

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

SSA MARINE, INC., and SSA  
TERMINALS, LLC.

Petitioners,

and

INTERNATIONAL ASSOCIATION OF  
MACHINISTS, DISTRICT LODGE 160,  
LOCAL LODGE 289,

Respondent.

Case Nos. 19-CD-502 and 19-CD-506

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**RESPONDENT IAM'S ANSWERING BRIEF IN OPPOSITION TO  
EXCEPTIONS AND BRIEFS IN SUPPORT OF EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE  
FILED BY COUNSEL FOR THE ACTING GENERAL COUNSEL,  
CHARGING PARTY SSA, AND INTERVENOR ILWU**

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## NATURE OF PROCEEDINGS

Pursuant to § 102.46 of the Board's Rules and Regulations, the International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289's ("Respondent" or "IAM") files this Answering Brief to the Counsel for the Acting General Counsel ("CAGC"), the Charging Party SSA Marine ("SSA"), and the Intervenor ILWU's Exceptions to the Administrative Law Judge's ("ALJ") Decision, JD(SF)-22-12, in consolidated Cases 19-CD-502 and 506.

## INTRODUCTION

The ALJ correctly concluded that the IAM's conduct did not violate Section 8(b)(4)(D) of the Act under the unique and specific circumstances of this case.<sup>1</sup> The IAM's pursuit of a contract action does not contradict nor undermine the Board's 10(k) decision. Congress surely did not intend for the Board to protect an employer who foments dispute by knowingly and blatantly renege on a clear agreement with one union by later signing an irreconcilable agreement with another union, all while procuring indemnity for grievances that were inevitably to be brought by the IAM. The Board's processes should not be made available to shield an intentionally wrongdoing SSA from the natural consequences of its actions, particularly where the IAM's actions (using only peaceful legal channels) have no coercive effect on SSA. No matter the outcome of the grievance remedy hearing, SSA will not change its assignment of work or pay one cent in damages. The underlying nature of this dispute relieves the IAM of any

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<sup>1</sup> This brief will not specifically address the argument primarily urged by the Respondent in its brief to the ALJ because the Judge did not reach the issue. On brief, the IAM argued that its conduct is not coercive because PMA (a non-assigning party), and not SSA (the assigning employer), is responsible for any damages owed the IAM. The IAM analogizes to Board precedent where unions are allowed to pursue a contract remedy after an adverse 10(k) decision because an entity other than the employer responsible for assigning the disputed work is liable for the damages. The foregoing argument is set fully forth in the IAM's cross-exceptions and brief in support thereof, filed simultaneously with this answering brief.

prohibition from seeking pay-in-lieu relief, under the Board's July 22, 2011, 10(k) decision, as SSA is not thereby coerced.

CAGC attempts to portray Respondent's actions as though they occur in a vacuum. The reality is that the IAM's conduct must be evaluated within the extremely unique context of the instant facts. Importantly, the material facts include the verbiage of the Complaint and the conduct of not just the IAM but also SSA and PMA. Instead, the General Counsel shifts the focus to inapposite case law that cannot be neatly applied here. The ALJ's dismissal of the Complaint was based on his correct recognition of the uniqueness of this case.

This is not a traditional 8(b)(4)(D) case. It does not involve an "innocent" employer caught in a situation not of its own making. Nor does it involve the sort of object Section 8(b)(4)(D) prohibits. Respondent IAM has been charged with violating Section 8(b)(4)(D) for doing nothing other than holding SSA to the obligations of a bargain knowingly reached by the parties with consequences fully known to SSA. Doing so under the unique facts of this case does not rise to the level of coercion prohibited by Section 8(b)(4)(D).

The Board should grant the complaining parties' exceptions only if it wishes to establish heightened incentive for employers to knowingly negotiate collective bargaining agreements that conflict with their current collective bargaining obligations to the detriment of employees. Such an approach greatly undermines important policies of the Act. On the unique facts of this case, no 8(b)(4)(D) violation lies, and the National Labor Relations Board should affirm the findings of fact and conclusions of law of the Administrative Law Judge and adopt his recommended Order.

## FACTUAL BACKGROUND

This case arose from a jurisdictional dispute between the IAM and the ILWU over “maintenance and repair” (“M&R”) work performed at Terminal 91 in Seattle, Washington by SSA. In an earlier proceeding, each union claimed the work, and on July 22, 2011, the Board issued a 10(k) award providing that employees of SSA represented by the ILWU were entitled to perform the work.

For decades, SSA has assigned M&R work in the Puget Sound area to employees represented by the IAM. SF ¶13.<sup>2</sup> SSA is a member of the Pacific Maritime Association (“PMA”), an entity that bargains on behalf of companies, including SSA, working at the various ports on the West Coast. SF ¶8. During the summer of 2008, PMA negotiated a labor agreement covering employees represented by the ILWU. SF ¶¶8, 13. On July 1, 2008, PMA and the ILWU entered into an agreement providing that M&R work at “new” Puget Sound terminals would be assigned to ILWU. SF ¶13.

Prior to PMA signing that agreement, SSA procured PMA’s promise that PMA would “fully indemnify” SSA from any damages that would result from SSA’s blatant breach of its CBA with the IAM as a result of the new language PMA negotiated with the ILWU. SF ¶¶34, 35. At the earlier 10(k) hearing in this matter, SSA Senior Vice President Edward DeNike testified that PMA felt, “as a Multi-Employer [that] it was in the best interests of the industry for SSA to go along with that commitment” to assign the work to the ILWU. SF-Exhibit I, p. 92-93. DeNike further testified that PMA “pretty much determines everything that happens on the West coast.” *Id.* Under the agreement,

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<sup>2</sup> Citations in this brief will be as follows: to the ALJ’s Decision “ALJD” p.#: line#; to the Complaint “Complaint ¶#”; to the Parties’ Stipulation of Facts “SF ¶#” and “E-#” for Exhibits; to the Counsel for the Acting General Counsel’s Exceptions “CAGC Exc. #” and Brief “CAGC Br. p. #”; to the Charging Party’s Exceptions “SSA Exc. #” and Brief “SSA Br. p. #”; and to the Intervenor ILWU’s Exceptions “ILWU Exc. #” and Brief “ILWU Br. p. #.”

all damages will be paid by PMA, and none of PMA's approximately seventy members (SF ¶7), including SSA, would have to pay any additional funds to PMA as a result of any damage payment. SF ¶35.

Following the 2008 contract negotiations, SSA assigned the M&R work at Terminal 91 in Seattle, Washington, to employees represented by the ILWU. SF ¶13. The IAM filed a grievance over SSA's blatant breach of the parties' collective bargaining agreement. *Id.* The grievance was heard by Arbitrator Michael Cavanaugh, who issued a Decision and Award in favor of the IAM. SF ¶15-16; Ex. F.

On July 22, 2011, the NLRB made a jurisdictional award of the "maintenance and repair" of SSA's power equipment at Terminal 91. SF ¶29. Following the award, the IAM informed the Regional Director that it would comply with the decision and would not demand that IAM members be dispatched to perform M&R work at Terminal 91. SF ¶30. The IAM has agreed that it will not, under any circumstances, seek to dispatch IAM members to perform the disputed work now or in the future in contravention of the July 22, 2011, Decision and Determination. SF ¶32.

### **ARGUMENT**

**THE ALJ CORRECTLY CONCLUDED THAT THE IAM'S PURSUIT OF PAY-IN-LIEU RELIEF FROM SSA'S BLATANT AND INTENTIONAL CONTRACT BREACH ON THE SPECIFIC FACTS OF THIS CASE DOES NOT OFFEND SECTION 8(b)(4)(D) OF THE ACT.**

- A. The ALJ Correctly Concluded That The Instant Facts Do Not Fall Easily Within The Evil Congress Sought To Proscribe In Section 8(b)(4)(D) (Regarding CAGC Exc. 1, SSA Exc. 2, & ILWU Exc. 6).

The ALJ's conclusion that the instant facts do not fall easily within the evil Congress sought to proscribe is not erroneous and does not fail to properly apply and analyze established precedent. The fundamental Congressional purpose underlying a

10(k) proceeding was “to protect employers from being ‘the helpless victims of quarrels that do not concern them at all.’” NLRB v. Radio Engineers Local 1212, 364 U.S. 573, 580-81 (1960).<sup>3</sup> It cannot be said that SSA is such an employer. Put differently, it cannot be seriously argued that SSA is an innocent employer caught “between the Devil and the Deep Blue.” Id. at 575. More importantly, however, the IAM is not the typical 10(k) Respondent.

Contrary to the CAGC’s bold assertion to the contrary, the Judge properly distinguished the authority relied upon by the CAGC to support the unfounded proposition that the IAM’s pursuit of only monetary damages on the facts of this case is equally as coercive as seeking assignment of the disputed work.

The CAGC first relies on Iron Workers Local 433 (Otis Elevator), 309 NLRB 273 (1992) for the proposition that a union’s pursuit of pay-in-lieu damages alone “necessarily subverts” a 10(k) award of the disputed work to a different union. The CAGC is mistaken as Iron Workers is clearly distinguishable from this case. In Iron Workers, the Board stated unequivocally in Amended Conclusion of Law 6 (Id. at 275)(emphasis supplied):

By filing a petition to confirm arbitration awards in the Superior Court of the State of California in and for the County of San Francisco and by

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<sup>3</sup> The Congressional purpose in enacting the Section 8(b)(4)(D) and 10(k) procedure was to reach, and prevent, jurisdictional strikes. “It is clear that Congress intended to protect employers and the public from the detrimental economic impact of ‘indefensible’ jurisdictional strikes. NLRB v. Plasterers Local Union, 404 U.S. 116, 130 (1971)(“indefensible” from text of Footnote 25: President Truman, 1947, State of the Union Message, 93 Cong. Rec. 136). As noted in Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 263 (1963):

While §8(b)(4)(D) makes it an unfair labor practice for a union to strike to get an employer to assign work to a particular group of employees rather than to another, the Act does not deal with the controversy anterior to a strike nor provide any machinery for resolving such a dispute absent a strike.

Simply put, the Congressional concern to alleviate injury caused by jurisdictional strikes is not implicated by the IAM’s enforcement action here where the employer paying the damages (PMA) is not responsible for assigning the disputed work (SF ¶¶34, 35) and the IAM has unequivocally disclaimed the disputed work (SF ¶32).

maintaining that lawsuit in the United States District Court for the Central District of California, for the purpose of enforcing the Board of Adjustment decisions requiring Otis to pay monetary damages pursuant to the Board of Adjustment Decisions, with an object of forcing or requiring Otis to assign, contrary to the Board's Decision and Determination of Dispute in 297 NLRB 964 (1990), the work of installing elevator fronts at the Avenue of Stars and Manual Life Building projects to the employees who are represented by Respondent Local, rather than to employees represented by Local 18, the Respondents have violated Section 8(b)(4)(ii)(D) of the Act.

Accordingly, the Board found the union's action had an object of forcing the reassignment of work. Commenting on the CAGC's reliance on Iron Workers, the Judge here correctly points out, "there is no evidence in [Iron Workers] that the union there unequivocally stated it does not seek, and would not accept the disputed work." ALJD 8: 44-45. Here, the IAM has explicitly disclaimed the work at issue. Thus, it is impossible for the IAM to have the proscribed object of forcing SSA to reassign the work.

The CAGC's reliance on Plasterers Local 200, 357 NLRB No. 160, slip op. at 3 (2011) and Sheet Metal Workers Local 27, 357 NLRB No. 131, slip op. at 2 (2011) and Roofers Local 30, 307 NLRB 1429 (1992) is similarly non-availing. In Plasterers Local 200, the Board held (Id. at \*4)

We agree with the judge that, applying these principles, the Respondents' filing and pursuit of the lawsuits, arbitrations, and Plan complaint after the Board issued its 10(k) determination in *SDI-II* were aimed at achieving a result contrary to the Board's ruling, i.e., to have the work awarded to employees represented by Local 200....

Again, there was no evidence that the Respondent had disclaimed the work. Similarly, in Sheet Metal Workers Local 27, the Board held (Id. at \*6)(emphasis supplied):

In sum, we agree with the judge that by maintaining the suit against Donnelly after the Board made its 10(k) determination, the Respondent sought to undermine the Board's 10(k) award and to coerce the Employer into reassigning to members of Local 27 the work that the Board found had been properly assigned to employees represented by Local 623.

Accordingly, the Respondent's conduct in maintaining the suit against Donnelly after the 10(k) determination issued violated Section 8(b)(4)(ii)(D) of the Act.

Just as in Iron Workers and Plasterers Local 200, the Respondent did not disclaim the disputed work. Finally, in Local 30 (Gundle Lining Const. Corp), 307 NLRB 1429, 1431 (1992) the Board held (emphasis supplied):

The Respondent has engaged in unfair labor practices proscribed by Section 8(b)(4)(i) and (ii)(D) of the Act by picketing and Section 8(b)(4)(ii)(D) of the Act by refusing to withdraw after June 28, 1990, its petition in *Roofers Local 30 v. Gundle Lining Construction Corp.*, Civil No. 90-2105, in the United States District Court for the Eastern District of Pennsylvania, both with an object of forcing or requiring Gundle to assign the work described below to employees represented by Local 30, United Slate, Tile, and Waterproof Workers Association, AFL-CIO rather than to employees represented by Laborers Local 172.<sup>4</sup>

While the Board noted that the Respondent purported to “disclaim” the disputed work (Id. at 1430), that claim was clearly not given any weight in light of the Respondent’s coercive picketing activity. The IAM has engaged in no such coercive activity, picketing or otherwise. To the contrary, the IAM clearly and unequivocally promised not to engage in coercive acts. Finally, Gundle, the party responsible for assigning the work, was the entity responsible for damages. The assigning party here, SSA, is not responsible for the damages.

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<sup>4</sup> The CAGC also relied upon Marble Polishers Local 47-T (Grazzini Bros), 315 NLRB 520 (1994), another case where the Respondent did not make an unequivocal renunciation of the work. There, the Board concluded (Id. at 523)(emphasis supplied):

By maintaining and refusing to withdraw its complaint pending before the Wisconsin Employment Relations Commission in Case 1 No. 45488 Ce-2115 for the purpose of forcing the Employer to arbitrate the consequences of the Employer’s assignment of the work in dispute to employees not represented by the Respondent, with an object of forcing or requiring the Employer to assign contrary to the Board’s Decision and Determination of Dispute in 307 NLRB 1290 (1992) the work of installing and finishing the tiles at the St. Croix racetrack, the Respondent has violated Section 8(b)(4)(ii)(D) of the Act.

Moreover, the union admitted it was still seeking the work. Id., at 521. Here, the IAM has specifically disclaimed the work. JD 4:52; 5:1; SF ¶32. The IAM has also refused to dispatch any of its workers if requested to conduct maintenance and repair work. JD 5:1-2; SF ¶32. In light of the IAM’s unequivocal renunciation, no such illegal object is present here.

In sum, the “precedent” relied upon by the CAGC is readily distinguishable from the instant, unique, set of facts. The Judge did not err in noting the important distinctions between this case and the authority relied upon by the CAGC. Moreover, the Judge correctly concluded that the CAGC has “failed to show that Respondent’s pursuit of monetary damages was for the purpose of forcing SSA to assign the work back to employees represented by Respondent; Respondent has clearly given up on that effort.” ALJD at 8: 50-52.<sup>5</sup>

B. The ALJ Correctly Concluded That SSA Was Not An Innocent Bystander And That SSA Created The Jurisdictional Dispute (Regarding CAGC Exc. 2, SSA Exc. 3, & ILWU Exc. 9).

The ALJ’s conclusion that SSA brought this situation on itself is well-supported by the record. It is beyond dispute that SSA knowingly acquiesced to an arrangement with PMA and the ILWU in 2008 that was wholly irreconcilable with its contractual obligations to the IAM.

At the earlier 10(k) hearing in this matter, SSA Senior Vice President Edward DeNike testified that PMA felt, “as a Multi-Employer [that] it was in the best interests of the industry for SSA to go along with that commitment” to assign the work to the ILWU. SF, Exhibit I, p. 92-93. DeNike further testified that PMA “pretty much determines everything that happens on the West coast.” Id. Thus, SSA knowingly agreed to support a blatant breach of its contract with the IAM. There can be no dispute than SSA

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<sup>5</sup> The Complaint states, at paragraph 6(d)(emphasis supplied):

**An object of Respondent’s conduct described above in paragraphs 6(a) through 6(c) has been to force or require the Employer to assign the work described above in paragraph 5(a) to employees who are members of, or represented by, Respondent, rather than to employees who are members of, or represented by, ILWU and who are not members of, or represented by, Respondent.**

Clearly, the CAGC has failed to prove this unequivocal allegation as against the IAM.

understood the natural consequences of its actions as it simultaneously negotiated protection, in the form of indemnification from PMA, from damage claims surely to be brought by the IAM.

SSA's actions reduce to a knowing, "eyes wide open" breach of its contract with the IAM. SSA made the informed choice to acquiesce to the stevedoring monopoly enjoyed by PMA and the ILWU. The National Labor Relations Board should not reward the hubris of PMA, SSA, and the ILWU who now, so piously, seek to shield themselves behind the protection of a Board policy that does not fit the instant facts and should not be applied to this cadre of wrongdoers.

- C. The ALJ Correctly Concluded That The AGC Sought To Have Respondent Reimburse SSA And PMA For The Costs Involved In Defending The Pay-In-Lieu Remedy Procedure (Regarding CAGC Exc. 3).

In an attached proposed order to its post-stipulation submission to the ALJ, the CAGC requested that the IAM (CAGC's brief to the ALJ at p. 15):

(b) Reimburse SSA Marine, Inc., and/or Pacific Maritime Association 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 NLRB [sic] 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010)....

Not surprisingly, the ALJ indicated his astonishment that the CAGC would propose such a remedy. The CAGC's request that the IAM reimburse PMA has no basis in law or equity. PMA is not a Charging Party, or even referenced by the Charging Party, in either of the underlying unfair labor practice charges, or the Complaint. (see Exhibits A, B, and C to Joint Motion and Stipulation of Facts) The absence of PMA from the charges and

Complaint is consistent with the fact that PMA did not receive “threats” from the Charged Party and, more importantly, does not assign the work at issue. By requesting a remedy for PMA, the CAGC sought to expand the scope of the charge(s) and Complaint far beyond that which is alleged on the face of the underlying charges. The General Counsel’s actions in this regard violate Section 10(b) of the Act as it reduces to an attempt to both initiate and to thereafter remedy a charge absent a timely filed unfair labor practice. Thus, the CAGC’s overzealous prosecution of the Complaint against the IAM also violates fundamental principles of due process.

D. The ALJ Correctly Concluded That The Arbitrator’s Decision Was Legally Relevant On Unique Facts Of This Case (Regarding CAGC Exc. 4).

The CAGC correctly referenced the stipulated fact that the Arbitrator found, after a full hearing on the merits, that SSA breached its collective bargaining agreement with the IAM by assigning the disputed work to its employees represented by the ILWU rather than those represented by the IAM. See SF ¶16. Incredibly, the CAGC now argues that the ALJ committed error by acknowledging a fact contained within the Stipulated Facts of this case because “the Judge does not have the authority to determine the merits of that contractual dispute....” CAGC Exc. 4. The CAGC is not at liberty to pick and choose which facts within the stipulated record the Judge, or any party, use in support of their respective positions.

E. The ALJ Correctly Concluded That The Manner In Which The Board Fulfills Its Obligations Under Section 10(k) May Be Contributing To The Creation Of Jurisdictional Disputes Because The Board Should Apply Its

Precedent On A Case-By Case Basis Rather Than In A Mechanistic Manner (Regarding CAGC Exc. 5, SSA Exc. 5, & ILWU Exc. 11).

The ALJ's conclusion that a mechanistic approach to 10(k) and 8(b)(4)(D) procedures may have the unintended effect of expanding the application of those policies to situation beyond the original intent of Congress is well taken. The arguments presented in opposition to the Exceptions filed by the CAGC, SSA, and the ILWU elsewhere in this brief stand as evidence that the ALJ's concern is well-founded.

F. The ALJ Correctly Concluded That The Board's 10(k) Decisions Always Award The Disputed Work Based On Employer Preference, No Matter The Other Relevant Facts (Regarding CAGC Exc. 6, CP Exc. 6).

The experienced ALJ correctly concluded what a historical review of Board law quickly reveals; a disproportionate number of 10(k) decisions simply award the disputed work based on "employer preference" to the exclusion of all other relevant criteria. While the CAGC argues, in Exception 6, that this "overbroad finding" is legally irrelevant, the IAM strenuously disagrees. Here, it is precisely because of the predictability of the Board's 10(k) decision that SSA and PMA acted with impunity toward the IAM. As noted above, SSA is not an innocent party and the Board should not allow its policies and processes to be hijacked by self-interested parties at the expense of employees covered by unambiguous collective bargaining agreements supported by years of industry practice.

G. The ALJ Correctly Concluded That SSA, PMA, And The ILWU Made A Joint Decision "To Take The Work From Employees Represented By

Respondent” Because SSA Explicitly Admitted This Fact (Regarding CAGC Exc. 7).

The ALJ’s conclusion that SSA, PMA, and the ILWU made a decision “to take away the work from employees represented by the Respondent” is supported by the record testimony related to the 2008 negotiations in Section B above.

H. The ALJ Correctly Concluded That The NLRB Has An Obligation To Minimize The Effect On Employees Who Are Victimized By Unscrupulous Employers By Not Disregarding The Core Policies Of The Act When Applying Section 8(b)(4)(D) Analysis To Unique Fact Patterns. (Regarding CAGC Exc. 8, SSA Exc. 8).

See opposition to CAGC Exc. 19 in Section S, below.

I. The ALJ Correctly Concluded That The Cases Relied Upon By The CAGC Were Inapposite Because The Facts Of The Instant Case Are Readily Distinguishable From Those Relied Upon By The CAGC (Regarding CAGC Exc. 9, SSA Exc. 10, & ILWU Exc. 13).

See Section A, above.

J. The ALJ Correctly Concluded That There Is No Statutory Nor Direct Case Authority That Bars Undermining Of A 10(k) Decision (Regarding CAGC Exc. 10, SSA Exc. 12, & ILWU Exc. 15).

The ALJ’s conclusion that the IAM has not undermined the Board’s 10(k) decision is legally and factually sound. First, as noted above, the IAM’s actions (and inactions) set it apart from Respondents in the cases relied upon by the CAGC. Here, the IAM took special care not to offend the 10(k) award. Notwithstanding the fact that the IAM does not seek a remedy from the employer responsible for assigning the disputed

work (SSA)<sup>6</sup>, the IAM has unequivocally disclaimed the work. So, no “undermining” can occur as the sanctity of the Board’s 10(k) decision is preserved prospectively as ILWU members will perform the work.

K. The ALJ Correctly Concluded, By Way Of A Rhetorical Question, That Not All Affirmative Acts Related To Disputed Work Are Coercive (Regarding CAGC Exc. 11 & ILWU Exc. 16).

The ALJ’s rhetorical question as to whether Respondent’s efforts to regain the disputed work through collective bargaining with SSA would undermine the Board’s 10(k) decision evidences a thoughtful, case-by-case review rather than the mechanistic approach urged by the CAGC. The CAGC argues that the ALJ’s question is legally irrelevant because “there is no record evidence showing Respondent made such efforts.” CAGC Exc. 11. The CAGC is wrong.

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<sup>6</sup> In this regard, the footnote in *Marble Polishers Local 47-T (Grazzini Bros)*, 315 NLRB 520, 523 fn. 9 (1994) noted by the Judge in the instant Decision at p. 8 is instructive (emphasis supplied):

The Respondent cites *Hutter Construction Co. v. Operating Engineers Local 139*, 862 F.2d 641 (7th Cir. 1988), and *Carpenters Local 33 (AGC of Massachusetts)*, 289 NLRB 1482 (1988), to support its proposition that a labor organization can lawfully pursue its contractual remedies even when there was a 10(k) proceeding and award. The cases cited by the Respondent are inapposite. Each involved a dispute over the employer’s subcontracting work in violation of a lawful union signatory subcontracting clause of a collective-bargaining agreement. The Board has held that a union does not violate the Act by pursuing contractual remedies for an employer’s breach of a union signatory subcontracting clause when there have been no coercive actions such as picketing and when no action has been taken or threatened against the employer of the employees to whom the work was awarded, because such an action is not necessarily inconsistent with a work award to the subcontractor’s employees. For example, a union may pursue a grievance against employer A if employer A subcontracts work to employer B in violation of a collective-bargaining agreement between employer A and the union, even if, in a 10(k) proceeding, the Board awarded the work in dispute to a union representing Employer B’s employees. In that situation, the union’s grievance would not be inconsistent with the Board’s 10(k) award. *Carpenters Local 33*, 289 NLRB at 1484. The instant case is distinguishable from the subcontracting cases because Grazzini itself is the employer of the employees to whom the work was awarded. Accord, *Gundle Construction*, 307 NLRB at 1430 fn. 4.

Here, by analogy, PMA is “employer” A, and the IAM can pursue its remedy under the PMA-SSA indemnity agreement because “employer” B (SSA) is the party responsible for assigning the disputed work but not the entity responsible for the damages.

The question before the Board requires precisely this type of analysis. As Board cases illustrate, some damage actions by the party who receives an adverse 10(k) decision are not coercive, and therefore do not violate Section 8(b)(4)(D). Put differently, some actions that might appear literally to offend Section 8(b)(4)(D) are not far enough down the “coercion” continuum to support prosecution. For example, in cases where an entity other than the assigning entity pays the damages, the Board will not find coercion.

In this regard, the ALJ’s rhetorical question is helpful. Should the IAM and SSA modify their agreement so that all M&R work in the Puget Sound will be assigned to IAM-represented employees, would the then Board issue another 8(b)(4)(D) complaint against the IAM? Presumably not. In such a circumstance the facts underlying the July 22, 2011 10(k) decision would have materially changed. It follows that “coercion” analysis is highly fact specific. Here, the critical fact is that the party responsible for assigning the work is not, and will never be, legally responsible for the remedy the IAM seeks. Accordingly, on the instant facts, no 8(b)(4)(D) violation lies.

L. The ALJ Correctly Concluded That It Is Not Clear As To What Respondent Has Done That Undermines The Board’s 10(k) Decision Because The CAGC Refuses To Acknowledge The Specific Facts Of This Case And Instead Insists On A Mechanistic Approach To 8(b)(4)(D) Analysis (Regarding CAGC Exc. 12, SSA Exc. 13).

As the ALJ correctly concludes, there is no undermining of the Board’s 10(k) here. The Board’s 10(k) award states, in relevant part (emphasis supplied):

International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force the Employer to assign the disputed work to workers represented by it.

357 NLRB No. 24 (2011). As noted by the ALJ, “there is no statutory or direct case authority that bars all undermining....” Moreover, there is no undermining whatsoever

here. The IAM does not seek the work at issue and, in fact, seeks nothing from the assigning employer, SSA. Rather, the IAM has disclaimed all interest in the disputed work and merely insists that PMA honor its commitment to indemnify SSA for its breach. Accordingly, the IAM's actions are not prohibited by Section 8(b)(4)(D).

M. The ALJ Correctly Concluded That The IAM's Actions Did Not Have A Proscribed Objective (Regarding CAGC Exc. 13, SSA Exc. 15, & ILWU Exc. 17).

The ALJ correctly concluded that on the facts of this case, the IAM lacks the requisite proscribed object of forcing SSA to assign the disputed work to members of the IAM. The ALJ acknowledged that "it is well-settled that after the Board issues its 10(k) award a union may not continue to obtain the disputed work by requiring an employer to pay monetary damages until it does so." ALJD 8: 33-35. However, the ALJ correctly noted that the Board precedent cited by the CAGC for that proposition does not address the factual distinctions found here; where a party has clearly and unequivocally renounced the disputed work and seeks only contract damages from an entity different than the party responsible for assigning the disputed work. ALJD 8: 40-40, 9: 9-11. As the CAGC's authority is readily distinguishable from the instant facts, the CAGC has failed to meet its burden.

N. The ALJ Correctly Concluded That The CAGC Failed To Show That The IAM's Conduct Restrained Or Coerced SSA Because SSA Is Not The Party Legally Responsible For The Damages Sought By Respondent (Regarding CAGC Exc. 14, SSA Exc. 15, & ILWU Exc. 17).

The ALJ's conclusion that SSA is not coerced is factually and legally sound. The CAGC's exception #14 is fraught with improper burden shifting, overstatement and/or misstatement of Board precedent, and concludes with an improper hypothetical that seeks to change the parties' Stipulated Facts. The CAGC states (CAGC Exc. 14):

The Judge's finding that the Acting General Counsel has failed to show that Respondent's conduct restrained or coerced SSA because PMA has agreed to indemnify SSA arising from SSA's breach of contract (ALJD 9: 9-11) because it: is unsupported by any Board precedent warranting dismissal of the Consolidated Complaint's allegations; conflicts with established Board precedent holding that Respondent's contractual damages action has an objective proscribed by § 8(b)(4)(D) where SSA has lawfully assigned the work to ILWU-represented employees under the Board's § 10(k) determination; and ignores the fact that SSA remains ultimately liable for any damages arising from the arbitrator's award under Respondent's legal action should PMA elect not to honor its agreement with SSA.

First, as the prosecuting party, the CAGC, not the IAM, carries the burden of proving the charges in the Complaint.<sup>7</sup> The lack of Board precedent dictating a clear result on the unique facts of this case undermines the CAGC's position, not the Respondent's. The CAGC carries the burden of proving that the authority relied upon is applicable to the unique facts here. The CAGC cannot meet that burden.

Second, the CAGC repeatedly asserts that the ALJ's conclusions "conflict" with established Board precedent but fails to reconcile the factual differences here with the authority relied upon. As noted above, the CAGC's mechanistic application of 8(b)(4)(D) precedent in run-of-the-mill cases fails here. The instant facts demand a more exacting inquiry into the IAM's alleged "object." Such an inquiry clearly reveals the absence of the coercion necessary to sustain an 8(b)(4)(D) charge.

Finally, in a desperate attempt to avoid/ignore a critical fact that clearly distinguishes this case from the authority relied upon by the CAGC, the CAGC

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<sup>7</sup> The Complaint states, at paragraph 6(d)(emphasis supplied):

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

complains that the indemnification agreement between SSA and PMA is of no legal or factual consequence because PMA may not honor the agreement.<sup>8</sup> The hypothetical does little to ameliorate the fact that SSA is not the party liable for the damages the IAM seeks. It matters little what may happen. The parties stipulated to facts. Paragraph 35 of the Stipulation states, unequivocally, that “PMA agreed to fully indemnify SSA if the IAM were to seek and obtain the ‘pay-in-lieu’ relief...” The Board must credit the parties’ stipulations.<sup>9</sup> Accordingly, SSA risks no financial outlay as a result of the IAM’s remedy action.

O. The ALJ Correctly Concluded That SSA, PMA, And The ILWU Could Anticipate That The CAGC Would Mechanistically Apply Inapposite Board Law Because The Board Routinely Gives Determinative Weight To Employer Preference In 10(k) Cases (Regarding CAGC Exc. 15, SSA Exc. 16, & ILWU Exc. 18).

The ALJ correctly noted that a disproportionate number of 10(k) decisions turn on the single question of the assigning employer’s preference. (ALJD 8: 20-22) Here, PMA and SSA made a side-deal in advance of PMA negotiating language that it surely understood would draw a grievance against SSA by the IAM. The Judge simply notes that so long as SSA assigned the work to the ILWU members, Board precedent would

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<sup>8</sup> Oddly, the Intervenor ILWU challenges the very existence of the indemnification agreement. In its Brief in Support of Exceptions the ILWU refers to the “alleged” indemnification agreement (ILWU Br. p. 1, fn. 1) and later as the “supposed indemnification agreement.” ILWU Br. p. 7. The ILWU complains that it was not afforded the opportunity to present or elicit “additional facts” about the agreement (to which it is not a party). The ILWU does not explain why it characterizes the agreement between PMA and SSA so disparagingly. Both parties to the indemnification agreement (PMA and SSA) are signatory to the Joint Motion and Stipulation of Facts in this case. The indemnification agreement is a fact in the instant record. SF ¶¶34, 35. The ILWU’s refusal to acknowledge the validity of the indemnification agreement is risible and serves to illustrate the baselessness of its challenge to the ALJ’s Decision. The ILWU’s conscious repudiation of record facts goes beyond the pale.

<sup>9</sup> The argument that SSA is “coerced” because it would have to attend a remedy hearing is not persuasive. PMA agreed to “fully indemnify” SSA which logically includes costs associated with the remedy phase of the arbitration proceeding. SF ¶¶34, 35. Further, “[o]ne who has contracted to indemnify another and save him harmless with respect to some obligation by which he is bound can generally be compelled by a decree for specific performance.” *Corbin on Contracts* § 1150. Consequently, if for some reason PMA refuses to pay SSA then SSA can demand specific performance from PMA.

support that decision. The Judge's observation is not "legally irrelevant" in that it acknowledges that section 8(b)(4)(D) Board precedent presents a challenge to Charged Parties who seek to distinguish their own unique fact patterns from those found in run-of-the-mill section 8(b)(4)(D) cases. The instant case presents such a unique fact pattern and SSA and PMA's calculated risk should not be rewarded at the expense of the only innocent party to the transactions at issue.

P. The ALJ Correctly Concluded That The Indemnification Agreement Between PMA And SSA Removed Any Coercive Effect Of The IAM's Pursuit Of Pay-In-Lieu Relief (Regarding CAGC Exc. 16, SSA Exc. 17, & ILWU Exc. 19).

As the ALJ correctly concluded, "PMA's conduct has served to assume any coercive effect from Respondent's conduct onto itself and away from SSA." ALJD 9: 15-16. As the ALJ also concluded, the ILWU agrees.<sup>10</sup> ALJD 9: 16-18. The existence of the indemnification agreement in this case places it squarely outside of the authority relied upon by the CAGC. The Board has held that a union's grievance or lawsuit alleging that a general contractor has breached a subcontracting clause is not "coercive," even after the Board has issued a 10(k) decision giving the work to a different union's employees, so long as the general contractor was not the "assigning" employer.

In Carpenters Local 33, 289 NLRB 1482 (1988) and Iron Workers Local 751, 293 NLRB 570 (1989), the Board held that a union's contract action against a general contractor does not conflict with a 10(k) decision because it will have no effect on the subcontractor's assignment of work. On those facts, the Board found "no conflict between the arbitration proceeding and the 10(k) proceeding." 289 NLRB at 1483-84;

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<sup>10</sup> The ILWU has subsequently reversed course by filing a motion to strike a portion of its own briefing, disavowing its admission that SSA is not coerced by the IAM's pursuit of pay-in-lieu relief. The ILWU's change of heart does not change the fact that it made this important admission. The ILWU's admission is part of the record in this case. See ALJD, p. 9: 16-18.

293 NLRB at 570-71. Therefore, the unions' respective actions were not coercive within the meaning of Section 8(b)(4)(ii)(D). Id. In both cases, the Board distinguished Carey v. Westinghouse, 375 U.S. 261 (1963), which held that a Board's 10(k) decision "take precedence" over related arbitration proceedings when the employer facing the grievance also made the disputed work assignment. Id. The facts of this case call for the same result.

This case does not present an attack on the Board's 10(k) decision. The General Counsel completely ignores the fact that on the instant facts SSA cannot be coerced. The General Counsel seeks to find coercive activity where there is none. The facts of this case present a clear and appropriate analogy to the Board's holdings in Carpenters Local 33 and Iron Workers Local 751.

Just as in Carpenters Local 33 and Iron Workers Local 751, SSA, the "assigning" party, risks no financial loss for its assignment. Thus, SSA can make assignments consistent with the Board's 10(k) decision, and the IAM encourages it to do so. This is the benefit of the bargain SSA reached with PMA, at PMA's insistence and with SSA's concurrence. Likewise, PMA is not "coerced" by the IAM's contract action. If Arbitrator Cavanaugh orders a pay-in-lieu remedy for IAM members harmed by the arrangement agreed upon by PMA and SSA, then PMA, the non-assigning employer, honors its bargaining agreement with SSA and simply pays the amounts it agreed to pay (see SF ¶¶34, 35). SSA and PMA cannot now complain about the arrangement agreed to at the bargaining table (to the exclusion of the IAM) addressing precisely this dispute. By dismissing the charge, the ALJ will thereby be giving all three contracting parties precisely the benefit of their respective bargains. The IAM membership will be made

whole, SSA will continue to assign the work consistent with the Board's 10(k) (with no threat of action by the IAM), and PMA achieves the objective sought in the "interest" of the West coast maritime industry, but at the price PMA understood and agreed to.

The General Counsel's position exalts a mechanistic application of the law and fails to acknowledge the unique facts of this case. The General Counsel will argue, as it must to construct a violation, that an action seeking monetary damages amounts to a challenge of the Board's 10(k) award of the disputed work. Here, nothing could be further from the truth. The IAM's contract action will have zero effect on SSA's assignment of work and result in zero financial loss to SSA. SF ¶¶32, 34, 35. The ALJ correctly concluded that the factual and legal landscape evident here distinguish this case from the precedent relied upon by the CAGC.

In an attempt to manufacture coercion, SSA argues that "there is no distinction between SSA and PMA for purposes of the Board's section 8(b)(4)(ii)(D) charge." (SSA brief at 8). SSA is wrong because the "agency" relationship between SSA and PMA is of a limited nature. As made clear by the parties in the Joint Motion and Stipulation of Facts, PMA is a "multiemployer collective-bargaining agent" for approximately 70 for-profit companies. SF ¶7. SSA (and the other 69 PMA members) has "duly authorized PMA to represent them in negotiations" with the ILWU "over terms and conditions of employment" in a multi-employer bargaining unit at Pacific coast ports. SF ¶8. The "indemnification" agreement between PMA and SSA is entirely distinct from this "agency" relationship as it in no way involves the "terms and conditions of employment" of ILWU members.

Put differently, PMA is not SSA's "agent" with regard to SSA's contractual obligations to the IAM. PMA made a unilateral decision to indemnify SSA (assume SSA's contractual obligations to the IAM) so that it could achieve its desired negotiation result with the ILWU. SSA agreed to the arrangement only because PMA assumed the financial risk. SF ¶34. This arrangement falls outside of the "agency" authority granted the PMA by SSA. PMA's agreement to pay damages related to SSA's breach is not coercive to PMA because PMA does not assign the disputed work. By the same token, the IAM's damage claim for SSA's breach is not coercive because SSA is not legally responsible for the damages. It matters little that PMA is SSA's bargaining agent for units of employees represented by the ILWU. The responsibility assumed by PMA relates to the terms and conditions of ILWU-represented employees of SSA, not IAM-represented employees of SSA.

SSA argues, citing 29 U.S.C. § 152 (2), that "employer" means any "person acting as an agent of an employer." This argument ignores the most elementary fact that SSA has not authorized or assigned to PMA any authority to bargain on behalf of IAM employees. JD 2:32-33; SF ¶¶8, 11, 12. PMA and SSA are not "one and the same," or the specific agreement to a special indemnification agreement above and beyond the designation of bargaining authority would not have been necessary. Because the PMA is not an agent of SSA over IAM employees, SSA was forced to demand a separate indemnification agreement, outside of the agency relationship, to protect SSA from the contractual grievances it knew would be filed by the IAM subsequent to the agreement negotiated with the ILWU. JD 5:14-16; SF ¶¶ 34, 35. SSA assigned the responsibility for

its contract breach related to IAM-represented employees to the PMA. The PMA is now responsible.

SSA also argues that PMA is the direct object of unlawful coercion. SSA cites United Steelworkers Local 1397, 240 NLRB 848, 849 (1979) for the proposition that a “tendency” to retrain or coerce is sufficient to establish coercion. However, United Steelworkers is distinguishable for the simple reason that it relates to a section 8(b)(1) action, and not an 8(b)(4)(ii)(D) action. Further, the case has nothing to do with coercing an employer; rather it involves a union official’s conflict with another union member. Id. at 848. Moreover, the case is dissimilar because PMA cannot be coerced because it has no relationship or control over IAM members. JD 2:32-33; SF ¶11. SSA is the “assigning” employer. JD 2:35-37; SF ¶13.

In making the argument that PMA and SSA are one-in-the-same, SSA ignores the twin cases (Carpenters Local 33 and Iron Workers Local 751, *supra*) relied upon by Respondent which hold that when an entity other than the entity responsible for assigning the disputed work is responsible for damages, there can be no coercion. In Carpenters Local 33 and Iron Workers Local 751 the general contractors were also “persons engaged in commerce” but the unions were nonetheless allowed to pursue contract remedies against them because a different entity (the subcontractors) assigned the disputed work.

SSA erroneously attempts to prove that it and PMA are the same entity. The argument is both legally insufficient and ignores the facts of this case. The agency relationship between PMA and SSA extends only to bargaining for ILWU-represented employees, not the IAM. Further, SSA and PMA entered into a separate indemnity agreement outside the scope of their agency relationship. Allowing the IAM to pursue its

damage claim against the PMA does not create a coercive effect under the statute. For SSA to now argue that the IAM brings “unlawful economic pressure to bear” against PMA by simply asking that two parties to an agreement honor that agreement is hypocrisy. How can a party claim to be coerced by its own agreement? SSA and PMA’s clever legerdemain should be rejected by the Board.

Q. The ALJ Correctly Concluded That Congress Could Not Have Intended For The Board To Protect An Employer Such As SSA Under The Instant Facts (Regarding CAGC Exc. 17 & ILWU Exc. 22).

The ALJ’s measured balance between the policies underlying 10(k) and other bedrock policies of the Act, such as discouraging contract breaches, encouraging the use of the grievance and arbitration process, and respecting properly issued arbitration awards reveals the thoughtful and thorough review of Board precedent engaged in by the ALJ.

It is axiomatic that national labor policy strongly favors the resolution of collective bargaining disputes through labor arbitration. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Steelworkers v. American Manufacturing Co., 363 U.S. 574 (1960). That national policy extends to the arbitration of jurisdictional disputes. Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1963). Prohibiting the IAM from pursuing its contract remedies here would run counter to federal labor policy and deprive the IAM the benefit of its bargain. In this regard, Congress has stated that a contractually negotiated grievance-arbitration procedure is the preferred method for the resolution of labor-management disputes.

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

29 U.S.C. § 203(d). This policy has been recognized by the Board. See e.g. ILWU Local 7 (Georgia-Pacific Corp.), 291 NLRB 89, 92 (1988).

The federal policy in favor of resolution through the grievance-arbitration machinery should not be disregarded lightly. Here, the IAM's contract right was the product of the give-and-take of contract negotiations. To render that right nugatory without proper, reciprocal consideration and compensation makes a mockery of the very collective bargaining process that arbitration and federal labor policy is designed to protect.

Courts and the Board have recognized a limited exception to this federal policy in some 10(k) cases involving pay-in-lieu remedies where coercion is present. This exception has been limited, however, to give 10(k) determinations precedence over arbitral awards "only to the extent necessary to effectuate the 10(k) determination." Sea-Land Service, Inc. ILWU, 939 F.2d 866, 873 (9<sup>th</sup> Cir. 1991). The Court further reasoned (Id.)(emphasis supplied):

The NLRB, at least in its jurisdictional dispute-resolution capacity, is simply not an arbiter of collective bargaining agreement disputes. To allow the NLRB to supersede arbitration awards beyond what is needed to resolve the specific jurisdictional dispute at issue would undermine Congress's intent regarding the role of arbitration.

It follows, then, that any exceptions made by the Board in 10(k) cases to this strong federal labor policy must be strictly limited to resolving the disputed work assignment. This exception has never been expanded to apply to an arbitral remedy that involved an indemnification agreement that would result in a non-assigning entity paying

the contract damages (nor where coercion is absent).<sup>11</sup> The Board should not expand the law beyond its own limited exception. To do so would eviscerate the negotiated remedy for a contract breach (pursuing a remedy through arbitration) and would not be necessary to effectuate the 10(k) determination because, as outlined above, dismissing the charge against the IAM does not coerce SSA to change its assignment or pay any damages whatsoever. Moreover, neither is PMA in any fashion “coerced.”

R. The ALJ Correctly Concluded And Observed That The Board’s Mechanistic Approach To 10(k) Analysis Has Undermined Other Equally Important Core Policies Under The Act, Encouraging Parties To CBAs To Disregard Their Contractual Obligations, Thereby Rendering Nugatory The Grievance-Arbitration Process (Regarding CAGC Exc. 18, SSA Exc. 18, 19, 20, 21, 22 & ILWU Exc. 23, 24, 25, 26).

The ALJ accurately noted that evaluating section 8(b)(4)(D) charges requires a thoughtful review of all facts on a case-by-case basis. For example, the excepting parties all argue that the IAM is guilty of a proscribed object notwithstanding the indemnification agreement because PMA is “any person engaged in commerce” and thus PMA’s payment of damages under the indemnity agreement is necessarily coercive. But the excepting parties have not attempted to distinguish the instant facts from the cases cited by the IAM wherein the Board found no 8(b)(4)(D) violation because an entity other than the assigning employer was responsible for the damages. See Carpenters Local 33, 289 NLRB 1482 (1988) and Iron Workers Local 751, 293 NLRB 570 (1989). In both cases, the party held ultimately responsible for the damages was, as PMA is here, “any person engaged in commerce.” Nonetheless, the Board held that the contract actions in those cases did not conflict with a 10(k) decision because it had no effect on

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<sup>11</sup> SSA obviously negotiated the agreement with PMA because it knew it would soon be blatantly violating its agreement with the IAM.

the employer who assigned the work. The exact same holds true here as SSA is not coerced.

- S. The ALJ Correctly Concluded That The Board Should Not Take The Next Step Down The Road Toward Undermining Core Policies Of The Act That Are Violenced By The CAGC's Complaint In This Case (Regarding CAGC Exc. 19).

The ALJ correctly identified similarly important policies under the Act that the Board should be reticent to undermine. The Board should only expand the law beyond its own limited exception, as described in Section Q, above.

- T. The ALJ Correctly Concluded That The Complaint Be Dismissed As No Violation Of Section 8(b)(4)(D) Lies Here (Regarding CAGC Exc. 20, SSA Exc. 23).

The ALJ correctly concluded that the precedent relied upon by the CAGC is both factually and legally distinguishable from the instant case. The CAGC has failed to meet its burden of proving the section 8(b)(4)(D) violation alleged in the Complaint.

- U. The ALJ Correctly Concluded That The IAM Did Not Violate Section 8(b)(4)(D)(Regarding CAGC Exc. 21 & ILWU Exc. 27).

The ALJ correctly concluded that the CAGC has failed to meet its burden of proving the section 8(b)(4)(D) violation against Respondent, as alleged in the Complaint, in light of the indemnity agreement between PMA and SSA and the IAM's renunciation of the work at issue in the underlying 10(k) decision.

- V. The ALJ Correctly Concluded That On The Facts Of This Unique Case No Order Should Issue Requiring The IAM To Withdraw Its Contractual Damages Action Before Arbitrator Cavanaugh (Regarding CAGC Exc. 22).

The ALJ correctly declined to enforce the CAGC's proposed order. The ALJ correctly dismissed the Complaint against Respondent.

- W. The ALJ Correctly Concluded That Upon Issuance Of The Board's Decision On July 22, 2011, The IAM Informed The Director That It Would Comply With The 10(k) Decision, And It Has (Regarding SSA Exc. 1 & ILWU Exc. 3).

The ALJ correctly concluded that the IAM has complied with the Board's order that it is "not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force the Employer (SSA) to assign the disputed work to workers represented by it..." (357 NLRB No. 27) The IAM has not taken any action inconsistent with the Board's order in light of the unique facts of this case.

- X. The ALJ Correctly Concluded That The IAM Does Not Have The Objective Or Purpose Of Forcing SSA To Assign The Work At Issue To The IAM (Regarding SSA Exc. 11 & ILWU Exc. 14).

The ALJ properly concluded that the IAM's pursuit of contract damages on the unique facts of this case does not rise to the level of forcing or requiring SSA to assign the work awarded to the ILWU to IAM-represented employees. The ALJ's decision is supported by the language of the Complaint, which states (at paragraph 6(d)):

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

The ALJ's decision is further supported as set forth in Sections A-W, above.

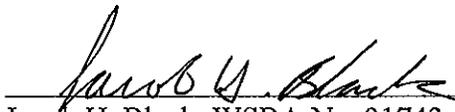
### CONCLUSION

The CAGC argues repeatedly that the ALJ's decision is not supported by Board authority. To the contrary, it is the CAGC who fails to cite relevant authority supporting its arguments. The CAGC carries the burden of proving the allegations set forth in the Complaint against the IAM. The CAGC cannot point to any analogous Board authority.

Rather, the CAGC simply parrots the general rule in section 8(b)(4)(D) cases without acknowledging the unique and distinguishing facts of the instant case. Put differently, the ALJ is not “wrong on the law,” the ALJ correctly concluded that this case does not fit neatly into the traditional section 8(b)(4)(D) analysis. Thus, this case calls for a different result.

For the foregoing reasons the IAM respectfully requests that the Board uphold the Administrative Law Judge’s conclusions that Respondent does not violate Section 8(b)(4)(D) by seeking pay-in-lieu relief under the unique and specific facts of this case.

DATED this 26<sup>th</sup> day of June, 2012.

  
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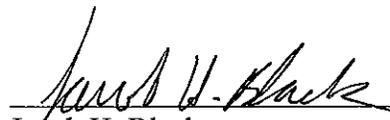
**CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of June, 2012, I caused the original of the foregoing to be filed electronically with the NLRB through its website at nlr.gov, and I emailed a copy to:

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