

**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

**RESPONDENT'S BRIEF IN SUPPORT
OF CROSS-EXCEPTIONS TO
THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

STATEMENT OF THE CASE

This matter concerns the IAM's lawful pursuit of a contract action that does not contradict nor undermine the Board's July 22, 2011, 10(k) decision. As shown below, on the unique facts of this case, no 8(b)(4)(ii)(D) violation lies. The ALJ's Decision in this case was correct. However, the ALJ failed to address two key arguments raised by the IAM. In light of the ALJ's Decision, and the arguments set forth below, the National Labor Relations Board should affirm the ALJ's Dismissal of the Complaint.

QUESTIONS PRESENTED

1. Did the ALJ err by not specifically relying upon the Respondent's legal argument, supported by Board precedent, that unions, such as the IAM on the facts of this case, may seek contract remedies following an adverse 10(k) decision where an entity other than the employer responsible for assigning the disputed work is ultimately liable for the damages? [Exception 1]
2. Did the ALJ err by failing to specifically address the Respondent's argument, in the alternative, that there can be no undermining of the 10(k) award by the IAM's pursuit of contract damages from the date of the contract breach to the date of the 10(k) decision on the facts of the instant case? [Exception 2]

STATEMENT OF FACTS

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 Marine Inc. (“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 ¶13.¹ 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.”

¹ Citations in this brief will be as follows: to the ALJ’s Decision “JD” 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. #.”

Id. Under the agreement, 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 Region 19 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

I. PRIOR BOARD PRECEDENT HAS ESTABLISHED THAT AN AGGRIEVED PARTY CAN SEEK A CONTRACT REMEDY AFTER A 10(k) DECISION WHERE AN ENTITY OTHER THAN THE ASSIGNING EMPLOYER IS RESPONSIBLE FOR DAMAGES.

The Board has held that a union may violate Section 8(b)(4)(ii)(D) in circumstances where it attempts to coerce the employer into reassigning the work in conflict with an adverse 10(k) determination. Laborers Local No. 261 (W.B. Skinner, Inc.), 292 NLRB 1035 (1989). The Board has ruled "...that by maintaining the suit after the Board has made its 10(k) determination, the Respondent sought to undermine the Board's 10(k) award and to coerce the Employer into reassigning to its members the work that the Board found had been properly assigned by the

Employer to employees represented by IBEW...[T]he Respondent's conduct in maintaining the suit after the 10(k) determination issued violated Section 8(b)(4)(D)." Id., at 1035.

Despite this prohibition, in unique cases, the Board has allowed an aggrieved party to recover damages following a 10(k) award. In circumstances where a general contractor violates an agreement via subcontracting work to another employer, an aggrieved party may recover damages. Carpenters Local 33 (Blount Brothers), 289 NLRB 1482 (1988). The Board held in Blount that a union's contract action against a general contractor did not conflict with a 10(k) decision because it would have no effect on the subcontractor's assignment of work. In these circumstances, the Board has found "...no conflict between the arbitration proceeding and the 10(k) proceeding." Id., at 1484. The union's actions were not coercive within the meaning of Section 8(b)(4)(ii)(D) because the "assigning" employer, the subcontractor, had no pressure to reassign the work. Id.

Similarly, in Ironworkers District Council (Hoffman Construction), 293 NLRB 570, 571 (1989), the Board held that a union's post 10(k) pursuit of contract damages against a general contractor did not coerce the assigning employer. In both Ironworkers and Blount, 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. In essence, the Board makes delineation between an employer "assigning" the work and another party paying the damages for a willful contract breach.

The facts of the present case fit squarely within these Board precedents. Here, SSA is the "assigning" employer because it dictates who will perform the maintenance work at its facilities. JD 2:35-37, 42-45; SF ¶13. PMA is not the assigning employer and has no relationship with the

IAM. Id.; SF ¶11. Prior to changing its assignment of work in this case, and in devious contemplation of its breach of contract with IAM, SSA obtained an indemnity agreement from PMA. JD 5:14-16; SF¶ 34, 35. Consequently, any damages owed to the IAM by virtue of SSA's breach of contract with the IAM is borne by PMA. JD 5:19-20; SF¶ 34, 35. It follows that the facts of this case are perfectly analogous to a general contractor-subcontractor relationship. Since PMA is not the "assigning" employer it cannot allege coercion, just as the general contractors in Ironworkers and Blount could not. Further, SSA cannot be coerced because it will not be paying any of the damages for its willful contract breach. JD 5:19-20; SF ¶ 34, 35.

Based on its exceptional agreement, PMA has assumed liability for SSA's breach. JD 5:17; SF ¶ 35. In addition, SSA cannot be coerced into reassigning the work because the IAM has specifically disclaimed the work. JD 4:52, 5:1-2; SF ¶¶ 30, 32. The IAM will not accept any reassignment of the work even if offered by SSA. SF ¶ 32. Moreover, there is no coercive effect because PMA will pay for the damages without having to increase cargo dues or make any material assessments to its members. JD 5:20-22; SF ¶ 35. "The reimbursement would be paid entirely from PMA's general assets." SF ¶ 35.

The parties attempt to side-step these undisputed facts by asserting that PMA is equally coerced because it, as SSA, is "any person engaged in commerce." This jejune argument fails for several reasons. First, the Board in Ironworkers and Blount allowed contract actions against the general contractors despite the fact that they too were "any person engaged in commerce." Second, allowing the IAM to pursue its claims in no manner inhibits SSA's rights as it can continue to allocate work assignments consistent with the 10(k) decision. Third, the Board has recognized that a fact specific determination is necessary to assess whether coercion is present or not. In the instant action, PMA cannot be coerced as "any person engaged in commerce"

because the twin precedents cited above illustrate that there is no coercion under these circumstances. A careful analysis of the facts demonstrates that if “any person engaged in commerce” extended as far as the CAGC suggests, it would be utterly inconsistent with Ironworkers and Blount.

Additionally, the fundamental Congressional policies underlying a 10(k) determination are not implicated here. Congress desired “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, 580-581 (1960) (emphasis added). Such is hardly the case under these facts. SSA can be called many things, but certainly not a “helpless victim.” SSA acted with full knowledge in concert with PMA to allocate the work from IAM to the ILWU. JD 5:11-12; 8:7-9; SF ¶ 34. SSA anticipated the breach and consequently made ready for it by securing indemnity from PMA. JD 5:14-16; 8:7-9; SF ¶¶ 34, 35.

SSA is not like an employer “...caught ‘between the devil and the deep blue’ ” as the court posited in the Radio Engineers decision. Id., at 575. In fact, SSA’s own senior vice president testified in the prior 10(k) hearing that “as a Multi-Employer it was in the best interest of the industry for SSA to go along with that commitment” to assign the work to the ILWU in

breach of its IAM contract. Exhibit 1, p. 92-93. SSA acted with full knowledge that it was breaching its agreement with the IAM.²

Contrary to the general counsel and SSA's contentions, this is not a petulant effort to disturb the 10(k) award. Rather, this is an exceptional situation that falls squarely within prior Board precedent allowing a party to recover damages where the entity compensating the aggrieved party is not the "assigning" employer. IAM merely seeks to obtain the benefit of the bargain it secured with SSA. The Board should not reward SSA for its legerdemain scheme of securing an indemnity agreement while simultaneously depriving IAM of its contractual right to a remedy.

II. AT A MINIMUM, IAM IS ENTITLED TO A PAY-IN-LIEU REMEDY FOR SSA'S CONTRACT BREACH PRECEDING THE BOARD'S 10 (K) DECISION.

At a minimum, the IAM should be permitted to seek a pay-in-lieu remedy for the time period between SSA's breach (July 1, 2008) and the Board's 10(k) decision favoring the assignment of work to the ILWU (July 22, 2011). The amount at issue for this time period is fixed (see SF at ¶133) and cannot increase no matter the outcome here. Moreover, such a limited pay-in-lieu remedy in no way subverts the Board's 10(k) decision.

The Board has held that a union's pursuit of a pay-in-lieu remedy pursuant to a collective bargaining agreement involving claims arising prior to a 10(k) decision is not coercive and

² Federal labor policy strongly supports 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). This policy extends to the arbitration of jurisdictional disputes between parties. Carey v. Westinghouse Electric Corporation, 375 U.S. 261 (1963). Congress has decreed that a contractually negotiated grievance and 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." Local Union No. 7 (Georgia Pacific Corp.), 291 NLRB 89, 92, quoting 29 U.S.C. § 203 (d). The Board can apply both of the Congressional policies implicated in this matter by awarding the IAM the right to pursue its contractual remedy. In Ironworkers and Blount, above, the Board's decisions acknowledged both policies by allowing the injured union to recover damages from an entity not responsible for assigning the disputed work. The same result is warranted here.

therefore does not offend Section 8(b)(4)(ii)(D). See Longshoremen ILWU Local 7, 291 NLRB 89 (1988). This result derives from settled Board law that a union's contract action is inconsistent with a 10(k) decision if it seeks "to undermine the Board's 10(k) award and to coerce the Employer into reassigning to [the respondent's] members the work that the Board found had been properly assigned" to other employees. Laborers Local 261, 292 NLRB 1035 (1989). Here, the IAM's pursuit of a pay-in-lieu remedy limited to the time period before the Board's decision does not violate Section 8(b)(4)(ii)(D) for two reasons.

First, the General Counsel cannot prove a crucial element of its case against the IAM as it cannot be shown that the IAM's contract enforcement action for the time period prior to the Board's decision would coerce SSA to reassign the disputed work. In fact, the IAM has agreed not to dispatch its members to perform the work under any circumstances. JD 5:1-2; 8:40-42; SF ¶ 32. Additionally, at all times since the Board's 10(k) decision the IAM has honored the decision and has taken no action by picketing, strike, or otherwise to reclaim the work. Second, should the IAM receive a monetary award from Arbitrator Cavanaugh, SSA risks absolutely zero financial exposure because PMA must pay. JD 5:14-16; SF ¶ 34-35.

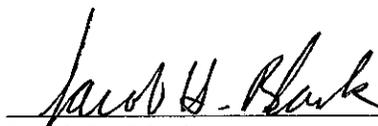
The foregoing argument; that a union does not offend a 10(k) award by seeking a pay-in-lieu remedy limited to work performed prior to the 10(k) decision, was repeatedly advanced by Board member Devaney. See Iron Workers Local 433, 309 NLRB 273, 276 (1992); Marble Polishers Local 47-T, 315 NLRB 520, 524 (1994); Local 30, 307 NLRB 1429, 1432 (1992); Iron Workers Local 433, 308 NLRB 756 (1992). Likewise here, if the Board limits the IAM's pursuit of monetary relief to the time period of SSA's breach that pre-dates the Board's 10(k) award, then such a pursuit cannot, as Devaney argued, be coercive. Devaney's cogent reasoning is compelling.

CONCLUSION

The IAM's pursuit of a contract remedy does not disturb the Board's 10(k) ruling. In analogous circumstances, the Board has permitted an aggrieved party to pursue remedy claims where a non-assigning entity is responsible for the damages. 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 or PMA.

DATED this 26th day of June, 2012.

Respectfully submitted,



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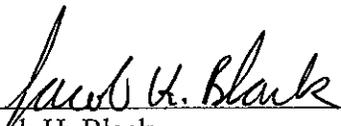
CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2012, I caused the original of the foregoing **RESPONDENT'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** to be filed electronically with the NLRB through its website at nlr.gov, and I emailed a copy to:

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