

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

SSA MARINE, INC.,

Cases: 19-CD-502;  
19-CD-506

and

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION.

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

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Charging Party SSA Marine, Inc. ("SSA") hereby files this Answering Brief in response to the International Association of Machinists' ("Respondent" or "IAM") Cross-Exceptions to the Decision and Order of the Administrative Law Judge ("ALJ").

**I. INTRODUCTION**

Contrary to Respondents' repeated assertions, there is no reason for the Board to abandon decades of legal precedent and allow the IAM to pursue and/or maintain a grievance seeking a monetary "pay-in-lieu" remedy against SSA for work that the Board has awarded to employees represented by another union.

The ALJ's dismissal of the Complaint flies in the face of Board law and policy, and upholding that dismissal would eviscerate well-established law and longstanding policy regarding the protections afforded by the Board's 10(k) procedures and determinations. The Board should reject Respondent's Cross-Exceptions and overturn the ALJ's Decision and Order.

## II. ISSUES PRESENTED

A. Whether the ALJ erred by not “specifically relying upon Respondent’s legal argument . . . that SSA is not coerced by the Respondent’s” pursuit and maintenance of a post-10(k) monetary remedy against SSA “because PMA agreed . . . to assume all costs arising from” the contract action, even though SSA is the Employer solely responsible assigning the work in dispute. (Respondent’s Cross Exception No. 1)

B. Whether the ALJ erred by not “specifically address[ing]” the IAM’s argument that, despite clear NLRB authority to the contrary, it should have been allowed to pursue “pay-in-lieu” damages “from the date of the contract breach to the date of the 10(k) decision. (Respondent’s Cross-Exception No. 2)

## III. LEGAL ARGUMENT

On July 22, 2011, the NLRB issued a Decision and Award finding that SSA’s employees represented by the ILWU were entitled to perform “the maintenance and repair of [SSA’s] stevedoring and terminal service power equipment while present at Terminal 91 in Seattle, Washington.” SSA Marine, Inc., 357 NLRB No. 24, pg. 1.

The Respondent’s Cross-Exceptions seek to render that Decision essentially meaningless and to deprive SSA of the legal protections of that jurisdictional Award and its underlying procedures. The Board should reject the Respondent’s Cross-Exceptions.

Furthermore, the Respondent’s attempted vilification of SSA is irrelevant, at best, and should also be rejected. In this regard, Board law prohibits “the re-litigation of threshold matters that are not necessary to prove 8(b)(4)(D) violations.” Hoffman Construction Company, 293 NLRB 570, at fn. 1 (1989). As defined by the Board, “threshold matters” are issues which concern “whether the proceeding is properly before the Board for disposition not whether a violation of Section 8(b)(4)(D) has been committed.” Id.

The Respondent’s Cross-Exceptions are infected with its repeated and desperate attempts to inject threshold issues into this 8(b)(4)(D) proceeding by portraying SSA as somehow unworthy of the protections afforded by the Board’s 10(k) Decision and Award . For example, the Respondent alleges:

“SSA can be called many things, but certainly not a ‘helpless victim’” (Respondent’s Brief in Support of Cross-Exceptions, pg. 6 [also referred to herein as “Respondent’s Brief” ]);

“SSA is not like an employer ‘ . . . caught between the devil and the deep blue” (Id.); and “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.” (Id., pg. 5.)

Certainly, the record indicates that SSA found itself caught between its long standing collective bargaining relationships and its multiemployer association that had the ability to dictate its labor policy. SSA properly invoked the Board’s processes to resolve the resulting jurisdictional dispute.

To the extent that Respondent’s Cross-Exceptions argue that the current proceeding is not properly before the Board. Any alleged improper acts by SSA (or any other employer or party) had to be raised as a threshold issue long ago. The Board should reject the Cross-Exceptions should be rejected in their entirety based on this procedural deficiency. More importantly, the Respondent’s Cross-Exceptions also lack substantive legal merit.

**A. Respondent’s First Cross-Exception Fails Because Board Law Prohibits the Losing Party to a 10(k) Decision from Attempting to Recover Monetary Damages from the Employer Responsible for Assigning the Work.**

IAM lost the 10(k) decision that upheld SSA’s assignment of the disputed work. Now IAM seeks damages against SSA. However, the IAM cites no case that supports the novel proposition that after losing a 10(k) decision it should be allowed to maintain an action for monetary damages against the employer responsible for assigning the disputed work.

In fact, Carpenters Local 33 (Blount Bros.), 289 NLRB 1482 (1988), and Ironworkers District Council (Hoffman Construction), *supra*, contradict that contention.

In both cases, post-10(k) monetary grievances pursuant to collective bargaining agreements were filed or pursued against general contractors. Those general contractors subcontracted work to other workers. Neither case involved disputed work assignments.

In Blount Bros., Carpenters Union Local 33 filed a grievance against the general contractor alleging that:

Blount had breached its collective-bargaining agreement by subcontracting the work to a subcontractor who was not under contract with Local 33, and requested a remedy making whole the employees represented by Local 33 for loss of earnings in lieu of the scaffolding work already performed. Blount Bros., *supra*, at 1482.

In Hoffman, Ironworkers Local 751 filed a grievance against the general contractor which alleged that Hoffman's decision to subcontract certain work to a subcontractor which then employed members of a different union to perform the work violated "the subcontracting article" of Hoffman's contract with the Ironworkers. Hoffman Construction Co., *supra*, at 570.

In both cases, the Board allowed the contract actions to survive only because the grievances were not about the assignment of the work:

While there is language in the Carey decision to the effect that if the Board should disagree with the arbitrator the Board's ruling would take precedence, that language is inapplicable to the instant case because Carey involved a grievance filed against an employer which had assigned certain work to employees represented by one union and which was involved in a dispute with that and another union over the assignment of the work. In the event of inconsistent Board and arbitral decisions, such an employer could be presented with a choice of either complying with the Board's decision and risking Section 301 damages, or complying with an arbitrator's determination. Such a result is not possible here because, as noted earlier, Blount is not the employer who made the work assignment . . . Blount Bros., *supra*, at 1484 [emphasis added].

Similarly, in Hoffman, the Board further explained the limited rationale for allowing the pursuit of damages against an entity other than the employer responsible for assigning the work:

. . . the judge applied the rule of Carey v. Westinghouse, 375 U.S. 261 (1963) that Board jurisdictional rulings take precedence over arbitration decisions on the same issue. We note that in Blount Bros. the Board found Carey inapposite because Carey involved a situation in which the Board's and the arbitrator's decisions could conflict, *i.e.*, when the employer against which the grievance was filed was also the employer that made the assignment.

In this case, SSA is both the assigning Employer and the Employer against whom contract damages are sought by the IAM. To fit within the narrow exception to Carey v. Westinghouse described by Blount Bros. and Hoffman, the IAM would need to pursue an action for a monetary remedy against an employer other than the one making the work assignment.

In addition, the IAM has not cited a single case [8(b)(4)(D) or otherwise] in which the Board has factored into its analysis how the employer responsible for the disputed work assignment was to pay for any monetary damages caused by the unlawful breach of contract action. The Board is simply not required to inquire as to whether SSA would ultimately itself pay any damages awarded to the IAM or would have financial assistance from another source. As a policy matter, such an inquiry would drag the Board down the very deep rabbit hole of ferreting out funding sources in every similar case, and the existence of an 8(B)(4)(ii)(d) violation would depend on whether the aggrieved party was responsible for paying all, some, or none of the damages. Here, that approach would leave the IAM free to pursue monetary claims in clear derogation of the Board's 10(k) award, and in violation of existing Board law and policy.

The IAM's refusal to relinquish its claim for a monetary remedy against SSA (because the NLRB awarded work to employees represented by a different union) violates the law. Thus, SSA is the aggrieved party in this proceeding in need of the protections afforded by Section 10(k), not the IAM.

**B. Respondent's Second Cross-Exception Fails Because Board Law Prohibits the IAM from Recovering Contract Damages as a Result of SSA's Assignment of the Disputed Work prior to the Issuance of the Board's 10(k) Decision and Award.**

The second Cross-Exception by the IAM urges the Board to adopt a rule 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." (Respondent's Brief, pg. 8.) However, the Board has repeatedly rejected this contention for sound policy reasons. The law on this issue is very clear:

. . . time-in-lieu claims, including [arbitration] awards that conflict with, and are filed or pursued subsequent to, a 10(k) award violate Section 8(b)(4)(ii)(D) . . . that principle in

turn rests on the undisputed proposition that a Board 10(k) award takes precedence over any conflicting arbitral award, and that 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.

. . . 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. Iron Workers Local 433 (Otis Elevator Co.), 309 NLRB 273, 274 (1992) [internal citations omitted, emphases added].

In this case, the Board's July 2011 Award of the disputed work forecloses the IAM's ability to pursue a pay-in-lieu remedy from SSA for disputed work performed by employees represented by the ILWU, either before or after the issuance of the Award. This Cross-Exception, which argues the exact opposite approach, should also be disregarded by the Board.

#### **IV. CONCLUSION**

For the foregoing reasons, the Respondent's Cross-Exceptions should be disregarded, and the Board should reverse the ALJ's Decision and Order.

Dated this 10<sup>th</sup> day of July 2012.

Submitted by:

  
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**UNITED STATES OF AMERICA**

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

SSA MARINE through its related company SSA PACIFIC,

and

Cases: 19-CD-502/506

INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS, DISTRICT LODGE 160,  
LOCAL LODGE 289, AFL-CIO.

**Proof of Service**

I hereby certify that on July 10, 2012, I caused the original of the foregoing Petitioners' **CHARGING PARTY'S ANSWERING BRIEF IN REPLY TO RESPONDENT'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** to be filed with the National Labor Relations Board via e-filing to:

Lester Helzer  
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Washington, D.C. 20570-0001

On this same date, I caused a true and correct copy of the same to be served via email to:

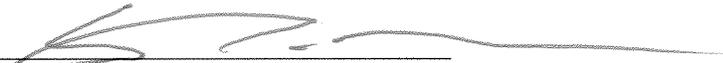
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I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on July 10, 2012, at San Diego, California.



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