controversy" in a "complex case of technological displacement." *ILA I*, 447 U.S. 490, 507 (1980). In situations where technological innovation may change the method of doing work, the Court held that defining the "work in controversy" requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance. Where there is a "clear primary objective" to preserve work in the face of a threat to jobs, a work preservation agreement does not have an unlawful secondary objective "absent some additional showing of attempt to reach out to monopolize jobs." *ILA II*, 473 U.S. 61, 79 (1985).

We find that ILA I and II do not support the judge's findings. As discussed above, ILWU-represented employees have never performed electrical M&R work for Kinder Morgan, and there is no evidence that any of the disputed work had arisen as a result of the introduction of new technologies or that there has been any diminution of work for ILWU-represented employees. Because the disputed electrical M&R work has not traditionally been performed by ILWU-represented employees and is also not work that exists due to any implemented technological changes, this is not a situation involving technological displacement, and existing electrical M&R work is not work that ILWU can "preserve" from the assault of technological change.

In sum, we find nothing in the record before us that calls into question the Board's conclusion in the 10(k) proceeding that ILWU's actions, in support of its claim for the disputed electrical M&R work, do not have a lawful work preservation objective. Because ILWU did not have a lawful work preservation objective, we find it unnecessary to reach the General Counsel's additional argument that Kinder Morgan lacked the right of control over the disputed work. See *Food & Commercial Workers Local 367 (Quality Food)*, 333 NLRB 771, 772 (2001).[10]

V.

Turning to the merits, we find that ILWU's actions violated the Act in the following respects. First, ILWU violated Section 8(b)(4)(ii)(D) by continuing to pursue the relevant grievances under the 2008 PCLCD after the Board issued the 10(k) award, because an object of this action was to force Kinder Morgan to assign the disputed work to ILWU-represented employees, rather than employees represented by IBEW. It is well settled that a union's pursuit of a lawsuit or arbitration to obtain work that the Board previously has awarded to employees represented by another union has an illegal objective and violates Section 8(b)(4)(ii)(D). See *Sheet Metal Workers, Local 37 (E.P. Donnelly)*, 357 NLRB 1577, 1578 (2011), and cases cited therein, enfd. 737 F.3d 879 (3d Cir. 2013). See also *Machinists Lodge 160 (SSN Marine, Inc.)*, 360 NLRB 520, 521–522 (2014); *Grazzini Bros.*, 315 NLRB at 522–523.[11] Similarly, we find that ILWU violated Section 8(b)(4)(ii)(D) by physically preventing Accurate Electric employees from performing electrical work at Kinder Morgan because one objective of ILWU's actions was to force assignment of electrical M&R work to employees ILWU represents rather than employees represented by IBEW.

The complaint also alleges that ILWU engaged in certain coercive conduct from May through November 2012, such as pressuring Kinder Morgan to prepare a general journeyman electrician job description for posting at ILWU's hiring hall and to interview ILWU-represented candidates. As a defense, ILWU argued, inter alia, that Kinder Morgan undertook these actions voluntarily, and the judge did not address this argument. We find it unnecessary to pass on these complaint allegations because any additional findings of unlawful conduct would be cumulative and would not affect the remedy.

We find that ILWU's continuing to pursue its lost work grievances after the Board's 10(k) decision issued, and ILWU's physical interference with Accurate employees attempting to work for Kinder Morgan, violated Section 8(b)(4)(ii)(B) as well. As explained, ILWU did not have a valid work preservation object motivating its actions; rather, one of ILWU's aims was to force Kinder to cease doing business with Accurate, thus establishing the violation of Section 8(b)(4)(ii)(B) in addition to 8(b)(4)(ii)(D).

VI.

Finally, we deny ILWU's motion to reopen the record. On November 19, 2014, approximately one year after the

[10] For this reason, we find it unnecessary to pass on the judge's findings concerning the content and implications of Washington State law.

[11] The fact that an arbitration award favorable to ILWU was issued pursuant to the grievance-arbitration procedures of the 2008 PCLCD between the PMA and ILWU has no impact on our analysis, as the Board's 10(k) award takes precedence over contrary claims and determinations. See *E.P. Donnelly*, 357 NLRB at 1580.

hearing, ILWU filed a motion to reopen the record to admit new evidence that it claims shows that, following the hearing, Kinder Morgan assigned the disputed work to ILWU-represented employees. ILWU argues that the proffered evidence establishes that "core allegations" in the complaint as well as testimony given at the hearing were "patently wrong." We disagree. The proffered evidence concerns events which occurred well after the close of the hearing and is therefore neither "newly discovered" nor "previously unavailable" evidence. See *Allis-Chalmers Corp.*, 286 NLRB 219, 219 fn. 1 (1987). Furthermore, even assuming that the evidence sought to be adduced is newly discovered, the Respondent has failed to show that it would require a different result. See Section 102.48(c)(1) of the Board's Rules and Regulations.

ORDER

The National Labor Relations Board orders that the Respondents, International Longshore and Warehouse Union, its officers, agents, and representatives, and International Longshore and Warehouse Union, Local 4, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening, coercing, or restraining Kinder Morgan Bulk Terminals (Kinder Morgan), or any other person engaged in commerce or in an industry affecting commerce, where an object of their actions is to force or require Kinder Morgan to assign electrical maintenance and repair work at the Vancouver Bulk Terminal to employees who are members of, or represented by, International Longshore and Warehouse Union, Local 4, rather than to employees who are members of or represented by, International Brotherhood of Electrical Workers, Local 48, AFL–CIO.

(b) Threatening, coercing, or restraining Kinder Morgan, or any other person engaged in commerce or in an industry affecting commerce, where an object of their actions is to force or require Kinder Morgan, or any other person, to cease doing business with Accurate Electric of Oregon, Inc.

(c) Pursuing six lost-work grievances to arbitration and seeking to enforce the arbitration award in order to obtain electrical maintenance and repair work performed by employees represented by Local 48 at the Vancouver Bulk Terminal or to force Kinder Morgan to cease doing business with Accurate Electric of Oregon, Inc.

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

(a) Notify the Joint Coast Labor Relations Committee established by the 2008 PCLCD, in writing, that it has withdrawn its six grievances filed between July and September 2010 against Kinder Morgan, and request, in writing, that the Area Arbitrator vacate her February 21, 2012 award on those grievances.

(b) Within 14 days after service by the Region, post at their respective offices and meeting halls copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondents' authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their members by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 14 days after service by the Region, deliver to the Regional Director for Region 19 signed copies of the notice in sufficient number for posting by Kinder Morgan at its jobsite, if it wishes, in all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. January 31, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[12] If this Order is enforced by a judgment of the 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."

APPENDIX

NOTICE TO EMPLOYEES
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 on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten, coerce, or restrain Kinder Morgan Bulk Terminals, or any other person engaged in commerce or in an industry affecting commerce, where an object of our actions is to force or require Kinder Morgan to assign electrical maintenance and repair work at the Vancouver Bulk Terminal to employees who are members of, or are represented by us, rather than to employees who are members of, or represented by, International Brotherhood of Electrical Workers, Local 48, AFL–CIO.

WE WILL NOT threaten, coerce, or restrain Kinder Morgan, or any other person engaged in commerce or in an industry affecting commerce, where an object of our actions is to force or require Kinder Morgan, or any other person, to cease doing business with Accurate Electric of Oregon, Inc.

WE WILL NOT pursue six lost-work grievances and seek to enforce the arbitration award in order to obtain electrical maintenance and repair work performed by employees represented by Local 48 at the Vancouver Bulk Terminal or to force Kinder Morgan to cease doing business with Accurate Electric of Oregon, Inc.

WE WILL notify the Joint Coast Labor Committee established by the 2008 PCLCD, in writing, that we have withdrawn our six grievances filed between July and September 2010 against Kinder Morgan, and WE WILL request, in writing, that the Area Arbitrator vacate her February 21, 2012 award on those grievances.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, AFL–CIO INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 4, AFL–CIO

The Board's decision can be found at https://www.nlrb.gov/case/19-CC-092816 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

John H. Fawley, Atty., for the General Counsel.
Eleanor Morton and *Lindsay R. Nicholas, Attys. (Leonard Carder LLP*), for the Respondents.
Lester V. Smith, Atty. (Bullard Law), of Portland, Oregon, for Charging Party Kinder Morgan Terminals.
Norman D. Malbin, General Counsel (IBEW Local 48), of Portland, Oregon, for Charging Party IBEW Local 48.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, ADMINISTRATIVE LAW JUDGE. The Regional Director for Region 19 issued the initial consolidated complaint in this proceeding on June 28, 2013, based on the charges filed by Local 48, International Brotherhood of Electrical Workers (Local 48, IBEW Local 48, or Charging Party)[1] on November 8, 2012, and amended multiple times thereafter, in Cases 19–CC–092816 and 19–CD–092820. The Regional Director issued an amended consolidated complaint (complaint) after further consolidating the original cases with Cases 19–CC–115273 and 19–CD–115274 filed by Local 48 on October 22, 2013.

I conducted a 7-day hearing on the complaint allegations at Portland, Oregon, between October 29 and December 12, 2013. During the course of the hearing I took official notice of, and have considered, the record made in a closely related 10(k) proceeding in Case 36–CD–236 conducted in April and May 2011. The complaint alleges that Respondents engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) and 8(b)(ii)(4)(D).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondents, Local 48 and KMBT, I conclude that the General Counsel failed to prove essential complaint allegations that establish the Respondents violated Section 8(b)(4)(B) and (D).

FINDINGS OF FACT

I. JURISDICTION

Kinder Morgan Bulk Terminals (KMBT), a Delaware

[1] I have amended the unconventional caption utilized in the original complaint and the amended complaint because they appear to depict Kinder Morgan Terminals and Accurate Electric of Oregon, Inc. as the charging parties in the CC cases, and Kinder Morgan Terminals and IBEW Local 48 as the charging parties in the CD cases. In fact, IBEW Local 48 alone filed all of the unfair labor practice charges in this proceeding. For due process purposes, I permitted Kinder Morgan Terminals, the employer involved, to fully participate at the hearing on a party-in-interest basis and to file a posthearing brief even though it has not been designated as such.

corporation with an office and place of business at the Vancouver Bulk Terminal (VBT), is engaged in the business of operating a bulk cargo handling facility under a management agreement with the Port of Vancouver (POV). During the 12-month period prior to the issuance of the complaint, KMBT purchased goods and supplies used in its VBT operations valued in excess of $50,000 directly from entities located outside the State of Washington. Based on these findings, I conclude that KMBT has been, at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on their admissions, I further conclude that each of the Respondents is a labor organization within the meaning of Section 2(5).

II. ALLEGED UNFAIR LABOR PRACTICES

A. An Overview of the Relevant Operation

KMBT operates nearly 150 bulk terminal facilities throughout the United States and Canada. In the Pacific Northwest KMBT operates marine bulk terminals at the Columbia River deep-draft ports in Portland, Oregon, Longview, Washington, and Vancouver, Washington. This proceeding involves KMBT's operation at Vancouver.

The POV opened the VBT at berth 7 of that port in 1982. From that time until 1985 it operated the VBT in partnership with the Anaconda Copper Company. From 1985 until 1991 and again from 1993 to 1995 the POV operated the VBT itself. Metropolitan Stevedoring operated the VBT from 1991 to 1993. The Hall Buck Company operated the VBT from 1995 until KMBT acquired Hall Buck in July 1998. KMBT has operated the VBT from that time to the present.

Since 2001 KMBT operates the VBT pursuant to a management agreement with the POV that provides the operator with no ownership or leasehold interest in the terminal. The agreement broadly requires KMBT to adhere to applicable laws and governmental regulations.

The operation at the VBT essentially consists of unloading copper concentrate or bentonite clay from railcars that arrive at the terminal and later loading those materials on ocean-going vessels for export. The terminal is equipped with conveyor machinery that transports these materials from the railcars to warehouses for storage until they are reloaded on a ship for export with the use of similar conveyor equipment. When the railcars arrive at the VBT, they are advanced to an unloading position by workers who operate programmable logic controllers (PLCs). At that point the bulk material is hand scooped into hoppers on a conveyor system that moves the material into a warehouse where it is dumped along the length of the building. When a ship arrives for loading, workers in the warehouse scoop the material on to the conveyor system that takes the material to the point where it is unloaded on the vessel.

KMBT utilizes local longshore workers represented by the ILWU to perform its principal operation of loading and unloading bulk materials.[2] It acquires these workers through a local referral hall jointly operated by ILWU Local 4 (Respondent Local 4 or Local 4) and the Pacific Maritime Association (PMA), a multiemployer bargaining agency. The terms and conditions of employment for those workers are governed by the Pacific Coast Longshore Contract Document (PCLCD) between the PMA and the ILWU.[3] This lengthy and highly complex agreement applies to a coastwise, multiemployer unit of workers represented by the ILWU's Longshore Division and employed by 70 or more members of the PMA that operate on or utilize the West Coast docks in California, Oregon, and Washington. KMBT is bound to that multiemployer agreement by reason of its membership in the PMA. The most recent PCLCD was effective for a term beginning on July 1, 2008, and continuing through June 30, 2014.

In this case, the Respondents claim that the 2008 PCLCD defined the unit work to include, among other tasks, all maintenance and repair (M&R) work on all cargo-handling equipment utilized by the PMA employers, other than that specifically excepted by two letters of understanding signed by the presidents of the PMA and the ILWU, and included as a part of the PCLCD. This includes, Respondents assert, not only the mechanical M&R work, but also the electrical/electronic M&R work (for brevity, electrical M&R work) associated with the programmable logic controller systems (PLC), the conveyor equipment, ship loading spouts, railcar advancement equipment, and the air compressors at least to the degree they are used as a part of the cargo-handling equipment.

KMBT has always used ILWU-represented labor to perform the mechanical M&R work at the VBT. The Respondents further claim that from 1982 until 1996, the employees they represented performed the electrical M&R work at the VBT. This claim is supported to a degree by the credible testimony of Lee Anderson, a retired ILWU mechanic who formerly worked at the VBT. Anderson confirmed that he performed electrical M&R work at the VBT until left in 1997 to work elsewhere.

However, other credible evidence establishes that as early as 1996, the VBT operators began using local electrical contractors to perform at least some of their electrical M&R work. Ken Sweo, the general foreman, a member of the board of directors of Accurate Electric of Oregon, Inc. (Accurate), and a trained electrician, recalled that he first began performing electrical M&R work at the VBT in 1996 while employed by Christensen Electric, a local electrical contractor. Christensen, he said, lost the work to Hughes Electric in 2002. Accurate acquired the work in 2004 and has been performing it since. The Accurate workers utilized to perform the disputed work are represented by Local 48, International Brotherhood of Electrical Workers (IBEW) located in Portland, the Charging Party in these cases.[4]

Vancouver aside, there is credible evidence that unit employees who work for other PMA employers at other West Coast ports regularly perform electrical M&R work on the cargo-

[2] Bulk material is any type of cargo not in a container or other type of package.

[3] The PCLCD is one portion of the Pacific Coast Longshore & Clerks Agreement that applies to the longshore workers. Another similar document, the PCCCD applies to the clerk classifications utilized by PMA employers.

[4] During the arbitration proceedings described more fully below, the PMA disputed the ILWU's claims that the electrical M&R work at the VBT had ever been performed by ILWU-represented workers but those claims appear to rely primarily on hearsay assertions.

handling equipment. Thus, Richard Marzano, the PMA's director of contract administration and arbitration, testified as follows:

> Q: Okay. Are there individuals in the ILWU Longshore bargaining unit who do electrical work?
>
> (Interruption to hear and rule on objections to the question)
>
> THE WITNESS: Yes. And to explain, longshore work–longshore work under Section 1 is the movement of cargo. But under Section 1.7, it is mechanic work. And longshore mechanics encompasses a great deal of different work. They maintain chasses. They change tires. The, you know, you could have, you know, a guy who is just sitting there with a hammer all day. But at the–if the other side of the spectrum, it would be crane maintenance. It would be reefer maintenance. And in my experience, the guys, the longshore workers who are performing crane maintenance and reefer maintenance work, they are a very skilled workforce. They have–not to say that they are, but I've worked with people directly that were electrical engineers, that these guys and these crane maintenance workers had incredible electrical skills. So to say that, are there longshore workers that do electrical work? The answer is yes.
>
> Q: Okay. Are there ILWU longshore workers that work with fiber optics in the course of their work also?
>
> A: Fiber optics? Cables and–yes, yeah, there are.
>
> Q: And are there ILWU represented longshore workers–well, let me go back to something you said. You mentioned reefers?
>
> A: Yes.
>
> Q: That's a refrigerated container?
>
> A: Yes, I'm sorry. It's a refrigerated container. It's a chilled container that's electrically controlled.

In addition, Respondents adduced multiple instances over a recent 2-year period of PMA employers throughout California, and in Tacoma and Seattle, Washington, soliciting applications through ILWU local unions for workers to fill unit positions that require a variety electrical and electronic skills, certificates, and state electrical licenses. (R. Exhs. 33, 34, 35, and 36.) This evidence far exceeds a mere anecdotal showing; many of the solicitations seek to fill numerous openings, a few up to 40.

Regardless, since taking over operation of the VBT, KMBT has split the M&R work that has been performed on the cargo-handling equipment there. It utilizes its own workers represented by the ILWU to perform the mechanical M&R work at the facility. However, it has always used a vendor to perform its electrical M&R work on an as needed basis. Over the years, those vendors have been local electrical contractors whose workers are represented by the ILWU. As noted, Accurate is currently the approved vendor utilized for the electrical M&R work on the cargo-handling equipment at the VBT. On average, an Accurate electrician spends 1 or 2 days a week performing electrical M&R work at the VBT. KMBT has no obligation or continuing agreement or contractual obligation to engage Accurate exclusively, nor has it ever had a collective-bargaining agreement with IBEW Local 48 that applies to any of the workers it directly employs at the VBT.

KMBT officials asserted that Leal Sundet, a coast committeeman for the ILWU Longshore Division and a member of the ILWU's coastwise bargaining team, warned them after the PMA and the ILWU completed negotiations of the 2008 PCLCD that the ILWU planned to come after the electrical M&R work at the VBT. On July 2, 2010, Local 4's president wrote to KMBT requesting, in effect, that KMBT's comply with the 2008 Bulk Terminal Past Practice LOU by hiring unit employees qualified to perform electrical M&R work instead of outsourcing that work. KMBT did not respond. In the next 2 months, KMBT's longshore workers at the VBT grieved over six instances where non-unit workers (Local 48 electricians employed by Accurate) performed electrical M&R work at the VBT.

B. The KMBT-ILWU Contract Dispute at the VBT

1. The 2008 PCLCD provisions concerning M&R work

The relevant terms of the 2008 PCLCD concerning M&R work reinforce the fact that it is an agreement covering a coastwise, multiemployer bargaining unit at west coast ports. Section 1.71 of the 2008 PCLCD declares that the M&R work on all stevedore cargo handling equipment (cargo-handling equipment) to be unit work with these words:[5] "This Contract Document shall apply to the maintenance and repair of all stevedore cargo handling equipment. (See sec. 1.81.)" The referenced section 1.81 states:

> ILWU jurisdiction of maintenance and repair work shall not apply at those specific marine terminals that are listed as being "red-circled" in the July 1, 2008 Letter of Understanding on this subject. Red-circled facilities, as they are modified/upgraded (e.g., introduction of new technologies), or expanded, while maintaining the fundamental identity of the pre-existing facility, shall not result in the displacement of the recognized workforce and shall not be disturbed, unless as determined by the terminal owner or tenant.

The letter of understanding (Red-Circle LOU) referenced in the above text sets forth the "Clarifications and Exceptions to ILWU Maintenance and Repair Jurisdiction." It declares that the parties "discussed the assignment of maintenance and repair work to the ILWU coastwise bargaining unit to offset the introduction of new technologies and robotics that will necessarily displace/erode traditional longshore work and workers." It then goes on to set forth a lengthy description of what "scope of ILWU work" includes. Among the listing of included ILWU work is the "maintenance and repair . . . of *all present and forthcoming technological equipment related to the operation of stevedore handling equipment and its electronics* in all West Coast ports except for those, and only those, specific marine terminal facilities listed as red-circled below." It then goes on to "red-circle" 30 excepted facilities, all of which are located at ports in Oakland, Long Beach, Los Angeles, Tacoma, and Seattle. No facility at the POV is included in this list of red-circled facilities.

[5] Sec. 1.7 is inapplicable here as it addresses M&R work at container terminals.

(R. Exh. 28, pp. 218–223, emphasis added.)

As the above description suggests, the Red-Circle LOU provides site-specific exceptions to the ILWU's jurisdiction over the M&R work at west coast ports. Its more specific term merit the inference that it involves situations where PMA employers have a direct collective bargaining agreement with other labor organizations that involve the performance of at least some M&R work. Thus, the Red-Circle LOU further provides that a terminal operator who owns or leases a red-circled facility and who has a "direct collective bargaining relationship" with another union as of July 1, 2008, may transfer, in effect, its red-circle status and its non-ILWU work force to a different, existing location in the same port provided in doing so it maintains "a continuity of operations, personnel, and equipment."

PCLCD section 1.72 sets forth the parties mutual understanding "that the introduction of new technologies, including fully mechanized and robotic-operated marine terminals, necessarily displaces traditional longshore work." This section goes on to describe the referenced "traditional longshore work" as operating the cargo-handling equipment, maintenance and repair, and the cleaning of the cargo handling equipment. It then states:

> The parties recognize robotics and other technologies will replace a certain number of equipment operators and other traditional longshore classifications. It is agreed that the jurisdiction of the ILWU shall apply to the maintenance and repair of *all present and forthcoming stevedore cargo handling equipment* in accordance with Sections 1.7 and 1.71 and shall constitute the functional equivalent of such traditional ILWU work. It is further recognized that since such robotics and other technologies replace a certain number of ILWU equipment operators and other traditional ILWU classifications, the pre-commission installation per each Employer's past practice . . . post-commission installation, reinstallation, removal, maintenance and repair, and associated cleaning of such new technologies perform and constitute the functional equivalent of such traditional ILWU jobs. [Emphasis added.]

Section 1.73 describes the "scope of work." The language used here to describe the scope of M&R work is patterned after the Red-Circle LOU. Thus, it states, "the scope of work shall include . . . maintenance and repair, and associated cleaning of all present and forthcoming technological equipment related to the operation of stevedore cargo handling equipment . . . and its *electronics* that are controlled or interchanged by PMA companies, in all West Coast ports." (Emphasis added.)

The 2008 PCLCD contains another letter of understanding that became relevant to this dispute as the grievances advanced through the contractual grievance-arbitration procedure. That letter of understanding is titled, "M&R Work 'Contract Stevedores' and Bulk Facilities (the Bulk Terminal Past Practice LOU). The Bulk Terminal Past Practice LOU states:

> During the course of the 2008 PCL&CA negotiations, the Parties discussed and agreed that Section 1.7, 1.71, 1.72, 1.73, and 1.731 shall cover work performed by PMA member companies functioning as "contract stevedores" and PMA member companies operating bulk facilities. "Contract stevedore" is a company performing stevedore work with its own or leased equipment at non-CY (container yard) terminals where it is not the owner or the lessee.
>
> It was agreed that such companies are entitled to waiver of Section 1.7 and associated subsections in keeping with an Employer's past practice in a port where such work was performed by non-longshore employees of said employer or by said employer's subcontractor pursuant to a past practice that was followed as of July 1, 1978.
>
> With respect to bulk facilities, the exception shall apply only to existing facilities.

[R. Exh. 28, pp. 225–226.]

Read together, as they must be in order to discern their essential essence, the foregoing provisions of the 2008 PCLCD constitute a negotiated arrangement between the PMA and the ILWU applicable to the entire shipping industry operating at West Coast ports designed to address the problem of worker displacements that they both see coming with the introduction of robotics and other technological advances designed to turn the loading and unloading of cargo into an unmanned operation. According to Marzano, the PMA and the ILWU also included provisions in the 2008 PCLCD designed to improve the mobility of registered longshoremen because the parties anticipated an uptick in maintenance work on the West Coast docks with the introduction of robotics. These provisions sought to make it easier for registered longshoremen to relocate to another geographical area where her/his skills were in demand.

2. The dispute over electrical M&R work at the VBT

As noted, between July and September 2010, longshore workers filed six lost-work grievances against KMBT. The ILWU and Local 4 vigorously prosecuted the grievances under the under the grievance-arbitration provisions of the PCLCD.

Under the PCLCD procedures, unresolved grievances are first considered by the Joint Port Labor Relations Committee (JPLRC). (As with nearly all joint committees provided for by the PCLCD and the parties' practices, the PMA and the ILWU each has, in effect, a single vote regardless of the number of representatives who may appear and participate in the meeting.) The JPLRC at Vancouver considered the six grievances at its November 30, 2010 meeting but failed to reach an agreement concerning them.

From the outset Local 4 claimed that the 2008 PCLCD provided that all M&R work, whether mechanical or electrical, constituted the longshore unit work based on the "grand bargain" made during those negotiations. Local 4 described that bargain in the following written outline of its position presented at the JPLRC:

> The intent of the 2008 (PCLCD) negotiations was to recognize that the Employers were free to introduce technology, including robotic technology, which would "*. . . necessarily replace traditional longshore work . . ."* as recognized to be the physical handling of cargo or the driving of machines that handle cargo. In exchange, all maintenance and repair work of such technologies would be assigned to the ILWU.
>
> Section 1.72 stipulates that ILWU maintenance and repair work applies to not just new technology such as robotics, but also to "present" cargo handling equipment. This M&R work

> (as described in the six grievances) would then constitute the functional equivalent of our 'traditional' work.
>
> In this case the Employers are misinterpreting the usage of the phrase "traditional ILWU work" as contained in Section 1.72, PCLCD, and in doing so are disingenuous and reneging on what was negotiated in 2008 bargaining.
>
> The modifications made to Section 1.7, its subsections and the corresponding LOU was to ensure that the ILWU does all maintenance and repair work regardless of the methodology of the work.

[10(k) Er. Exh. 5. Emphasis in the original.]

Word obviously spread quickly to Local 48 about the nature of the six grievances and the significance of the ILWU position concerning them. Equally obvious is the alarm with which Local 48 perceived the impact the grievances could have on the workers it represents should the ILWU succeed. Thus, on December 9, 2010, Local 48's general counsel wrote to KMBT's counsel expressing his disappointment at learning that KMBT "is considering assigning electrical work to Longshoremen." He asserted that "Electrical construction work at the Port of Vancouver had been performed by IBEW Local 48 electricians since the opening of their facility and we intend to ensure that it will continue to be performed by IBEW Local 48 electricians until the day it shuts down. We are not going to sit idly by and allow you to hand over our work to another union." The letter goes on to charge that ILWU workers were not qualified to perform electrical work at the VBT and asserted that at least two grievances involved new installations, work the ILWU specifically disclaimed during this proceeding.[6] (Er. Exh. 6, 10(k).)

The grievances were again considered at a JPLRC meetings on February 3 and March 14, 2011. At the latter meeting, the parties (PMA on behalf of, and with, KMBT and ILWU Local 4) failed to reach agreement concerning the grievances but did agree to submit them directly to the area arbitrator for resolution, thereby bypassing Joint Area Labor Relation Committee (JALRC).

The parties to the PCLCD employ "permanent" arbitrators at both the area and coastwise level of their grievance-arbitration procedure to resolve the disputes that arise under the PCLCD. The area arbitrator for the northwest area involved here is Jan R. Holmes. The coast arbitrator is John Kagel, a nationally known arbitrator of high repute entirely aside from his work as a permanent arbitrator for the PMA and ILWU.

Area Arbitrator Holmes conducted an arbitration hearing concerning the six grievances on April 12, 2011, and rendered her decision on May 31. The determinative issue during the hearing concerned the interpretation of the past practice exception(s) provided for in the Bulk Terminal Past Practice LOU. In her decision, Area Arbitrator Holmes concluded that the Bulk Terminal Past Practice LOU established separate past practice exceptions to the requirements of PCLCD section 1.71, et seq. concerning maintenance and repair work. She reasoned that the Bulk Terminal Past Practice LOU provided contract stevedores with an exception to the requirement that all M&R work be assigned to unit employees as provided in PCLCD section 1.71 et seq. but only if they had a past practice of doing so that predated July 1, 1978. However, she concluded that the absence of a similar date contained in the reference to bulk terminal operators (third paragraph of the Bulk Terminal Past Practice LOU) reflected the parties' intent to approve of past practices that were in effect as of the date they signed the Bulk Terminal Past Practice LOU, to wit, July 28, 2008. Because KMBT regularly subcontracted its electrical M&R work well before July 28, 2008, she concluded it enjoyed an exception from the requirements of PCLCD section 1.71 et seq., so that the six grievances "were not payable."

In accord with the PCLCD's grievance-arbitration provisions, the ILWU appealed Holmes' decision to the Coast Labor Relations Committee (CLRC), a bilateral committee of high-level PMA and ILWU representatives with each side effectively having one vote.[7] The CLRC failed to reach an accord with respect to affirming or reversing Holmes' decision. Instead the CLRC submitted Holmes' interpretation of the Bulk Terminal Past Practice LOU to the coast arbitrator to be affirmed or reversed.

Coast Arbitrator Kagel held a hearing on the Bulk Terminal Past Practice LOU on December 5, 2011, and rendered his decision on December 28. He vacated Area Arbitrator Holmes' finding that the Bulk Terminal Past Practice LOU provided for two separate past practice exceptions, one applicable to the bulk terminal operators such as KMBT, and the other applicable to contract stevedores. Coast Arbitrator Kagel construed the 2008 Bulk Terminal Past Practice LOU as requiring any PMA employer operating at a non-red-circled facility, such as Vancouver, to demonstrate a past practice predating July 1, 1978, in order to qualify for the exception it provided. His ruling states in pertinent part:

> The "exception" referred to in the third paragraph (of the Bulk Terminal Past Practice LOU) is in the singular, and applies to the 1978 past practice exception referenced in the second paragraph, and as it had appeared in the PCLCD prior to 2008. And, this view is clinched by the fact, as claimed by the Union, that a Kinder Morgan bulk facility in the Port of Portland claimed to have such a 1978 exception by virtue of being a successor to a facility which had such an exception, and contentions that the 1978 exception there also applied to an additional Kinder Morgan facility in the same port because of the 1978 exception applying to the successor facility. If a specific bulk facility had a 1978 exception, it could keep it by virtue of the third paragraph of the LOU in 2008. But there is nothing in the LOU, read as a whole, to show that what its third paragraph did was to create a successor past practice exception for all bulk facilities that did not have the 1978 exception to go into effect on July 28, 2008.

[R. Exh. 32, p. 4.] Accordingly, he referred the case back to the area arbitrator to resolve any remaining issues.

Area Arbitrator Holmes issued her second decision in the case

[6] To be sure, the record here also provides no support for the conclusion the ILWU sought by its grievances any "electrical construction work" at the POV.

[7] The votes cast on behalf of either the PMA or the ILWU at CLRC meetings are effectively preapproved by the presidents of those two organizations.

involving the six grievances on February 21, 2012. Prior to that time, Holmes had been advised of the Board's 10(k) award, discussed below, that issued on December 31, 2011. Regardless, Area Arbitrator Holmes, relying on the record made in her original hearing as well as the record made before Arbitrator Kagel, concluded in her second decision that the work described in each of the grievances constituted unit M&R work and further concluded that KMBT did not qualify for an exception that would permit it to outsource such work. But she referred the question of how to implement the decision she had reached to the CLRC.

No appeal was taken from the area arbitrator's second decision. Effectuation of the Arbitrator Holmes February 21 award was taken up at the May 10, 2012, CLRC meeting. The CLRC unanimously instructed KMBT to "to take the necessary steps to assign the work in dispute in CRAA-0002-2012 to ILWU Longshore Division employees." The minutes of that meeting state as follows:

> The Employers inquired as to whether the Union felt it would be lawful to act on this ruling given the NLRB ruling in the 10(k) hearing.
>
> The Union stated that the NLRB 10(k) decision in this ease is irrelevant in that it does not bind Kinder Morgan, as a matter of law or otherwise, from assigning the work to the ILWU. Any 10(k) decision is only relevant at the time of issuance and to the extent that the Employer seeks to use it. Here, Kinder Morgan is free at any time to not use a subcontractor.
>
> The Area Arbitrator referred the issue of implementation to the CLRC and, as such, it is the Committee's duty to require implementation of the Award. The Union stated that Kinder Morgan and PMA have a further duty to defend the assignment of work in any legal proceeding (see Section 1.76, PCLCD).
>
> After discussion, the Committee agreed that Kinder Morgan is required to take the necessary steps to assign the work in dispute in CRAA-0002-2012 to ILWU Longshore Division employees.

Neil Maunu, KMBT's operations manager for the Columbia River area, claims that his company never received notice of the foregoing action by the CLRC until August 8, almost 3 months after the fact. On August 20, a PMA official in the area notified Maunu that Local 4 wanted a JPLRC meeting to discuss the CLRC's May 10 directive. He also said that Local 4 asked KMBT prepare for a qualifications list it could use to determine if any workers anyone within the local were qualified to perform the electrical M&R work at the VBT. The meeting was held on September 11. KMBT provided Local 4 with the qualifications list as requested.

Meanwhile, KMBT continued to call on Accurate for its electrical M&R needs at the VBT. On October 18, Accurate dispatched a journeyman electrician, Jeff Andrews, to the VBT at the request of KMBT to repair a malfunctioning conveyor.[8] After Andrews arrived at KMBT's terminal office at about 2:45 p.m. and received instructions to report to KMBT Supervisor Delashmitt at an electrical room located near the south end of the terminal.

When Andrews arrived at the electrical room, a crowd of about 20 individuals, several of whom he recognized as longshoremen that he had seen at the VBT during his past visits there, refused to permit him to enter the electrical room to perform the work he had been sent there to do. In fact, at one point early on one in the group, a longshoreman named Justin France, put his hands on Andrews to prevent him from entering the electrical room. Local 4 Vice President Jared Smith, told Andrews that they would not let him enter the electrical room to perform the repairs because it was the longshoremen's work. That refrain was repeated by several in the crowd who continued to block Andrews from entering the electrical room even when Supervisor Delashmitt and KMBT Terminal Manager Noa Lidstone sought to personally escort him through the group. When the stalemate continued, Larry Sefton, a Local 4 labor relations committeeman, was summoned to the scene and he insisted that Andrews leave. Finally, the parties agreed to an instant arbitration of their dispute that lasted until about 7 p.m. when Andrews was finally permitted to complete the repair he had been summoned to perform.

A similar incident occurred on early on October 21 when Accurate's general foreman, Ken Sweo, arrived at the VBT to perform more electrical maintenance work that KMBT arranged for on October 18. This time a group of about 15 longshoremen interfered with his efforts to get material from his van and later prevented him from entering the pit building to replace an electrical switch. In the course of these confrontations, the group charged that he had come to the VBT to perform longshore work and insisted that he leave. The group that prevented Sweo from performing his work that day included Local 4 labor relations committeemen Lynch and Sefton. Eventually, Sweo had to leave without getting any of the work done that he had been hired to do.

KMBT officials present at the scene on both occasions pointed out to the Local 4 officials that the Board had awarded the work Andrews and Sweo were there to perform to the IBEW but the union officers insisted that the work to be done was unit work. On October 22, 2013, Local 48 filed the charges in Cases 19–CC–115273 and 19–CD–115275 alleging that the ILWU and Local 4 violated Section 8(b)(4)(ii)(B) and (D).

On November 15 Local 4 requested through the PMA that KMBT interview at their earliest convenience the applicants who had signified their interest on a signup sheet posted at the union hall along with the electrical M&R work job description that KMBT provided earlier. Some of the ILWU members claimed to be licensed electricians, a few even claimed to be licensed master electricians. However, KMBT notified the PMA on November 21 that it was suspending any further action looking toward the hiring ILWU electricians to perform M&R work at the VBT in view of the October 22 unfair labor practice charges and reports that another POV terminal operator had been cited by the State of Washington for performing electrical M&R work at the POV in violation of the Washington electrical code.[9]

[8] Andrews said he had performed work at the VBT on numerous occasions since 1996.

[9] These citations were the direct outgrowth of the 10(k) hearing.

C. The 10(k) Proceeding

On March 18, 2011, 4 days after the JPLRC's initial referral of the six grievances to the area arbitrator for decision, Local 48's general counsel wrote to KMBT's counsel threatening to picket KMBT if it assigned "work traditionally done by Local 48 electricians" to workers represented by the ILWU. (Er Exh. 8 10(k).) Five days later on March 23, KMBT filed the unfair labor practice charge against Local 48 in Case 36–CD–236. That charge generated a 3-day 10(k) hearing in April and May 2011. The ILWU and Local 4 intervened and participated in that proceeding. On December 31, 2011, the Board issued its decision and determination awarding the electrical work at the VBT to workers that Local 48 represents. *Electrical Workers Local 48*, 357 NLRB 2217 (2011).[10]

In that decision and determination, the Board found that the work in dispute was that described in the six grievances filed by the ILWU "as well as all other electrical work not specifically covered by the grievances." It found that KMBT operated the VBT pursuant to a management agreement requiring it to comply "with all applicable rules and regulations of the Port and applicable federal, state, and local laws, ordinances and regulations." Citing the "uncontradicted" testimony of a Washington State inspector that "state regulations require that Kinder Morgan subcontract any electrical work to a licensed electrical contractor with employees possessing appropriate electrical licenses," the Board further found that "Kinder Morgan has hired electrical subcontractors on an as-needed basis to perform necessary installation and electrical repairs on the cargo loading equipment," all of whom have been signatories to collective-bargaining agreements with the IBEW.

That same Washington State inspector testified in this proceeding. Here, he conceded that KMBT could lawfully perform the disputed electrical work if it obtained the POV's specific authorization to do so, or if it obtained its own electrical contractor's license. In Washington, anyone (electrician or not) may become an electrical contractor by filing an application with the required fee and providing the requisite surety bond or an acceptable substitute. A person who obtains an electrical contractor's license may then lawfully perform any electrical work in the state by designating a licensed master electrician (a journeyman with a specified amount of experience in the trade), or a person with a Washington electrical administrator's certificate to approve the work actually performed by the contractor's licensed electricians. Washington will grant an administrator's certificate to any individual who passes a subject-matter examination and pays the required fee. But unlike a licensed master electrician, an administrator may not actually perform any electrical work. As a licensed electrical contractor in Washington, KMBT would be permitted it to do its own electrical M&R work on the cargo handling equipment without obtaining the POV's approval. Nothing in this record warrants finding that the law or regulations in the State of Washington absolutely requires that KMBT outsource electrical work.

More importantly, the Board rejected the ILWU's motion to quash the 10(k) notice of hearing on the ground that the dispute amounted to a contractual, work-preservation dispute, and that the IBEW's March 18 threat was an artificial, calculated contrivance between the IBEW and KMBT designed to create the appearance of a jurisdictional dispute so that the IBEW could obtain the work assignment preferred by KMBT. The Board concluded that the ILWU's work-preservation claim lacked merit because of the ILWU worker had never performed the work in dispute at least during KMBT tenure as the operator. The Board also found that the ILWU had failed to prove its claim that KMBT and Local 48 concocted the whole affair to create the appearance of a jurisdictional dispute. The Board then concluded that four of the five factors it considered in this work assignment dispute favored the IBEW and awarded the electrical M&R work on the cargo handling equipment at the VBT to workers represented by Local 48.

The initial factor considered in the Board's 10(k) decision involved "Certifications and collective-bargaining agreements." The Board found that factor failed to favor either party. After noting no relevant certifications applied here, the Board went on to find that KMBT had no agreement with the IBEW. But as to KMBT's agreement with the ILWU, the 10(k) award states:

> As a member of the PMA, Kinder Morgan is bound to a collective-bargaining agreement with ILWU. Section 1.71 of both the current and prior agreements sets forth the scope of work and ILWU's jurisdiction as "the maintenance and repair of all stevedore cargo handling equipment." The current agreement, however, contains new provisions addressing the work in light of the introduction of new technologies. Section 1.72, one of the new provisions, provides that ILWU's jurisdiction applies to the M&R of all present and forthcoming stevedore cargo handling equipment, which shall constitute the functional equivalent of such traditional ILWU work. Section 1.73 defines the scope of ILWU work to include "the pre-commission installation per each Employer's past practice . . . , post-commission installation, reinstallation, removal, maintenance and repair, and associated cleaning of all present and forth-coming technological equipment related to the operation of stevedore handling equipment . . . and its electronics that are controlled or interchanged by PMA companies." Several "letters of understanding" providing exceptions to ILWU's contractual jurisdiction of M&R work were added to the agreement during the course of the 2008 negotiations, but none applies to the work at issue here.

[10] Citing *Noel Canning v NLRB*, 705 F.3d 490 (D.C. Cir. 2013), Respondents argue that this 10(k) award is ultra vires because the Board panel involved included a member invalidly appointed to office. The panel issuing the decision included former Board Member Craig Becker. In *NLRB. v. New Vista Nursing & Rehabilitation*, 719 F.3d 203, 218 (3d Cir. 2013), the court held that Member Becker had been invalidly appointed during a 17-day intrasession Senate recess. The Supreme Court's recent decision in *Noel Canning v. NLRB*, 573 U.S. ___ (2014), concluded, contrary to the *New Vista* court, that the President's constitutional recess appointment authority extended to intrasession recesses of the Senate. Accordingly, I find Respondents' argument that the Board panel issuing the 10(k) decision lacked authority apparently due to Member Becker's participation is without merit.

> As just shown, the PMA bargaining agreement's jurisdictional work description is very general, including among other things "the maintenance and repair of all stevedore cargo handling equipment." But there is no explicit mention of electrical work or any similar work arguably described in ILWU's contractual grievances. ILWU argues that more recent additions to the collective-bargaining agreement address the subcontracted electrical work. But both the testimony and contract language demonstrate that the collective-bargaining agreement changes were directed at new work to be based on the introduction of new technologies. There is no evidence that electrical work associated with cargo handling equipment conducted at Kinder Morgan's facility is any different from when Kinder Morgan took over the terminal in 1995, nor is there evidence of new equipment with more sophisticated technology installed in those 15-plus years. The applicable collective-bargaining agreement provisions have remained the same, as has the work and who performs the work.

[357 NLRB 2217, 2219–2220.] As discussed in more detail below, the evidence in this proceeding casts considerable doubt on the sustainability of the findings of fact, analysis, and conclusions in the 10(k) proceeding.

D. The Parties' Contentions

The General Counsel alleges and argues that the ILWU and Local 4 violated Section 8(b)(4)(ii)(B) and (D) by (1) failing to withdraw the six grievances seeking the electrical M&R work at the VBT; (2) coercing KMBT to assign that work to the employees they represent; and (3) preventing electricians represented by Local 48 from performing electrical work for KMBT. The Charging Party and KMBT submitted briefs in support of the General Counsel's contentions. The theory underlying the General Counsel's complaint rests on his conclusion that Accurate is the primary employer in this dispute while KMBT is a secondary employer allegedly "whipsawed" by the ILWU's grievances seeking the electrical work that Accurate currently performs at the VBT.[11] The General Counsel rejects the ILWU's claim that the grievances and the other activity alleged as unlawful had a work preservation objective, arguing that cannot be possible because the ILWU has never performed the electrical M&R work at the VBT for well over a decade. In addition, the General Counsel argues that the fundamental premise of the ILWU's defense that is grounded on the subcontracting provision in the PCLCD is not a "lawful no-subcontracting provision . . . that (KMBT) could have breached."

The Respondents argue that the General Counsel failed to prove by a preponderance of the evidence that they violated Section 8(b)(4)(B) and (D). They argue that the evidence shows that the primary labor dispute here is between the ILWU and KMBT, not Accurate as the General Counsel claims. That is so, the Respondents assert, because PMA, KMBT's bargaining agent agreed in the 2008 PCLCD that all M&R work, whether electrical or mechanical, constituted traditional longshore work. It argues further that KMBT exercises the right of control over this particular M&R work. For these reasons, Respondents argue, the sole object of their conduct was to enforce their collective-bargaining agreement with KMBT. That agreement, the Respondent's insist, provided them with a "fairly claimable" right to the disputed work because it involves M&R work on cargo-handling equipment declared to be traditional longshore work. In an alternative argument limited to paragraphs 8(a)-(c) alleging that Respondents were threatened, coerced and restrained in connection with the drafting of an electrician's job description, its posting at the Local 4 union hall, and Local 4's requests that interested applicants be interviewed lacks merit because the credible evidence establishes that KMBT initiated and promoted this action of its own volition, independent even of the PMA.

E. Analysis and Conclusions

1. The statutory provisions and relevant case law

As noted, this complaint alleges that Respondents violated Section 8(b)(4)(ii)(B) and (D) of the Act. Based on the complaint's premise that the primary employer is Accurate and that KMBT is a neutral, the General Counsel alleges that Respondents violated these provisions of the Act by the following conduct that occurred after the Board issued its award in the 10(k) case:

> 1. The alleged direction given by ILWU officials at the May 2012 CLR meeting that KMBT assign the electrical M&R work at the VBT that had been awarded to workers represented by Local 48 in the Board's 10(k) decision and determination of December 31, 2011, to employees represented by Respondents.
>
> 2. The alleged direction and subsequent follow up by Local 4's officers in the period from September 11, 2012 (presumably during the JPLRC meeting) that KMBT create a "general journeyman electrician job description" for posting at Local 4's to facilitate the hiring of ILWU-represented workers to perform the electrical M&R work at the VBT.
>
> 3. The physical blocking of the Accurate electricians at the VBT on October 18 and 21, 2012 who had been summoned to perform electrical M&R work for KMBT.

In relevant part Section 8(b)(4) declares that it is an unfair labor practice for a labor organization to: . . . "(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce," where the object is:

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

[11] Complaint par. 9 avers that the Respondents' labor dispute is with Accurate and not with KMBT.

primary picketing;

. . .

(D) forcing or requiring any employer to assign work to employees in a particular union, trade, craft or class rather than to employees in another union, trade, craft, or class, unless the employer is failing to conform to a Board order or certification determining the representative of the employees performing the disputed work.

If the Board finds reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred, Section 10(k) requires the Board "to hear and determine the dispute out of which such unfair labor practice shall have arisen," unless the parties to the dispute provide "satisfactory evidence" within 10 days after the Board's notice of the filing of the 8(b)(4)(D) charge that "they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute." If the parties comply with the Board's determination or the outcome of their voluntary procedure, the charge is dismissed. See Section 101.33—101.36 of the NLRB Statements of Procedure.

But if the charged party (here the ILWU and its Local 4) elects not to abide by the Board's 10(k) award, then the General Counsel is empowered to issue a complaint alleging a violation of Section 8(b)(4)(D), which he must prove by a preponderance of the evidence in a proceeding conducted under the Administrative Procedures Act. See generally *Longshoremen ILWU Local 6 (Golden Grain)*, 289 NLRB 1 (1988).

In general, the provisions of Section 8(b)(4) reflect "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building. & Construction Trades Council,* 341 U.S. 675, 692 (1951); *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 625–627 (1967). Here, the parties obviously disagree about the identity of the primary (or "offending") employer(s) and the identity of the neutral or a secondary "unoffending" employer(s). In contrast to the position of the General Counsel, KMBT, and Local 48, the Respondents assert that the primary employer here is KMBT as it is the employer that with the right to control the category of employees, longshoremen or electricians, who perform the electrical M&R work.

In *United Pipe Fitters Local 438 (George Koch Sons, Inc.),* 201 NLRB 59, 63 (1973), enfd. 490 F.2d 323 (4th Cir. 1973), the Board addressed its use of the right of control test generally used in determining whether a charged union's conduct amounts to unlawful secondary activity under Section 8(b)(4) or lawful primary activity under the proviso to that section. There the Board stated:

. . . [O]f late, the Board has characterized its approach simply in terms of a right-of-control test. The test as stated would seem to imply that the Board looked solely at the pressured employer's "contract right to control" the work at issue at the time of the pressure to determine whether that pressure was primary or secondary. In fact, this is not now the Board's approach nor was it ever.

Rather, the Board has always proceeded with an analysis of (1) whether under all the surrounding circumstances the union's objective was work preservation and then (2) whether the pressures exerted were directed at the right person, i.e., at the primary in the dispute. For the reasons set forth, supra, we think this approach fully conforms with *National Woodwork* and is in fact compelled by Section 8(b)(4)(B). In following this approach, however, our analysis has not nor will it ever be a mechanical one, and, in addition to determining, under all the surrounding circumstances, whether the union's objective is truly work preservation, we have studied and shall continue to study not only the situation the pressured employer finds himself in but also how he came to be in that situation. And if we find that the employer is not truly an "unoffending employer" who merits the Act's protections, we shall find no violation in a union's pressures such as occurred here, even though a purely mechanical or surface look at the case might present an appearance of a parallel situation.

Even well before *Pipe Fitters 438*, the Board held that the right of control test does not apply to situations where an employer intentionally exposes himself to union pressure by engaging in conduct that seeks to avoid his contractual commitments under a union agreement. Such an employer cannot be deemed "an unoffending employer" entitled to the protection of Section 8(b)(4)(B). *Painters District Council 20 (Uni-Coat Spray Painting)*, 185 NLRB 930 (1970), cited with approval in *Pipe Fitter 438*.

In addition, since *Pipe Fitters 438,* the Board has emphasized that its' right-of-control test presumes that an employer is a neutral entitled to the protection afforded under Section 8(b)(4) if "when faced with a coercive demand from its union, (it) is powerless to accede to such a demand except by bringing some form of pressure on an independent third party." *Electrical Workers Local 501 (Atlas Co.)*, 216 NLRB 417 (1975). If the "pressured employer cannot himself accede to the union's wishes, the [union's] pressure is secondary undertaken for its effect elsewhere." Id.

Respondents' assert that its conduct seeking to enforce the provisions of the 2008 PCLCD at the VBT is lawful, work preservation activity. Work preservation agreements, and their enforcement, have been held lawful by the Supreme Court under the provisions of 8(b)(4) and 8(e) of the Act even where they have a severe impact on others. *NLRB v. ILA*, 447 U.S. 490 (1980) (*ILA I*); *NLRB v. ILA*, 473 U.S. 61 (1985) (*ILA II*). The existence of a lawful work preservation objective depends on whether, under all the surrounding circumstances, the union's objective is the preservation of unit work or whether its objective is tactically calculated to satisfy union objectives elsewhere. As the Supreme Court has explained, the "touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees." *National Woodwork*, 386 U.S. at 644–645.

In complaint paragraph 5, the General Counsel alleges that under Washington State regulations KMBT "must subcontract any electrical work to a licensed electrical contractor." The preponderance of the evidence fails to support that sweeping allegation. Instead, the evidence shows that KMBT has at least two alternatives. First, it was shown that KMBT could, if it chose to do so,

which it has not, seek authorization from the POV to perform the electrical maintenance work on the cargo-handling equipment in use at the VBT using its own employees. Second, it could obtain its own state electrical contractors' license, a relatively simple process. I find the claims that the Washington electrical code and regulations virtually prohibit KMBT from performing its own electrical maintenance and repair work wildly exaggerated. No evidence shows that the PMA employers seeking to hire large numbers of workers qualified to perform electrical work at the docks in Seattle and Tacoma are not in compliance with state law.

In my judgment, Respondents have a fairly claimable right under the 2008 PCLCD to the work described in the six grievances that they pursued all the way through to a final decision under the contractual grievance-arbitration procedure. The analysis of this issue begins with determining the appropriate unit to measure the traditional work performed the ILWU-represented workers. Where, as here, the ILWU represents a coastwise multiemployer unit, it is the work of the employees in that unit which determines the fairly claimable question, not an isolated unit of any individual PMA employer. *Sheet Metal Workers Local 162*, 207 NLRB 741, 749–750 (1973); *WA Boyle, United Mine Workers*, 179 NLRB 479, 483–484 (1969). Hence, it is the work performed by the ILWU mechanics in the multiemployer, coastwise unit that counts here, not the work performed only at the VBT. The preponderance of the evidence shows that ILWU-represented longshore mechanics perform both electrical and mechanical M&R work at numerous West Coast ports.

The 2008 PCLCD represents an integrated agreement by the parties to define "traditional" longshore work as applied to the coastwise bargaining unit. All provisions of section 1.7 and 1.81, as well as the two relevant LOUs must be read in conjunction in order to properly construe the parties' agreement in a reasonable, fair, and practical manner that accords with their intention at the time they entered into it. I find that this agreement structurally defines all M&R work, whether electrical or mechanical, as work to be performed by employees who belong to a coastwise unit represented by the Respondents unless a PMA employer qualifies for an exception based on either the Red-Circle LOU, or the Bulk Terminal Past Practice LOU.

KMBT as a member of the PMA is bound to this collective-bargaining agreement wherever it operates on the West Coast. For that reason, and as I have previously found that it is not seriously encumbered by Washington law, I reject any assertion that KMBT "is powerless to accede to" the demand that the electrical M&R work involved be assigned to the ILWU unit employees. In fact, it has now been contractually determined that it is obliged to do just that. Because all M&R work on cargo-handling equipment performed by PMA members at the West Coast ports is subject to the terms of the PCLCD, the past practices at the VBT only have relevance under the Bulk Terminal Past Practice LOU if they predate July 1978. Because the VBT did not come into existence until 1982, the past practices there are simply not relevant under the PCLCD. As Arbitrator Kagel noted, even KMBT recognizes this fact because it relies on and is accorded the benefit of the Bulk Terminal Past Practice LOU in its use of nonunit workers to perform its electrical M&R work at the bulk terminal it operates for the Port of Portland, directly across the Columbia River from the VBT.

For these reasons, I find the preponderance of the evidence establishes that the Respondents' efforts to compel KMBT to assign the electrical M&R work on the cargo-handling equipment at the VBT in accord with the requirements of the 2008 PCLCD has been primary activity from the outset. The PMA, KMBT's bargaining agent, agreed to define M&R work on cargo-handling equipment as traditional longshore work and to reserve that work for unit employees. In exchange, the ILWU agreed that it would not oppose the introduction of robotics and other technological advancements on the West Coast docks.

The evidence also establishes that the right of control over the assignment of the electrical M&R work at the VBT is vested in KMBT, not Accurate as alleged by the General Counsel. That control is exercised each time an agent of KMBT picks up the phone and calls Accurate instead the PMA/ILWU dispatch hall when in need of electrical M&R work on its cargo-handling equipment. Any meaningful and realistic right of control analysis must focus on that moment and the process that gave rise to it.

This record is totally devoid of evidence suggesting that Respondents seek to influence the decisionmaking by Accurate's managers when it comes to the workers Accurate assigns to perform the disputed work but they most decidedly care about KMBT's decision to call Accurate instead of the dispatch hall in the first place. Respondents have an agreement covering the M&R work with KMBT, not Accurate. I find merit to Respondents charge in their brief that "(b)y no stretch of the imagination is (KMBT) 'wholly unconcerned' with or a 'neutral' in the instant dispute." (R. Br., p. 36). This case involves a primary contract dispute the ILWU has with KMBT, nothing more and nothing less. KMBT is not obliged in any manner to use Accurate's employees to perform the disputed work but it does have a contractual obligation with Respondents that provide a substantial basis for the ILWU's claims here.

In this setting, the March 18, 2011, letter from Local 48's general counsel threatening to picket at the VBT if KMBT assigns the electrical M&R work at the VBT to the ILWU unit employees strikes me as an oddity. Local 48's claim to the electrical M&R work at the VBT is grounded on its agreement with Accurate, not KMBT, because it has no agreement with KMBT. If it did, KMBT would likely have acquired a red-circle exception under the PCLCD. Arguably, Local 48's March 18 threat that gave rise to the 10(k) proceeding violates Section 8(b)(4) as its object seeks to impose on KMBT a *de facto* union signatory agreement prohibited by Section 8(e). Furthermore, based on KMBT's historical practice at the POV, I strongly suspect that if certain select employees of Accurate who have regularly performed work at the VBT since 1998 obtained employment elsewhere, even Accurate's presence at the VBT would quickly fade into the past, as happened to its predecessors.

Of course, my conclusion that the Respondents' activities are in furtherance of a primary work-preservation object is at odds with the conclusion reached by the Board in the 10(k) proceeding. However, the findings and conclusions in the 10(k) proceeding are not *res judicata* in a subsequent 8(b)(4)(D) proceeding. *NLRB v. Plasterers Local 79*, 404 U.S. 116, 122 fn. 10 (1971). But even so, the far more expanded record before me

strongly supports my conclusion that, some findings and conclusions in the 10(k) decision merit reconsideration.

For example, the conclusions reached there that the two relevant letters of understanding included in the 2008 PCLCD have no application to this situation fails to appreciate their purpose. The Red-Circle LOU and the Bulk Terminal Past Practice LOU reflect the primary exceptions to the general assignment of all present and future M&R work found in section 1.71 et seq. to the unit employees. It strikes me as completely illogical to say they have no application simply because KMBT's operation at the VBT does not qualify for an exception under either of them. On the contrary, that fact is extremely meaningful when it comes to assessing the Respondents' work preservation defense.

In addition, the repeated mention that "present" M&R work constitutes the "traditional" longshore work of the unit employees appear to directly contradict the conclusion reached in the 10(k) decision that the parties' agreement about M&R work in section 1.71 et seq. is limited to that work resulting from the future introduction of robotics and other new technologies. Even the conclusion that the agreement makes no reference to electrical M&R work appears not to have considered the use of the word "electronics," once in section 1.73 and again in the Red-Circle LOU.[12] But the most notable support in this expanded record for finding that the construction of the 2008 PCLCD made in the 10(k) proceeding fails to reflect a fair and reasonable construction of the parties' intent may be found in the fact that the PMA, KMBT's representative, *never*, as near as I can tell from my review of the arbitration proceedings, advanced the claim that the M&R work reserved to the unit employees was limited to future electrical work resulting from the introduction of robotics and other new technologies, a potentially case-busting argument in that forum.

Respondents' rest their work preservation claims here on the principles articulated by the Supreme Court in the *ILA* cases. *NLRB v. Longshoreman ILA*, 447 U.S. 490 (1980) (*ILA 1*); *NLRB v. Longshoremen ILA*, 473 U.S. 61 (1985) (*ILA 2*). In those cases, the Supreme Court twice rejected the Board's highly restrictive view that the work preservation doctrine is confined only to work traditionally performed by unit employees especially in situations where the traditional way of doing the work involved is undergoing cataclysmic changes resulting from technological innovations. In the *ILA* cases the Supreme Court refined and expanded the work preservation doctrine to something well beyond those simple fact patterns found in the *National Woodwork* case, and its progeny, to include a recognition that changes transformative of an entire industry require that the law accord a reasonable accommodation to the collectively-bargained efforts of the parties to minimize the adverse impacts on the workers involved.

In the *ILA* cases, the parties, after lengthy, crippling strikes that debilitated the east coast shipping industry, ultimately agreed to a provision entitling workers represented by the ILA to the jobs involved in "stuffing" and "stripping" containers anywhere within a 50-mile radius of the New York piers.[13] The provision sought to compensate the unit workers for the massive loss of work bound to result from the transition to containerization from the old bulk-loading operation on the New York docks, the typical locus of longshore work. The ILA claimed that the agreement and its efforts to enforce it constituted lawful, work-preservation activity on behalf of the employees it represented when faced with a massive loss of jobs they faced.

ILA 1 concerned Board decisions rejecting the ILA's work-preservation defense that the collectively-bargained container rules requiring the use of unit employees to stuff and strip containers within a 50-mile radius of the pier unless performed by employees of the cargo owner. Such work, the Board found, had historically been performed by the employees of area freight consolidators so the rules and actions by the ILA constituted unlawful work-acquisition activity. The rationale for this conclusion rested on the theory that the container rules negotiated by the New York Shipping Association (NYSA) and the ILA required that the shipping companies cease providing containers to the consolidators who refused to use longshore labor in place of their own labor to stuff and strip the containers. The Board rejected the ILA's claim that this agreement, and its efforts to enforce it, constituted lawful work preservation activity finding that actions by the ILA seeking off-pier stuffing and stripping work constituted an unlawful work acquisition device. Hence, the Board found that the NYSA/ILA container rules violated Section 8(e), and the ILA's efforts to enforce them violated Section 8(b)(4)(B).

Upon consideration of the Board's decision, the Supreme Court first observed that the application of the work preservation agreements cannot be "limited solely to employees who respond to change with intransigence," a pejorative characterization it applied to the situations such as those found in the *National Woodwork* line of cases. The Court then went on to severely criticize the Board's application of the work-preservation doctrine:

> The Board's approach reflects a fundamental misconception of the work preservation doctrine as it has been applied in our previous cases. Identification of the work at issue in a complex case of technological displacement requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance. The analysis must take into account "all the surrounding circumstances," *National Woodwork,* 386 U.S. at 644, 87 S.Ct. at 1268, including the nature of the work both before and after the innovation. In a relatively simple case, such

[12] Even if it is assumed that the relevant portions of the PCLCD made no reference to electrical M&R work, the application of the common maxim of contract interpretation, proper in this circumstance, that the "greater includes the lesser" merits the conclusion that both electrical and mechanical M&R work are included. See, e.g., *Principles of Contractual Interpretation,* 60 Louisiana Law Review No. 3 at 783–786 (2000); *Principles of Contract Interpretation: Interpreting Collective Bargaining Agreements*, 16 Cap. U. L. Rev. 31, 44–45 (1986-1987). But the fact that the provisions dealing with M&R work twice refers to "electronic" work as unit work warrants the conclusion that the parties understood that electrical M&R work related to the operation of cargo handling equipment constituted unit work.

[13] The shipping companies own or lease virtually all of the containers used in the industry. They provide them to customers with marine shipping needs. These customers either load (stuff) or unload (strip) the containers themselves or arrange for such services with other entities.

as *National Woodwork* or *Pipefitters*, the inquiry may be of rather limited scope. Other, more complex cases will require a broader view, taking into account the transformation of several interrelated industries or types of work; this is such a case. Whatever its scope, however, the inquiry must be carefully focused: to determine whether an agreement seeks no more than to preserve the work of bargaining unit members, the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work, and examine the relationship between the work as it existed before the innovation and as the agreement proposes to preserve it.

The Board, by contrast, focused on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping. It found that work was similar to work those employees had done before the innovation and concluded that ILA was trying to acquire the traditional work of those employees. That conclusion ignores the fact that the impact of containerization occurred at the interface between ocean and motor transport; not surprisingly, the work of stuffing and stripping containers is similar to work previously done by both longshoremen and truckers. The Board's approach would have been entirely appropriate in considering an agreement to preserve the work of truckers' employees, but it misses the point when applied to judge this contract between the ILA and the shipowner employers.

By focusing on the work as performed, after the innovation took place, by the employees who allegedly have displaced the longshoremen's work, the Board foreclosed-by definition-any possibility that the longshoremen could negotiate an agreement to permit them to continue to play any part in the loading or unloading of containerized cargo. For the very reason the Rules were negotiated was that longshoremen do not perform that work away from the pier, and never have. Thus, it is apparent that under the Board's approach, in the words of the Court of Appeals, the "work preservation doctrine is sapped of all life." 198 U.S. App.D.C. at 176, 613 F.2d at 909.

That this is so is vividly demonstrated by considering how different would have been the results in *National Woodwork* and *Pipefitters* if we had adopted the approach now chosen by the Board. In *National Woodwork* we held that carpenters could seek to preserve their traditional work of finishing blank doors at the construction jobsite by prohibiting the employer, a general contractor, from purchasing prefinished doors from the factory. If we had followed the Board's current approach in analyzing the agreement, we would have defined the work in controversy as "the finishing of blank doors away from the construction site." That work, of course, had never been done by the carpenters employed by the general contractor, but had been performed by the employees of the door manufacturers since before the adoption of the agreement. We would perforce have determined that the object of the agreement was work acquisition, not work preservation.

Similarly, *Pipe Fitters* involved an agreement between a subcontractor and a pipefitters' union that pipe threading and cutting were to be performed on the jobsite. Relying on the agreement, the union refused to install climate-control units whose internal piping had been cut, threaded, and installed at the factory. The Board held that the provision was a lawful work preservation agreement, but that the refusal to handle the prepiped units was an unfair labor practice because the units had been specified by the general contractor and the subcontractor had no power to assign the employees the work they sought. Neither the Court of Appeals nor this Court questioned the validity of the work preservation clause but for the fact that it was enforced against an employer who could not control the work. Under the Board's current approach, however, the "work" would have been "cutting, threading, and installing pipe in climate-control units at the factory." Since the bargaining unit employees had never performed that work, there would have been no reason to reach the "right of control" issue.

Thus the Board's determination that the work of longshoremen has historically been the loading and unloading of ships should be only the beginning of the analysis. The next step is to look at how the contracting parties sought to preserve that work, to the extent possible, in the face of a massive technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members. This case presents a much more difficult problem than either *National Woodwork* or *Pipefitters* because the union did not simply insist on doing the work as it had always been done and try to prevent the employers from using container ships at all-though such an approach would have been consistent with *National Woodwork* and *Pipefitters*. Instead, ILA permitted the great majority of containers to pass over the piers intact, reserving the right to stuff and strip only those containers that would otherwise have been stuffed or stripped locally by anyone except the beneficial owner's employees. The legality of the agreement turns, as an initial matter, on whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere. (Footnote omitted.)

I agree with the Respondents' contention that the 10(k) decision here repeated the fundamental error the Supreme Court addressed in *ILA I*. In this case there is ample evidence to conclude that the 2008 PCLCD contains the parties' bargain that permits the PMA employers to install innovative equipment and technologies on the west coast ports in exchange for strictly defined limitations on the use of nonunit employees by PMA employers to perform their traditional M&R work on cargo handling equipment. This arrangement is far narrower than the Supreme Court approved as a work preservation in the *ILA* cases. Thus, the Bulk Terminal Past Practice LOU placed certain limits on the past practices that could be recognized under the PCLCD in

anticipation of the need to have M&R work available that could be performed by equipment operators and others displaced by introduction of robotics and other technologies.

Hence, I find the work preservation aspects of the PCLCD focuses narrowly on the work employees in the coastwise ILWU unit already perform at many locations and will be performing in the future. According virtually insurmountable primacy to the past practice at a single location of a coastwise bargaining unit simply strikes me as unsupportable under the *ILA* cases. Contractually, the Bulk Terminal Past Practice LOU has monumental significance here as it precluded KMBT from continuing to follow its past practice of using nonunit employees to perform bargaining unit work. i.e., electrical M&R work on the cargo handling equipment.

In addition, the approach taken in the 10(k) decision appears to misapply the strict definition of "work acquisition" activities as set forth in *ILA II*. There the Supreme Court addressed that subject in the following manner:

> However, while we acknowledge that the (preservation/acquisition) dichotomy may be susceptible to wooden application, we are not prepared to abandon it. The "acquisition" concept in the work preservation area originated in *National Woodwork,* where we distinguished *Allen Bradley,* 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945), as involving "a boycott to reach out to monopolize jobs or acquire new job tasks *when [union members'] own jobs are not threatened.*" 386 U.S., at 630-631, 87 S.Ct., at 1260–1261 (emphasis added); see n. 15, *supra.* An agreement bargained for with the objective of work preservation in the face of a genuine job threat, however, is not "acquisitive" in the sense that concept was used in *National Woodwork,* even though it may have the incidental effect of displacing work that otherwise might be done elsewhere or not be done at all. See Pipefitters, 429 U.S., at 510, 526, 528–529, n. 16, 97 S.Ct., at 894, 902, 902–903, n. 16. Yet as the facts of *Allen Bradley* demonstrate, an agreement that reserves work for union members may also have an unlawful secondary objective. The preservation/acquisition dichotomy, when employed with the *Allen Bradley* distinction firmly in mind, can serve the useful purpose of aiding the inquiry regarding unlawful secondary objectives when an agreement attempts to secure work but "jobs are not threatened."

ILA II, 473 U.S. 61, 79 fn. 19. Here, the 2008 PCLCD clearly describes a genuine threat to the unit jobs, to wit, the introduction of robotics and other technological advances likely to displace a large number of equipment operators by turning the loading and unloading of cargo into an unmanned operation. By its very terms, the 2008 PCLCD seeks to limit the more recent outsourcing of unit jobs to nonunit employees in order to diminish these looming adverse consequences on unit employees who face the loss of the jobs they have been performing for years. For that reason, I fail to see how a unlawful work-acquisition objective can be inferred from the enforcement of the terms of that agreement even where it might result in the displacement of nonunit workers currently performing the electrical M&R work at the VBT. Based on the Supreme Court's perception of the "preservation/acquisition dichotomy" quoted above, I find any inference of a secondary objective would not be warranted in this case.

I find on the basis of the expanded record in this case, that the Respondent's work preservation defense warrants dismissal of this complaint in its entirety including the allegations pertaining to the physical blocking of Accurate's employees from the work they were called to do at the VBT on October 18 and 21, 2013. Although their conduct was clearly unprotected under Section 7 of the Act, it did not violate Section 8(b)(4)(B) and (D) as alleged in this complaint. Accordingly, my recommended order will provide for the dismissal of this complaint in its entirety.[14]

CONCLUSION OF LAW

1. The General Counsel failed to prove by a preponderance of the evidence that Respondents violated Section 8(b)(4)(ii)(B) and (D) as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 13, 2014

[14] In view of this conclusion, I find it unnecessary to reach the Respondents' alternate contention about the alleged demand that KMBT prepare a job description in September 2012 for Local 4 to post at its hall.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.