

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

INTERNATIONAL ASSOCIATION OF
MACHINISTS DISTRICT LODGE 160, LOCAL
LODGE 289

and

Cases 19-CD-502
19-CD-506

SSA MARINE, INC.

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF
IN SUPPORT OF EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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I. STATEMENT OF THE CASE

This matter concerns the conduct of the International Association of Machinists District Lodge 160, Local Lodge 289 ("Respondent"), which refuses to withdraw and continues to maintain its contractual payment-in-lieu damages action against SSA Marine Inc. ("SSA") seeking to enforce an arbitrator's award that directly conflicts with the Board's §10(k) decision. Following Respondent's refusal to withdraw its legal action subsequent to the Board's issuance of its §10(k) decision on July 22, 2011, a Consolidated Complaint issued on October 31, 2011, alleging that Respondent's conduct violated §8(b)(4)(ii)(D) of the Act.

In lieu of a hearing, the parties submitted the matter by a Joint Motion and Stipulation of Facts, with attached exhibits, to Administrative Law Judge William G. Kocol, who granted the Motion and accepted the Stipulation of Facts with attached

exhibits by Order dated March 19, 2012. On May 8, 2012, approximately two weeks after the parties had filed their briefs with him, Judge Kocol issued his Decision and Order dismissing the Consolidated Complaint.

Counsel for Acting General Counsel has filed numerous exceptions to Judge Kocol's (the "Judge's") Decision and Order. Those exceptions highlight the Judge's erroneous legal conclusions that reflect both a failure to properly apply and analyze established Board precedent, and a reliance on legally irrelevant, as well as factually and legally unsupported, propositions. Counsel for the Acting General Counsel files the instant brief in support of those exceptions and respectfully requests that the Board: reverse the Judge's Decision and Order; find that Respondent has violated §8(b)(4)(II)(D) as alleged; and order the remedial relief requested.

II. QUESTIONS PRESENTED

- A. Whether the Judge's Decision Is Erroneous Because It Fails to Properly Apply and Analyze Established Precedent Mandating a Finding that Respondent's Conduct Violates §8(b)(4)(ii)(D)? [Exceptions 1, 3, 4, 9, 10, 12, 13, 14, and 16 through 22]
- B. Whether the Judge's Decision Is Erroneous Because It Is Based on a Number of Conclusions and Propositions that Are Legally Irrelevant to Determining Whether Respondent's Conduct Violates §8(b)(4)(ii)(D)? [Exceptions 4, 5, 6, 7, 8, 11, and 15]
- C. Whether the Judge's Decision Is Erroneous Because It Is Based on a Number of Conclusions and Propositions that Are Unsupported by Record Evidence and/or Board Precedent? [Exceptions 2, 5, 6, 7, 11, and 15]

III. STATEMENT OF THE FACTS

A. Background

Charging Party SSA, which has an office and place of business in Seattle, Washington, provides stevedoring and terminal services at Puget Sound area marine

terminals, including cruise ship terminals (JD 2: 8-10; SF ¶5).¹ SSA is a member of the Pacific Maritime Association (“PMA”), which is a multiemployer collective-bargaining agent. PMA’s member employers include approximately 50 for-profit stevedore companies, marine terminal operators and maintenance contractors who employ longshoremen, mechanics, and other categories of dockworkers at facilities located at West Coast ports in Washington, Oregon, and California. PMA’s member employers also include approximately 20 for-profit ocean carriers who use the stevedore companies, marine terminal operators and maintenance contractors to load and unload their cargo. (JD 2: 21-27; SF ¶¶ 7-8) At all material times, SSA has been an employer engaged in commerce within the meaning of §§ 2(2), (6), and (7) of the Act (JD 2: 13-15; SF ¶9).

SSA and other member employers have authorized PMA to represent them in collective-bargaining negotiations with the International Longshore and Warehouse Union (“ILWU”) with respect to the terms and conditions of employment for a Coast-wide multi-employer bargaining unit of employees performing work at the Port of Seattle and other ports along the West Coast. As a member employer of the PMA, SSA has been party to a collective-bargaining agreement with the ILWU at all material times (JD 2: 27-32, 39-40; SF ¶¶8, 12). That agreement covers ILWU-represented employees whom SSA has employed to perform traditional longshore work, as well as certain maintenance and repair work at several West Coast ports not located in the Puget Sound area (Ex J, p. 1).

At all material times SSA has also been party to a collective-bargaining agreement with Respondent. That agreement covers all maintenance and repair work

¹ References to the Administrative Law Judge’s decision appear as (JD ___: ___), with the first number referring to the page and the second number referring to the lines. References to the Stipulation of Facts appear as (SF ¶___) with the number following the symbol designating in which paragraph the facts have been stipulated. References to the exhibits attached to the Stipulation of Facts appear as (Ex ___).

performed on equipment owned and/or leased by SSA in the Puget Sound area. (JD 2: 35-37; SF ¶12). Respondent and the ILWU are, and have been at all material times, labor organizations within the meaning of § 2(5) of the Act (JD 2: 13-15; SF ¶ 10).

B. Respondent Threatens to Picket SSA to Obtain the Work and ILWU Demands that the Work Remain with Its Employees After An Arbitrator Finds that SSA Has Breached Its Contract with Respondent By Assigning Certain Work to ILWU-Represented Employees

PMA and the ILWU entered into a contract in July 2008 that gave maintenance and repair work at all “new” marine terminals to ILWU-represented employees. As a result of that agreement, around July 1, 2008, SSA assigned the maintenance and repair work of its stevedoring and terminal service power equipment while present at Terminal 91 in Seattle, Washington (the “disputed work”) to employees represented by the ILWU. (JD 2: 40-45; SF ¶13). At the time that SSA assigned the disputed work to the ILWU-represented employees, the Port of Seattle had recently completed construction of Terminal 91 as a passenger cruise facility (Ex J, p. 2). SSA has continued to assign the disputed work to ILWU-represented employees at all times since July 1, 2008 (JD 2: 43-45; SF ¶13).

Prior to July 1, 2008, SSA had assigned all its maintenance and repair work in the Puget Sound area to employees represented by Respondent (JD 2: 37-39; SF ¶13). On April 24, 2009, Respondent filed a grievance against SSA regarding SSA’s assignment of the disputed work to the ILWU-represented employees (JD 3: 4-5; SF ¶15). The grievance was heard by Arbitrator Michael Cavanaugh (the “Arbitrator”), who issued a Decision and Award in the matter dated May 8, 2009. The Arbitrator found that SSA had breached its collective-bargaining agreement with Respondent by assigning the disputed work to the ILWU-represented employees, and directed SSA to make the employees represented by Respondent whole for the loss of work. (JD 3: 5-9; SF ¶16;

Ex F). The Arbitrator remanded the matter to the parties to permit them to reach agreement on the calculation of the make-whole remedy, but retained remedial jurisdiction with respect to any clarification or implementation of the award issued (Ex F, pp. 10-11).

By letter dated May 12, 2009, Respondent, through its then Directing Business Representative, Don Hursey, demanded under the threat of picketing that SSA assign the disputed work to employees represented by Respondent and that SSA make those employees whole. The letter threatened that the picketing would commence at 5 p.m. on May 13, 2009, and would continue until Respondent regained the work. (JD 3: 47-50; SF ¶17; Ex G). By letter dated May 14, 2009, ILWU, through its attorneys, informed PMA that it rejected and repudiated the Arbitrator's decision and award, and would pursue all available and appropriate remedies to insure that the disputed work remained with the ILWU-represented employees (JD 4: 1-3; SF ¶ 18; Ex H).

As a result of the threats and competing demands for the disputed work, SSA filed an unfair labor practice charge against Respondent alleging a violation of §8(b)(4)(D) in Case 19-CD-502 (JD 4: 5-6; SF ¶19; Ex A). Finding that probable cause existed to believe that §8(b)(4)(D) had been violated, the Regional Director for Region 19 ordered a hearing pursuant to §10(k) of the Act, which was held in Seattle, Washington between June 30 and July 2, 2009. Representatives of Respondent, SSA, and the ILWU were permitted to participate fully in the hearing by calling and cross-examining witnesses, and introducing evidence into the record. (JD 4: 6-7; SF ¶20; Ex I).

C. Respondent Pursues Its Action for Contractual Pay-In-Lieu Relief that Directly Conflicts with the Board's Decision and Determination Despite the Board's Decision and Determination Awarding the Disputed Work to Employees Represented by ILWU

On January 22, 2010, the Board by its then two-sitting Members, issued a Decision and Determination of Dispute finding that SSA's employees represented by ILWU were entitled to perform the disputed work and that Respondent was not entitled by any means proscribed by §8(b)(4)(D) to force SSA to assign the disputed work to employees represented by Respondent (JD 4: 7-11; SF ¶21; Ex J). As a result of Respondent's written agreement to comply with the Board's Decision and Determination of Dispute, the Regional Director for Region 19 approved the withdrawal of the charge in Case 19-CD-502 (JD 4: 12-14; SF ¶22).

Despite its earlier agreement to comply with the Board's Decision and Determination of Dispute awarding the disputed work to ILWU-represented employees, Respondent notified the Arbitrator and SSA that it was filing an action seeking contractual pay-in-lieu relief for its employees to enforce the Arbitrator's May 8, 2009 Decision and Award regarding the disputed work, and requested the scheduling of a hearing (JD 4: 16-18; SF ¶ 23). In light of Respondent's action seeking pay-in-lieu relief, SSA filed a charge in Case 19-CD-506 on September 28, 2010, alleging that Respondent had violated §8(b)(4)(D) by seeking the contractual pay-in-lieu relief and reneging on its agreement to comply with the Board's Decision and Determination of Dispute in Case 19-CD-502 (JD 4: 18-20; SF ¶24; Ex B).

In light of the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), which held that a panel of at least three Board members must be maintained to exercise the Board's delegated authority, the Board, by a three-member panel, issued a Decision and Determination of Dispute in Case 19-CD-502 on December 15, 2010, again finding that SSA's employees represented by ILWU were

entitled to perform the disputed work (JD 4: 25-29; SF ¶¶26; Ex K). Subsequently, on May 24, 2011, the Board issued an Order vacating its December 15, 2010, Decision and Determination of Dispute as having been improvidently issued due to the previous withdrawal of the charge, and remanding Case 19-CD-502 to the Regional Director (JD 4: 29-32; SF ¶¶27; Ex L).

In light of Respondent's maintenance of its action seeking contractual pay-in-lieu relief from the Arbitrator, and its refusal to withdraw that action, the Regional Director found that Respondent had taken action that was inconsistent with its agreement to comply with the Board's original Decision and Determination of Dispute, which had formed the basis for the Regional Director's approval of the withdrawal of the charge in Case 19-CD-502. Accordingly, on May 26, 2011, the Regional Director issued an Order revoking his approval of the withdrawal of the charge, and reinstating the charge, in Case 19-CD-502. (JD 4: 32-34; SF ¶¶28; Ex M). On July 22, 2011, the Board by a three-member panel issued a Decision and Determination of Dispute in which it again found in Case 19-CD-502 that SSA's employees represented by ILWU were entitled to perform the disputed work and that Respondent was not entitled by any means proscribed by §8(b)(4)(D) to force SSA to assign the disputed work to employees represented by Respondent (JD 4: 34-39; SF ¶¶29; Ex N).

Following issuance of the Board's decision on July 22, 2011, Respondent refused to assure the Regional Director that it would comply with the Board's Decision and Determination of Dispute by withdrawing its contractual pay-in-lieu claim before the arbitrator (JD 4: 41-45; SF ¶¶ 30). Unless it is adjudged to be in violation of the Act, Respondent will seek full contractual pay-in-lieu relief against SSA to enforce the Arbitrator's Decision and Award. (JD 4: 48-51; SF ¶¶31-32). In the event that the arbitrator issues monetary damages against SSA pursuant to Respondent's unlawful pursuit of its contractual action before the arbitrator, PMA has reached agreement with

SSA to indemnify and reimburse SSA for such damages (JD 5: 11-19; SF ¶34).

IV. ARGUMENT

A. Respondent Violated §8(b)(4)(ii)(D) by Maintaining Its Contractual Damages Action that Directly Undermines the Board's §10(k) Decision and Determination of Dispute

Under §8(b)(4)(ii)(D) of the Act (29 U.S.C. §158(b)(4)(ii)(D)), a union may not “threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization . . . unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.”

In enacting this section of the Act, Congress sought to protect employers and the public from the detrimental impact of jurisdictional strikes. *NLRB v. Plasterers' Local 79*, 404 U.S. 116, 130 (1971). Where a charge alleges a violation of §8(b)(4)(D) and reasonable cause exists to believe that a violation has occurred, the Board must suspend proceedings on that charge and resolve the underlying jurisdictional dispute pursuant to §10(k) of the Act (29 U.S.C. §160(k)).² *NLRB v. Plasterers' Local 79*, 404 U.S. at 123-124.

In resolving the jurisdictional dispute, the Board has the authority “to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision.” *NLRB*

² Section 10(k) of the Act provides: Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of [S]ection 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

v. Radio Engineers Local 1212, IBEW, 364 U.S. 573, 586 (1961). The Board's §10(k) award takes precedence over any prior inconsistent arbitration award. *Carey v. Westinghouse Corp.*, 375 U.S. 261, 271 (1964). In essence, the "[§]10(k) award trumps the collective-bargaining agreement." *Longshoremen ILWU Local 13 v. NLRB*, 884 F.2d 1407, 1413 (D.C. Cir. 1989), *enforcing Longshoremen ILWU Local 13 (Sea-Land)*, 290 NLRB 616 (1988).

Under settled law, "a union's pursuit of a lawsuit or arbitration to obtain work awarded by the Board under Section 10(k) to employees represented by another union, or monetary damages in lieu of the work, has an illegal objective and violates Section 8(b)(4)(ii)(D)." *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 160, slip op. at 3 (2011) [emphasis added]. Accord *Sheet Metal Workers Local 27 (E.P. Donnelly, Inc.)*, 357 NLRB No. 131 (2011); *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273 (1992), *aff'd.* 46 F.3d 1143 (9th Cir. 1995); *Roofers Local 30 (Gundle Construction)*, 307 NLRB 1429 (1992), *enfd.*, 1 F.3d 1419 (3d Cir. 1993); *Laborers Local 261 (Skinner, Inc.)*, 292 NLRB 1035 (1989); *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, 271 NLRB 759 (1984), *enfd. sub nom., Longshoremen ILWU v. Pacific Maritime Assn.*, 773 F.2d 1012 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986). Such post-10(k)-award conduct is proscribed by Section 8(b)(4)(ii)(D) "because it directly undermines the §10(k) award, which, under the congressional scheme, is supposed to provide a final resolution to the dispute over which group of employees are entitled to the work at issue." *Roofers Local 30*, 307 NLRB at 1430. Accord *Plasterers Local 200*, 357 NLRB No. 160, slip op. at 3; *Marble Polishers Local 47-T (Grazzini Bros.)*, 315 NLRB 520, 523 (1994).

Applying the above principles to the record evidence demonstrates that Respondent has violated §8(b)(4)(ii)(D) as alleged. As the record demonstrates, the Board found in its July 22, 2011 decision (Ex N) that employees represented by the

ILWU, not those represented by Respondent, were entitled to perform the disputed work. As that §10(k) determination constitutes the final resolution to the dispute regarding which group of employees is entitled to perform the work, Respondent was required to honor that determination and withdraw any inconsistent action. Indeed, as Respondent was a full participant in the §10(k) proceeding, the Board's §10(k) determination put Respondent "on notice that there was no longer any reasonable basis for continuing to prosecute the [damage action] that [it] filed prior to the 10(k) award to confirm a contrary arbitral award." *Laborers Local 261 (W.B. Skinner, Inc.)*, 292 NLRB 1035 (1989). Respondent, however, has unlawfully refused to withdraw its action or comply with the Board's §10(k) determination. Rather, Respondent continues to seek payment-in-lieu relief for its employees for the work that SSA has assigned to its ILWU-represented employees, which the Board has determined is appropriate and lawful.

Respondent's pursuit of such relief thus *directly* conflicts with the Board's §10(k) determination, which found that the ILWU-represented employees were entitled to perform the work. See *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273, 274 (1992), *aff'd.*, 46 F.3d 1143 (9th Cir. 1995) ("Allowing the losing party in a 10(k) dispute to pursue payments for work that the Board awarded to employees other than those involved in the grievance necessarily subverts the Board's 10(k) award"). Accordingly, Respondent's conduct in maintaining that action directly undermines the Board's determination in violation of §8(b)(4)(ii)(D).

Moreover, the maintenance of the action seeking payment-in-lieu relief for *any* of the disputed work performed by the ILWU-represented employees --whether performed before or after the issuance of the Board's §10(k) determination -- violates §8(b)(4)(ii)(D). Although Respondent did not violate the Act by instituting and maintaining its action seeking payment-in-lieu relief prior to the Board's §10(k)

determination,³ it does not follow that seeking such relief post §10(k) award for work performed before the §10(k) award is lawful. Indeed, the Board specifically rejected that argument in *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273 (1992). In rejecting that contention, the Board stated:

It makes no difference that the awards seek payment for work performed before the Board's 10(k) determination because the issue here is not when the work was performed, but whether the claims for "pay in lieu" were pursued after an adverse Board 10(k) determination covering the work subject to those claims had been made.

309 NLRB at 274. Accord *Marble Polishers Local 47-T (Grazzini Bros.)*, 315 NLRB 520, 523 n.9 (1994).

B. The Judge Employed a Faulty Analysis of Precedent, Made Legally Irrelevant Findings, and Relied on Factually and Legally Unsupported Propositions in Finding that Respondent Did Not Violate §8(b)(4)(ii)(D)

1. The Judge Improperly Found that Established Board Precedent Is Inapposite Because Respondent Seeks Only Monetary Damages

Despite the "decades of well-established precedent [that does not] permit a union to pursue a contractual claim conflicting with the Board's [§10(k)] award,"⁴ the Judge determined that, because Respondent had unequivocally renounced its claim to the disputed work and sought only monetary damages for SSA's breach of contract, such precedent was inapposite and Respondent's conduct did not violate the Act. (JD 8: 40-52). The Judge is wrong as a matter of law.

As noted above, "a union's pursuit of a lawsuit or arbitration to obtain work

³ *ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 89, 92-93 (1988).

awarded by the Board under Section 10(k) to employees represented by another union, **or monetary damages in lieu of the work**, has an illegal objective and violates Section 8(b)(4)(ii)(D).” *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 160, slip op. at 3 (2011) [emphasis added]. This is true even where the union no longer claims the work. See, e.g., *Sheet Metal Workers Local 27*, 357 NLRB No. 131, slip op. at 2 (union’s second amended lawsuit, which no longer sought reassignment of the work but sought contractual damages, violated §8(b)(4)(ii)(D)); *Roofers Local 30 (Gundle Construction)*, 307 NLRB 1429 (1992), *enfd.*, 1 F.3d 1419 (3d Cir. 1993) (union’s pursuit of contractual damages that conflict with §10(k) award violated §8(b)(4)(ii)(D) even though union disclaimed the work). Thus, the Judge’s conclusion ignores the numerous cases finding §8(b)(4)(D) violations where a union files a legal action that seeks damages **in lieu of the work**.

It is therefore irrelevant that Respondent has now renounced its claim to the work because its damages action seeks monetary compensation **in lieu of the work** for both past and future work, which the Board prohibits. Moreover, contrary to the Judge’s conclusion that Respondent does not violate §8(b)(4)(ii)(D) where its action seeks only damages for SSA’s breach of contract, the Board explicitly rejected that rationale in *Sheet Metal Workers Local 27*, 357 NLRB No. 131, slip op. at 3 (Board rejects union’s claim that lawsuit was lawful because it sought damages only for breach of contract rather than pay-in-lieu of the assignment of work because it is a distinction without a difference). As the Judge’s conclusion is erroneous as a matter of law, it should be reversed.

⁴ *Sheet Metal Workers Local 27 (E.P. Donnelly, Inc.)*, 357 NLRB No. 131, slip op. at 3-4 (2011).

2. The Judge's Erroneous Finding that Respondent's Pursuit of Its Contractual Damages Action Does Not Undermine the Board's 10(k) Award Is Legally Unsupportable and Based on Unsupported and Irrelevant Conclusions

In spite of the clear Board precedent cited above, the Judge concocted various reasons to support his conclusion that Respondent's continued pursuit of contractual damages does not undermine the Board's §10(k) award in violation of §8(b)(4)(ii)(D). First, the Judge asserted that "there is no statutory or direct case authority that bars all undermining" (JD 9: 2). The Judge, however, failed to cite any legal authority in which the Board found that the pursuit of a legal action that undermines a §10(k) award does not violate the Act. By contrast, *all* of the above Board cases cited in Section IV. A. hold that a union's pursuit of any legal action, whether for work or monetary damages, that directly conflicts with the Board's §10(k) award undermines that award and violates §8(b)(4)(D).

Rather than citing any legal authority for his above assertion, the Judge then posed a hypothetical question asking if Respondent's effort to regain the disputed work through collective bargaining with SSA would "undermine" the Board's §10(k) award. (JD 9: 2-4). Aside from the fact that there was an actual, rather than hypothetical, dispute before him, such inquiry is completely irrelevant. There is no evidence that Respondent engaged in such collective bargaining and the Consolidated Complaint does *not* allege that Respondent violated the Act by seeking to regain the disputed work through collective bargaining after the Board issued its §10(k) award. Thus, in light of such facts, the Judge's hypothetical cannot support any legitimate basis for dismissing the allegations.

The Judge's further statement that "it is not clear what Respondent has done here results in unlawful undermining," (JD 9: 4-5), is similarly unsupportable. As the above precedent demonstrates, Respondent's pursuit of its contractual damages action that directly conflicts with the Board's §10(k) award has an unlawful objective because it undermines that award. Accordingly, this musing is legally untenable.

Finally, the Board should also reject the Judge's expressed personal concern with the manner in which the Board exercises its authority in deciding §10(k) cases (JD 8: 17-24) as a proper basis for dismissing the Consolidated Complaint. The Judge's impression that the Board may be contributing to the creation of jurisdictional disputes and that the result is "always" the same when the Board applies its multifactor test in deciding disputes under §10(k) is unsupported by any evidence or case authority. More importantly, however, it is improper for the Judge to dismiss the Consolidated Complaint allegations because he has an apparent disagreement with the Board concerning the manner in which the Board exercises its §10(k) authority. This is not the proper venue, as those concerns are best addressed by Congress.

3. The Judge's Erroneous Finding that SSA Is Not Entitled to the Protection of §8(b)(4)(D) Is Unsupported Factually or Legally

In dismissing the Consolidated Complaint, the Judge concluded that Charging Party SSA was not entitled to the protections of the Act because it was not an innocent bystander caught up in a dispute not of its own making. Rather, the Judge found that SSA had intentionally (with PMA and ILWU) sought to take work away from employees represented by Respondent by reneging on its agreement with Respondent and signing an irreconcilable agreement with another union. (JD 8: 7-9, 24-26, JD 9: 26-25). The

Judge's conclusion is both unsupported by the record evidence and contrary to Board precedent.

Although the Judge concluded that PMA, SSA, and ILWU engaged in collusion regarding SSA's assignment of the disputed work, the Judge failed to note that the Board specifically found in its initial §10(k) decision (Ex J), which was reaffirmed in the final July 22, 2011 §10(k) decision (Ex N), that Respondent failed to present sufficient evidence of any coercion that resulted in SSA's preference for assigning the disputed work to employees represented by the ILWU. The Board's determination on that threshold issue is not subject to relitigation after the §10(k) award issues. See, e.g., *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 160, slip op. at 3 fn. 12 (2011) (threshold issue of whether SDI and Carpenters engaged in collusion regarding the assignment of the disputed work was a threshold issue that may not be relitigated after the §10(k) award).

Moreover, the fact that SSA signed a collective-bargaining agreement with ILWU that arguably covered the disputed work, even though it already had a collective-bargaining agreement with Respondent that also arguably covered the disputed work, does not remove SSA from the protection of §8(b)(4)(D) of the Act. As the Board has observed, "[I]t is not at all uncommon in 10(k) disputes for both competing unions to have broad jurisdictional clauses arguably covering the work in question." *Roofers Local 30 (Gundle Construction)*, 307 NLRB 1429, 1430 fn. 3 (1992), *enfd.*, 1 F.3d 1419 (3d Cir. 1993). The Board determined that a legitimate jurisdictional dispute existed that required it to invoke its §10(k) authority. That is the end of the inquiry; the Judge has no authority years later to determine that the Board's invocation of its 10(k) authority, and

accompanying assessment regarding §8(b)(4)(D) protections, was improper merely because he disagrees with that decision based on how the jurisdictional dispute arose.

4. The Judge's Erroneous Finding that the Core Policies of the Act Will be Undermined if a Violation is Found Is Based on a Faulty Legal Analysis

There is also no merit to the Judge's conclusion that it would be inappropriate to find a violation here because the core policies of the Act discouraging contract breaches and encouraging remedies for contract breaches will be undermined because employees represented by Respondent would be left without a remedy for SSA's breach of contract (JD 8: 9-11, 29-31, 9: 37-45). The Supreme Court determined long ago that the Board's §10(k) award takes precedence over any prior inconsistent arbitration award. *Carey v. Westinghouse Corp.*, 375 U.S. 261, 271. Accord *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, 271 NLRB 759 (1984), *enfd. sub nom.*, *Longshoremen ILWU v. Pacific Maritime Assn.*, 773 F.2d 1012 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).

Congress has determined that the award that issues pursuant to §10(k) provides the final resolution to the jurisdictional dispute over which group of employees is entitled to perform the work. *Roofers Local 30 (Gundle Construction)*, 307 NLRB at 1430. If Respondent were permitted to pursue its actions for damages for loss of the disputed work, even though the Board has determined through its §10(k) award that the ILWU-represented employees are entitled to perform it, the whole purpose underlying §10(k) would be completely frustrated. *Id.*; *Longshoremen ILWU Local 13 v. NLRB*, 884 F.2d 1407, 1414 (D.C. Cir. 1989), *enforcing Longshoremen ILWU Local 13 (Sea-Land)*, 290 NLRB 616 (1988). In sum, the Judge's concern that the core policies of the Act will be

thwarted by a finding that Respondent has violated the Act is misplaced.

5. The Judge's Erroneous Finding that Respondent's Pursuit of its Contractual Damages Action Does Not Coerce SSA Within the Meaning of §8(b)(4)(ii)(D) Is Based on Legally Irrelevant Findings

As shown above, Respondent's pursuit of its contractual damages action directly undermines the Board's §10(k) determination. Under well settled law cited above, Respondent's conduct therefore violates §8(b)(4)(ii)(D). Nonetheless, the Judge concluded — again without citation to any legal authority — that Respondent's conduct does not unlawfully coerce SSA because PMA has agreed to indemnify SSA for any contractual damages that the arbitrator orders (JD 9: 9-11). Again, the Judge's conclusion is based on a faulty legal analysis of precedent.

Contrary to the Judge's conclusion, which entity is ultimately responsible for paying the contractual damages is legally irrelevant for the simple reason that the contractual damage action may not be maintained once the Board issues its §10(k) award.⁵ *Laborers Local 261 (Skinner, Inc.)*, 292 NLRB 1035 (1989). Here, the Board invoked its §10(k) authority because two competing groups of employees both claimed the disputed work, there was no agreed-upon method for resolving the dispute, and Respondent coerced SSA into assigning its employees the work by threats to picket. As discussed above, Congress determined that the Board's §10(k) determination as to which group of employees is entitled to perform the work constitutes the *final* resolution of the competing demands for the work. *Roofers Local 30 (Gundle Construction)*, 307 NLRB 1429, 1430 (1992), *enfd.*, 1 F.3d 1419 (3d Cir. 1993). Once the §10(k) award issues, the losing party in the §10(k) proceeding must comply. Otherwise, its pursuit of contractual damages for work to which it is not entitled under the §10(k) determination necessarily subverts the §10(k) determination. *Iron Workers Local 433 (Otis Elevator)*,

⁵ At best, this fact would be relevant only to determine whether Respondent had to reimburse SSA for any contractual damages paid.

309 NLRB 273, 274 (1992), *aff'd.*, 46 F.3d 1143 (9th Cir. 1995).

Here, however, Respondent is *not* complying with the award. Rather, it is pursuing a legal action *against* SSA, *not* PMA, on the basis that SSA breached its contract by assigning the disputed work to the ILWU-represented employees. As the Board has determined that SSA may rightfully assign the work to the ILWU-represented employees, Respondent was not entitled to pursue *any* relief for the work performed. *Laborers Local 261 (W.B. Skinner, Inc.)*, 292 NLRB 1035 (1989). Respondent's demands to SSA are unlawfully coercive because of the objective proscribed by §8(b)(4)(D). That ends the inquiry.

Which entity would ultimately be responsible for paying the contractual damages is simply not determinative as to whether Respondent's conduct violates §8(b)(4)(ii)(D) and the Judge's manufactured rationale that the indemnification agreement removes the coercion against SSA is ill conceived. To wit, were PMA ultimately to refuse to honor its agreement to indemnify SSA, the Judge's rationale could not be sustained. Simply stated, PMA's refusal to honor that agreement would not absolve SSA of its financial responsibility because the Arbitrator determined that SSA, not PMA, was responsible for the contract breach.

For all of the above reasons, the Judge's conclusion that Respondent did not violate §8(b)(4)(ii)(D) is factually and legally unfounded. Counsel for the Acting General Counsel contends that it should be reversed in its entirety.

C. Respondent's Conduct Warrants An Order Requiring Withdrawal of the Contractual Claim and Reimbursement of SSA for Any Expenses in Defending Against It

As the Judge dismissed the Consolidated Complaint, he did not order any remedial relief. As shown above, however, Respondent's continued pursuit of its contractual damages action violates §8(b)(4)(ii)(D) of the Act. Recent Board decisions

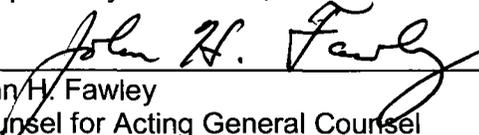
demonstrate that the customary remedy for this type of violation requires a respondent to withdraw the damages action that is inconsistent with the Board's §10(k) determination, reimburse the entity for any reasonable legal fees and expenses associated with the defense of that damages action,⁶ and to post a remedial notice. See, e.g., *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 160 (2011); *Sheet Metal Workers Local 27 (E.P. Donnelly, Inc.)*, 357 NLRB No. 131 (2011). Counsel for the Acting General Counsel respectfully requests that the Board order such relief to remedy Respondent's unfair labor practice violations.⁷

V. CONCLUSION

In light of the above and the record as a whole, Counsel for the Acting General Counsel respectfully requests that the Board reverse the Judge's Decision in its entirety and find that Respondent violated §8(b)(4)(ii)(D) of the Act by maintaining its contractual pay-in-lieu damages action since July 22, 2011. Counsel for the Acting General Counsel also respectfully urges that an Order issue against Respondent requiring that it remedy its unfair labor practice by: (1) immediately withdrawing its contractual pay-in-lieu damages action; (2) reimbursing SSA for any reasonable legal fees and expenses associated with the defense of that action; and (3) posting an appropriate remedial notice.

DATED at Seattle, Washington, this 12th day of June, 2012.

Respectfully submitted,



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⁶ Contrary to the Judge's conclusion (JD 8: 9-11), Counsel for the Acting General Counsel has not sought, and does not seek, a remedy that requires Respondent to reimburse SSA for its costs in defending against the underlying grievance that led to the Arbitrator's decision.

⁷ A proposed Order appears at the conclusion of this brief.

[PROPOSED] ORDER

Respondent, International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289, its officers, agents, and representatives, shall

1. Cease and desist from:

(a) Threatening, coercing, or restraining SSA Marine, Inc., or any person engaged in commerce, or in an industry affecting commerce, where an object thereof is to force or require SSA Marine to assign the maintenance and repair work of SSA Marine's stevedoring and terminal service power equipment while it is present at Terminal 91 in Seattle, Washington (the "disputed work"), to employees who are members of, or represented by, IAM District Lodge 160, Local Lodge 289, rather than to employees who are members of, or represented by, International Longshore and Warehouse Union;

(b) Maintaining or prosecuting after July 22, 2011, its contractual damages action, or any legal action, to enforce Arbitrator Michael Cavanaugh's May 8, 2009, Decision and Award, or requesting after July 22, 2011, any monetary damages for SSA Marine's failure to assign the disputed work to employees who are members of, or represented by, IAM District Lodge 160, Local Lodge 289;

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

(a) Immediately withdraw its pay-in-lieu contractual damages action, or any legal action, to enforce Arbitrator Michael Cavanaugh's May 8, 2009, Decision and Award;

(b) Reimburse SSA Marine, Inc. for reasonable legal expenses and fees associated with the defense of IAM District Lodge 160, Local Lodge 289's pay-in-lieu damages action, or any legal action, to enforce Arbitrator Michael Cavanaugh's May 8, 2009, Decision and Award after July 22, 2011, with interest as computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010);

(c) Within 14 days after service by the Region, post at its office in Seattle, Washington, as well as any other offices and meeting halls it maintains, copies of a remedial notice. Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the authorized representative of Respondent, shall be posted by Respondent immediately upon receipt 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 Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2012, I caused copies of the following documents be served upon the following parties via the following means:

1. Counsel for the Acting General Counsel's Brief In Support Of Exceptions To The Decision Of The Administrative Law Judge
2. Counsel for the Acting General Counsel's Exceptions To The Decision Of The Administrative Law Judge

E-File and U.S. Mail

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DATED at Seattle, Washington this 12th day of June, 2012.



Vicky Perkins