

Nos. 19-70297, 19-70604, 19-71471

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION;
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 4,
Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

KINDER MORGAN TERMINALS; INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 48,
Intervenors.

PACIFIC MARITIME ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petitions for Review and Cross-Application for
Enforcement of an Order of the National Labor Relations Board

**REPLY BRIEF OF INTERNATIONAL LONGSHORE
AND WAREHOUSE UNION AND ILWU LOCAL 4**

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I. INTRODUCTION

The National Labor Relations Board (“Board”) fails to successfully defend its decisions at issue in this appeal.

The Board’s interpretation of the ILWU collective bargaining agreement, which is subject to *de novo* review, ignores the plain language and the common understanding of the parties. When the agreement is properly construed, as it was by the ALJ, the Board’s decision under Section 10(k) of the National Labor Relations Act and resulting decisions under Sections 8(b)(4)(B) and (D) topple like a house of cards. Indeed, the Board appears to agree that rejection of the Board’s contract interpretation means that the decisions must be vacated.

The Board Attorneys retreat from the other principal arguments that the Board relied on to support its decisions. The Board Attorneys offer almost no defense of the Board’s position that ILWU’s work preservation claim in the 10(k) decision was entitled to preclusive effect in the unfair labor practice proceeding. They concede that under the authorities from this and other Circuits, the Board looks to the work of the multi-employer bargaining unit as a whole and not just work for Kinder Morgan in Vancouver, Washington, when evaluating ILWU’s work preservation claim under Section 8(b)(4)(B). They offer no rationale for applying a different rule in this case. The Board Attorneys agree that *NLRB v. International Longshoremen's Association (ILA I)*, 447 U.S. 490 (1980), and *NLRB*

v. International Longshoremen's Association, (ILA II), 473 U.S. 61 (1985), guide the analysis of work preservation, but fail to justify the Board's rejections of their teachings. Just like the wave of technological change and resulting job losses that longshore workers faced in those cases, longshore workers today face the threat and the growing reality of widespread job losses due to automation. If unions representing such workers cannot reach agreements with employers to mitigate job losses caused by changing technologies without facing NLRB prosecution, then unions will have little choice but to simply block the technological change. This is the inefficient result that the Supreme Court counseled the Board against in *ILA I* and again in *ILA II*. It seems the Board did not receive the message.

Finally, the Board fails to justify its decision to preclude ILWU from re-litigating its collusion defense to the 10(k) proceeding. The Board Attorneys try to downplay the evidence, but cannot legitimately dispute that a finder of fact could determine that the proceeding was a "set-up," as Kinder Morgan itself indicated in its private correspondence with IBEW.

For the reasons shown herein, in ILWU's opening brief and in the briefs of Pacific Maritime Association, the Board's decisions should be vacated.

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II. ARGUMENT

A. **The Board’s 10(k) Decision Cannot Stand Because it Hinges on an Erroneous Interpretation of the ILWU Collective Bargaining Agreement, which the Court Reviews *De Novo*.**

In the unfair labor practice case, the Board found ILWU liable under two theories – a secondary boycott theory under section 8(b)(4)(B) and an inter-union jurisdictional dispute theory under section 8(b)(4)(D). As a matter of law, liability under Section 8(b)(4)(D) requires a valid 10(k) award. *E.g., NLRB v. ILWU*, 378 F.2d 33, 36 (9th Cir. 1967). Here, the Board chose to pin ILWU’s liability under both Sections 8(b)(4)(B) and (D) to the Board’s prior Section 10(k) decision to award the work in dispute to IBEW. Thus, if the Court finds the 10(k) award improper, the Court also must reject the unfair labor practice decision. The Board Attorneys appear to agree that this is so.

As explained in ILWU’s opening brief, the Board’s 10(k) decision cannot stand because, among other things, the Board misinterpreted the ILWU collective bargaining agreement when it found that it did not cover the work in dispute. Brief of ILWU, Dkt 36 (“ILWU”) at 28-33.¹ The Board Attorneys agree that the Board’s interpretation of the PCLCD is subject to *de novo* review. Brief of NLRB, Dkt 55 (“Bd.”) at 36. The Board Attorneys also do not deny that a 10(k) decision

¹ Citations to briefs refer to the internal page numbers in the document and not the page numbers assigned in ECF.

that rests on an erroneous interpretation of a collective bargaining agreement must be vacated. *See* Bd. at 42. This is why this Court vacated and remanded the dispute in *NLRB v. ILWU*, 504 F.2d 1209, 1217 (9th Cir. 1974), a case the Board Attorneys make no effort to distinguish. In that case as in this one, the Board had erroneously interpreted the ILWU agreement in a 10(k) proceeding and awarded the disputed work to a union that (like IBEW) had no contract with the employer. ILWU at 30-31.

The Board Attorneys' arguments in support of the 10(k) decision's interpretation of the PCLCD do not hold up. First, while the Board Attorneys acknowledge the relevance of the parties' "common understanding" of a collective bargaining agreement's meaning (Bd. at 40 n.23), the Board Attorneys ignore the undisputed common understanding of the parties to the agreement at issue here. ILWU and PMA agree that it covers the disputed work and requires Kinder Morgan to assign the work to ILWU. Based on this common understanding, an ILWU mechanic began performing the disputed electrical work for Kinder Morgan in 2014. The Board cites no case for the proposition that the Board has the authority to ignore and give no weight to the common understanding of the parties to a contract and impose the agency's own interpretation. Such a remarkable notion completely undermines the ability of parties to resolve their disputes peacefully and with certainty through collective bargaining and is contrary to the

purposes of the NLRA. 29 U.S.C. § 151 (“It is hereby declared to be the policy of the United States to ... encourage[e] the practice and procedure of collective bargaining and ... protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”).

The fact that ILWU and PMA’s common understanding was reached through arbitration after the 10(k) decision issued does not undercut its significance in determining the meaning of the agreement. Arbitration is the “vehicle by which meaning and content are given to the collective bargaining agreement.” *Steelworkers v. Warrior Gulf Co.*, 363 U.S. 574, 581 (1960). In addition, maintaining and arbitrating its grievances against Kinder Morgan was ILWU’s legal mechanism for challenging the Board’s 10(k) decision, which is not subject to direct appeal. *PMA v. NLRB*, 827 F.3d 1203, 1209 (9th Cir. 2016).

Second, turning to the language of the PCLCD, the Board argues that it only covers “new work based on the introduction of new technologies” or work performed “years in the future.” Bd. at 39, 41. The Board does not and cannot reconcile this argument with the plain language of Sections 1.72 and 1.73, which specifically cover not only “forthcoming” work, but work on “present” equipment and “its electronics.” ILWU Excerpts of Record (“ER”) 134-135; *see Pierce Cty.*

Hotel Emp. & Rest. Emp. Health Tr. v. Elks Lodge, B.P.O.E. No. 1450, 827 F.2d 1324, 1327 (9th Cir. 1987) (holding that plain language governs interpretation of collective bargaining agreement).

Third, the Board fails to recognize that even under its reading, the contract covers the disputed work. This case came before the NLRB “years in the future” from when the 2008 agreement was negotiated. Now almost twelve years have passed. Throughout that time, PMA member companies have had the benefit of the relevant contract terms, including the right to eliminate traditional longshore work through automation. A number of companies have done so. “[T]he future erosion of ILWU’s scope of work,” for which the relevant contract provision sought to compensate ILWU, has occurred and is continuing. Bd. at 40.

Fourth, the Board Attorneys say that their factual findings about the contract are entitled to deference even under *de novo* review. *Id.* This argument does not help the Board here. The points above showing that the Board’s interpretation was wrong do not turn on disputed facts. In any event, the ALJ who actually heard the testimony about the contract, its negotiation and its meaning, found that the agreement covered the work in dispute. ER 10. Thus, even if the Board’s contrary factual findings were relevant to determining the contract’s meaning, they would not be entitled to deference. *E.g., Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286, 291 (9th Cir. 2011) (holding that court’s “review is more ‘searching’ in instances

where the Board's findings or conclusions are contrary to those of the ALJ”).

Because the Board’s interpretation of the PCLCD was wrong, the 10(k) decision cannot stand. Without a valid 10(k) decision, the unfair labor practice decision also cannot stand. The Board’s erroneous interpretation of the PCLCD requires that both the 10(k) decision and the unfair labor practice decision be vacated.

B. The Board’s Disregard of Relevant Authorities under Section 8(b)(4)(B) and the Board Attorneys’ Concessions as to the Lack of Legal Support for the Board’s Analyses Show that the Court Must Vacate the Board’s Decision under Section 8(b)(4)(B).

The Board’s brief makes key concessions showing why the decision on the Section 8(b)(4)(B) claim must be vacated. Unable to defend the Board’s analysis, the Board Attorneys attempt to raise new arguments not considered by the Board itself. These are not properly before this Court and, in any event, are not supported by the law or substantial evidence in the record.

1. The Board Attorneys’ Failure to Defend the Board’s Preclusion Ruling Shows that it Was Legally Erroneous and Requires that the Unfair Labor Practice Decision be Vacated.

First, the Board Attorneys make no real effort to defend the Board’s erroneous conclusion that the 10(k) decision was “dispositive” of the claims under either Section 8(b)(4)(B) or (D). The Board Attorneys relegate their argument to a conclusory sentence in a footnote. Bd. at 25 n.10.

Unable to defend the preclusion ruling, the Board Attorneys try to characterize it as “largely immaterial” because the Board “expressly reconsidered its prior analysis ... of work preservation” anyway. *Id.* But if the Board’s preclusion ruling was wrong, as the Board Attorneys suggest and as the ILWU showed in its opening brief, then it is for the Board itself to decide whether this is “immaterial” or “largely immaterial” (whatever that may mean) to the Board’s decision.

The Board decision itself shows that the preclusion ruling cannot be segregated from the rest of the decision. Standing on its own, preclusion was the Board’s first basis for finding that ILWU violated Sections 8(b)(4)(B) and (D). ER 3 (Section A of the Board’s decision). As the Board reached other issues in Section B of the decision, the Board’s 10(k) decision remained the touchstone. *E.g.*, ER 4 (rejecting the ALJ’s decision due to its “conflict[s] with the Board’s 10(k) decision”); *id.* 5 (discussing whether the evidence “calls into question the Board’s conclusion in the 10(k) proceeding”). Thus, rejection of the Board’s preclusion ruling requires that the unfair labor practice decision be vacated and the matter remanded to determine whether the decision still stands in its absence.

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2. The Board Attorneys Implicitly Concede that the Board Departed from Precedent Without Justification When it Held that the Work of the Coastwise Multi-Employer Unit Was Not Relevant to Determining Whether ILWU's Claim for the Work was Secondary Under Section 8(b)(4)(B).

The Board Attorneys implicitly concede that the Board's decision applied the wrong legal standard when analyzing whether ILWU had a work preservation claim to the work under Section 8(b)(4)(B) and thus a lawful primary objective in seeking work from its employer. In its decision, the Board lumped together the claims under Section 8(b)(4)(B) and (D) and said that the relevant question for the work preservation analysis under both was whether ILWU had performed the disputed work for "the specific employer [Kinder Morgan], not whether employees in the multiemployer bargaining unit as a whole have performed the disputed work." ER 4. While the Board Attorneys make some effort to defend this aspect of the decision under Section 8(b)(4)(D), they make no real effort to defend it under Section 8(b)(4)(B). They agree that the Board and courts in this Circuit and others have consistently looked to the work of the multi-employer bargaining unit as a whole when analyzing primary versus secondary activity and work preservation "in cases arising solely under Section 8(b)(4)(ii)(B)." Bd. at 30, 30 n.14 (collecting cases); e.g., *Maui Trucking Inc. v. Opt'g Eng'rs Local Union No. 3*, 37 F.3d 436, 439 (9th Cir. 1994) (holding that the "relevant work universe" for analyzing union's work preservation claim "was coextensive with the bargaining

unit,” not limited to the single location where the dispute arose). Neither the Board nor its attorneys offer any justification for deviating from this precedent in this case. For this reason too, the decision under Section 8(b)(4)(B) must be vacated.

While declining to defend the propriety of the Board’s decision in this respect, the Board Attorneys nonetheless continue to apply the Board’s unsupported test in attempting to defend the result. The Board Attorneys concede that “longshoremen have long performed ‘maintenance and repair’ work on cargo-handling equipment,” but insist there has been a “traditional exclusion of electrical work from ILWU work.” Bd. at 46. The record evidence of the work of the bargaining unit as a whole, which the law required the Board to consider, does not contain substantial evidence showing the traditional exclusion of electrical M&R. The ALJ found “credible evidence that unit employees who work for other PMA employers at other West Coast ports regularly perform M&R work on cargo-handling equipment.” ER 8-9. This included:

- “[M]ultiple 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.... [M]any of the solicitations seek to fill numerous openings, a few up to 40” (ER 9 [ALJ]);

- Uncontradicted testimony from the employers’ collective bargaining representative that “longshore workers ... do electrical work” and offering examples (ER 163-164) [Marzano];²
- Uncontradicted testimony from an ILWU official that ILWU “mechanics do electrical work everywhere” and offering examples (ER 102-104 [Sundet]);
- “[C]redible” testimony from an ILWU mechanic that he performed all of the electrical work at the Vancouver terminal before Kinder Morgan took over the operation (ER 8-9 [ALJ]);
- Uncontradicted testimony from an ILWU mechanic working for a different employer in Vancouver that he has long performed every type of electrical M&R work in dispute at Kinder Morgan in Vancouver (ER 49-58, 221-245, 379-406 [Van Husen]); and
- Uncontradicted testimony from an ILWU mechanic who worked at Kinder Morgan’s facility in Southern California that he and other ILWU mechanics exclusively performed the disputed electrical work at the facility until it closed and then performed electrical work at other facilities after (ER 195-200 [Antalos]).

Because the Board failed to consider this work of the bargaining unit as a

² The Board Attorneys are simply incorrect to chide ILWU for not providing “employer testimony.” Bd. at 34.

whole or acknowledge and reconcile its departure from precedent, the decision under Section 8(b)(4)(B) must be vacated.

3. The Board Attorneys Cannot Make Up for the Board’s Failure to Analyze Whether ILWU’s Actions Were “Tactically Calculated” to Achieve Objectives Outside of Its Relationship with Kinder Morgan and PMA.

Unable to defend the Board’s legal analysis of Section 8(b)(4)(B), the Board Attorneys instead rely on arguments and findings that the Board itself did not make. These supply no basis for upholding the decision and are not properly considered. The Board Attorneys say that the ILWU’s pursuit of contractual grievances and work stoppages against Kinder Morgan to obtain the disputed work violated Section 8(b)(4)(B) because they were secondary, meaning that they were targeted at the labor relations of Accurate Electric rather than Kinder Morgan. Bd. at 55-56. But the Board itself never made this essential finding. *See* ER 5 (holding that ILWU violated Section 8(b)(4)(B) but making no finding that ILWU’s conduct was secondary).

As the lead cases cited by the Board explain, Section 8(b)(4)(B) prohibits “*secondary* activities whose object is to force one employer to cease doing business with another.” *ILA I*, 447 U.S. at 503 (emphasis added); *see also ILA II*, 473 U.S. at 78–79 (“[Section] 8(b)(4)(B) ... prohibit[s] secondary, but not primary, union activity” with a cease-doing-business objective). To determine whether activity is primary or secondary, “the relevant inquiry ... is ... whether the union's

efforts are directed at its own employer on a topic affecting employees' wages, hours, or working conditions that the employer can control, or, instead, are directed at affecting the business relations of neutral employers and are 'tactically calculated' to achieve union objectives outside the primary employer-employee relationship." *ILA II*, 473 U.S. at 81 (citations omitted). The Board did not conduct this necessary analysis.

The ALJ who heard the testimony found the "record ... totally devoid of evidence suggesting that [ILWU] seek[s] to influence the decision-making by Accurate Electric's managers when it comes to the workers Accurate Electric assigns to perform the disputed work" and found "any inference of a secondary objective would not be warranted." ER 16, 19. The Board did not reject these findings or even acknowledge them.

For this reason also, the unfair labor practice decision under Section 8(b)(4)(B) must be vacated.

4. The Board Attorneys' Arguments that ILWU's Objective was Secondary Rely on the Wrong Legal Standards and Ignore Substantial Evidence in the Record.

Even if the Board's failure to find ILWU's actions secondary could be corrected by the arguments of counsel on appeal, the record does not permit an inference of a secondary object in this case. There is not substantial evidence to support the notion that ILWU's efforts to prevent Kinder Morgan from

subcontracting were “‘tactically calculated’ to achieve union objectives outside the [ILWU’s] primary employer-employee relationship” with Kinder Morgan and the PMA multi-employer group. *See ILA II*, 473 U.S. at 81.

Echoing the Board’s analysis in the 10(k) decision, the Board Attorneys claim that ILWU failed to meet an invented burden of proving a “work preservation” as opposed to a “work acquisition” objective. Bd. at 55. This is not the law.

As ILWU showed in its opening brief, the Supreme Court has instructed that the work-acquisition-versus-preservation distinction is not a useful means for distinguishing secondary from primary activity “when union members’ own jobs are threatened.” *ILA II*, 473 U.S. at 79 n.12 (explaining that “an agreement bargained in the face of a genuine job threat ... is not ‘acquisitive’” in the sense of being secondary). “The Supreme Court in *National Woodwork* made absolutely clear that, in enacting section[] ... 8(b)(4)(B) ..., Congress did not intend to prohibit a collective bargaining agreement that has as its ‘sole objective the protection of union members from a diminution of work flowing from changes in technology.’” *Am. Trucking Associations, Inc. v. N.L.R.B.*, 734 F.2d 966, 980 (4th Cir. 1984) *aff’d ILA II*, 473 U.S. 61 (quoting *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 648-50 (1967) (Harlan, J., concurring)). Here, the Board Attorneys do not appear to deny that “PMA’s future implementation of robotics ... could

eventually displace nearly all traditional longshoremen’s work” and that this was the reason for 2008 contract modifications. Bd. at 42. Thus, characterizing ILWU’s actions as seeking to “acquire” rather than “preserve” work for the bargaining unit fails to give rise to an inference that ILWU’s objective was secondary.

Procedurally, the Board is also wrong. While sometimes described as a defense, work preservation is a way of showing that the union’s conduct is primary. *See ILA II*, 473 U.S. at 81 (“The various linguistic formulae and evidentiary mechanisms ... employed to describe the primary/ secondary distinction are not talismanic nor can they substitute for analysis.”); *see also Longshoremen ILWU Local 6 (Golden Grain)*, 289 NLRB 1, 2 (1988) (holding that work preservation under Section 8(b)(4)(D) defeats an element of the claim). Actions that have a primary object for whatever reason do not violate Section 8(b)(4)(B) in the first place. *ILA I*, 447 U.S. at 503 (Section 8(b)(4)(B) “reach[es] only agreements with secondary objectives.”); *accord Nat’l Woodwork*, 386 U.S. at 632 (“Congress ... took pains to confirm the limited application of the section to such ‘secondary’ conduct.”).

The Board insists that a union violates Section 8(b)(4)(B) unless it produces substantial evidence that it performed the work in dispute or its functional equivalent on a “widespread” basis or as a “regular practice.” Bd. at 33. This is

not the law either. Analysis of a union's traditional work patterns is relevant because a "secondary object might be inferred" when a union "seeks to claim work so different from that traditionally performed by the bargaining unit employees." *ILA II*, 473 U.S. at 81 (quoting *Am. Trucking Associations, Inc.*, 734 F.2d at 980).

Here, the Board Attorneys acknowledge that "longshoremen have long performed 'maintenance and repair' work" and that at least some ILWU mechanics in Vancouver and elsewhere have performed electrical M&R work in particular. Bd. at 31, 45. The Board fails to explain how the disputed electrical maintenance and repair work on the same equipment is "so different from that traditionally performed by the bargaining unit employees" that a secondary object could be inferred.

The Board Attorneys and IBEW attach great weight to the fact that at least some of the disputed work requires an electrical license. The ALJ found that the need for an electrical license did not impede Kinder Morgan's ability to assign the work to the ILWU. He called the Board's, Kinder Morgan's and IBEW's contrary arguments "wildly exaggerated." ER 15-16. The Board did not reject nor even address these findings. Thus, the need for a license does not support the decision the Board issued in this case.

Even if the Board had considered this issue, the need for an electrical license would not permit an inference that ILWU's actions were "'tactically calculated' to

achieve union objectives outside the primary employer-employee relationship.”
See ILA II, 473 U.S. at 81. The record contains substantial, uncontradicted evidence that ILWU has workers with electrical licenses, including the licensed master ILWU electrician whom Kinder Morgan ultimately hired. ER 115, 245, 249-250.

Even if ILWU were required to show that it performed the disputed work on a “widespread basis,” substantial evidence supports this conclusion. The ALJ found “that unit employees who work for other PMA employers at other West Coast ports regularly perform electrical M&R work on the cargo-handling equipment.” ER 8-9. The Board only rejected this conclusion by ignoring or distorting significant amounts of record evidence.

Finally, the Board Attorneys attempt to defend the decision on the Section 8(b)(4)(B) claim with a red herring. They cite the rule that activity is secondary and unlawful under Section 8(b)(4)(B) where a union seeks to pressure an employer that has no right to control the assignment of the work in dispute. Bd. at 55, 56. Here, the ALJ found “that the right of control over the assignment of the electrical M&R work ... is vested in [Kinder Morgan], not Accurate Electric as alleged by the General Counsel.” ER 16. The Board declined to reach the ALJ’s conclusion on this issue. ER 5. Thus, the Board Attorneys’ legal assertion is a distraction not relevant to the matter on appeal.

For all of these reasons, the Board's decision that ILWU violated Section 8(b)(4)(B) must be vacated.

C. The Board's Decision that ILWU Violated Section 8(b)(4)(D) Must be Vacated.

The Court must vacate the Board's decision under Section 8(b)(4)(D) for many of the same reasons that require the Court to vacate the decisions under 10(k) and 8(b)(4)(B).

First, as described above in section B.1, because the Board's preclusion ruling cannot stand, the unfair labor practice decision under Section 8(b)(4)(D) also must be vacated.

Second, the Board applied the same work preservation analysis to the claim under Section 8(b)(4)(B) as the claim under Section 8(b)(4)(D). ER 5; *see also* Bd. at 19 (describing the need to establish a “secondary” objective” to establish liability under Section 8(b)(4)(D)). Because the Board's analyses under Section 8(b)(4)(B) rest on legal errors and disregard substantial record evidence for the reasons discussed above, the analyses under Section 8(b)(4)(D) do too. The decision must be vacated for the same reasons.

The Board Attorneys attempt to draw only one significant distinction between the work preservation authorities under the two theories. They point out that the numerous cases rejecting the Board's focus on work for the “the specific employer” rather than for “the multiemployer bargaining unit as a whole” arose

under Section 8(b)(4)(B) and (e) and not Section 8(b)(4)(D). Bd. at 29-30 n.14 (collecting cases); ER 4. The Board in its decision in this case made no distinction between 8(b)(4)(B) and (D), treated work preservation as requiring the same analyses under both theories, and relied on cases decided under Section 8(b)(4)(B), (D) and (e) interchangeably. ER 4-5. Thus, the Board Attorneys' argument does not save the Board's decision.

But the Board Attorneys too undermine their own argument. They rely on cases decided under Section 8(b)(4)(B) and (e) as the sources of the work preservation analysis under Section 8(b)(4)(D), including *ILA I*. E.g., Bd. at 26, 3-47 (citing *ILA I*, 447 U.S. 490, and *ILA II*, 473 U.S. 61, as authority for work preservation analysis under Section 8(b)(4)(D)); *id.* at 25 (citing *Nat'l Woodwork*, 386 U.S. 635, as authority for the same). Under *ILA I*, 447 U.S. at 507, analysis of work preservation focuses on "the work of the bargaining unit employees," which here is longshore workers in the coastwide, multi-employer unit. Thus, the Board Attorneys' authorities support using the same analysis for both theories. The Board Attorneys offer no reason to apply a different one.

Finally, the Board Attorneys offer no cogent rationale or significant authority to defend the decision to deny ILWU the ability to litigate its collusion defense to Section 8(b)(4)(D) in the unfair labor practice adjudication. The Board Attorneys concede that "collusion is relevant in a Section 10(k) proceeding to

determine whether a jurisdictional dispute exists that the Board must referee.” Bd. at 49. They further agree that a union can only be found to have violated Section 8(b)(4)(D) if it acts contrary to a 10(k) award. *Id.* at 21. Thus, if there is no valid 10(k) decision because the proceeding was the product of collusion, there can be no violation of Section 8(b)(4)(D).

Differing from the Board Attorneys, Kinder Morgan argues that collusion does not matter because the Board still had jurisdiction to hear the 10(k) dispute based on ILWU’s pursuit of grievances against Kinder Morgan. Kinder Morgan says these were a “proscribed means to assert [ILWU’s] claim to the work in dispute.” Brief of Kinder Morgan, Dkt 66 at page 21 (citation omitted). Kinder Morgan is wrong as a matter of law. The Board’s 10(k) decision rested entirely on IBEW’s alleged picketing “threat,” not any actions of ILWU. ER 21. This is because “a union’s pursuit of work assignment grievances ... before issuance of a 10(k) decision concerning the disputed work is not coercive and therefore does not violate Section 8(b)(4)(D).” *E.g., Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273, 277 (1992), *enf’d NLRB v. Ironworkers Local 433*, 46 F.3d 1143 (9th Cir. 1995). It follows that ILWU’s grievances did not give the Board jurisdiction to resolve the dispute under Section 10(k). *Id.*

The Board Attorneys say it is “well-established” that collusion cannot be re-litigated once it is rejected in a 10(k) proceeding. Bd. at 49. But their discussion

shows that this is not true. The Board Attorneys acknowledge that cases have permitted re-litigation of collusion. *Id.* at 50-51 n.29-30 (citing *Constr. & Gen. Laborers Local 190 v. NLRB*, 998 F.2d 1064, 1066-67 (D.C. Cir. 1993) (remanding to Board for re-litigation of collusion); *Marble Polishers Local 47-T (Grazzini Bros.)*, 315 NLRB 520 (1994) (permitting re-litigation of collusion but rejecting defense on dispositive motion on the merits)). The Board Attorneys' authority for the allegedly "well-established" proposition is one phrase in a footnote containing no explanation or analysis. *Operative Plasterers' & Cement Masons' Int'l Ass'n (Standard Drywall, Inc.)*, 357 NLRB 1921, 1923 n.12 (2011). This brief, conclusory statement is too slim a reed, particularly given the contrary authority and the facts of this case.

The unfair labor practice adjudication was ILWU's first and only opportunity to offer live witness testimony that could be evaluated for credibility. This is because, as explained in ILWU's opening brief, the 10(k) decision is made without live testimony. No fact-finder was present at the 10(k) hearing to evaluate the credibility of testimony on the bona fides of IBEW's picketing threat. The Board has held that issues raised in a 10(k) proceeding may be re-litigated in the unfair labor practice adjudication when they require evaluation of credibility. *Golden Grain*, 289 NLRB at 2. The Board Attorneys offer no response.

The Board Attorneys argue that the evidence was insufficient to show

collusion even if it had been litigated. This argument may be disregarded entirely. It is for the Board to decide whether the evidence is sufficient or not.

Here, the evidence of collusion could hardly be more glaring. The documentary record shows that Kinder Morgan solicited the picketing “threat” from IBEW for the purpose of trying to avoid arbitration of ILWU’s grievances and that IBEW made the “threat” according to Kinder Morgan’s instructions. ER 123-125, 407, 409. These facts combined with the other circumstances are such that a reasonable fact-finder could easily conclude that the “threat” was a sham. Indeed, although the ALJ refused to allow ILWU to litigate collusion, he recognized the suspiciousness of the circumstances, describing the “threat” letter from IBEW counsel to Kinder Morgan counsel as an “oddity.” ER 16. As the ALJ explained, IBEW had no contractual relationship with Kinder Morgan nor claim to the work and arguably violated Section 8(e) of the NLRA by threatening to picket. Kinder Morgan’s and Accurate Electric’s relationship was occasional, ad hoc and likely transitory. ER 16. A violation of Section 8(e) entitles an employer to emergency injunctive relief against a union and the right to pursue a lawsuit for damages against the union. 29 U.S.C. §§ 160(l), 187(b). It is difficult to fathom that IBEW would have risked such remedies to obtain occasional assignments that it had no legal claim to perform and no ability to keep. As Kinder Morgan says in its brief, even after a 10(k) award issued, “IBEW could not (and cannot) have had

any *right* to the work because it had no applicable collective bargaining agreement” and Kinder Morgan “cannot be *compelled* to assign the work to any particular contractor (with or without IBEW members).” Kinder Morgan at 23 (emphasis in original). It is more likely that IBEW’s “threat” was never real, but merely the paper that Kinder Morgan needed in order to try to use the Board process to avoid its agreement with ILWU. ILWU should be permitted to have these issues heard and evaluated by a finder of fact.

III. CONCLUSION

The Board’s petition for enforcement should be denied and the Board’s unfair labor practice and 10(k) decisions should be vacated.

Dated: June 8, 2020

Respectfully submitted,
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FOR THE NINTH CIRCUIT

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