

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

Submitted by,

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**I. STATEMENT OF THE CASE**

This matter concerns the unlawful pursuit by International Association of Machinists District Lodge 160, Local Lodge 289 ("Respondent"), of a contractual payment-in-lieu damages action against SSA Marine Inc. ("SSA") directly in conflict 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. After receipt of a stipulated record on March 15, 2012, Administrative Law Judge William G. Kocol dismissed the Consolidated Complaint on May 8, 2012. Counsel for Acting General Counsel has filed numerous exceptions to Judge Kocol's (the "Judge's") Decision and Order as well as a brief in

support of those exceptions with the Board.<sup>1</sup>

Recognizing the tenuous legal ground on which the Judge's Decision and Order rests, Respondent has filed cross-exceptions and offers two additional arguments in the hope that the Board will find some basis on which to uphold dismissal of the Consolidated Complaint. Pursuant to §102.46(f) of the Board's Rules and Regulations, Counsel for the Acting General Counsel files the instant answering brief in response to those cross-exceptions. As shown below, Respondent's arguments lack merit under extant Board precedent.

## II. ARGUMENT

### A. **Board Precedent Refutes Respondent's Contention That Respondent May Lawfully Pursue Its Contractual Damages Claim Here Where that Claim Directly Undermines the Board's §10(k) Decision**

There is no merit to Respondent's contention (Br 3-7)<sup>2</sup> that Board precedent permits its contractual damages claim here. Respondent's reliance on *Ironworkers Dist. Council (Hoffman Construction)*, 293 NLRB 570 (1989), and *Carpenters Local 33 (Blount Bros.)*, 289 NLRB 482 (1988), is completely misplaced and does not support its contention. Both of those cases are easily distinguishable because they involve contractor-subcontractor relationships in which one union files a grievance against the general contractor for unlawfully subcontracting the work to a subcontractor, which then uses a different union (which is awarded the work in a §10(k) decision) to perform the work. Both cases stand for the proposition that the union's pursuit of that grievance action does not undermine the Board's §10(k) decision because the dispute for which

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<sup>1</sup> Counsel for the Acting General Counsel relies on the full recitation of the facts underlying this matter set forth in that brief and does not repeat them here.

the contractual damages are sought (*i.e.*, the unlawful subcontracting) is a *separate* dispute from the one that the §10(k) proceeding resolves (*i.e.*, which union's employees get to perform the work).

By contrast, Respondent here is *not* seeking contractual damages because SSA breached an agreement not to subcontract the disputed work. Rather, it is undisputed that Respondent is seeking to have SSA ordered to pay contractual damages to enforce the arbitrator's determination that SSA breached its contract with Respondent by having ILWU-represented SSA employees perform the disputed work. Respondent's damages action is merely another version of the exact *same* §10(k) dispute that the Board decided already in favor of SSA assigning the work to the ILWU-represented employees. Thus, Respondent's pursuit of the contractual damages action *directly* conflicts with and undermines the Board's §10(k) decision in violation of §8(b)(4)(ii)(D).

Respondent's attempt to analogize the situation here to the above no-subcontracting cases because of SSA's indemnification agreement with PMA is based on faulty logic. The Board found no undermining of the §10(k) decision (and, therefore, no violation) in the cited cases because they concerned separate contractual disputes involving different theories, *not* because a different party was ultimately responsible for paying the damages. As argued in Acting General Counsel's brief in support of its Exceptions to the Judge's Decision and Order, it simply does not matter under Board precedent who ultimately pays the damages.

What does matter is that a party may not pursue a contractual damages action that directly undermines the Board's §10(k) decision because that decision takes

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<sup>2</sup> "Br" refers to Respondent's Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge

precedence over any prior inconsistent arbitration award. *Carey v. Westinghouse Corp.*, 375 U.S. 261, 271 (1964). *Accord 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) (the "[§]10(k) award trumps the collective-bargaining agreement."). Respondent is pursuing just such an improper contractual damages action based on its claim that SSA breached its contract by assigning the work to the ILWU-represented employees. That action directly undermines the Board's §10(k) decision finding that SSA lawfully assigned the work to the ILWU-represented employees.

Respondent cannot disregard the §10(k) procedure that Congress enacted to resolve jurisdictional disputes merely because it is unhappy with the result of that procedure and the Judge disagrees with Congress and the Board. Respondent's contractual damages action violates §8(b)(4)(ii)(D).

**B. Respondent's Contention That Respondent May Lawfully Pursue Its Contractual Damages Claim for Work Performed Prior to the Board's §10(k) Decision Is Legally Erroneous**

There is also no merit to Respondent's contention (Br 7-8) that it may lawfully pursue its contractual damages action for work performed before the Board's §10(k) decision. Indeed, the Board has consistently rejected that argument.

Although a union does not violate the Act by instituting and maintaining an action seeking payment-in-lieu relief *prior* to the Board's §10(k) decision,<sup>3</sup> the same is not true post §10(k) decision. Once the §10(k) decision issues, the union violates §8(b)(4)(D) by

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<sup>3</sup> See, e.g., *ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 89, 92-93 (1988).

maintaining *any* action seeking payment-in-lieu relief for *any* period of time where the action is inconsistent with the §10(k) determination:

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.

*Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273, 274 (1992). *Accord Marble Polishers Local 47-T (Grazzini Bros.)*, 315 NLRB 520, 523 n.9 (1994).

Respondent relies on the rationale advanced by former Board Member Devaney that a damages action limited to seeking pay-in-lieu relief for work performed prior to the §10(k) decision is not unlawful. However, reliance on that rationale does not aid its argument here, as Devaney's rationale was always set forth as a dissenting opinion. The Board has never adopted Devaney's position with respect to this issue, and Respondent set forth no cogent reason to adopt it now.

In sum, Respondent's pursuit of its contractual damages action against SSA has an unlawful objective in violation of §8(b)(4)(ii)(D). It does not matter whether Respondent limits its demand for monetary relief to one day or 10 years. The Act precludes Respondent from maintaining its contractual damages action here because it conflicts with the Board's §10(k) decision.

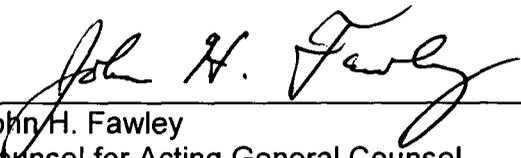
### **III. CONCLUSION**

Based on the foregoing, the Board should reject Respondent's arguments in support of its cross-exceptions to the Judge's Decision and Order. Moreover, as urged in its brief in support of its Exceptions, Acting General Counsel respectfully requests

that the Board find that Respondent violated §8(b)(4)(ii)(D) by maintaining its contractual damages action against SSA directly undermining the Board's §10(k) decision, and to order the appropriate remedial relief.

**DATED** at Seattle, Washington, this 10<sup>th</sup> day of July, 2012.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>th</sup> day of July, 2012, I caused copies of Counsel for the Acting General Counsel's Answering Brief in Response to Respondent's Cross-Exceptions to the Decision of the Administrative Law Judge to be served upon the following parties via the following means:

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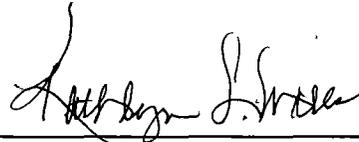
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**DATED** at Seattle, Washington, this 10th day of July, 2012.

A handwritten signature in cursive script, appearing to read "Kathlyn L. Mills", written over a horizontal line.

Kathlyn L. Mills, Secretary