APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

No. 23-1059

SOUTH CAROLINA STATE PORTS AUTHORITY,
Petitioner,

THE STATE OF SOUTH CAROLINA;
UNITED STATES MARITIME ALLIANCE, LTD.,
Intervenors,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 1422; INTERNATIONAL
LONGSHOREMEN'S ASSOCIATION,
Intervenors.

NATIONAL RIGHT TO WORK LEGAL DEFENSE
FOUNDATION; CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA; SOUTH CAROLINA CHAMBER OF
COMMERCE; NATIONAL ASSOCIATION OF
MANUFACTURERS; SOUTH CAROLINA MANUFACTURERS
ALLIANCE; GOVERNOR HENRY MCMASTER,
Amici Supporting Petitioner.

MARINE ENGINEERS' BENEFICIAL ASSOCIATION,
DISTRICT #1-PCD; AMERICAN FEDERATION OF
LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS;
TRANSPORTATION TRADES DEPARTMENT;
STATE OF MARYLAND; INTERNATIONAL
LONGSHORE AND WAREHOUSE UNION,
Amici Supporting Respondent.

Argued: June 6, 2023
Decided: July 28, 2023

Procedural Posture(s): On Appeal;
Review of Administrative Decision.

On Petition for Review of an Order of the
National Labor Relations Board. (10–CC–276241)

Opinion

Petition denied by published opinion. Chief Judge Diaz wrote the opinion, in which Senior Judge Motz joined. Judge Niemeyer wrote a dissenting opinion.

DIAZ, Chief Judge:

A collective-bargaining agreement between the International Longshoremen's Association (ILA) and the United States Maritime Alliance (USMX), an association of carriers and other employers, earmarks all container loading and unloading work on the East and Gulf Coasts for the union's members. So when USMX-affiliated ships docked at a new South Carolina terminal that used non-union lift operators, the union sued USMX and its carrier-members for damages. Soon enough, USMX's carrier-members stopped calling at that terminal.

We're asked to determine whether the ILA's lawsuit—and a separate provision of its contract with USMX—violate the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* The National Labor Relations Board held that they don't, and the South Carolina State Ports Authority petitioned for review.

We agree with the Board and deny the petition.

I.

A.

First, some historical context. Before the "container revolution," longshore workers would transfer loose ("break-bulk") cargo piece-by-piece from pier to ship. *Am. Trucking Ass'ns v. NLRB*, 734 F.2d 966, 968 (4th Cir. 1984), *aff'd sub nom. NLRB v. Int'l Longshoremen's Ass'n (ILA II)*, 473 U.S. 61, 105 S.Ct. 3045, 87 L.Ed.2d 47 (1985). But "[a]s might be expected, moving cargo in this break-bulk manner proved expensive and inefficient."

A more economical method emerged in the mid-1950s with the "containership," a vessel made to transport large containers of cargo. *Id.* at 969. Since containers didn't need to be packed and unpacked at the pier, the new ships could be "loaded or unloaded in a fraction of the time required for a conventional ship." *NLRB v. Int'l Longshoremen's Ass'n (ILA I)*, 447 U.S. 490, 494–95, 100 S.Ct. 2305, 65 L.Ed.2d 289 (1980). And since the containerships spent less time in port and could make more frequent journeys, fewer ships were needed to carry a given volume of cargo. *Id.* at 495, 100 S.Ct. 2305.

But as "containerization" streamlined the shipping industry, it also "threatened the jobs of longshoremen by dramatically increasing their productivity." *Id.* at 496, 100 S.Ct. 2305. Because containers could be hooked up to trucks and driven to their destinations, shippers were no longer bound to the ports closest to their customers. They "could now call at ports with cheaper non-union labor, then truck the goods the extra distance, and save money." *Bermuda Container Line Ltd. v. Int'l Longshoremen's Ass'n*, No. 97 CIV. 1257, 1997 WL 795766, at *5 (S.D.N.Y. Dec. 29, 1997).

The result was "wide job loss in the longshore industry, and widespread upheaval and acrimony in the management-labor relationship in the industry." *Id.*

B.

In the face of these technological developments, the ILA has sought to maintain its members' traditional work through collective bargaining. The ILA and its constituent local units represent "longshoremen, clerks, checkers, and maintenance employees working on ships and terminals" on the East and Gulf Coasts "from Maine to Texas." J.A. 433–34. Local 1422, an intervenor here, represents members working at the Port of Charleston, South Carolina.

The ILA has negotiated a series of collective-bargaining agreements—known as "Master Contracts"—with USMX, a multi-employer association of shipping carriers and longshore companies. The current Master Contract, effective from 2018 to 2024, contains several provisions relevant to this appeal.

First, Article I, Section 3 provides that the Master Contract is a "full and complete agreement" between the ILA and USMX on all issues

> relating to the employment of longshore employees on container and ro-ro [roll on/roll off] vessels and container and ro-ro terminals in all ports from Maine to Texas at which ships of USMX carriers and carriers that are subscribers to this Master Contract may call.

J.A. 434.

Second, Appendix A to the Master Contract (the "Containerization Agreement") recognizes the "existing work jurisdiction of ILA employees" and bars USMX

from contracting out that work to non-union members. It reads, in part:

> 1. Management and the Carriers recognize the existing work jurisdiction of ILA employees covered by their agreements with the ILA over all container work which historically has been performed by longshoremen and all other ILA crafts at container waterfront facilities. Carriers, direct employers and their agents covered by such agreements agree to employ employees covered by their agreements to perform such work which includes, but which is not limited to:
>
> (a) the loading and discharging of containers on and off ships
>
> (b) the receipt of cargo
>
> (c) the delivery of cargo
>
> (d) the loading and discharging of cargo into and out of containers
>
> (e) the maintenance and repair of containers
>
> (f) the inspection of containers at waterfront facilities (TIR men).
>
> 2. Management, the Carriers, the direct employers and their agents shall not contract out any work covered by this agreement. Any violations of this provision shall be considered a breach of this agreement.
>
> * * *
>
> 9. Violations of Agreement: This Agreement defines the work jurisdiction of employees and prohibits the subcontracting out of any of the work covered hereby. It is understood that the provisions of this Agreement are to be rigidly enforced in order to

> protect against the further reduction of the work force. . . . The parties agree that the enforcement of these provisions is especially important and that any violation of such other provisions is of the essence of the Agreement.

J.A. 484–85 (cleaned up).

Finally, Article VII, Section 7 of the Master Contract deals with the anomalous "hybrid labor model" historically used by ports in Wilmington, North Carolina; Charleston, South Carolina; and Savannah, Georgia. Under the hybrid model, non-union employees operate lift equipment to load and unload the containerships and ILA members perform the rest of the longshore work.

It's not clear from the record why the hybrid model arose at these ports. And while the hybrid model seems to violate the no-subcontracting provision (included in all past Master Contracts), the ILA has never sought to enforce the contract's terms against those ports.

The ILA and USMX negotiated Section 7 in 2012 and 2013 to address the hybrid model and kept the provision in their current contract without further discussion. It reads:

> Section 7. Port Authorities.
>
> (a) USMX and the ILA shall conduct a study to determine how the business model currently used by port authorities in the Ports of Charleston, SC, Savannah, GA, and Wilmington, NC, could be altered to permit work currently performed by state employees to be performed by Master Contract-bargaining-unit employees in a more productive, efficient, and competitive fashion.

> USMX and the ILA will use this study to meet with these port authorities in an effort to convince them to employ Master Contract-bargaining-unit employees.
>
> (b) USMX agrees to formally notify any port authority contemplating the development of or intending to develop a new container handling facility that USMX members may be prohibited from using that new facility if the work at that facility is not performed by Master Contract bargaining-unit employees.

J.A. 449.

USMX and the ILA never conducted the study described in Section 7(a). And they disagree about Section 7(b)'s intended purpose and application. ILA and Local 1422 officials involved in the negotiations believed that Section 7(b) requires USMX carrier-members to refrain from doing business at any new facility where ILA members don't perform all the longshore work. But USMX's former counsel testified that the language was meant to be a compromise, acknowledging the ILA's issues with the hybrid model without binding USMX.

C.

The South Carolina State Ports Authority operates three terminals at the Port of Charleston: the North Charleston Terminal, the Wando Welch Terminal, and the new Hugh K. Leatherman, Sr. Terminal. The North Charleston and Wando Welch Terminals use the hybrid labor model, and USMX carrier-members have long docked at those terminals. The Ports Authority isn't a party to the Master Contract.

In 2020, the Ports Authority announced that it planned to operate the Leatherman Terminal using the same hybrid model. Under the Master Contract's Section 7(b), USMX notified the Ports Authority that "USMX members may be prohibited from using the new facility . . . if the work at that facility is not performed by Master Contract bargaining-unit employees." J.A. 531. Several USMX carrier-members sent similar letters to the Ports Authority. Then things fell apart.

USMX, the ILA, the Ports Authority, and the State of South Carolina met several times over the ensuing months but couldn't agree on a work arrangement for the new terminal. At one meeting, the ILA proposed that the existing hybrid terminals be "redline[d]" and allowed to keep using non-union labor, but that all longshore work at the new terminal be performed by ILA members. J.A. 549. The State and the Ports Authority responded that they weren't bound by Section 7(b) and were free to use non-union lift workers at the new terminal just as they had at the older Charleston terminals.

The State and the Ports Authority then filed an unfair labor practice charge with the National Labor Relations Board against the ILA, USMX, and Local 1422. They claimed that the ILA and USMX violated Section 8(e) of the National Labor Relations Act, *see* 29 U.S.C. § 158(e), by agreeing to a "hot cargo" provision—a provision barring an employer from doing business with another party—in Section 7(b) of the Master Contract.

Undeterred by the failed discussions, the Ports Authority began operating the Leatherman Terminal using the hybrid model. Two USMX carrier-members sent ships to the Leatherman Terminal, and the ILA

promptly sued them (and USMX) in New Jersey state court.

Among other claims, the ILA alleged that USMX and the carrier-members breached Article I, Section 3 of the Master Contract and Sections 1, 2, and 9 of the Containerization Agreement by docking at Leatherman. Its complaint didn't mention Section 7(b). And while the ILA sought $300 million in damages, the union didn't ask for injunctive relief like assigning union employees to the work. J.A. 529.

Soon after the ILA filed its lawsuit, at least five USMX carrier-members contacted the Ports Authority and demanded to be reassigned from the Leatherman Terminal to the Wando Welch Terminal. One threatened to redirect its vessels to the Port of Savannah, Georgia. The Ports Authority agreed to reassign the vessels, and USMX carrier-members eventually stopped sending ships to the Leatherman Terminal.

The State, the Ports Authority, and USMX then filed more unfair labor practice charges against the ILA and Local 1422, claiming that the ILA's lawsuit also violated the National Labor Relations Act.

II.

A.

The Board's General Counsel consolidated both sets of charges and an Administrative Law Judge ("ALJ") held a hearing and issued a decision.

First, the ALJ rejected the Ports Authority's argument that Section 7(b) of the Master Contract was an illegal "hot cargo" provision. The section's language was facially valid, the ALJ held, because it didn't require USMX to stop doing business with the Ports Authority—it only required USMX to notify the Ports

Authority that it "may be prohibited" from using a hybrid facility. J.A. 942.

The ALJ acknowledged that the ILA and USMX had debated the provision's meaning and that union officials believed it to bar USMX carrier-members from calling at Leatherman. But he found that the evidence "establishe[d] disagreement, rather than agreement," so it didn't demonstrate a meeting of the minds on the issue. J.A. 943.

Next, however, the ALJ held that the ILA's lawsuit against USMX and the carrier-members violated the National Labor Relations Act. Rejecting the ILA's argument that the lawsuit had a lawful "work preservation" goal, the ALJ found that the ILA used the Master Contract "as a sword to achieve an unlawful, secondary object"—the acquisition of "all the container work at the Leatherman Terminal, as well as at any future container-handling facilities." J.A. 948–49. And the ALJ further found that the ILA intended its lawsuit to make USMX cease doing business at Leatherman Terminal, violating Section 8(b)(4)(ii)(B) of the Act.

B.

The State, the Ports Authority, and the ILA filed exceptions to the Board's rulings. A three-member panel issued its own opinion, finding for the ILA on both issues.

The Board quickly dismissed the challenge to Section 7(b) of the Master Contract, unanimously affirming the ALJ's ruling "for the reasons stated by the judge." J.A. 1328.

But the Board disagreed that the ILA's lawsuit had an illegal work-acquisition objective. Instead, the

Board found, the ILA lawfully sought to preserve its traditional work and jobs—"the loading and unloading generally at East and Gulf Coast ports"—against the technological changes wrought by containerization. J.A. 1332. While the lawsuit may have had the "secondary *effect*" of causing ships to bypass the Port of Charleston, that effect was still "incidental to a lawful primary purpose." *Id.* The Board also disagreed with the ALJ's requirement that the ILA show a threat of job losses in Charleston—if such a showing was required, it was measured coastwide and "satisfied by the history of containerization and its effect on the number of longshoremen." J.A. 1333.

Board Member John F. Ring dissented on the lawsuit issue. Rejecting the majority's coastwide definition of the "work" being preserved, Ring instead posited that "the work in question is the operation of the lift-equipment work at the Leatherman Terminal, and USMX and its carrier-members do not have the power to give that work to ILA-represented employees." J.A. 1334. The ILA's real beef was with the Ports Authority, he continued, and its lawsuit had the unlawful secondary *objective* (rather than a secondary *effect*) of pressuring the Ports Authority to assign lift-equipment work at Leatherman to union members.

The Ports Authority petitioned for review of the Board's decision under 29 U.S.C. § 160(f), and the Board is the respondent before us. The State of South Carolina intervened on the Ports Authority's behalf, and the ILA and Local 1422 intervened for the Board. USMX, also an intervenor, sides with the Ports Authority on the lawsuit issue, but with the ILA on the Section 7(b) issue.

III.

The Ports Authority advances two issues on appeal. First, it argues, the ILA's lawsuit against USMX and its carrier-members had the illegal aim of obtaining the lift work at Leatherman Terminal—work that ILA members had never performed and USMX was powerless to award. Second, the Ports Authority claims that the Master Contract's Section 7(b) represents a tacit unlawful agreement that USMX's carrier-members won't call at new terminals unless ILA members perform all the longshore work there.

Because the Board's rulings for the union are supported by substantial evidence and aren't illogical or inconsistent with the National Labor Relations Act, we deny the Ports Authority's petition for review.

A.

Our review of a Board decision is "limited." *Tecnocap, LLC v. NLRB*, 1 F.4th 304, 312 (4th Cir. 2021). We will uphold the Board's findings of fact if they're supported by substantial evidence, "even though we might have reached a different result had we heard the evidence in the first instance." *Id.* at 313.

Under this standard, we can't "displace the [Board's] choice between two fairly conflicting views" of the evidence. *NLRB v. Pepsi Cola Bottling Co. of Fayetteville*, 258 F.3d 305, 310 (4th Cir. 2001). And when factual findings "rest upon credibility determinations," we accept them absent "exceptional circumstances"—for example, when a credibility determination is unreasonable or contradictory. *Eldeco, Inc. v. NLRB*, 132 F.3d 1007, 1011 (4th Cir. 1997).

We will also uphold the Board's legal interpretations if they're "rational and consistent with the Act," even

if the Board's reading isn't "the best way to read the statute." *Tecnocap*, 1 F.4th at 313. But we don't give "special deference . . . to the Board's interpretation of collective bargaining contracts" (though we're "mindful of the Board's considerable experience" in interpreting such agreements). *Bonnell/Tredegar Indus. v. NLRB*, 46 F.3d 339, 343 (4th Cir. 1995).

B.

The primary issue is whether the ILA's lawsuit against USMX and its carrier-members violates the Act. Since the First Amendment protects a union's right to access the courts, the Board may determine that a union's lawsuit constitutes an unfair labor practice only if it is baseless or "has an objective that is illegal under federal law." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 738 n.5, 743, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983).

No one asserts that the ILA's lawsuit is baseless. So we're left to determine whether it has an illegal objective under the Act. We conclude that it doesn't

Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a union "to threaten, coerce, or restrain any person engaged in commerce," where "an object" of the union's coercive conduct is to force that person to "cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B). Section 8(e) prohibits unions and employers from agreeing to "cease doing business with any other person," and Section 8(b)(4)(ii)(A) prohibits unions from pressuring employers into such agreements. *Id.* § 158(b)(4)(ii)(A), (e).

These provisions exempt "primary" activity—that is, a "union's efforts [ ] directed at its own employer on a topic . . . that the employer can control." *ILA II*, 473 U.S. at 81, 105 S.Ct. 3045. An activity has a

"secondary" purpose, by contrast, if it is "directed at affecting the business relations of neutral employers and [is] 'tactically calculated' to achieve union objectives outside the primary employer-employee relationship." *Id.*; *see also Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 623, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967) (explaining that a secondary boycott is characterized by "pressure tactically directed toward a neutral employer in a labor dispute not his own.").

The Supreme Court has emphasized that secondary *purposes* are distinct from secondary *effects*: If a union has "no forbidden secondary purpose to disrupt the business relations of a neutral employer," any "extra-unit effects, no matter how severe, are irrelevant to the analysis." *ILA II*, 473 U.S. at 79, 105 S.Ct. 3045 (cleaned up).

Preserving work for bargaining-unit members is a lawful, primary object.[1] *ILA I*, 447 U.S. at 504, 100 S.Ct. 2305. A union's activity must pass two tests to be considered work-preserving. First, the activity "must have as its objective the preservation of work traditionally performed by employees represented by the union." *Id.* And second, the "contracting employer must have the power to give the employees the work in question" (the "right of control" test). *Id.*

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[1] Several circuits have referred to the work-preservation doctrine as a "defense" available to a union facing charges of an unfair labor practice. *See, e.g., Int'l Longshore & Warehouse Union v. NLRB*, 978 F.3d 625, 637 (9th Cir. 2020); *Loc. 32B-32J, SEIU v. NLRB*, 68 F.3d 490, 494 (D.C. Cir. 1995); *Nat'l Mar. Union of Am. v. Com. Tankers Corp.*, 457 F.2d 1127, 1134 (2d Cir. 1972). At oral argument, the Board agreed that the doctrine could be characterized as a defense, giving the union the burden of proving it applies. Assuming the burden is on the union, we find—as we'll explain—that the ILA met it here.

The Ports Authority claims that the ILA's lawsuit violates several of the Act's prohibitions on activities with secondary purposes. In the Ports Authority's view, the union's lawsuit aims to "coerc[e] neutral parties (USMX and its carrier-members) to pressure [the Ports Authority] to give ILA members the lift-equipment jobs." Petitioner's Br. at 3. But the Board found that the lawsuit met both requirements to be considered lawful work preservation:

> (1) the lawsuit's objective was the preservation of work traditionally performed by employees represented by ILA, and (2) USMX and its carrier members had the power to give the employees the work in question, and therefore, are primary employers.

J.A. 1331. We address each finding in turn.

1.

a.

First, the parties dispute whether the ILA's lawsuit seeks to preserve the union's historic work jurisdiction or to acquire new work. To decide this question, "the first and most basic question is: What is the 'work' that the [activity] allegedly seeks to preserve?" *ILA I*, 447 U.S. at 505, 100 S.Ct. 2305.

The Board looked to the Master Contract and found that the "work" was all container work historically performed by ILA members "in all ports from Maine to Texas." J.A. 1331–32. But the Ports Authority argues that the work is narrower, encompassing only "the lift-equipment jobs at the Port's Leatherman Terminal" that are performed by non-union employees. Petitioner's Br. at 32.

We're guided by a pair of 1980s Supreme Court cases that also involved the ILA. These cases were about challenges to the ILA's Rules on Containers, which gave union longshore workers the right to load and unload containers that would otherwise be packed or unpacked within fifty miles of the port. *ILA I*, 447 U.S. at 499, 100 S.Ct. 2305.

After several shipping companies contracted with third parties who used non-ILA labor to pack and unpack cargo within the 50-mile radius, the ILA assessed damages against the shipping companies. *Id.* at 502, 100 S.Ct. 2305. The shipping companies stopped working with the third parties, and the third parties filed unfair labor charges with the Board. *Id.*

The Board found the charges substantiated, defining the "work" as "the off-pier stuffing and stripping of containers" and determining that the ILA members hadn't traditionally performed that work. *Id.* at 506, 100 S.Ct. 2305.

But the Court rejected that formulation of the "work" in *ILA I*. After sketching the history of containerization, the Court explained that the Board needed to perform "a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve" in the face of "technological displacement." *Id.* at 507, 100 S.Ct. 2305.

The Board had "focused on the work done by the employees of the charging parties . . . after the introduction of containerization." *Id.* But it should have focused "on the work of the bargaining unit employees"—the ILA longshore workers—"not on the work of other employees who may be doing the same or similar work." *Id.* The Court remanded to the Board "to evaluate the relationship between traditional

longshore work and the work which the Rules attempt to assign to ILA members." *Id.* at 509, 100 S.Ct. 2305.

Five years later in *ILA II*, the Court held that the Rules on Containers—and the ILA's attempts to enforce them—were lawfully aimed at work preservation, articulating two principles relevant here.

First, the Court noted that in cases involving work displaced by innovation, "the place where work is to be done . . . is seldom relevant to the definition of the work itself." *ILA II*, 473 U.S. at 77, 105 S.Ct. 3045. The Court therefore defined the work as "simply 'the work of loading and unloading containers,'" not just at the ports or within the fifty-mile range covered by the collective-bargaining agreements. *Id.* at 77 n.17, 105 S.Ct. 3045. And second, the Court reiterated that "extra-unit effects, no matter how severe, are irrelevant to the analysis." *Id.* at 79, 105 S.Ct. 3045 (cleaned up).

Finding that the Rules on Containers were "motivated entirely by the longshoremen's understandable desire to preserve jobs" in the face of dwindling longshore work, the Court concluded that harmful effects on non-union workers weren't alone sufficient to find an improper secondary objective. *Id.*

Given the Court's directive to focus "on the work of the bargaining unit employees," *ILA I*, 447 U.S. at 507, 100 S.Ct. 2305, we hold that the Board here rationally determined that the "work in question is the loading and unloading generally at East and Gulf Coast ports." J.A. 1332. The Master Contract defines the ILA's existing work jurisdiction in similarly broad strokes.[2]

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[2] *See* J.A. 484 ("Management and the Carriers recognize the existing work jurisdiction of ILA employees covered by their agreements with the ILA over all container work which

And the Contract controls "in all ports from Maine to Texas," J.A. 434, reflecting that it was "designed to preserve the work of ILA employees in the coast-wide bargaining unit," *Bermuda Container Line Ltd. v. Int'l Longshoremen's Ass'n*, 192 F.3d 250, 257 (2d Cir. 1999).

The Ports Authority would prefer to define the work as only the lift-equipment work at Leatherman Terminal. But that view ignores two takeaways from the *ILA* cases: (1) it focuses on "the place where work is to be done," which is "seldom relevant"; and (2) it focuses on "extra-unit effects," not the work of bargaining-unit employees. *ILA II*, 473 U.S. at 77, 79, 105 S.Ct. 3045.

It's true that "ILA-represented employees have never performed the lift-equipment work at any terminal of the Port of Charleston," Petitioner's Br. at 33—the Board recognized as much, *see* J.A. 1327. But as the Board explained, the *ILA* cases instruct us to "look beyond the locus of a dispute and consider traditional work patterns" more broadly. J.A. 1332; *see also Bermuda Container*, 192 F.3d at 257 (declining to "narrow the employment relationship to include only employees of Maher terminals"); *Int'l Longshore & Warehouse Union v. NLRB*, 978 F.3d 625, 639–40 (9th Cir. 2020) (rejecting a Board order as overly "preoccupied with the precise location of the disputed work" where it "made prior performance of electrical M&R work" at a particular facility "a talisman"). It would defang the parties' collective-bargaining agreement to hold that the union couldn't enforce it at a new location just because no one, union or otherwise, had "historically" worked there.

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historically has been performed by longshoremen and all other ILA crafts at container waterfront facilities.").

The Ports Authority relies on *Marrowbone Development Co. v. District 17, United Mine Workers of America*, 147 F.3d 296 (4th Cir. 1998), but that case is distinguishable. *Marrowbone* involved a newly certified local union of mineworkers that sought work at a particular mining site. *Id.* at 298–299. Although members of other locals had performed such work, we looked narrowly at the (lack of) work historically performed *by the new local* to determine that it sought to acquire, not preserve, work. *Id.* at 302.

But in *Marrowbone*, the new local—as the "exclusive bargaining representative" of the mine's employees—was the relevant "bargaining unit." *Id.* at 298, 303 (citing *ILA I*, 447 U.S. at 507, 100 S.Ct. 2305); *see also* J.A. 946 n.29 (ALJ drawing same distinction). We emphasized that given the site-specific nature of the mining work, only the members of the new local would be "directly affected by the dispute"—any effects on members of other locals "would be by and large incidental." *Marrowbone*, 147 F.3d at 303.

Here, by contrast, the ILA (not Local 1422) is the relevant bargaining unit. The ILA negotiated the Master Contract and filed the lawsuit to benefit its coastwide constituents. And as we'll explain, the "work" of loading and unloading containers isn't tethered to a single location, unlike the work at the Marrowbone mine—so it's not the case that the ILA's lawsuit will have only "incidental" effects across the coastwide unit. We therefore agree with the ALJ that *Marrowbone* is inapt.

At oral argument, the Ports Authority and USMX suggested that Section 7(a) of the Master Contract effectively excludes the hybrid-model ports—Charleston, Savannah, and Wilmington—from the ILA's work jurisdiction. But while that section acknowledges the

reality that non-union employees currently perform the lift work at those ports, it doesn't suggest that the union meant to forever surrender its claim to that work.[3]

As the ALJ put it, the "origin and rationale for [the hybrid model] is not clear from the record, but there is no indication the parties intended to carve out, individually or collectively, these three South Atlantic ports from the multi-port bargaining unit." J.A. 948 n.32. No party challenged this finding. So giving due deference to the agency, we decline to find that Section 7(a) represents any kind of tacit agreement to exclude the lift work at hybrid ports from the Master Contract's jurisdiction.

In all, we conclude that the Board and ALJ rationally defined "the work in question" as longshore work throughout the ILA's coastwide jurisdiction, not just the lift work at Leatherman Terminal.

b.

Next, we consider whether the challenged activity (the lawsuit) sought to preserve that work. The Board found that although this case arose some 40 years after the *ILA* cases, it follows in their lineage: The ILA is still "seeking to preserve the traditional work of unit employees in the face of the technological advances affecting the coastal units," including at Leatherman Terminal. J.A. 1332. And the union is trying to do so by enforcing its coastwide Containerization Agreement—the Rules on Containers' direct descendant, *see* J.A.

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[3] To be clear, we express no view on the merits of USMX's potential waiver defense in the New Jersey lawsuit. We only observe that a union may still claim work preservation when its traditional work is performed at a new location within the jurisdiction of its collective-bargaining agreement.

1328 n.9—against employers that breach its terms by choosing hybrid ports for their longshore work.[4] Though its lawsuit against USMX had the effect of diverting ships away from Leatherman, the key word is *effect*—and "extra-unit effects, no matter how severe, are irrelevant to the analysis." *ILA II*, 473 U.S. at 79, 105 S.Ct. 3045 (cleaned up).

None of the Ports Authority's arguments undermine this conclusion. First, the Ports Authority contends that the *ILA* cases are inapt because "the lift-equipment work at Leatherman Terminal does not involve any technological change." Petitioner's Br. at 35–36; *see also* Dissent at 393 (contending that the "historic loss of work because of containerization" is "long past for this case"); J.A. 1341 (dissenting member arguing that the Board's opinion is stuck "back in the 1960s or 1970s").

But we decline to disregard history, especially where the Court has demanded a "careful analysis of the *traditional* work patterns that the parties are allegedly seeking to preserve." *ILA I*, 447 U.S. at 507, 100 S.Ct. 2305 (emphasis added). And we see no reason why the passage of time should negate the

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[4] To support its view that the ILA seeks to acquire, not preserve work, the dissent cites several comments from ILA officials expressing a "desire to 'have all of the work ... that is performed by nonbargaining workers to be brought under the ILA['s] jurisdiction.'" Dissent at 396 (citing J.A. 260). These remarks aren't smoking guns, however. It's no secret that the ILA isn't a fan of the hybrid model—but doesn't follow that the ILA isn't entitled to sue to enforce its collective-bargaining agreement. And more broadly, in nearly *all* work-preservation cases, a union is seeking work not currently assigned to it. Our inquiry is whether that aim is lawful work preservation considering the union's traditional work patterns.

bargain the ILA negotiated in the (aptly named) Containerization Agreement.

As the Board explains, "The lift work arose from and was enabled by containerization." Respondent's Br. at 48. Before containerization, cranes were mounted on ships and operated by union employees. J.A. 269–72. The rise of containers made specially designed shoreside cranes, like those operated by the state employees in Charleston, a better option. *Id.* So the ILA negotiated its containerization agreements to combat the loss of this traditional work. J.A. 272–73; *see also* J.A. 484 (defining work jurisdiction to include "the loading and discharging of containers on and off ships"). Indeed, no one disputes that at non-hybrid ports, ILA members perform all the lift work.

It's true that at terminals in the Port of Charleston, non-union employees have operated the shoreside cranes since the early days of containerization. But *ILA I* warns against "focusing on the work as performed, after the innovation took place, by the employees who allegedly have displaced the longshoremen's work." 447 U.S. at 508, 100 S.Ct. 2305. Such a focus would "foreclose[ ]—by definition—any possibility that the longshoremen could negotiate an agreement" to keep loading or unloading cargo as the work evolved. *Id.*

The Ports Authority also argues that this isn't a situation "where the ILA workforce is genuinely threatened" by the "continued use of state-employees to perform the lift-equipment work." Petitioner's Br. at 37 (cleaned up); *see also Nat'l Woodwork*, 386 U.S. at 630–31, 87 S.Ct. 1250 (suggesting that workers boycotting to "acquire new job tasks when their own jobs are not threatened" may be an unfair labor practice). But even if such a showing of genuine threat

is required, it's satisfied by "the history of containerization and its effect on the number of longshoremen." J.A. 1333.

Like its predecessors, the Master Contract aims "to preserve jobs against the steadily dwindling volume of cargo work." *ILA II*, 473 U.S. at 79, 105 S.Ct. 3045 (cleaned up). The Leatherman Terminal contributes to that "dwindling" by assigning to non-union workers jobs earmarked for the union by contract. As the ILA argues, moreover, the lower labor costs of hybrid-model ports could draw cargo away from fully union ports, threatening other bargaining-unit jobs. *See* ILA's Br. at 13, 34–35; *cf.* J.A. 92–93 (Ports Authority president testifying that "[a] deviation from [the hybrid model] would put us at a competitive disadvantage . . . relative to any new terminal or any facility that had to operate a more expensive model"); Gov. McMaster's Amicus Br. at 10 (heralding the "efficiency of the Port's hybrid model").[5]

Finally, the Ports Authority notes that the ILA has, for decades, "acquiesced in the Port of Charleston's use of state employees to perform the lift-equipment work." Petitioner's Br. at 39; *see also* Gov. McMaster's Amicus Br. at 10 (noting "settled expectations" that Leatherman would also use the hybrid model). But while that might serve as a defense for USMX in the New Jersey breach-of-contract lawsuit, it doesn't bear

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[5] Much of Governor McMaster's amicus brief details the potential economic impact of ruling in the ILA's favor. The State of Maryland, in turn, argues in its amicus brief supporting the Board that "union labor provides tremendous benefits for workers" and their communities. Md.'s Amicus Br. at 12. While these arguments may have normative force, it's "not our function as a court of review to weigh the economic cost" of a collective bargaining agreement. *Am. Trucking*, 734 F.2d at 979.

on whether the lawsuit itself has an unlawful work-acquisition object.

The Board rationally found the ILA's lawsuit against USMX to have a valid work-preservation purpose. We therefore find that it passes *ILA I*'s first prong.

2.

ILA I's second prong asks whether USMX has the "right to control" the relevant work's assignment. 447 U.S. at 512, 100 S.Ct. 2305. The answer largely turns on how we define the work. *Id.* at 512 n.27, 100 S.Ct. 2305.

The Board, viewing the "work" on a coastwide scale, found that USMX's carrier-members controlled the work because they could "bypass the Port of Charleston entirely and call on other [fully union] ports." J.A. 1332. But USMX and the Ports Authority again urge us to focus on the lift-equipment work at the port of Charleston, which the Ports Authority exclusively controls. Because we agree with the Board's broader work definition, it follows that USMX and its carrier-members have the right to control it.

In *American Trucking*, we held that shipping companies had the "right to control the container work sought by the longshoremen" because they owned or leased the containers and controlled where they went. 734 F.2d at 978. That holding applies here.

As the ALJ put it, "the USMX carrier-members, like the carrier-members in *ILA I* and *II*, own or lease their containers, and, therefore, determine what ports they call on, which ultimately gives the carriers the right to control who performs the lift-equipment work on their containers." J.A. 948. That's because "[i]n the long-shore industry, containers (and other sorts of cargo)

are the work." ILA's Br. at 44. If no ships dock at a terminal, there's no longshore work to be done there. So where USMX's carrier-members choose to send their ships is the whole ballgame.

The Ports Authority and USMX rely on a West-Coast longshore case holding that the Port of Portland—not the carriers or third-party terminal operator—controlled the "reefer work" of "plugging in, unplugging, and monitoring refrigerated shipping containers." *Hooks ex rel. NLRB v. Int'l Longshore & Warehouse Union*, 905 F. Supp. 2d 1198, 1201, 1211 (D. Or. 2012), *aff'd in relevant part*, 544 F. App'x 657, 658 (9th Cir. 2013) (unpublished); *accord Int'l Longshore & Warehouse Union v. NLRB*, 705 F. App'x 1, 3 (D.C. Cir. 2017) (per curiam). But *Hooks* is distinguishable.

In that case—a jurisdictional scuffle between two unions—the Board determined that the "work in dispute" was site-specific reefer work at one terminal in Portland. *See Int'l Bhd. of Elec. Workers, Loc. 48*, 358 N.L.R.B. 903, 904 (2012). One union expressly sought reassignment of the reefer work, threatening to picket the terminal operator "or take other economic action if the disputed work was not assigned to its members." *Id.* at 905.

ILA's lawsuit, by contrast, seeks damages from USMX and its carrier-members for breaching the Master Contract—not injunctive relief like work reassignment. We accept that USMX, like the terminal operator in *Hooks*, can't control who operates the cranes (or plugs in the reefers) at a specific terminal. But USMX and its carrier-members *can* control whether they send their containers to a terminal whose labor model doesn't comply with their contractual obligations. And under *American Trucking*, that's what matters.

The Ports Authority also claims this case is like *NLRB v. Enterprise Association of Pipefitters*, 429 U.S. 507, 97 S.Ct. 891, 51 L.Ed.2d 1 (1977), which preceded *ILA I* and *II*. There, a subcontractor entered into two conflicting agreements: one with a union, promising that pipe threading and cutting would be performed onsite; and one with a general contractor, agreeing to use units with pre-cut pipes on a construction project. *Id.* at 511–12, 97 S.Ct. 891. Relying on the first agreement, the union members refused to install the units at the jobsite. *Id.* at 512–13, 97 S.Ct. 891.

The Court found that while the agreement was valid, the boycott wasn't. The union members were exerting pressure on a subcontractor with "no power to award the [jobsite cutting and threading work] to the union," the Court held, when their real problem was with the (neutral) general contractor. *Id.* at 513, 521–523, 97 S.Ct. 891.

Following the dissenting Board member's lead, the Ports Authority argues that USMX is analogous to the subcontractor in *Pipefitters*. Like the subcontractor, the Ports Authority contends, USMX has no power to assign the lift work at Leatherman to union members.[6] And while USMX could direct its carrier-members to avoid hybrid ports, the subcontractor likewise could have walked away from its deal with the general contractor—but the general contractor (like the Ports Authority) would still control the work.

But that analogy doesn't fit. In *Pipefitters*, the "work" was confined to cutting and threading pipes at one specific site. 429 U.S. at 529–30, 97 S.Ct. 891. The subcontractor could have walked away from the deal

[6] True enough, and the Board readily concedes the point.

with the general contractor—but the union members would have gone home empty-handed too.

Here, as we've discussed, the "work" is the loading and unloading of containers along the coastwide bargaining unit. And USMX's carrier-members *can* unilaterally give that work to union members by "simply refus[ing] to supply their containers" to ports using non-ILA labor. *Int'l Longshoremen's Ass'n v. NLRB*, 613 F.2d 890, 913 (D.C. Cir. 1979), *aff'd, ILA I*, 447 U.S. 490, 100 S.Ct. 2305 (1980); *see also id.* n.192 (finding *Pipefitters* "inapplicable to the instant cases").

In other words, USMX has all the "power to settle the dispute with the union" by avoiding terminals that would violate the Master Contract. *Pipefitters*, 429 U.S. at 522, 97 S.Ct. 891. "It is difficult to imagine a more forceful demonstration of control." *Int'l Longshoremen's Ass'n*, 613 F.2d at 913.

Since USMX and its carrier-members control where the containers go, the Board rationally concluded they also control the relevant work—the loading and unloading of containers along the East Coast. Finding that the union has satisfied *ILA I*'s right-of-control test as well, we hold that the ILA's lawsuit had a legitimate work-preservation objective.

We therefore deny the Ports Authority's petition on this issue.

IV.

The ALJ separately held (and the Board affirmed) that Section 7(b) of the Master Contract wasn't a prohibited agreement to stop doing business—known as a "hot cargo" clause—with the Ports Authority. The Ports Authority contends that the Board erred in concluding that the provision didn't violate Section

8(e) of the Act, which makes it an unfair labor practice for a union and employer to form an agreement, "express or implied, whereby such employer . . . agrees to cease . . . doing business with any other person." 29 U.S.C. § 158(e).

In the Ports Authority's view, the ILA and USMX had an "implied agreement not to do business with new container-handling terminals that did not exclusively employ ILA members"—an agreement that became reality when carriers asked not to dock at Leatherman Terminal. Petitioner's Br. at 56–57.

The Board responds that the provision doesn't require USMX carrier-members to boycott Leatherman; it only requires them to give notice that they "may be prohibited" from calling there. Respondent's Br. at 25 (cleaned up). And while the Ports Authority argues that extrinsic evidence shows the contracting parties made an unlawful agreement, the Board and the ILA say that the evidence in fact shows "a dispute, not an agreement," about the provision's meaning. ILA's Br. at 54 (cleaned up); *see also* Petitioner's Br. at 29–30. We agree with the Board and the ILA.

The Board evaluates whether a contractual clause violates Section 8(e) in two steps. *See Gen. Teamsters, Loc. 982*, 181 N.L.R.B. 515, 517 (1970). First, the Board determines whether the clause's meaning is clear. *Id.* If it is, the Board will determine whether it's valid under Section 8(e). *Id.* But if the clause is ambiguous, the Board can then "consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner." *Id.*

In conducting this analysis, the ALJ first found that the meaning of Section 7(b) was clear: It didn't "require USMX or its carrier-members to boycott the

Leatherman Terminal or to cease doing business with [the Ports Authority] or any other employer or person." J.A. 942. The ALJ's reasoning was sound.

The plain text of Section 7(b) requires USMX to "notify" port authorities that their members "may be prohibited" from using terminals staffed by non-union workers. J.A. 449. As the ALJ explained, "The word 'may' is ordinarily construed to mean permissive and discretionary," while "shall" connotes a requirement. J.A. 1350; *see also Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171–72, 136 S.Ct. 1969, 195 L.Ed.2d 334 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."). And elsewhere in the contract, the parties used "shall" and "may" to differentiate terms. *See* J.A. 942 (listing examples). We therefore agree that Section 7(b) doesn't bind USMX to a particular plan—so the ALJ (and Board) correctly concluded that the provision isn't "clearly unlawful on its face." *Id.*

The Ports Authority contends that the provision is at least ambiguous and that we should examine extrinsic evidence that "reveals the parties' intentions." Petitioner's Br. at 52–53. But even if we consider the extrinsic evidence, it doesn't change our view.

First, the Ports Authority notes that ILA President Harold Daggett testified that Section 7(b) was meant to stop carriers from docking at "any new terminal that comes online, if it's not 100 percent ILA." J.A. 295. But USMX's former counsel Donato Caruso testified that he negotiated for the term "may" because he "didn't want to give the impression that USMX agreed . . . with the Union's position." J.A. 314.

The ALJ credited Caruso over Daggett "because Caruso's recollection and testimony were more logical

and consistent with the other evidence." J.A. 935 n.16. Giving due deference to the agency's credibility findings, *see Eldeco*, 132 F.3d at 1011, substantial evidence establishes that USMX and the ILJ didn't come to a tacit unlawful agreement when they negotiated Section 7(b).

The Ports Authority points to a series of communications from USMX carrier-members indicating that they wouldn't dock at Leatherman unless the terminal was fully union-staffed. As the ALJ noted, however, the carrier-members weren't speaking for USMX, but for the individual shipping companies. And even if the statements could be attributed to USMX, none establish a bilateral agreement between ILA and USMX that ships couldn't call at Leatherman. *See Loc. 27, Sheet Metal Workers Int'l Ass'n*, 321 N.L.R.B. 540, 541 n.3 (1996) ("solely unilateral" conduct by a union "to enforce an unlawful interpretation of a facially lawful contract clause does not violate Sec. 8(e) because such conduct does not constitute an 'agreement'" (cleaned up)). To the contrary, the statements note the carriers' concerns about "risk," "challenges," and "uncertainty," J.A. 117, 540, 651—all suggesting "disagreement, rather than agreement" about what Section 7(b) meant. J.A. 943.

We agree that USMX and the ILA haven't made an agreement that violates Section 8(e), so we deny the Ports Authority's petition on this issue too.

V.

The Board rationally held that the ILA's lawsuit against USMX sought to preserve its coastwide jurisdiction over loading and unloading work, so it didn't violate the Act. And the Board and ALJ correctly concluded that Section 7(b) of the Master Contract

didn't constitute an illegal hot-cargo provision, whether by its text or by tacit agreement

The South Carolina State Ports Authority's petition for review is therefore

DENIED.

NIEMEYER, Circuit Judge, dissenting, except as to Part IV:

In its effort to coerce the South Carolina State Ports Authority to hire union workers to operate the state-owned cranes at the new Leatherman Terminal in the Port of Charleston, the International Longshoremen's Association ("ILA") sued the United States Maritime Alliance, whose members are customers of the Port, to effect a boycott by Maritime Alliance members' ships of the new terminal. This was an unfair labor practice under § 8(b) of the National Labor Relations Act ("NLRA"), as so found by the Administrative Law Judge ("ALJ"), and I would reverse the National Labor Relations Board and remand, directing it to provide relief to the Ports Authority.

After the State of South Carolina spent $1.5 billion building the new terminal to handle increased demand, the Ports Authority staffed the new terminal in accordance with the practice that it had followed at the port's two other terminals for 50 years — "a hybrid" division of labor in which the work of operating the state-owned cranes is performed by state employees and the remaining longshore work is performed by members of the ILA local union. The ILA, which represents longshoremen on the East Coast and Gulf Coast, has long wanted to displace the port's state employees with union workers, as it has also wanted to do at the Ports of Wilmington, North Carolina, and Savannah, Georgia, which likewise use the hybrid division of labor. As an ILA officer specifically stated, the ILA wanted "100 percent" of the work at the new terminal. Indeed, he stated that they "were interested in consuming all the jobs" and told the Ports Authority, "as you try to grow your business, I have to try to grow mine as well."

Consequently, before the opening of the new terminal, the ILA negotiated with the State and the Ports Authority in an attempt to displace the hybrid model and acquire new work for union workers. When the discussions yielded no change, the ILA took further steps to achieve its goal. After the new terminal opened and cargo ships began calling at it, the ILA sued the United States Maritime Alliance — a multi-employer association of container carriers — and two of its members whose ships had called at the new terminal, alleging that, by doing so, they were violating the collective bargaining agreement between the ILA and the Maritime Alliance. The ILA sought $300 million in damages. It also made clear that the same fate would befall any other Maritime Alliance carrier whose ships called at the new terminal. In response to that suit, Maritime Alliance carriers immediately stopped calling at the new terminal, causing the Ports Authority extensive damages, which are ongoing.

In response to this ILA activity, the Ports Authority and the Maritime Alliance brought an unfair labor practice charge against the ILA, alleging that it was attempting to enforce the collective bargaining agreement in a coercive manner so as to force Maritime Alliance carriers to cease calling at the new terminal, thus effecting a boycott in violation of § 8(b) of the NLRA. Separately, the Ports Authority brought an additional unfair labor practice charge against both the ILA and the Maritime Alliance, alleging that a provision of their collective bargaining agreement violates § 8(e) of the NLRA.

Section 8(b) prohibits unions "from engaging in secondary activities whose object is to force one employer [here, the Maritime Alliance] to cease doing business with another [here, the Ports Authority]."

NLRB v. Int'l Longshoremen's Ass'n (ILA I), 447 U.S. 490, 503, 100 S.Ct. 2305, 65 L.Ed.2d 289 (1980); *see also* 29 U.S.C. § 158(b)(4)(ii)(B). And § 8(e) "makes unlawful those collective-bargaining agreements in which the employer [here, the Maritime Alliance] agrees to cease doing business with any other person [here, the Ports Authority]." *ILA I*, 447 U.S. at 503–04, 100 S.Ct. 2305; *see also* 29 U.S.C. § 158(e). Unions can, however, avoid liability under those provisions if they show, as an affirmative defense, that the primary objective of their activity is the *preservation* of work historically done by the bargaining unit, not the *acquisition* of union work. *See National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 630, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967); *see also ILA I*, 447 U.S. at 504, 100 S.Ct. 2305.

The majority concludes that because ILA workers perform "the loading and unloading generally at East and Gulf ports," *ante* at 380, as described without exception in the Master Contract between the ILA and the Maritime Alliance, the ILA's efforts at the Port of Charleston were intended merely to preserve such work for union workers. This conclusion, however, is fundamentally flawed because it fails to focus on the work performed by the relevant bargaining unit, Local 1422, as required. *See ILA I*, 447 U.S. at 507, 100 S.Ct. 2305 (requiring the analytical focus to be on "whether an agreement seeks no more than to preserve the work *of bargaining unit members*" (emphasis added)); *Marrowbone Dev. Co. v. Dist. 17, United Mine Workers of Am.*, 147 F.3d 296, 302–03 (4th Cir. 1998) (same). Moreover, the majority's premise for making this argument is inaccurate. While ILA workers do *generally* operate the cranes in East Coast and Gulf Coast ports, the undisputed facts of record show a longstanding exception to that generalization — they have *never*

operated cranes in the Ports of Charleston, Wilmington, and Savannah, each of which has *always* operated with a hybrid division of labor. Thus, the ILA's effort to bring about change in the Port of Charleston to eliminate the hybrid model in favor of 100% ILA work was clearly an effort *to acquire* work, which, as it was attempted, was illegal, and not the lawful effort *to preserve* work. The record shows further that the ILA faced no loss or threatened loss of work in the Port of Charleston from the opening of the new terminal. Moreover, as the ALJ found, there is no record evidence that the opening of the new terminal caused or threatened to cause loss of work at any other port on the East Coast or Gulf Coast.

I agree with the ALJ in this case, as well as the dissenting member of the National Labor Relations Board ("NLRB" or the "Board"), both of whom concluded that the ILA committed an unfair labor practice in violation of § 8(b). I would therefore grant the Ports Authority's petition for review, reverse, and remand to require the Board to provide relief to the Ports Authority.

I

In the spring of 2021, the Ports Authority opened the Hugh K. Leatherman, Sr., Terminal in the Port of Charleston, operating the new terminal with the same hybrid division of labor that had been in use at the port for some 50 years. Under the hybrid model, state employees operate the state-owed cranes at the port and ILA workers perform all other longshore work. The state employees are not represented by the ILA, and the Ports Authority has no agreement with the ILA governing the terms and conditions of the Ports Authority's employment of crane operators. This hybrid model is also in use at the Ports of Wilmington and Savannah.

The vast majority of container ships that call at the Port of Charleston are owned by carriers who are members of the United States Maritime Alliance, which represents the carriers in negotiating collective bargaining agreements with the ILA. The most recent "Master Contract" between the ILA and the Maritime Alliance became effective in 2018 and will continue to 2024.

The Master Contract provides the terms and conditions for union longshore work in all the ports on the East Coast and Gulf Coast — "from Maine to Texas." It requires that all Maritime Alliance members' cargo be loaded and unloaded exclusively by ILA longshore workers. While the Master Contract contains no explicit exception for crane operators in the Ports of Charleston, Savannah, and Wilmington, the parties agree that the crane operators in those ports have never been union workers. And the Master Contract recognizes this in Article VII, § 7(a)–(b):

> (a) [The Maritime Alliance] and the ILA shall conduct a study to determine how the *business model currently used by port authorities in the Ports of Charleston, SC, Savannah, GA, and Wilmington, NC could be altered* to permit work currently performed by state employees to be performed by Master Contract-bargaining-unit employees in a more productive, efficient, and competitive fashion. *[The Maritime Alliance] and the ILA will use this study to meet with these port authorities in an effort to convince them to employ Master Contract-bargaining-unit employees.*
>
> (b) [The Maritime Alliance] agrees to formally notify any port authority contemplating the development of or intending to develop a new container handling facility that [Maritime Alliance] members

> may be prohibited from using that new facility if the work at that facility is not performed by Master Contract-bargaining-unit employees.

(Emphasis added).

The study contemplated by § 7(a) was never conducted, and no action has ever been taken before the ILA's activities in this case with respect to the Maritime Alliance members' right to call at these three ports. Even so, the representatives of the ILA and the Maritime Alliance disagree over the meaning of § 7. The ILA asserts that it precludes Maritime Alliance carriers from calling at the new terminal in the Port of Charleston unless the terminal is staffed "100 percent ILA," while the Maritime Alliance asserts that § 7 was intended merely to cabin the hybrid model to those ports using the hybrid model.

Despite the long and consistent history of the hybrid model's being used at the three ports, the ILA has been intent on changing the model and acquiring 100% of the work at those ports. Before the new terminal in the Port of Charleston opened, the ILA met with representatives of the State of South Carolina and the Ports Authority in an effort to persuade the Ports Authority to make the change at the new terminal. As the ALJ noted, the ILA representative stated that the ILA "[was] interested in consuming all the jobs at the Leatherman Terminal" and that the ILA representative "opposed the use of the hybrid operating model throughout his 24-year career as a union officer." The representative also stated that with the opening of the new terminal, the ILA decided to focus on combatting the use of the hybrid model at the Port of Charleston because "Charleston just happened to be the 'first terminal up at bat.'"

When negotiations between the ILA and the Ports Authority failed and the new terminal opened using the hybrid model, the ILA pursued a different course and filed an action against the Maritime Alliance and two member carriers who had called at the new terminal, alleging that they violated the Master Agreement between the ILA and the Maritime Alliance. The ILA sought $300 million in damages, intending to deter other carriers from calling at the new terminal. That effort proved effective. Thereafter, no Maritime Alliance carriers called at the new terminal, causing the State and the Ports Authority substantial damages, as it presently operates at only 10% capacity.

The Ports Authority filed two unfair labor practice charges against the ILA. In the first, it alleged that by employing the ILA's interpretation of Article VII, § 7 of the Master Contract, the ILA illegally attempted to require Maritime Alliance carriers to refrain from dealing with the Ports Authority at its new terminal, in violation of § 8(e) of the NLRA. In the second charge, the Ports Authority alleged that the ILA filed suit against the Maritime Alliance and its member carriers with the unlawful objective of forcing Maritime Alliance carriers to cease doing business with the Ports Authority and thereby to coerce the Ports Authority to assign union workers to state-owned cranes, in violation of §§ 8(b) and 8(e).

After a two-day trial in June 2021, the ALJ dismissed the first unfair practice charge because the language of § 7 did not *require* the Maritime Association to refrain from calling at the new terminal but merely required the Maritime Alliance members to *warn* the Ports Authority that they *may* not be able to use the new terminal if it used the hybrid model. With respect to the second charge, however, the ALJ

found that the ILA's action in filing suit against the Maritime Alliance was an illegal effort to create a secondary boycott with the purpose of *acquiring new work*, not *preserving existing work*. The ALJ drew on the Supreme Court's distinction in *National Woodwork* between contractual provisions employed as a "'sword' to reach out and acquire new work" and provisions employed as a "'shield' to retain work traditionally performed by Union employees." (Quoting *National Woodwork*, 386 U.S. at 630, 87 S.Ct. 1250). The ALJ concluded that the ILA had used its suit to enforce the Master Contract as a "sword" to acquire new work because "a condition precedent to finding a lawful work preservation object is evidence of an actual or anticipated threat to [bargaining] unit jobs." He found both (1) that the ILA had not adduced sufficient evidence to support its claim that the new terminal in the Port of Charleston threatened existing ILA jobs, and (2) that there was concrete evidence of the ILA's "desire to obtain all the container work at the Leatherman Terminal, as well as at any future container-handling facilities." Both findings supported a conclusion that the purpose of the ILA's activities was to acquire work.

While the NLRB affirmed the ALJ's dismissal of the first charge, it reversed the ALJ's finding of an unfair labor practice with respect to the second charge by a 2-to-1 vote. The panel majority concluded both that the ALJ took too narrow a view "of the work preservation defense" and that the object of the ILA's lawsuit was actually work preservation. It found that the primary object of the suit was to force the Maritime Alliance members to give longshore work to ILA members by avoiding the Leatherman Terminal in favor of facilities staffed completely by ILA workers, and that any secondary effects on the Port of Charleston were

unintended — and thus permissible. With respect to the ALJ's conclusion that there was no job loss or threat thereof, the majority said that the ILA was merely pursuing job preservation, a conclusion it took to be supported by the history of containerization and its effect on longshoremen, citing *NLRB v. Int'l Longshoremen's Ass'n (ILA II)*, 473 U.S. 61, 79, 105 S.Ct. 3045, 87 L.Ed.2d 47 (1985). It also concluded that the ILA's activity was not a secondary effort directed at the Ports Authority but rather was legitimately directed at the Maritime Alliance and its carriers because the carriers had "the power to give the employees the work in question, and therefore, are primary employers."

From the NLRB's order of December 16, 2022, dismissing the Ports Authority's charges against the ILA, the Ports Authority filed this petition for review.

II

Section 8(b) of the NLRA forbids "forcing or requiring any person . . . to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B). And § 8(e) of the NLRA forbids any employer from entering "into any contract or agreement . . . whereby such employer ceases or refrains or agrees to cease . . . doing business with any other person." *Id.* § 158(e). The general principles implemented by these provisions are not complex or even unique to labor law. While the NLRA allows union activities "having the object of pressuring the employer for agreements regulating relations between [the employer] and [its] own employees," it prohibits "'secondary' objectives" — that is, the "use of the boycott to further [a union's] aims by involving an employer in disputes not [that employer's] own." *National Woodwork*, 386 U.S. at 620, 87 S.Ct. 1250. As the *National Woodwork* Court noted:

The congressional design in enacting § 8(b)(4)(A) is therefore crucial to the determination of the scope of §§ 8(e) and 8(b)(4)(B). Senator Taft said of its purpose:

> This provision makes it unlawful to resort to a *secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees.*
>
> * * *

And the Senate Committee Report carefully characterized the conduct prohibited by § 8(b)(4)(A) in the same terms:

> Thus, it would not be lawful for a union to engage in [a] strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute).

Id. at 624–25, 87 S.Ct. 1250 (emphasis added). Thus, in enacting §§ 8(b) and 8(e), "Congress intended to reach only agreements with *secondary* objectives." *ILA I*, 447 U.S. at 504, 100 S.Ct. 2305 (emphasis added). In other words, § 8(b) does not prohibit the kinds of activities described where those activities are directed toward achieving primary union objectives, and "[a]mong the primary purposes protected by the [NLRA] is 'the purpose of *preserving* for the contracting employees themselves work traditionally done by them.'" *Id.* (emphasis added) (quoting *NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters of N.Y.* (*Pipefitters*), 429 U.S. 507, 517, 97 S.Ct. 891, 51 L.Ed.2d 1 (1977)). Thus, if a union's activity is directed at preserving

"work traditionally performed by [bargaining unit employees]" and if the target of the union action has the "right of control" over that work — *i.e.*, the right to decide who performs the work — then the union activity is permitted even where it would otherwise violate the letter of § 8. *Id.* Because § 8(b) facially prohibits union activities "requiring any person . . . to cease doing business with any other person," 29 U.S.C. § 158(b)(4)(ii)(B), the union carries the burden of establishing the affirmative defense that its activities are nonetheless permissible on the ground that they (1) have the purpose of *preserving* for its employees the work traditionally done by them, rather than acquiring new work, and (2) are *directed at the employer with the right to control the work, see ILA I*, 447 U.S. at 504, 100 S.Ct. 2305; *Marrowbone*, 147 F.3d at 302.

I conclude that the ILA's activities clearly fall under § 8(b) and that the ILA did not carry its burden to avoid liability. The intent of its conduct in filing suit against the Maritime Alliance was *to gain* union work, not to preserve it, as the ILA failed to show any loss or threatened loss of work caused by the opening of the new terminal in the Port of Charleston. Furthermore, its effort was not directed against the employer it was seeking to persuade — the Ports Authority — but against customers of the Ports Authority, *i.e.*, the Maritime Alliance and its members. Those entities had no control over the Ports Authority's employees, except to bring collateral pressure on the Ports Authority with a boycott, and thus the ILA's activity was secondary. In pursuing these activities, the ILA violated § 8(b) and thus committed an unfair labor practice, as charged by the Ports Authority. I address in turn the ILA's failure to demonstrate each of the two requirements of the affirmative defense.

A

With respect to the first requirement, the NLRB and the ILA contend that the ILA is entitled to the benefit of its Master Contract, which has as its purpose "to preserve traditional work and the jobs of union employees in the face of the technological advances [such as containerization] affecting the coastal units." While this assertion is true enough, it gains the ILA nothing unless it also shows that the opening of the new terminal in the Port of Charleston threatened a loss of work from technological advances and that its actions were directed toward preserving that work. To fill that gap in its reasoning, the Board and the ILA argue that when more cargo — and therefore work — is directed to the Port of Charleston or the other two ports using the hybrid model, work is being pulled away from all other ports, which use only ILA workers. First, this analysis is too broad and is inconsistent with the focused analysis required for determining whether work is being preserved or acquired. As our court held in *Marrowbone*, "regardless of whether the agreement is national in scope, in determining whether it preserves or acquires work, the analysis must focus on the work of the local employees and not those elsewhere." 147 F.3d at 303 (citing *ILA I*, 447 U.S. at 507, 100 S.Ct. 2305 (noting that "the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work")). The NLRB and ILA's argument focusing on all coastal units is thus legally irrelevant.

Second, even the broad argument that the NLRB and the ILA make lacks support in the record. The record lacks any evidence to show that the new terminal caused the diversion of cargo in a manner that resulted in loss of union work, and the ILA only

offered the thought that "discretionary cargo work *might* migrate from ILA-controlled ports to Charleston" (emphasis added), which the ALJ characterized as "vague speculation."

Moreover, without any apparent logic, both the NLRB and the majority also describe the ILA's impetus in this case as being the loss of traditional work performed by union workers emanating from the containerization of cargo in the 1950s. But there is no factual or logical basis to conclude that the ILA's effort to obtain the crane-operating work at the new terminal in the Port of Charleston is an effort to preserve work lost by containerization. Both of the first two terminals in the Port of Charleston, as well as the new terminal, handle containerized cargo, and the division of labor has always been that state employees operate the state-owned cranes, and the union workers perform the other longshore work. Simply, the issue is not whether there was a historic loss of work because of containerization — that issue is long past for this case — but whether the union can change the post-containerization settled status quo of the hybrid model's use at the Port of Charleston to obtain 100% ILA work at the new terminal.

Not only have the NLRB and the ILA not shown a loss or threatened loss of work at other ports, they have not even shown any loss or threatened loss of work by Local 1422 within the Port of Charleston, the burden that they must carry. The cranes in the Port of Charleston were *always* operated by state employees and *never* by union workers, and the record shows that the hybrid division of work that existed before the opening of the new terminal continued thereafter without change. The ALJ found, and no one challenges on appeal, that after the new terminal opened, the

same division of work and the same proportion of workers were used at the new terminal as had been used at the other two terminals in the port. There was no transfer of workers from the other two terminals to the new one, but rather the new terminal was staffed by new employees, in the same proportion that had always existed in the port *i.e.*, the status-quo hybrid model. As the ALJ found, "There is no evidence that the work performed by state employees at the Leatherman Terminal differed in any way from the other Port of Charleston terminals. The same is true regarding the work of [union] members performed there."

Both the NLRB and the ILA, perhaps recognizing that the undisputed facts show no loss or threatened loss of jobs anywhere, argue with some futility that the ILA need not show "a specific loss or threat of loss of jobs" because of the "unique" context of longshore work, citing *ILA I*, *ILA II*, and *American Trucking Ass'ns v. NLRB*, 734 F.2d 966 (4th Cir. 1984). But this position is conclusively refuted by the very sources that the NLRB and ILA cite, and their argument simply amounts to a concession of error. *ILA I* was, of course, a maritime shipping case — decided much closer in time to the immediate aftereffects of containerization — and yet even in that case, the Supreme Court expressly reaffirmed the requirement that a union make a precise showing of there being *an actual or imminent threat to bargaining-unit jobs.* In other words, the requirement of a rigorous showing was imposed by the Supreme Court in a case that took place within precisely the same "unique maritime context" as this dispute. Thus, the maritime context of this case in no way relieves the ILA of the requirement that its activity be directed at *preserving work*

traditionally performed by the relevant bargaining unit of the union. As the Supreme Court stated:

> Identification of the work at issue in a complex case of technological displacement requires a *careful analysis of the traditional work patterns* that the parties are allegedly seeking to preserve, and of *how the agreement seeks to accomplish that result* under the changed circumstances created by the technological advance. The analysis must take into account "all the surrounding circumstances," including the nature of the work *both before and after the innovation*. . . . Whatever its scope, . . . the inquiry must be *carefully focused*: to determine whether an agreement seeks *no more than* to preserve the work of bargaining unit members, the Board must focus on the work of the bargaining unit employees . . . .

ILA I, 447 U.S. at 507, 100 S.Ct. 2305 (emphasis added) (quoting *National Woodwork*, 386 U.S. at 644, 87 S.Ct. 1250).

The Board's conclusions to the contrary are owed deference only if they are "supported by substantial evidence." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493, 71 S.Ct. 456, 95 L.Ed. 456 (1951) (quoting 29 U.S.C. § 160(e)). Yet, there is no evidence in this case supporting the proposition that any ILA jobs were lost or threatened by the use of the hybrid model at the new terminal and were therefore in need of preservation.

This case closely resembles a course of conduct explicitly described as impermissible by the Supreme Court in *Pipefitters*. In that case, an agreement required that unionized workers perform threading and cutting of pipes themselves while on the job,

rather than working with pre-threaded and pre-cut pipes. *Pipefitters*, 429 U.S. at 511–12, 97 S.Ct. 891. The Court held that the union's actions in furtherance of that contract — a boycott of a neutral subcontractor without authority to control whether the right kinds of pipes were ordered for the job site — were illegal. *Id.* at 520–21, 528–31, 97 S.Ct. 891. The Court explained that while the union's activity was *partially* premised on permissible primary objectives, it was also clearly partially premised on impermissible secondary objectives — it was enough that "*an* object" of the union's activities was an illegal secondary objective. *Id.* at 528, 97 S.Ct. 891 (emphasis added); *see also id.* at 529–30 n.16, 97 S.Ct. 891 (stating that if a union were to attempt to capture work it had previously acquiesced to non-union workers' performing, such conduct would serve "not to preserve, but to aggrandize, its own position and that of its members," concluding that "[s]uch activity is squarely within the statute" and thus prohibited).

In this case, the impermissible secondary objective motivating the ILA's suit against the Maritime Alliance was to obtain *new work* by means of a boycott of the Ports Authority's new terminal.

B

To satisfy the second part of the *ILA I* test for demonstrating a defense of an alleged § 8(b) violation, the ILA must show that the Maritime Alliance had the "right of control" over the work at issue. *ILA I*, 447 U.S. at 504, 100 S.Ct. 2305. To meet that test, the Board and the ILA argue that the boycott effected in this case was not secondary, as prohibited by § 8(b), but primary, because the Maritime Alliance had the *right of control* over the crane-operating work in the Port of Charleston. They make this claim on the basis

that the Maritime Alliance carriers have discretion as to where their ships call, and thus they can, in exercising that discretion, offload ships at ports staffed solely by ILA workers. The majority adopts the same reasoning, describing the Maritime Alliance members as having the power to "unilaterally give [the] work to union members." *Ante* at 385. But the ILA's coercing the Maritime Alliance members to exercise this power is precisely what § 8(b) prohibits as an illegal secondary boycott. *See National Woodwork*, 386 U.S. at 627, 87 S.Ct. 1250 (noting Congress's concern with the "dangerous practice of unions" to widen industrial conflict by creating coercive pressures on neutral employers) (cleaned up). Rather than dealing with the Ports Authority directly with respect to the work that the Ports Authority controls, the ILA brought pressure against the Ports Authority's customers in an attempt to coerce the Ports Authority. This is secondary activity and is illegal.

It must be recalled that, as an undisputed matter, the crane operators at the Port of Charleston are employees of the Ports Authority, hired and paid by it. Neither those employees nor the Ports Authority are under any contract with the ILA with respect to crane-operating work. The crane workers are thus neither employees of the Maritime Alliance carriers nor under their control, as required for the ILA's actions to be lawful. The Maritime Alliance carriers were contractual strangers to the crane operators employed by the Ports Authority. While it would indeed be primary conduct for the ILA to deal directly with and bring pressure on the Ports Authority about the assignment of union workers to crane operation, it was secondary conduct for them to seek to achieve that result through a coercive suit against the Maritime Alliance. The determining fact focuses on whether there was a

contractual relationship between the Maritime Alliance carriers and the port workers. As the Supreme Court made clear:

> Whether an agreement is a lawful work preservation agreement depends on "whether, under all the surrounding circumstances, the Union's objective was preservation of work for bargaining unit employees, or whether the agreement was tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to *the labor relations of the contracting employer vis-à-vis his own employees.*"

ILA I, 447 U.S. at 504, 100 S.Ct. 2305 (emphasis added) (cleaned up) (quoting *National Woodwork*, 386 U.S. at 644–45, 87 S.Ct. 1250). The Court explained that "if the contracting employer has *no power to assign the work*, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work." *Id.* at 504–05, 100 S.Ct. 2305 (emphasis added). Of course, in this case, it was the Ports Authority that had the right to assign the work.

Not only does the argument that the Board and the ILA make with respect to the right of control fly in the face of controlling Supreme Court precedent, the ILA's own statements and testimony fairly concede that the Ports Authority is the relevant employer. First, the complaint in the ILA's lawsuit against the Maritime Alliance states that a Maritime Alliance ship "went to the Leatherman Terminal even though it knew that the non-bargaining unit employees who were *not covered* by the Master Contract *would be hired* to unload its containers." Moreover, in previously negotiating with and attempting to persuade the Ports

Authority, the ILA by its actions acknowledged that it was the Ports Authority that would assign the employees and that it was the Ports Authority whom had to persuade to use union workers. But then, when those negotiations failed, the ILA sought to bring secondary pressure on the Ports Authority by intimidating Maritime Alliance carriers, who otherwise would call at the new terminal, thereby forcing them not to do so and thus effecting a secondary boycott — the exact course of conduct that Congress prohibited when it enacted § 8(b).

III

Finally, *ILA II* instructs that an absence of unlawful secondary purposes is essential to a defense against charges under § 8(b). 473 U.S. at 82, 105 S.Ct. 3045. But the record here shows clearly, by undisputed evidence, that the ILA's purpose was to acquire new work, not to preserve existing work. An ILA representative acknowledged at trial that the very origin of Article VII in the Master Contract was the ILA's desire to "have all of the work . . . that is performed by nonbargaining workers to be brought under the ILA jurisdiction." An ILA vice president also testified that the purpose of Article VII of the Master Contract was to establish that, with respect to new terminals, the "jobs would be bargaining unit workers . . . or else those [carriers] would be prohibited from coming into those terminals." The ILA representative also testified that the ILA was interested in "consuming all the jobs," and that in doing so it was trying to "grow" its business. The goal of *growing* union work through secondary pressure renders the ILA's activity illegal and an unfair labor practice under § 8(b).

* * *

For the reasons given, I would grant the Ports Authority's petition for review and reverse the NLRB's order and remand with instructions to grant relief to the State and the Ports Authority.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, CLC

AND

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AFL-CIO, LOCAL 1422 AND UNITED STATES MARITIME ASSOCIATION, LTD. AND STATE OF SOUTH CAROLINA AND SOUTH CAROLINA STATE PORTS AUTHORITY

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Cases 10-CC-276241, 10-CE-271046, 10-CE-271053, 10-CC-276207, 10-CE-276221, 10-CC-276208, 10-CE-271047, 10-CE-271052, and 10-CE-276185

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December 16, 2022

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DECISION AND ORDER

BY MEMBERS RING, WILCOX, AND PROUTY

The primary issue in this case is whether the International Longshoremen's Association (ILA) engaged in a lawful attempt to preserve work when it sued the United States Maritime Association (USMX) and two USMX carrier members for breach of contract regarding container work at the Port of Charleston in South Carolina. For the reasons set forth below, we find that that the ILA did not violate the Act.[1]

[1] On September 16, 2021, Administrative Law Judge Andrew S. Gollin issued the attached decision. The ILA filed exceptions and a supporting brief. International Longshoremen's Association

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

Local 1422 (Local 1422) filed exceptions and argument. USMX filed cross-exceptions and a supporting brief, as did the State of South Carolina (State) and the South Carolina State Ports Authority (SCSPA) jointly. The AFL-CIO filed an amicus brief in support of the ILA and Local 1422. The General Counsel and USMX filed answering briefs to the ILA's exceptions, and the State and SCSPA jointly filed an answering brief to ILA's and Local 1422's exceptions, as well as a response to the AFL-CIO. ILA filed reply briefs to the General Counsel's, the State and SCSPA's, and USMX's answering briefs. ILA filed an answering brief to USMX's cross-exceptions, and USMX filed a reply brief. USMX, ILA, and Local 1422 filed answering briefs to the State and SCSPA's joint cross-exceptions. The State and SCSPA filed reply briefs to USMX, ILA, and Local 1422. On September 2, 2022, ILA submitted supplemental authority to the Board, i.e., the Board's supplemental decision in *International Longshore Workers Union (Kinder Morgan)*, 371 NLRB No. 125 (2022) (accepting *ILWU Local 4 v. NLRB*, 978 F.3d 625 (9th Cir. 2020) as the law of the case on remand). The State and SCSPA jointly filed a response.

[2] ILA, USMX, the State, and SCSPA have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

I. BACKGROUND

ILA and its constituent locals represent longshoremen, clerks, checkers, and maintenance workers at East and Gulf Coast ports from Maine to Texas. ILA and the United States Maritime Association (USMX), a multi-carrier association, are parties to the most recent ILA Master Contract which is effective from 2018 to 2024 and covers all ports along the East and Gulf Coasts of the United States, including the Port of Charleston. Because the effect of containerization on unit work has long been a concern to ILA, the Master Contract contains numerous provisions regarding container handling, including Appendix A, a "Containerization Agreement." As relevant here, the Master Contract states:

> Article I, Section 3
>
> This Master Contract is a full and complete agreement on all Master Contract issues relating to the employment of longshore employees on container and ro-ro [roll-on/roll-off] vessels and container and ro-ro terminals in all ports from Maine to Texas at which ships of USMX carriers and carriers that are subscribers to this Master Contract may call. This Master Contract as supplemented by local bargaining constitutes a complete and operative labor agreement.
>
> * * *
>
> Article VII, Section 7
>
> (a) USMX and the ILA shall conduct a study to determine how the business model currently used by port authorities in the Ports of Charleston, SC, Savannah, GA, and Wilmington, NC could be altered to permit work currently performed by

> state employees to be performed by Master Contract-bargaining-unit employees in a more productive, efficient, and competitive fashion. USMX and the ILA will use this study to meet with these port authorities in an effort to convince them to employ Master Contract-bargaining-unit employees.
>
> (b) USMX agrees to formally notify any port authority contemplating the development of or intending to develop a new container handling facility that USMX members *may be prohibited from using that new facility if the work at that facility is not performed by Master Contract-bargaining-unit employees*. (Emphasis added.)[3]

The "Containerization Agreement" attached to the Master Contract as Appendix A addresses container handling in more detail, providing in relevant part:

> 1. Management and the Carriers recognize the existing work jurisdiction of ILA employees covered by their agreements with the ILA over all

[3] USMX and ILA agreed to Sec. 7(a) and (b) in 2012, included those provisions in their 2013-2018 collective-bargaining agreement and, without subsequent discussion, added them to the current agreement. USMX and ILA did not undertake the study contemplated by Sec. 7(a), and they did not invoke Sec. 7(b) until 2020. Former USMX counsel Donato Caruso credibly testified that he drafted the language, and specifically the notice requirement, as a compromise to ILA's insistence on a provision requiring that unit employees perform all longshore work by 2014 because he feared that ILA's recommended language could be interpreted as violating Sec. 8(e). As explained below, ILA Vice President Dennis Daggett and Acting Delegate for Local 1422 Kenneth Riley testified that their understanding was that Sec. 7(b) required USMX carrier members to refrain from doing business at any new facility where unit employees did not perform all the longshore work.

container work which historically has been performed by longshoremen and all other ILA crafts at container waterfront facilities. Carriers, direct employers and their agents covered by such agreements agree to employ employees covered by their agreements to perform such work which includes, but which is not limited to:

(a) the loading and discharging of containers on and off ships

(b) the receipt of cargo

(c) the delivery of cargo

(d) the loading and discharging of cargo into and out of containers

(e) the maintenance and repair of containers

(f) the inspection of containers at waterfront facilities (TIR men).

* * *

2. Management, the Carriers, the direct employers and their agents shall not contract out any work covered by this agreement. Any violations of this provision shall be considered a breach of this agreement. . . .

* * *

9. Violations of Agreement: This Agreement defines the work jurisdiction of employees and prohibits the subcontracting out of any of the work covered hereby. It is understood that the provisions of this Agreement are to be rigidly enforced in order to protect against the further reduction of the work force. Management believes that there may have been violation of work jurisdiction, of subcontracting clauses, and of this Agreement, by steamship

> carriers and direct employers. The parties agree that the enforcement of these provisions is especially important and that any violation of such other provisions is of the essence of the Agreement. The Union shall have the right to insist that any such violations be remedied by money damages to compensate employees who have lost their work. Because of the difficulty of proving specific damages in such cases, it is agreed that, in place of any other damages, liquidated damages of $1,000.00 for each violation shall be paid to the appropriate Welfare and Pension Funds.

The State of South Carolina (State) and its instrumentality South Carolina State Ports Authority (SCSPA) are not and have never been parties to the Master Contract. In fact, a 1969 State law prohibits state employees from organizing and joining unions.[4]

For nearly 50 years, SCSPA has operated the Port of Charleston using a hybrid division of labor in which nonunionized state employees operate state-owned lift equipment to load and unload container ships that call at the port's two terminals—the Walter Wando Terminal and the North Charleston Terminal.[5] State employees also lift the containers from trucks and stack them in the port's holding area to await pickup. ILA-represented employees perform the remainder of the longshore work at the port. In 2020, SCSPA announced the imminent opening of the $1.5 billion

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[4] *Branch v. City of Myrtle Beach*, 532 S.E.2d 289 (S.C. 2000); McNair Resolution, H. 1636, 1969 S.C. Sen. Jour. 826 (April 5, 1969).

[5] A similar hybrid model is used for longshore work at the Port of Wilmington, North Carolina and the Port of Savannah, Georgia.

Hugh K. Leatherman, Sr. Terminal at the port and advised that it would operate using the same hybrid labor model as at the Waldo and North Charleston terminals.

In a June 2020 letter to SCSPA President and CEO James Newsome in response to the announcement, USMX CEO David Adam wrote, "[P]ursuant to Article VII, Section 7(b) of the [Master Contract] . . . USMX employer-members may be prohibited from using the new facility being developed . . . at [the port] if the work at that facility is not performed by Master Contract bargaining-unit employees." Some USMX carrier members sent similar letters to SCSPA. In the ensuing months, Adam, Newsome, USMX, ILA, and the State met numerous times but could not come to an arrangement for the performance of work at the new terminal. At a January 6, 2021 meeting,[6] ILA proposed that current terminals operating under the hybrid model would be redlined, but all longshore work at all new facilities should be performed by ILA-represented employees pursuant to Section 7(b). The State and SPSCA responded that they were not bound by Section 7(b) and that SCSPA had a right to expand the hybrid labor model to any new facilities. USMX asserted that its employer members interpreted Section 7(b) as allowing the continuation of the hybrid model so long as performance of the work by state employees and ILA-represented employees was proportionally the same as at the port's two older terminals. On January 6 and 7, the State and SCSPA filed with the Board unfair labor practice charges against ILA, Local 1422, and USMX, alleging that Section 7(b) of the Master Contract violated Section

[6] Hereafter, all dates are in 2021 unless otherwise stated.

8(e) of the Act.[7] On March 17, the General Counsel issued a consolidated complaint.

On March 30, SCSPA began operating the Leatherman Terminal using the hybrid labor model. On April 9, USMX carrier member Hapag-Lloyd called at the new terminal, and on April 22, ILA filed a lawsuit against USMX and Hapag-Lloyd in New Jersey State court, where ILA and USMX are incorporated. On April 21, USMX carrier member Orient Overseas Container Line Limited (OOCL) called at the Leatherman Terminal, and ILA added it to the New Jersey lawsuit. The lawsuit, which, at the request of USMX, was ultimately transferred to federal court, alleges that USMX, Hapag-Lloyd, and OOCL breached Article I, Section 3 of the Master Contract and Sections 1, 2, and 9 of the Container Agreement; engaged in tortious interference with contract, tortious interference with prospective economic advantage, and civil conspiracy; and seeks $300 million in damages plus attorney's fees, interest, and costs. The lawsuit neither mentions Section 7(b) nor seeks to enjoin unrepresented state employees from performing the work or to have bargaining unit employees assigned the work in issue.

Thereafter, the State, SCSPA, and USMX filed Section 8(e) and 8(b)(4)(ii)(A) and (B) unfair labor practice charges with the Board alleging that ILA filed its lawsuit with the intent to require USMX and its carrier members to cease doing business at the Leatherman Terminal unless ILA-represented unit employees performed all the longshore work there,

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[7] On March 18, the three Respondents—ILA, Local 1422, and USMX—agreed in writing not to enforce Sec. 7(b) of the Master Contract until the resolution of the Sec. 8(e) unfair labor practice charges.

including the lift work.[8] Within two weeks of ILA's filing of its lawsuit, at least five USMX carrier members contacted SCSPA demanding to be assigned to call at the Wando Terminal, and one threatened to redirect its vessels to the Port of Savannah. Over the next month, SCSPA diverted 12 vessels of USMX carrier members to the Wando Terminal, and USMX carrier members ceased calling at the Leatherman Terminal.

II. THE JUDGE'S DECISION

The first consolidated complaint alleges that USMX, ILA, and Local 1422 violated Section 8(e) of the Act by entering into and reaffirming a "hot cargo" provision in Article VII, Section 7(b) of the Master Contract. The second consolidated complaint alleges that ILA violated Section 8(b)(4)(ii)(A) and (B) and 8(e) of the Act by filing a lawsuit against USMX, Hapag-Lloyd, and OOCL to prevent USMX and its carrier members from doing business with SCSPA at the Leatherman Terminal.

The judge dismissed the allegations in the first consolidated complaint. He reasoned that the language of Section 7(b) of the Master Contract was facially valid because it did not require USMX and its carrier members to cease doing business with SCSPA, but only to "formally notify" SCSPA that they "*may* [if an arbitrator ruled in favor of ILA] be prohibited" from calling at new facilities where ILA unit employees did not perform all the loading and unloading work, including the use of lift equipment. The judge also considered the fact that ILA, Local 1422, and USMX

[8] The General Counsel issued a second consolidated complaint on these charges, and the two complaints were consolidated for hearing. Thus, USMX is both a Respondent and a Charging Party in these cases.

interpreted Section 7(b) differently and determined that, absent a mutual understanding, the provision did not constitute an agreement to cease handling the products of, or cease doing business with, SCSPA. Relying chiefly on *Bermuda Container Lines, Ltd. v. Longshoremen ILA*, 192 F.3d 250 (2d Cir. 1999) (finding Rules on Containerization lawful and dismissing Section 8(e) charge), the judge also found that the Master Contract, together with the Containerization Agreement, constitutes a valid, coastal work preservation agreement.[9] We agree for the reasons stated by the judge.[10]

The judge next found, however, that ILA attempted to use the lawful agreement "as a sword to achieve an unlawful secondary object" (i.e., acquisition of work) and thereby violated Section 8(b)(4)(ii)(A) and (B) and 8(e) of the Act. The judge rejected ILA's argument that the lawsuit had a lawful work preservation object. In the judge's view, there was no loss or threat of loss of unit work, but there was evidence of ILA's desire to obtain all the container work at the Leatherman Terminal and future container handling facilities. The judge pointed to statements made by ILA Vice President and Local 1422 Delegate Kenneth Riley in a 2020 book to the effect that any new terminals would sit idle if ILA-represented workers did not perform all

[9] The Rules on Containerization ("Rules") have been modified by mutual agreement over the years and are now called the Containerization Agreement, but they remain substantially the same.

[10] The judge's recommended Order failed to include dismissal of the first consolidated complaint. Our Order below corrects that inadvertent error by dismissing both complaints.

of the work.[11] The judge also relied on conversations between ILA and the State in which Riley and ILA Executive Vice President Dennis Daggett admonished SCSPA for not assigning all the container work at the new terminal to unit employees and stated that ILA wanted to prevent expansion of the hybrid labor model. The judge characterized USMX as a secondary (or neutral) employer and the State and SCSPA as the primary employer because the State owned the lift equipment operated by state employees for the container work. Based on the foregoing, the judge concluded that ILA filed its lawsuit with the object of forcing USMX and its carrier members to agree that they were prohibited from calling at the Leatherman Terminal in violation of Sections 8(b)(4)(ii)(A) and 8(e) and forcing them to cease doing business with the State and SCSPA at that terminal in violation of Section 8(b)(4)(ii)(B). Accordingly, the judge ordered ILA to cease pursuit of its lawsuit and to move for its dismissal. He also ordered ILA to reimburse USMX, Hapag-Lloyd, and OOCL, the three defendants in the lawsuit, for reasonable expenses and legal fees, with interest. Based on his findings and conclusions, the judge implicitly rejected ILA's arguments that, pursuant to *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), ILA's First Amendment right to petition

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[11] In the book, entitled *Kenny Riley and Black Union Labor Power in the Port of Charleston*, Riley is quoted as saying, "The port can build whatever terminals it wants, and it can put in the most expensive cranes and infrastructure it wants at any terminal it wants, but if no ships call on that terminal, then it just got a brand-new terminal with nothing there . . . if there are any new terminals built, and if they are not in compliance with the [Master Contract], the ships will not call on those facilities." Industry articles also quote similar statements made by Riley.

the government precludes the Board from finding the lawsuit unlawful.

III. EXCEPTIONS AND AMICUS ARGUMENTS

ILA excepts to all the judge's adverse findings and argues that its lawsuit is protected by the First Amendment right to petition the government for the redress of grievances under the standards articulated by the Supreme Court in *Bill Johnson's*. See id. ILA points out that the lawsuit alleges a violation of the subcontracting restrictions in the Containerization Agreement and that it was not accompanied by any illegal conduct. In essence, ILA asserts that if the Master Contract is lawful on its face, a lawsuit against parties who breach it is also lawful. ILA further excepts to the judge's finding that the lawsuit did not have a lawful work preservation objective.

The AFL-CIO argues similarly in its amicus brief. It relies on *NLRB v. Longshoreman's Association (ILA I)*, 447 U.S. 490 (1985), in which the Supreme Court held that the "Rules on Containers" were lawful work preservation agreements notwithstanding that stuffing and stripping containers were not historically longshore work. It contends that the lawsuit encompasses a straightforward primary dispute between ILA and USMX carrier members rather than an attempt by ILA to exert unlawful secondary pressure on USMX carrier members to cease doing business with the State and SCSPA.

The State and SCSPA except to the judge's failure to find that Article VII, Section 7(b) of the Master Contract standing alone violated Section 8(e) of the

Act.[12] However, they contend that the judge correctly found the Section 8(b)(4)(ii)(A) and (B) and 8(e) violations. They take issue with the judge's statement that USMX controls the work, but they contend that control and primary/secondary status are irrelevant in any event because the judge found that ILA attempted to acquire work it had not previously performed at the port. They further except to the judge's failure to order that ILA and Local 1422 reimburse them for fees and expenses incurred in the prosecution of the unfair labor practice case.

USMX counters ILA's exceptions, arguing that the judge correctly found that the lawsuit violates Section 8(b)(4)(ii)(A) and (B) and 8(e). USMX also excepts to the judge's finding that, as a consequence of owning or leasing containers, USMX's carrier members "determine what ports they call on, which ultimately gives the carriers the right to control who performs the lift-equipment work on their containers." USMX contends that SCSPA controls the assignments of vessels to terminals, as well as the lift work, but that control of the work is irrelevant because the judge rested his conclusions that ILA violated the Act on his finding that ILA's lawsuit had a work acquisition object. *International Longshore Workers Union (ICTSI)*, 363 NLRB 121 (2015), enfd. 705 Fed.Appx. 1 (D.C. Cir. 2017).

IV. ANALYSIS

To protect the fundamental First Amendment right to petition the government for redress of grievances, the Supreme Court has placed limits on the Board's authority to find that a lawsuit constitutes an unfair labor practice. The Board may not make such a finding

[12] As explained above, we adopt the judge's dismissal of that allegation.

unless the lawsuit is both objectively baseless and retaliatory or the lawsuit "has an objective that is illegal under federal law." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983). See also *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). No party argues that ILA's lawsuit is baseless and retaliatory. Accordingly, we have no basis upon which to enjoin the lawsuit *unless* it has an illegal objective.[13] Contrary to the judge and our dissenting colleague, we find that the lawsuit's objective is lawful work preservation. As explained below, in finding the lawsuit to be an attempt by the ILA to acquire work it had not previously performed at the port, the judge and our dissenting colleague have erred by taking too

[13] USMX, the State, and SCSPA argue that the lawsuit, in addition to having an illegal objective, is preempted by federal labor law. In footnote 5 of *Bill Johnson's*, the Supreme Court made clear that it did not intend to preclude the Board from enjoining lawsuits that are "beyond the jurisdiction of the state courts because of federal-law preemption." 461 U.S. at 737 fn. 5. However, the filing of a preempted lawsuit is an unfair labor practice only if it is otherwise unlawful under traditional NLRA principles. See, e.g., *Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at 4 (2018) (citing *Can-Am Plumbing, Inc*., 335 NLRB 1217, 1217 (2001)) ("A preempted lawsuit enjoys no special protection under *Bill Johnson's* and can be condemned as an unfair labor practice if it is unlawful under traditional NLRA principles.") (internal citations and quotation marks omitted), enf. denied on other grounds and remanded 321 F.3d 145 (D.C. Cir. 2003), reaffd. 350 NLRB 947 (2007), enfd. 340 Fed. Appx. 354 (9th Cir. 2009); *Bakery Workers Local 6 (Stroehmann Bakeries*), 320 NLRB 133, 138 (1995) (holding that union did not violate Sec. 8(b)(1)(A) by maintaining a preempted lawsuit because the lawsuit was not motivated by a desire to retaliate against the exercise of Sec. 7 rights). Because we find below that the lawsuit has a lawful work preservation objective (and is therefore not unlawful under traditional NLRA principles), we need not decide whether the lawsuit is preempted.

narrow a view of the work preservation defense under Section 8(b)(4)(ii)(A) and (B), both geographically and legally.[14]

As noted above, ILA's lawsuit alleges breach of contract by USMX and two USMX member carriers who were parties to the 2018 Master Contract. In addition, the lawsuit alleges tortious interference with contract, tortious interference with prospective economic advantage, and civil conspiracy. The lawsuit seeks monetary damages, attorney's fees, interest, and costs. It does not seek to enjoin the performance of work by non-ILA bargaining unit employees or require the work at issue be assigned to ILA-bargaining unit employees.

A. Legal Principles

Before examining the judge's work preservation analysis, we first summarize the relevant provisions of the Act. With certain provisos not applicable here, Section 8(e) of the Act makes it unlawful for labor organizations and employers to enter into any agreement, express or implied, requiring the employer "to cease or refrain or agree to cease or refrain from handling, using, selling, transporting, or otherwise dealing in the products of any other employer, or to cease doing business with any other person." Section 8(b)(4)(ii) makes it unlawful for a labor organization to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where an object thereof is—

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[14] Because we find that the lawsuit's objective was lawful, we also need not reach ILA's argument that there was no "underlying act" and that *Anheuser-Busch, LLC,* 367 NLRB No. 132 (2019), therefore precludes the Board from applying the *Bill Johnson's* "illegal objective" exception.

> (A) forcing or requiring any employer or self-employed person to, among other things, enter into any agreement which is prohibited by [S]ection 8(e);
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . [p]rovided, [t]hat nothing contained in clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing
>
> . . . .

Sections 8(b)(4)(ii)(A) and (B) and 8(e) prohibit secondary, not primary, activity. As the Supreme Court explained in *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967), preservation of work for bargaining unit employees is a lawful, primary object. In that case, the employer, Frouge Corporation, and the Carpenters Union were parties to a contract that prohibited unit employees from handling precut doors. Customarily, unit employees mortised "blank" doors for knobs, routed the doors for hinges, and beveled them to make them fit between jambs before the doors could be hung on construction projects. Frouge ordered 3600 precut doors on a jobsite through the Wood Manufacturers Association, and the union ordered unit employees not to handle them. The Wood Manufacturers Association filed charges alleging that the agreement not to handle precut doors violated Section 8(e) and that the union's refusal to do so at the jobsite violated Section 8(b)(4)(ii)(B). The Court upheld the Board's finding that agreement was a lawful work preservation agreement and that the union's refusal to handle the precut doors was lawfully directed at the

primary employer, Frouge. Contrast *NLRB v. Pipefitters*, 429 U.S. 507 (1977), cited by the judge, in which the subcontractor and the union were parties to an agreement that required unit employees to do pipe-threading and cutting at the jobsite. On the project in issue, the general contractor required the subcontractor to purchase pre-threaded pipe, and unit employees on the project refused to handle the pre-threaded pipe. The Court held that the union-instigated refusal of the subcontractor's employees to handle materials that the general contractor's job specifications required constituted unlawful secondary activity because the union's real object was to influence the general contractor by exerting pressure on the subcontractor, who had no power to award the work to the union.

In *NLRB v. International Longshoremen's Association*, 447 U.S. 490 (1980) (*ILA I*), the Supreme Court affirmed the D.C. Circuit's reversal of the Board's finding that the union violated the Act by attempting to acquire work its members had not previously performed. The Court found that ILA's attempt to enforce the Rules on Containers was lawful work preservation.[15] Borrowing from its earlier decisions in

[15] The Rules initially were negotiated by ILA and the New York Shipping Association (NYSA) in 1974 in response to the loss of jobs created by containerization and were later adopted by other shippers at other ports, including Baltimore, Maryland and Hampton Roads, Virginia. Among other things, the Rules provided that if containers owned or leased by the shipping company signatories were to be stuffed (loaded) or stripped (unloaded) within a 50-mile radius of the port by anyone other than the employees of the beneficial owner of the cargo, that work had to be done at the piers by ILA labor. A number of entities that used nonunion labor for these tasks filed charges when signatory carriers refused to continue supplying containers or refused to continue doing business with them.

Woodworkers, supra, and *Pipefitters*, supra, the Court stated:

> The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees. Under this approach, a lawful work preservation agreement must pass two tests: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called "right of control test . . . ." The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work. (Internal citations omitted.)

Id. at 504–505.

The Court also held that when work preservation agreements result from technological changes, the definition of work "requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, through collective bargaining and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance." Id. at 507. The focus always must be "on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work," and on how the agreement attempts to preserve jobs impacted by the introduction of new technologies. Id. The Court remanded the case to the Board.

Thereafter, in *NLRB v. International Longshoremen's Association*, 473 U.S. 61 (1985) (ILA II), the Court concluded the Board again erred by focusing on the extra-unit effects of the container rules and by finding that work eliminated by technology could never be the object of a work preservation agreement.[16] The Court found the union's objective consistently had been to preserve longshore work and the carriers had the power to control assignment of that work because they owned or leased the containers used for transport. It also concluded that when "the objective of an agreement and its enforcement is so clearly one of work preservation, the lawfulness of the agreement under [Section] 8(b)(4)(B) and 8(e) is secure absent some other evidence of secondary purpose." Id. at 81–82. Thus, the rules were held valid irrespective of their effects on workers outside of the bargaining unit because there was no object to disrupt the business relations of a neutral employer.

B. Analysis of ILA's Objective

Applying these principles, we find that ILA's lawsuit meets both requirements for a lawful work preservation objective: (1) the lawsuit's objective was the preservation of work traditionally performed by employees represented by ILA, and (2) USMX and its carrier members had the power to give the employees the work in question, and therefore, are primary employers.

First, as stated earlier we find that the judge and our dissenting colleague have assessed the scope of unit work too narrowly in rejecting ILA's work

[16] On remand from the Court, the Board found that the Rules were lawful, but that ILA's application of them to acquire the stuffing, stripping, and short-stopping work nevertheless contravened the Act, leading to *ILA II*.

preservation defense under Section 8(b)(4)(ii)(A) and (B). As in the *ILA* cases, the collective-bargaining agreements in issue cover coast-wide units. The Master Contract provides that it is the full complete agreement on "issues relating to the employment of longshore employees on container and ro-ro vessels and container and ro-ro terminals in all ports from Maine to Texas at which ships of USMX carriers and carriers that are subscribers to this Master Contract may call." The Master Contract incorporates the Containerization Agreement, which is substantially the same as the Rules and which provides that:

> Management and the Carriers recognize the existing work jurisdiction of ILA employees covered by their agreements with the ILA over all container work which historically has been performed by longshoremen and all other ILA crafts at container waterfront facilities. Carriers, direct employers and their agents covered by such agreements agree to employ employees covered by their agreements . . . .

Here, as in the *ILA* cases, ILA is seeking to preserve the traditional work and the jobs of unit employees in the face of the technological advances affecting the coastal units, including such changes as at the new Leatherman Terminal. That ILA seeks to stop expansion of the hybrid work model is merely one facet of preserving work for the employees it represents. ILA, USMX, and USMX carrier members are parties to the contract and any one of them may seek to enforce it to reap the benefit of that party's perceived bargain.[17]

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[17] We do not purport to interpret the contract or to decide or predict the outcome of ILA's lawsuit. A judge or jury will have to do that.

Second, contrary to our dissenting colleague, we find that USMX and its carrier members have sufficient control over the work in question—the loading or unloading of containers they own or lease. Although SCSPA has sole authority to decide which terminals at the Port of Charleston USMX carriers call on, as well as who performs loading and unloading work at those terminals using state-owned lift equipment, USMX carriers have the authority to bypass the Port of Charleston and call on other ports where ILA-represented employees perform all loading and unloading work. Therefore, USMX carriers have the right to control who performs loading and unloading work of their containers.

We are unpersuaded by our dissenting colleague's argument that, insofar as USMX and its carrier-members may call at other ports, they are analogous to the subcontractor in *Pipefitters*, who could have elected to work on other projects. Thus, the dissent argues that the subcontractor in *Pipefitters* could have chosen to bypass the project at issue and work only on projects where the general contractor did not require it to install pre-cut and pre-threaded piping, but the subcontractor was nevertheless found *not* to have the right to control the work in question. Similarly, the dissent claims that in the present case, USMX carrier-members do not have the right to control the work in question by virtue of their ability to bypass the Leatherman Terminal. That analogy has an appealing rationality if the work in question is defined as the lift equipment work at the Leatherman Terminal, which SCSPA indisputably controls. However, the work in question is the loading and unloading generally at East and Gulf Coast ports. Thus, *ILA I and II* demonstrate that the Board must look beyond the locus of a dispute and consider traditional work

patterns and industrial practices when analyzing a work preservation defense in cases involving alleged secondary activity under Section 8(b)(4)(ii)(A) and (B).[18] Here, as in the seminal Supreme Court *ILA* cases, ILA is seeking to preserve the traditional work of unit employees in the face of technological advances affecting the coastal units, including work at the new Leatherman Terminal.[19] The Master Contract is coast-wide in scope and not limited to any specific port. And, as discussed above, although the SCSPA has the sole authority to determine which terminal at the Port of Charleston USMX carriers call on, USMX carrier-members own and lease their own containers and, therefore, have the authority to bypass the Port of Charleston entirely and call on other ports where ILA-represented employees perform all loading and

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[18] *ILA II*, 473 U.S. at 77 (observing that while "the place where work is to be done often lies at the heart of the controversy," it "is seldom relevant to the definition of the work itself") (citing *ILA I*, 447 U.S. at 506–507)).

[19] Our dissenting colleague suggests that we are somehow out of sync because the transition to containerization began 50 – 60 years ago. However, issues about the performance and preservation of longshore work have arisen in the ensuing decades – and continue to arise—in the context of Sec. 8(b)(4)(ii)(A) and (B) and other cases. See *American Presidential Lines Ltd. v. International Longshore & Warehouse Union*, 997 F.Supp.2d 1037 (D. Alaska 2014), affirmed 611 Fed. Appx. 908 (9th Cir. 2015); *American Trucking Assn. v. NLRB*, 734 F.2d 966, 966-977 (1984). Maritime associations and unions continue to include containerization clauses in their collective-bargaining agreements, and in the maritime industry, as in many industries, technological advances have been implemented, e.g., robotics. Indeed, it would defy common and entrepreneurial sense for a port to renovate an existing terminal or build a new one without incorporating upgrades and/or innovative technology, and for unions representing longshore workers not to argue that the operation or maintenance of new technologies is bargaining unit work.

unloading work.[20] Although bypassing the Port of Charleston would result in a secondary effect on the State or SCPCA, that is immaterial. As the Court alluded to in *ILA II*, a secondary *effect* is different from a secondary *purpose*. The former, no matter how consequential, is incidental to a lawful primary purpose.[21]

Our dissenting colleague contends that this is not "a complex case of technological displacement" as in the *ILA* cases, but is instead "a simple case of the ILA seeking to acquire *more* lift-equipment work." However, in characterizing the *ILA* cases as inapposite, the dissent chooses to overlook the fact that the Court there found that ILA's attempt to enforce the Rules on Containers was lawful work preservation notwithstanding that the work in question—the stuffing and stripping of containers—was not historically longshore work. Here, as in the ILA cases, the ILA is merely seeking to enforce the Master Contract and the Containerization Agreement (which is substantially the same as the "Rules on Containers") in order to prevent the erosion of unit jobs in the coastwide unit.

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[20] *ILA II*, 473 U.S. at 74 fn. 12 (observing that the employers had the "right to control" container loading and unloading work by virtue of their ownership or leasing of the shipping containers, and distinguishing *Pipefitters* on that basis). *ILA II* affirmed in relevant part the Fourth Circuit's decision in *American Trucking Ass'n v. NLRB*, supra at 978, which found that the "argument that the shipping lines do not have the right to control the container work sought by the longshoremen lacks any semblance of merit").

[21] 473 U.S. at 79 ("[E]xtra-unit effects, 'no matter how severe,' are 'irrelevant' to the analysis. 'So long as the union had no forbidden secondary purpose' to disrupt the business relations of a neutral employer, . . ., such effects are 'incidental to primary activity.'") (quoting *ILA I*, 447 U.S. at 507 fn. 22 and *Pipefitters*, 429 U.S. at 526)).

That ILA seeks to stop expansion of the hybrid work model—rather than to combat the effects of containerization—with its lawsuit does not change the fact that the lawsuit has a clear primary objective. Thus, this case encompasses a straightforward primary dispute between ILA and USMX carrier members rather than an attempt by ILA to exert unlawful secondary pressure on USMX carrier members to cease doing business with the State and SCSPA.

Further, to the extent the judge suggests that ILA waived its right to enforce the contract by acquiescing to the hybrid work model used at the Wando and North Charleston terminals in the past, the court may, of course, consider that argument if it is raised as a defense to the lawsuit. However, it has no bearing on the question before the Board, which is whether ILA's lawsuit has a secondary object.

Finally, we reject the judge's apparent finding that a valid work preservation object requires a showing that ILA would lose jobs at the port or that the hybrid union-to-nonunion employee ratio would widen if business at the port expanded. To the extent that a showing of job loss or threat thereof is required, it has been satisfied by the history of containerization and its effect on the number of longshoremen. See, e.g., *ILA II*, 473 U.S. at 79 ("[T]he Rules [on Containerization] were motivated entirely by the longshoremen's understandable desire to preserve jobs against the steadily dwindling volume of cargo work at the pier," a "clear primary objective") (citation omitted) (affirming in relevant part the Fourth Circuit's decision on the history of longshore work and containerization and ILA's coast and gulf-wide unit in *American Trucking Associations, Inc. v. NLRB*, 734 F.2d 966 (4th Cir. 1984)). To the extent that the judge believed that a

showing of job loss *at the Port of Charleston* was required, we have found instead that a coast-wide examination is appropriate. Hence, there is no requirement that ILA prove that the proportion of union and nonunion workers would change at the port.[22]

CONCLUSION

For the foregoing reasons, we find that ILA's lawsuit against parties to the Master Contract—USMX, Hapag-Lloyd, and OOCL—entails a primary rather than a secondary dispute and that its pursuit of the suit does not violate Section 8(B)(4)(ii)(A) and (B) or 8(e).[23]

ORDER

The complaints are dismissed.

Dated, Washington, D.C. December 16, 2022

Gwynne A. Wilcox
Member

David M. Prouty
Member

[22] Because *ILA I* and *II* squarely address the work preservation defense in the context of Sec. 8(b)(4)(ii)(A) and (B) litigation, we find it unnecessary to rely on the Board's supplemental decision in *International Longshore Workers Union (Kinder Morgan)*, 371 NLRB No. 125 (2022) (accepting *ILWU Local 4 v. NLRB*, 978 F.3d 625 (9th Cir. 2020) as the law of the case on remand).

[23] We deny the State and SCSPA's request for make-whole relief, fees, and costs.

MEMBER RING, dissenting in part.

Following the advent of containerization over 50 years ago and the corresponding reduction of longshore work at the Nation's ports, the International Longshoremen's Association, AFL-CIO, CLC (ILA) sought to negotiate contracts with shipping companies that require them to use ILA-represented employees to perform all container work. The current Master Contract between ILA and a multi-employer organization, United States Maritime Association, Ltd. (USMX), is one such agreement. The Master Contract covers all ports along the East and Gulf Coasts of the United States, including the Port of Charleston in South Carolina (the Port), where a State of South Carolina (the State) instrumentality, the South Carolina State Ports Authority (SCSPA), owns and operates terminals. The Master Contract requires all USMX carrier-members and their agents to use ILA-represented employees to perform all container work at covered facilities. It also prohibits subcontracting.

Critically, however, and for decades, the ILA, the State, and the SCSPA have taken a markedly different approach to container work at the Port. The SCSPA is not, and never has been, a party to the Master Contract (or any other labor agreement) with the ILA. And despite the ILA's contractual claim to all container work along the East and Gulf Coasts, for nearly 50 years the SCSPA, with the ILA's acquiescence, has used a "hybrid" operating model at the Port's North Charleston and Wando Welch terminals. Under this hybrid model, container work is divided between nonunion state employees and employees represented

by ILA Local 1422.[1] When USMX carrier-members covered under the Master Contract call at either of those terminals, state employees perform the lift-equipment work using State-owned equipment; ILA-represented employees perform the other work.

The ILA has allowed this longstanding arrangement at the Port's terminals to effectively function as an unwritten exception to the work-jurisdiction requirements contained in the Master Contract. But when the SCSPA was getting ready to open a new terminal at the Port—the $1.5 billion Hugh K. Leatherman, Sr. Terminal—and advised that it would use the hybrid model there, an ILA official stated that the ILA wanted to obtain all the container work at that terminal and prevent the expansion of the hybrid model. The SCSPA opened the Leatherman Terminal for business on March 30, 2021,[2] and, in April, two carrier-members of USMX called there. Because the SCSPA applied the hybrid model to the container work at the Leatherman Terminal, the ILA sued USMX and the two carrier-members for hundreds of millions of dollars. The lawsuit cited breach-of-contract grounds, including the carrier-members' decision to contract with non-unit labor at the Leatherman Terminal.[3]

The impact of the lawsuit was quickly felt. Within weeks, USMX carrier-members asked to be diverted

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[1] State law prohibits state employees from organizing or joining unions. See *Branch v. City of Myrtle Beach*, 532 S.E.2d 289, 292 (S.C. 2000) ("[P]ublic employees in South Carolina do not have the right to collective bargaining.").

[2] All subsequent dates refer to 2021 unless otherwise noted.

[3] The lawsuit does not challenge the continued application of the hybrid model at the North Charleston and Wando Welch terminals.

from the Leatherman Terminal to one of the Port's other terminals. By the next month, USMX carrier-members stopped calling at the Leatherman Terminal altogether. USMX, the State, and the SCSPA filed unfair labor practice charges against the ILA, claiming that the lawsuit had an illegal secondary objective under the Act. They asserted that the lawsuit was designed to force USMX—a secondary or neutral employer—to cease doing business with the SCSPA—the primary employer—at the Leatherman Terminal unless ILA-represented employees perform all the longshore work there, including the lift-equipment work.

Acting on the General Counsel's complaint, the judge determined that the SCSPA is the primary employer in the dispute and USMX and the carrier-members are the secondary employers. He found that the ILA filed its lawsuit as a "sword" to acquire work, as opposed to a "shield" to preserve work. Determining that the lawsuit violated Section 8(b)(4)(ii)(A) and (B) and Section 8(e) as alleged, he ordered the ILA to move to dismiss the lawsuit and take additional remedial measures.

My colleagues reverse. In their view, the ILA's lawsuit has a lawful work-preservation objective. Under *NLRB v. International Longshoremen's Association*, 447 U.S. 490 (1980) (*ILA I*), a work-preservation agreement, to be lawful, must have as its objective the preservation of work traditionally performed by employees represented by the union, and the contracting employer must have the power to give the employees the work in question. Id. at 504. My colleagues find both elements of the *ILA I* test satisfied here.

I disagree. Contrary to my colleagues, even assuming arguendo that the ILA's lawsuit has as its objective the preservation of work traditionally performed by the ILA and thus satisfies the first element of the *ILA I*

test, the work in question is the operation of the lift-equipment work at the Leatherman Terminal, and USMX and its carrier-members do not have the power to give that work to ILA-represented employees. The SCSPA has that power, and therefore the ILA's dispute is with the SCSPA. USMX and its carrier-members are secondary or neutral employers in the dispute, and the ILA filed and is maintaining its lawsuit against USMX and the carrier-members for an unlawful secondary objective of forcing USMX and its carrier-members to cease doing business with the SCSPA at the Leatherman Terminal in order to pressure the SCSPA to assign the lift-equipment work there to ILA-represented employees.

The purpose of the ILA's lawsuit is obvious. As ILA officials stated with perfect clarity, the ILA wants to obtain all the container work at the Leatherman Terminal and stop the expansion of the hybrid model. This necessarily means that the lift-equipment work at that terminal would have to be reassigned from nonunion state employees to ILA-represented employees. ILA is entitled to attempt to achieve this goal through lawful means. But it is not entitled to do so through a lawsuit that has an illegal objective under the Act. Because my colleagues find otherwise, I respectfully dissent in relevant part.[4]

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[4] For the reasons stated by the judge, I agree with my colleagues that the judge properly dismissed the separate complaint allegation that, on its face, Article VII, Sec. 7(b) of the Master Contract, set forth below, is not a "hot cargo" agreement, and therefore the Respondent did not violate Sec. 8(e) of the Act by entering into and reaffirming that provision.

I. BACKGROUND

USMX represents its employer-members for purposes of negotiating and administering collective-bargaining agreements with the ILA and its local affiliates, including ILA Local 1422.[5] The ILA and its affiliates represent, among others, longshoremen, clerks, and maintenance workers at East and Gulf Coast ports from Maine to Texas. David Adam is USMX's Chairman and CEO. Harold Daggett and Dennis Daggett serve as ILA President and Vice President, respectively. Kenneth Riley has served as ILA Vice President and as an Acting Delegate for Local 1422.

The current Master Contract between USMX and the ILA is effective October 1, 2018, through September 30, 2024. The Master Contract states, in relevant part, as follows:

> Article I, Section 3
>
> This Master Contract is a full and complete agreement on all Master Contract issues relating to the employment of longshore employees on container and ro-ro [roll-on/roll-off] vessels and container and ro-ro terminals in all ports from Maine to Texas at which ships of USMX carriers and carriers that are subscribers to this Master Contract may call. This Master Contract as supplemented by local bargaining constitutes a complete and operative labor agreement.

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[5] The employer-members are container carriers, terminal operators, and port associations responsible for the transportation and handling of cargo shipped to and from the United States. They include, among others, Hapag-Lloyd (America) LLC and Orient Overseas Container Line, Ltd., which, along with USMX, are the defendants in the ILA's lawsuit. The ILA serves as Local 1422's trustee.

* * *

Article VII, Section 7

(a) USMX and the ILA shall conduct a study to determine how the business model currently used by port authorities in the Ports of Charleston, SC, Savannah, GA, and Wilmington, NC could be altered to permit work currently performed by state employees to be performed by Master Contract-bargaining-unit employees in a more productive, efficient, and competitive fashion. USMX and the ILA will use this study to meet with these port authorities in an effort to convince them to employ Master Contract-bargaining-unit employees.

(b) USMX agrees to formally notify any port authority contemplating the development of or intending to develop a new container handling facility that USMX members may be prohibited from using that new facility if the work at that facility is not performed by Master Contract-bargaining-unit employees.[6]

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[6] The language of Art. VII, Sec. 7(a) and (b) first appeared in the parties' 2013–2018 contract. It was added to the current Master Contract without further discussion. USMX and the ILA did not undertake the study contemplated by Sec. 7(a). And the ILA did not invoke Sec. 7(b) until 2020 when, as discussed below, it argued that this paragraph meant that the SCSPA could not use the hybrid model at the Leatherman Terminal. USMX's former counsel, Donato Caruso, credibly testified that he drafted this language, and specifically the Sec. 7(b) notice requirement, as a compromise alternative to the ILA's insistence on a provision requiring that unit employees perform all longshore work by 2014. Caruso was concerned that the ILA's proposed language could be interpreted as violating Sec. 8(e) of the Act. ILA Vice President Dennis Daggett and Local 1422 Acting Delegate Kenneth Riley testified that their understanding was that Sec. 7(b) required USMX carrier-members to refrain from doing

The "Containerization Agreement" attached to the Master Contract as Appendix A addresses container handling in more detail. In relevant part, it states as follows:

> 1. Management and the Carriers recognize the existing work jurisdiction of ILA employees covered by their agreements with the ILA over all container work which historically has been performed by longshoremen and all other ILA crafts at container waterfront facilities. Carriers, direct employers and their agents covered by such agreements agree to employ employees covered by their agreements to perform such work which includes, but which is not limited to:
>
> (a) the loading and discharging of containers on and off ships
>
> (b) the receipt of cargo
>
> (c) the delivery of cargo
>
> (d) the loading and discharging of cargo into and out of containers
>
> (e) the maintenance and repair of containers

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business at any new facility where ILA-represented employees did not perform all the longshore work. That is, they viewed Sec. 7(b) as limiting the hybrid model to existing terminals. Caruso, in contrast, testified that USMX's understanding of Sec. 7(b) was that it did not prohibit the hybrid model from being applied at new terminals. In USMX's view, the word "may" in Sec. 7(b) was meant to signify that the ILA might be able to persuade an arbitrator that the Master Contract prohibited carriers from calling at any terminal that is not exclusively manned by ILA labor. Crediting Caruso's testimony, the judge dismissed the General Counsel's allegation that Sec. 7(b), on its face, violates Sec. 8(e) of the Act. As stated, I join my colleagues in adopting the judge's dismissal of this allegation.

(f) the inspection of containers at waterfront facilities (TIR men).

* * *

2. Management, the Carriers, the direct employers and their agents shall not contract out any work covered by this agreement. Any violations of this provision shall be considered a breach of this agreement. . . .

* * *

9. Violations of Agreement: This Agreement defines the work jurisdiction of employees and prohibits the subcontracting out of any of the work covered hereby. It is understood that the provisions of this Agreement are to be rigidly enforced in order to protect against the further reduction of the work force. Management believes that there may have been violation of work jurisdiction, of subcontracting clauses, and of this Agreement, by steamship carriers and direct employers. The parties agree that the enforcement of these provisions is especially important and that any violation of such other provisions is of the essence of the Agreement. The Union shall have the right to insist that any such violations be remedied by money damages to compensate employees who have lost their work. Because of the difficulty of proving specific damages in such cases, it is agreed that, in place of any other damages, liquidated damages of $1,000.00 for each violation shall be paid to the appropriate Welfare and Pension Funds.

The SCSPA, as an instrumentality of the State, operates container-handling terminals at the Port.[7] In the 1940s, the SCSPA opened the North Charleston Terminal at the Port; in 1981, it opened the Wando Welch Terminal. The SCSPA and the State are not, and never have been, parties to the Master Contract or any other agreement with the ILA. However, the SCSPA contracts with several USMX carrier-members to provide services related to the loading and unloading of their ships at the Port's terminals. The SCSPA has the sole authority to assign the terminals at which USMX carrier-members call.

Unlike the vast majority of other ports along the East and Gulf Coasts, where ILA-represented employees perform all the container work, the Port uses a hybrid division-of-labor model. Nonunion state employees perform the lift-equipment work, and ILA-represented employees perform the other work.[8] With the ILA's acquiescence, the Port has used this model for nearly 50 years at the North Charleston and Wando Welch terminals.

The hybrid model functions as follows. The SCSPA owns and operates the cranes and other lift equipment used to perform container-handling services at the Port's terminals. Operating ship-to-shore cranes, state

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[7] As the judge noted, the SCSPA, as an instrumentality of the State, is not an employer within the meaning of Sec. 2(2) of the Act. However, the SCSPA is a "person" engaged in commerce within the meaning of Sec. 2(1), (6), and (7) of the Act for purposes of determining whether a labor dispute involves secondary activity.

[8] The Port of Wilmington, North Carolina, and the Port of Savannah, Georgia, use a similar hybrid model for longshore work, which explains why they are mentioned in Master Contract Sec. 7(a) along with the Port.

employees unload containers from incoming ships and place the containers onto chassis. Trucks pull the container-bearing chassis to the Port's container yard. There, state employees, operating lift equipment, remove the containers from the chassis and stack them. ILA Local 1422-represented employees perform the remaining work, including the lashing and unlashing of containers, container spotting, and securing containers on ships. Approximately 270 state employees and over 2000 ILA-represented employees work at the Port's terminals.[9]

In 2020, the SCSPA announced that it intended to open and operate the Leatherman Terminal, using the same hybrid operating model that is in place at the Port's North Charleston and Wando Welch terminals. There would be no change to the hybrid workforce or the division of work between state employees and employees represented by ILA Local 1422.

On June 8, 2020, USMX President and CEO Adam sent SCSPA President and CEO James Newsome III a letter formally notifying Newsome that pursuant to Article VII, Section 7(b) of the Master Contract, USMX employer-members "may be prohibited from using the new facility being developed by" the SCSPA "if the work at that facility is not performed by Master Contract bargaining unit members." Newsome asked Adam whether USMX would be willing to submit the matter to arbitration; Adam explained that there was nothing to grieve or arbitrate because the Leatherman Terminal had not yet opened. After Newsome communicated with representatives from several USMX carrier-members about the SCSPA's plan to operate

[9] At the Port, ILA affiliates provide representation for individuals covered under the Master Contract. Local 1422 represents the deep-sea longshoremen.

the Leatherman Terminal under the hybrid model, some USMX carrier-members indicated that they would not call at the Leatherman Terminal absent a resolution of the ILA's claim that the hybrid model could not be used there.

Subsequently, Adam, Newsome, USMX, the ILA, and the State attempted to but could not reach an agreement about the performance of work at the Leatherman Terminal. In October 2020, ILA Vice President Dennis Daggett chastised Newsome about not assigning all container work at the Leatherman Terminal to ILA-represented employees. Local 1422 Acting Delegate Riley stated that the ILA and Local 1422 were interested in obtaining all the jobs at the Leatherman Terminal, that existing terminals using the hybrid model would be "redlined," and that any new terminal would be operated differently.[10] On January 7, the State and the SCSPA filed unfair labor practice charges against USMX, the ILA, and Local 1422, alleging that Article VII, Section 7 constituted a "hot cargo" provision in violation of Section 8(e). On March 17, the General Counsel issued a complaint so alleging.

On March 30, the SCSPA began operating the Leatherman Terminal using the hybrid model. The next month, carrier-member Hapag-Lloyd (America) called at the Leatherman Terminal. The ILA then filed

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[10] In a book entitled *Kenny Riley and Black Union Labor Power in the Port of Charleston*, Riley is quoted as stating, "The port can build whatever terminals it wants . . . but if no ships call on that terminal, then it just got a brand-new terminal with nothing there . . . . [I]f there are any new terminals built, and if they are not in compliance with the [Master Contract], the ships will not call on those facilities." Industry articles quote similar statements by Riley.

a lawsuit against USMX and Hapag-Lloyd in New Jersey Superior Court. The lawsuit was subsequently removed to federal district court.[11] Shortly thereafter, the ILA added carrier-member Orient Overseas Line Limited (OOCL) to the lawsuit because it had also called at the Leatherman Terminal. The lawsuit alleges that USMX, Hapag-Lloyd, and OOCL breached Article I, Section 3 of the Master Contract and Sections 1, 2, and 9 of the Container Agreement and engaged in tortious conduct and civil conspiracy.[12] Among other things, the lawsuit claims that covered carrier-members must use ILA-represented employees to perform all container work at any marine terminal at which their ships call on the East and Gulf Coasts. The lawsuit seeks damages of $300 million.

The lawsuit had a rapid effect. Within two weeks of the filing of the lawsuit, five carrier-members of USMX demanded that the SCSPA change their scheduled calls from the Leatherman Terminal to the Wando Welch Terminal because they did not want to get enmeshed in the lawsuit. One carrier-member threatened that if the SCSPA did not allow it to change terminals, it would bypass the Port entirely and proceed, instead, to the Port of Savannah. Over the next month, the SCSPA diverted 12 carrier-members from the Leatherman Terminal to the Wando Welch Terminal. Carrier-members ceased calling at the Leatherman Terminal.

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[11] The lawsuit has been stayed, pending the resolution of the unfair labor practice case.

[12] The ILA argues that USMX was aware of the relevant contractual provisions and did nothing to dissuade its carrier-members from calling at the Leatherman Terminal.

Acting on unfair labor practice charges filed by the State, the SCSPA, and USMX, the General Counsel alleges that the ILA's lawsuit is unlawful under the Act. Specifically, the General Counsel alleges that the ILA violated Section 8(b)(4)(ii)(A) and (B) of the Act by filing the lawsuit with the unlawful secondary object of forcing or requiring USMX and its employer-members to enter into or enforce an agreement with the ILA prohibited by Section 8(e), and by forcing or requiring USMX and other persons engaged in commerce or in an industry affecting commerce to cease doing business with the SCSPA, the State, and other persons. The General Counsel further alleges that the ILA violated Section 8(e) by filing lawsuits that interpret and give effect to an agreement in which USMX and its employer-members agree not to do business with another person. The ILA asserts that its lawsuit has a lawful primary object of preserving unit work.

Judge Gollin found that although the Master Contract and Containerization Agreement contain facially valid work-preservation provisions,[13] the facial validity of an agreement does not shield a union from liability under Section 8(b)(4) when it uses the agreement as a "sword" to acquire work. Pointing to the statements of ILA officials, the judge concluded that the ILA's lawsuit has a work-acquisition objective, not a work-preservation objective. That is, he found that the ILA wants to obtain all the work at the Leatherman Terminal, as well as at any future container-handling facilities. The judge determined that ILA's lawsuit violates the Act because the ILA filed it with the object

[13] Insofar as the judge, in reaching this finding, relied on what he viewed as USMX's and its carrier-members' right to control the work in dispute, I disagree. Although I agree with the judge's ultimate conclusion, I do so for the reasons set forth below.

of forcing USMX and its carrier-members to agree that the Master Contract and Containerization Agreement prohibit them from calling at the Leatherman Terminal unless ILA-represented employees perform all container work at that terminal, including the lift-equipment work performed by state employees under the hybrid model. He also determined that by filing its lawsuit, the ILA sought to have USMX and its carrier-members cease doing business with the State and the SCSPA at the Leatherman Terminal. The judge ordered the ILA to move to dismiss the lawsuit and reimburse USMX, Hapag-Lloyd, and OOCL for all reasonable expenses and legal fees in defending against the lawsuit.

I agree with these unfair labor practice findings. Contrary to the majority, the ILA's lawsuit has an illegal objective under the Act. Like the judge, I would therefore require the ILA to move to dismiss the lawsuit and reimburse the defendants for reasonable fees and expenses incurred in defending against it.

II. DISCUSSION

When the General Counsel alleges that a lawsuit violates the Act, the Board, to avoid running afoul of the First Amendment's Petition Clause,[14] must determine whether the lawsuit is both objectively baseless and retaliatory *or* "has an objective that is illegal under federal law." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983). The parties before us do not contend that the ILA's lawsuit is objectively baseless and retaliatory. Rather, the General Counsel asserts that the lawsuit against USMX, Hapag-Lloyd (America), and OOCL has objectives that

[14] The Petition Clause protects the right "to petition the Government for a redress of grievances."

are illegal under Section 8(b)(4)(ii)(A) and (B) of the Act, as described above.

Section 8(b)(4)(ii), in relevant part, makes it unlawful for a labor organization to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where an object thereof is

> A. forcing or requiring any employer or self-employed person to . . . enter into any agreement which is prohibited by [S]ection 8(e);
>
> B. forcing or requiring any person to . . . cease doing business with any other person . . . [p]rovided, [t]hat nothing contained in clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

Section 8(e) of the Act prohibits an employer and a labor organization from entering into any contract or agreement, express or implied, whereby the employer agrees "to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or cease doing business with any other person."[15] These statutory provisions prohibit secondary conduct. See *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 638 (1967). Thus, if the object of the union's conduct is to put direct pressure on the employer with which the union has a dispute, the conduct is primary and therefore lawful. However, if the object of the union's conduct, viewed as a whole, is to bring indirect pressure on the primary employer by involving one or more

[15] The statutory term "to enter into" is interpreted broadly to include, among other things, enforcement of a contract or an agreement. *Dan McKinney Co.*, 137 NLRB 649, 653–657 (1962).

neutral or secondary persons in the dispute, the conduct is secondary and unlawful. A union may have more than one goal, but so long as *an* object of its conduct is secondary, the conduct will be unlawful. *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689 (1951). A complete cessation of business is not required for a violation of Section 8(b)(4)(ii)(A) or (B). *Road Sprinkler Fitters Local Union 669 (Firetrol Protection Systems, Inc.)*, 365 NLRB No. 83, slip op. at 6 (2017). As the Supreme Court has observed, Congress, in enacting these sections of the Act, intended to preserve a union's right to bring pressure on offending employers in primary labor disputes, while shielding unoffending employers or persons from pressures in controversies not their own. *NLRB v. Denver Building Trades Council*, 341 U.S. at 692.

As relevant here, a union may argue that an agreement—or a lawsuit that seeks to enforce an agreement—does not fall afoul of these provisions of the Act because it merely seeks to preserve unit employees' jobs. As the Supreme Court has observed, "Congress in enacting [Section] 8(e) had no thought of prohibiting agreements directed to work preservation." *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. at 640. In *National Woodwork*, the employer (Frouge) and the union were parties to a contract that prohibited unit employees from handling precut doors. Frouge ordered thousands of precut doors on a jobsite through the Woodwork Manufacturers Association, and the union ordered unit employees not to handle them. The General Counsel alleged that the union thereby violated Section 8(b)(4)(ii)(B). However, the Board found that the agreement between Frouge and the union was a lawful work-preservation agreement, and the union's refusal to handle the precut doors was lawfully directed at the primary employer,

Frouge. Id. at 615–617. The Court agreed with the Board, stating that the relevant inquiry for determining whether an agreement or activity is for a primary or secondary object is "whether, under all the surrounding circumstances, the [u]nion's objective was preservation of work for [unit] employees, or whether the [conduct was] tactically calculated to satisfy union objectives elsewhere . . . ." The Court further observed that the "touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees." Id. at 644–645. The Court indicated, however, that the result would have been different had the union applied the agreement as a "sword" to reach out and obtain new work. Id. at 630.

In a subsequent decision, *NLRB v. Pipefitters*, 429 U.S. 507 (1977), the Court reached a different result. In that case, the union and a subcontractor were parties to an agreement that gave unit employees the work of cutting and threading pipe at the jobsite. On the project at issue, the general contractor required the subcontractor to purchase pre-cut and pre-threaded piping, which the subcontractor's unit employees refused to install. The Board found that this work stoppage had an unlawful secondary object because the union's real object was to influence the general contractor by exerting pressure on the subcontractor, who was bound to the general contractor's requirements and therefore could not assign pipe-cutting and pipe-threading work to its unit employees even if it wanted to do so. The Court agreed with the Board, determining that regardless of the union's work-preservation object, its conduct was proscribed secondary activity within the meaning of Section 8(b)(4). Id. at 511–514, 528–531. In reaching this conclusion, the Court observed that the Board, consistent with

National Woodwork Manufacturers Association, supra, analyzed the totality of the circumstances and, in doing so, placed weight on the subcontractor's lack of power to award the work to the union. Id. at 523–524.

Building on these principles, the Supreme Court, in *ILA I*, supra, set forth the definitive test for determining whether an agreement is a lawful work-preservation agreement:

> [A] lawful work preservation agreement must pass two tests: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called "right of control" test of *Pipefitters*, supra. The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work. "Were the latter the case [the contracting employer] would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary." *National Woodwork*, supra, at 644-645.

ILA I, 447 U.S. at 504–505. The Court emphasized that in applying this test, "the first, and most basic question is: What is the 'work' that the agreement allegedly seeks to preserve?" Id. at 505. The Court remanded the case to the Board for further analysis of whether the agreement at issue in that case—the

Rules on Containers—constituted a lawful work-preservation agreement under this test.[16]

Applying these principles to the facts of the instant case, I would find that under the two-part test of *ILA I*, the ILA's lawsuit does not have a lawful work-preservation objective. The work in question is the lift-equipment work at the Leatherman Terminal. The lawsuit and statements made by ILA officials, discussed above, make this clear. I will assume arguendo that the lawsuit meets the first element of the two-part test, i.e., that its objective is the preservation of work traditionally performed by ILA-represented employees.[17] But even assuming as much, the lawsuit runs aground at the second step of the test: whether USMX and its carrier-members have the power to give the work in

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[16] Subsequently, in *NLRB. v. International Longshoremen's Association ILA*, 473 U.S. 61 (1985) (*ILA II*), the Court determined that the Rules met the two-part test set forth in *ILA I* and were lawful. In reaching this determination, the Court found that the carriers had the power to control the assignment of work because they owned or leased the containers used for transport. Id. at 70 fn. 10 & 74 fn. 12

[17] Whether the first element of the *ILA I* test is met here depends on how one defines the work traditionally performed by ILA-represented employees. If one defines that work as the operation of the lift-equipment work at the Port, that element is not met: for roughly 50 years, and hence traditionally, that work has been performed by state employees, not by ILA-represented employees. But if one defines that work as the operation of lift-equipment work at most ports along the East and Gulf Coasts, then the ILA's lawsuit satisfies the first element of the *ILA I* test: with the exception of three East Coast ports, ILA-represented employees perform, and have traditionally performed, that work. As stated, I need not define the scope of the work at issue here because the ILA's lawsuit fails to satisfy the second element of the *ILA I* test, and it must satisfy both elements to have a lawful work-preservation object.

question to those employees. They do not. That power rests with the SCSPA, not with USMX and the carrier-members. The State owns the lift equipment at the Leatherman Terminal, and the State, through the SCSPA, has the exclusive power to assign the operation of that equipment.

The Court's reasoning in the *Pipefitters* case is applicable here. The SCSPA occupies a position analogous to that occupied by the general contractor in *Pipefitters*. Like the general contractor, the SPSCA is in control of the work in question. USMX and its carrier-members, with whom the ILA has an agreement, are analogous to the subcontractor in *Pipefitters*. They do not control the work in question. USMX may direct its carrier-members to call at ports other than the Port, just as the subcontractor in *Pipefitters* could have elected to work on different projects with different general contractors. But in *Pipefitters*, this freedom to work on different projects with different contractors did not obscure the point that the union was trying to force the subcontractor to cease doing business with the general contractor on the particular job at issue, in order to pressure the general contractor to stop requiring the subcontractor to install pre-cut and pre-threaded piping. Thus, the union's dispute was with the general contractor because the general contractor controlled the work in question. Similarly, in the present case, the ILA's dispute is with the SCSPA because the SCSPA controls the work in question, i.e., the lift-equipment work at the Leatherman Terminal. And the ILA, through its lawsuit, is trying to acquire that work by forcing USMX and its carrier-members to cease doing business with the SCSPA in order to pressure the SCSPA to give the operation of the lift equipment at the Leatherman Terminal to employees it represents.

In sum, because the SCSPA, not USMX or its carrier-members, has the power to give employees the work in question, the ILA's lawsuit targeting the latter has a secondary object: to indirectly pressure primary employer SCSPA by forcing secondary employers USMX and its carrier-members to cease doing business with the SCSPA at the Leatherman Terminal until the SCSPA assigns the lift-equipment work at that terminal to ILA-represented employees. Thus, I conclude that the ILA is violating Section 8(b)(4)(ii)(A) and (B) and Section 8(e) as alleged. And because the lawsuit has an illegal objective, it may be found unlawful notwithstanding the Petition Clause of the First Amendment pursuant to *Bill Johnson's Restaurants*, supra, 461 U.S. at 738 fn. 5.[18] As the judge found, the ILA should be ordered to move to dismiss the lawsuit and reimburse USMX, Hapag-Lloyd (America), and OOCL for reasonable fees and expenses incurred in defending against the lawsuit, plus interest.[19]

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[18] Contrary to the ILA, *Anheuser-Busch*, 367 NLRB No. 132 (2019), does not preclude the Board from finding the lawsuit unlawful. In *Anheuser-Busch*, the Board interpreted *Bill Johnson's* and its progeny as requiring an underlying unlawful act apart from the act of filing the judicial pleading in and of itself. Here, the underlying unlawful act is the ILA's act of interpreting the Master Contract and Containerization Agreement in a manner that renders them unlawful under Sec. 8(e).

Because I would find that the lawsuit has an illegal objective, it is unnecessary for me to address the argument presented by USMX, the State, and the SCSPA that the lawsuit, in addition to having an illegal objective, is preempted by federal labor law.

[19] I would deny the State's and the SCSPA's request for make-whole relief resulting from ILA's lawsuit. The Board may order this relief when a charging party has incurred expenses by bringing, or defending against, civil or criminal litigation. See, e.g., *Allied Mechanical Services, Inc.*, 357 NLRB 1223, 1234, 1241 (2011). Unlike USMX, Hapag-Lloyd (America), and OOCL,

The majority reaches a different result. They find that the ILA's lawsuit meets both requirements under *ILA I* for having a lawful work-preservation objective. Putting to the side their arguments regarding the first requirement, I cannot agree with them that the lawsuit meets the second element of the *ILA I* test. My colleagues' fundamental error lies in their failure to recognize that the work in question is the operation of the lift-equipment work at the Leatherman Terminal. Instead, they define the work in question as the loading and unloading of containers generally at East and Gulf Coast ports. And they find that although the SCSPA has the sole authority to assign the Port of Charleston terminal at which USMX carriers are to call, USMX carrier-members have the right to control the work in question (as the majority defines it) because they "have the authority to bypass the Port of Charleston and call on other ports where ILA-represented employees perform all loading and unloading work."

The majority's analysis and findings regarding the second step of the *ILA I* standard are problematic in at least two respects. First, to find the ILA's lawsuit lawful because a carrier may "bypass" a port where, and because, the SCSPA controls the lift-equipment work and assigns it to state employees is just another way of saying that the lawsuit is lawful because the carrier may cease doing business at that port. But the

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however, the State and the SCSPA are not parties to the ILA's lawsuit and have incurred no legal costs defending against it. Also, I would deny the State's and the SCSPA's request for other make-whole relief. The Board does not generally order such relief unless employees or a party to the unfair labor practice litigation incurred a loss. See generally *Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 (Emery Worldwide)*, 295 NLRB 1123, 1123 (1989). There is no evidence that the state employees who operate the lift equipment have suffered any remediable loss.

gravamen of the 8(b)(4)(ii)(B) allegation at issue here is precisely that the ILA, in bringing its lawsuit, has that very object—i.e., an object of forcing carriers to cease doing business with the SCSPA. In effect, my colleagues find the ILA's lawsuit lawful to the extent it succeeds in accomplishing its unlawful object!

Second, the majority's definition of the work in question is at odds with the Supreme Court's decision in the *Pipefitters* case. If a party controls the work in question by virtue of controlling *where* the work is performed, the subcontractor in *Pipefitters* would have had the right to control the work in question because it could have chosen, as my colleagues put it, to "bypass" the job at issue in that case and work only on projects where the general contractor will not require it to install pre-cut and pre-threaded piping. But the subcontractor in *Pipefitters* was found *not* to have the right to control the work in question. Consistent with *Pipefitters*, USMX carrier-members do not have the right to control the work in question by virtue of their ability to "bypass" the Leatherman Terminal and call at other terminals. Indeed, under the majority's logic, so long as ILA-represented employees perform all loading and unloading work at some terminal, USMX's carrier-members control the work in question by virtue of their ability to dock there. Applying the second step of the *ILA I* test in this way comes close to reading it out of the test altogether.

The difference between the majority's position and mine boils down to the difference between our respective definitions of the work in question. My colleagues acknowledge that analogizing this case to *Pipefitters* has "an appealing rationality if the work in question is defined as the lift equipment work at the Leatherman Terminal, which the SCSPA indisputably controls."

They say, however, that I define the work in question too narrowly and that their broad definition is warranted because "[h]ere, as in the seminal Supreme Court *ILA* cases, ILA is seeking to preserve the traditional work of unit employees in the face of technological advances . . . ."

But that's just it. The ILA is *not* seeking to preserve the traditional work of its members "in the face of technological advances." My colleagues treat this case as though we were back in the 1960s or 1970s, when, as a consequence of "the container revolution,"[20] traditional longshore work all but disappeared, its tools displaced by cranes and other lift equipment for the loading and unloading of container-bearing ships. In response, agreements were concluded that gave the operation of that equipment to the ILA. The Supreme Court upheld these as valid work-preservation agreements, explaining that the "[i]dentification of the work at issue in a complex case of technological displacement requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance." *ILA I*, 447 U.S. at 507.

The circumstances that drove the Court's definition of the work in question in the *ILA* cases are entirely absent here. This is not "a complex case of technological displacement" warranting a creative definition of the work in question in order to preserve a union's traditional work. It's a simple case of the ILA seeking to acquire *more* lift-equipment work. It cannot do so directly, as it has no relationship with the entity that

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[20] *ILA I*, 447 U.S. at 494 (internal quotation marks omitted).

indisputably controls that work at the Leatherman Terminal. So it seeks to do so by secondary means, by filing and maintaining a lawsuit—claiming shock-and-awe damages—in order to scare USMX's carrier-members away from that terminal until the SCSPA takes the lift-equipment work away from the state employees and gives it to the ILA. You could not ask for a more classic case of unlawful secondary pressure.

By adopting a definition of the work in question based on *ILA*, in the absence of the circumstances that justified that definition in the *ILA* cases themselves, my colleagues attempt to cloak a straightforward case of work acquisition as a work-preservation case. For the time being, their attempt succeeds. Whether that success will endure on appellate review remains to be seen. I respectfully dissent.

Dated, Washington, D.C. December 16, 2022

John F. Ring
Member

APPENDIX C

BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

Cases 10-CC-276241

JD-57-21

10-CE-271046
10-CE-271053
10-CE-276207
10-CE-276221
10-CE-276208
10-CE-271047
10-CE-271052
10-CE-276185

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, CLC

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, CLC, LOCAL 1422

and

UNITED STATES MARITIME ALLIANCE, LTD.

and

STATE OF SOUTH CAROLINA

and

SOUTH CAROLINA STATE PORTS AUTHORITY

Charleston, SC

September 16, 2021

DECISION

INTRODUCTION[2]

Andrew S. Gollin, Administrative Law Judge. These consolidated cases concern the operation of a new container-handling facility at the Port of Charleston and the work preservation/work acquisition dichotomy. In general, when the object of an agreement, or its enforcement, is to benefit bargaining unit members, or to preserve work traditionally performed by those in the unit, it is considered lawful, primary activity; however, when the object is to acquire work not traditionally performed by unit employees, or to benefit union members elsewhere, particularly where there is no threat to unit jobs, it is considered unlawful, secondary activity.[3] As explained below, I find that while the agreement at issue contains lawful work preservation provisions, the union's lawsuit to enforce those provisions was for an unlawful, work acquisition

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[2] Abbreviations are as follows: "Tr." for transcript; "Jt Exh." for Joint Exhibits; "GC Exh." for the General Counsel's Exhibits; "ILA Exh." for International Longshoremen's Association's Exhibits; "USMX Exh." for United States Maritime Alliance's Exhibits; and "SCSPA Exh." for the South Carolina State Ports Authority's Exhibits. Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based on my review and consideration of the entire record.

[3] Note, *Clarifying the Work Preservation / Work Acquisition Dichotomy Under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act: National Labor Relations Board v. International Longshoremen's Association,* 35 CATH. U. L. REV. 1061, 1063–64 (1986).

object, in violation of Section 8(b)(4)(ii)(A) and (B) and Section 8(e) of the National Labor Relations Act ("Act").

STATEMENT OF THE CASES

The collective-bargaining agreement between the United States Maritime Alliance, Ltd. ("USMX") and the International Longshoremen's Association, AFL-CIO, CLC ("ILA") covers all ports along the East and Gulf Coasts of the United States, including the Port of Charleston. It requires that all USMX carrier-members and their agents use ILA-bargaining unit members to load and discharge containers on and off their ships, and perform all other container work, at the facilities (also referred to as terminals) at these ports, and it prohibits the subcontracting of that unit work. The stated purpose of these provisions is to protect against further reduction of the ILA work force caused by containerization.[4]

The State of South Carolina and the South Carolina State Ports Authority ("SCSPA") are not parties to this agreement, but SCSPA contracts with USMX carrier-members to load and unload their ships at the Port of

[4] Prior to the 1960s, longshoremen employed by steamship or stevedoring companies loaded and unloaded cargo into and out of oceangoing ships. Cargo arriving at the port was transferred piece by piece to the ship by longshoremen. The longshoremen checked the cargo, sorted it, placed it on pallets and moved it by forklift to the side of the ship, and lifted it by means of a sling or hook into the ship's hold. The process was reversed for cargo taken off incoming ships. Containerization revolutionized maritime cargo handling and enabled carriers to move numerous smaller packages in portable containers instead of break-bulk cargo, significantly reducing the amount of manpower required to get the cargo on and off the ship. To stem the loss of longshore work caused by containerization, ILA and other unions negotiated agreements with employers to use ILA unit employees to perform the container-handling work.

Charleston. Unlike the other ports where ILA-bargaining unit members perform all the container work for covered carriers, the parties have carved out an unwritten exception to the work jurisdiction/no-subcontracting provisions at certain South Atlantic ports, including the Port of Charleston. For nearly 50 years, SCSPA has used a "hybrid" operating model, in which it divides the container work between non-union State employees and members of the International Longshoremen's Association, AFL-CIO, CLC Local 1422 ("Local 1422") working for private companies, which are also members of the USMX and covered under the ILA-USMX collective-bargaining agreement.

ILA and Local 1422 have sought to limit the expansion of the hybrid model because of its potential effect on bargaining-unit work on the East and Gulf Coasts. In 2013, ILA and USMX added Article VII, Section 7(b) to their agreement, which requires USMX to notify any port authority that its members may be prohibited from using a new terminal if all the container work there is not performed by ILA-bargaining-unit employees. This provision remained, unchanged in the parties' current 2018-2024 agreement.

The State and SCSPA recently opened Phase 1 of a new, $1.5 billion container-handling facility at the Port of Charleston, called the Hugh K. Leatherman, Sr. Terminal, where it planned to use the same hybrid model to perform the container work as at its other waterfront terminals. In June 2020, USMX sent SCSPA notification pursuant to Article VII, Section 7(b) regarding the operation of this new terminal. There was uncertainty and disagreement over whether USMX carrier-members could call on/utilize the Leatherman Terminal once it opened if it utilized the hybrid model,

but neither USMX nor ILA were willing to submit the dispute to arbitration.

On January 7, 2021, almost three months before the Leatherman Terminal opened, the State and SCSPA filed unfair labor practice charges against USMX, ILA, and Local 1422 alleging that Article VII, Section 7 constituted a "hot cargo" provision, in violation of Section 8(e) of the Act. On March 17, the General Counsel issued a consolidated complaint on these allegations. On March 31, USMX, ILA, and Local 1422 each answered this consolidated complaint.[5]

On April 22, 2021, after the Leatherman Terminal opened and began servicing USMX carrier-members using the hybrid operating model, ILA filed a lawsuit in the Superior Court of New Jersey, which it later amended, alleging that USMX and two of its carrier-members violated the ILA-USMX agreement by allowing non-ILA members to perform bargaining-unit work at the Leatherman Terminal. On April 26, the State, SCSPA, and USMX filed unfair labor practice charges against ILA alleging the lawsuits violated

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[5] One of USMX's affirmative defenses includes a challenge to the prosecution of these cases following President Biden's removal of then General Counsel Robb. A district court recently ruled in a Sec. 10(j) case that the plain language of the Act permitted the President to relieve Robb of his position without the same process required for Board members. *Goonan v. Amerinox Processing, Inc.*, 1:21-cv-11773-NLH-KMW, 2021 WL 2948052, slip op. at 14 (D.N.J. July 14, 2021). The General Counsel contends that Amerinox and recent Supreme Court precedent, should be sufficient for the Board to decide this issue. See *Collins v. Yellin*, __ U.S. __, 141 S.Ct. 1761, 1782–1783 (2021). However, in *NABET*, 370 NLRB No. 114 (2021), the Board held it will not exercise its jurisdiction to review the actions of the President regarding the removal of the General Counsel. As such, I decline to make any findings regarding this affirmative defense.

Sections 8(b)(4)(ii)(A) and (B) and 8(e) of the Act. On May 19, the General Counsel issued a second consolidated complaint on these allegations. On May 21, the two complaints were consolidated for hearing. On June 3, ILA answered this second consolidated complaint.

These consolidated complaints were tried together on June 9-10, 2021, via the Zoom for Government platform due to the compelling circumstances caused by the ongoing Coronavirus-19 (COVID-19) pandemic. At the hearing, all parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions. All parties also filed post-hearing briefs. After careful review of the transcript, exhibits, and briefs, I make the following:

FINDINGS OF FACT

Background

A. *Jurisdiction*

USMX represents its employer-members in negotiating and administering collective-bargaining agreements with ILA and its local affiliates, including Local 1422. USMX's employer-members are container carriers, terminal operators, and port associations, including (among others) Hapag-Lloyd (America), LLC; Orient Overseas Container Line Limited; Charleston Stevedoring Company, LLC; Ceres Terminals Incorporated; Evergreen Shipping Agency (America) Corp.; A.P. Moller-Maersk; Mediterranean Shipping Co. USA Inc.; Ports of America; and South Carolina Stevedores Association, which are responsible for the transportation and handling of cargo shipped to and from the United States. In conducting their business operations annually, USMX's employer-members collectively performed services valued in excess of $50,000 in states

other than the State of South Carolina. Based on the foregoing, the employer-members of USMX, including Hapag-Lloyd (America) LLC and Orient Overseas Container Line Limited, have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Don Adam is USMX's Chairman and CEO and is an admitted supervisor and agent within the meaning of Section 2(11) and (13) of the Act, respectively.

B. *Labor Organization Status*

ILA and Local 1422 have been labor organizations within the meaning of Section 2(5) of the Act. Local 1422 also has been an agent of ILA, acting on behalf of ILA, within the meaning of Section 2(13) of the Act. At all material times, Local 1422 has been in trusteeship, with ILA serving as its trustee. As trustee of Local 1422, ILA is responsible for overseeing the operation of Local 1422, including assigning representatives to continue its day-to-day functions. Harold Daggett is ILA President and Dennis Daggett is ILA Vice President. Kenneth Riley has served as a Vice President for ILA and as an Acting Delegate for Local 1422. In his capacity as Vice President and Acting Delegate, Riley has been an agent of ILA and Local 1422 pursuant to Section 2(13) of the Act, including for the purpose of communicating with SCSPA regarding the Leatherman Terminal. (GC Exh. 20).

C. *Collective-Bargaining Relationship and Master Contract*

The current Master Contract between USMX and ILA is dated October 1, 2018 to September 30, 2024. (GC Exh. 2). It states in relevant part:

ARTICLE 1

SCOPE OF AGREEMENT

Section 2. Recognition.

Management recognizes ILA as the exclusive bargaining representative of longshoremen, clerks, checkers, and maintenance employees who are employed on ships and terminals in all ports on the East and Gulf Coasts of the United States, inclusive from Maine to Texas, and ILA recognizes USMX as the exclusive employer representative in such ports on Master Contract issues.

Section 3. Complete Labor Agreement.

This Master Contract is a full and complete agreement on all Master Contract issues relating to the employment of longshore employees on container and ro-ro vessels and container and ro-ro terminals in all ports from Maine to Texas at which ships of USMX carriers and carriers that are subscribers to this Master Contract may call. This Master Contract as supplemented by local bargaining constitutes a complete and operative labor agreement.[6]

APPENDIX A

CONTAINERIZATION AGREEMENT

1. The Agreements of "Management" shall set forth the work jurisdiction of employees covered by the said Agreements in the following terms:

[6] The term "ro-ro" is an acronym that refers to the "roll-on-roll-off" method of moving cargo from ground transport vehicles to a ship and vice-versa.

Management and the Carriers recognize the existing work jurisdiction of ILA employees covered by their agreements with ILA over all container work which historically has been performed by longshoremen and all other ILA crafts at container waterfront facilities. Carriers, direct employers and their agents covered by such agreements agree to employ employees covered by their agreements to perform such work which includes, but which is not limited to:

(a) the loading and discharging of containers on and off ships

(b) the receipt of cargo

(c) the delivery of cargo

(d) the loading and discharging of cargo into and out of containers

(e) the maintenance and repair of containers

(f) the inspection of containers at waterfront facilities (TIR men).

As pertains to (e) above, the Carriers Container Council is and shall remain party to the Charleston Container Maintenance and Repair Contract, effective October 1, 1980 on behalf of all of its members and agrees that an identical contract binds its members as to container maintenance and repair in each South Atlantic port. It is further agreed that the Carriers shall only use vendors who have subscribed to such agreements. Fringe benefit coverage shall be under the South Atlantic Funds including GAI, Vacation, Holiday, Container Royalty and local deep sea Welfare and Pension Funds. It is further agreed that each Carrier shall subscribe to the foregoing.

2. Management, the Carriers, the direct employers and their agents shall not contract out any work covered by this agreement. Any violations of this provision shall be considered a breach of this agreement.

. . .

9. Violations of Agreement: This Agreement defines the work jurisdiction of employees and prohibits the subcontracting out of any of the work covered hereby. It is understood that the provisions of this Agreement are to be rigidly enforced in order to protect against the further reduction of the work force. Management believes that there may have been violation of work jurisdiction, of subcontracting clauses, and of this Agreement, by steamship carriers and direct employers. The parties agree that the enforcement of these provisions is especially important and that any violation of such other provisions is of the essence of the Agreement. The Union shall have the right to insist that any such violations be remedied by money damages to compensate employees who have lost their work. Because of the difficulty of proving specific damages in such cases, it is agreed that, in place of any other damages, liquidated damages of $1,000.00 for each violation shall be paid to the appropriate Welfare and Pension Funds. Liquidated damages shall be imposed by the Emergency Hearing Panel described below.[7]

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[7] Following the hearing, the parties reached a stipulation that par. 5 of the consolidated complaint issued on May 19, 2021, misquotes the language from the Master Contract and should be replaced with the language set forth above. The parties also agreed that par. 10 of ILA's April 22, 2021 lawsuit and par. 11 of its April 26, 2021 amended lawsuit incorrectly cited par. "4"

(GC Exh. 2).[8]

D. *South Carolina State Port Authority, the Port of Charleston, and the Hybrid Model*

SCSPA is an instrumentality of the State of South Carolina that operates container-handling facilities/ terminals at the Port of Charleston. SCSPA contracts with several USMX carrier-members to provide services related to the loading and unloading of their ships at the Port's waterfront container-handling facilities. (Tr. 48). For 40 years, SCSPA operated two container-handling facilities at the Port of Charleston: the North Charleston Terminal and the Wando Welch Terminal. The former opened in the 1940s, and the latter opened in 1981. The State and SCSPA sought to expand its capacity by adding a third terminal on the former Charleston Navy Yard, which was about two nautical miles (seven land miles) from the Wando Terminal. SCSPA obtained a permit to begin construction on this new terminal in 2007, and construction was expected to be completed by 2012. However, shortly after obtaining the permit, the Port of Charleston lost approximately 40 percent of its volume, which caused construction to be delayed. (GC Exh. 8(b), pg. 21). When completed, the Leatherman Terminal was the first new container-handling facility built in the United States in over a decade.

Neither SCSPA nor the State has ever been a party to the Master Contract, or any other labor agreement covering the Port of Charleston. As stated, unlike

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rather than paragraph "9" of the Containerization Agreement in the Master Contract. (Jt. Exh. 1). I hereby accept and incorporate this stipulation as part of the record.

[8] Appendix B to the Master Contract are the Rules on Containers, which defines the tasks included in covered work.

other ports along the East and Gulf Coasts where ILA-bargaining unit employees perform all the container work, the Port of Charleston, along with the ports in Wilmington, North Carolina and Savannah, Georgia, use a hybrid operating model. This has been the case since containerization began.[9]

SCSPA owns and operates the cranes and other lift equipment used to perform the container-handling services at those terminals, and it employs state employees to operate that equipment (referred to as lift-equipment work). Specifically, the state employees operate SCSPA's ship-to-shore cranes to unload containers from incoming cargo ships and place them onto trucks, which transport the containers to a designated stack location in the Port's container yard. There, other state employees operate SCSPA's lift machines (e.g., rubber tyred gantry cranes and container handlers) to unload the containers and place them in a stack for pickup and delivery. (Tr. 43–44; 273–274). The remaining work – the loading and unloading of ships, the lashing and unlashing of containers, container spotting, securing containers on the ships, etc. (referred to as stevedoring work) – is performed by Local 1422 members. Those members are hired by the carriers and stevedoring companies, like the Charleston Stevedoring Company, which are covered under the Master Contract. SCSPA has used this hybrid model in Charleston for nearly 50 years.[10]

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[9] The record does not reflect how covered carriers who called on the ports in Charleston, Wilmington, or Savannah, were not required to comply with the Containerization Agreement's work jurisdiction/no-subcontracting provisions.

[10] The situation is analogous at the ports in Wilmington and Savannah, involving the same job titles and job descriptions as at the Port of Charleston. (Tr. 249–250). These three ports are the

There are approximately 270 state employees and over 2,000 ILA members working on the terminals at the Port of Charleston.[11] Under South Carolina law, state employees are prohibited from being represented by a union for the purposes of collective bargaining.[12]

E. *Article VII, Section 7*

In 2012, ILA and USMX began negotiations over their 2013-2018 Master Contract. During those negotiations, ILA proposed adding the following "Jurisdiction" language to specifically address the container-handling facilities/terminals, like those at the Port of Charleston, where ILA-bargaining unit employees were not performing all container work:

> All work associated with the loading and unloading of cargo aboard vessels of USMX carriers including the receiving and delivery of all cargo and all terminal work must be performed by ILA-represented workers. All cargo handling work currently contracted out to port authorities must be brought under the jurisdiction of ILA and all such work must be performed by ILA-represented workers no later than January 1, 2014.

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only ones along the East and Gulf Coasts where non-ILA unit members perform container work for covered carriers. These three ports are the only ports along the East and Gulf Coasts where ILA unit employees do not perform the lift-equipment work. (Tr. 272–273)

[11] At the Port of Charleston, ILA affiliates provide representation for those covered under the Master Contract. Local 1422 represents the deep-sea longshoremen, Local 1422-A represents the maintenance and repair workers, and Local 1771 represents the clerks and checkers.

[12] See, e.g., *Branch v. City of Myrtle Beach*, 340 S.C. 405, 411, 532 S.E.2d 289, 292 (2000).

(USMX Exh. 9) (Tr. 186; 251).

USMX rejected this proposal, but the parties continued to discuss work preservation for the ILA bargaining unit. (Tr. 181). The parties eventually agreed to add Article VII, Section 7, which states:

> Section 7. Port Authorities
>
> (a) USMX and ILA shall conduct a study to determine how the business model currently used by port authorities in the Ports of Charleston, SC, Savannah, GA, and Wilmington, NC could be altered to permit work currently performed by state employees to be performed by Master Contract-bargaining-unit employees in a more productive, efficient, and competitive fashion. USMX and ILA will use this study to meet with these port authorities in an effort to convince them to employ Master Contract-bargaining-unit employees.
>
> (b) USMX agrees to formally notify any port authority contemplating the development of or intending to develop a new container handling facility that USMX members may be prohibited from using that new facility if the work at that facility is not performed by Master Contract-bargaining-unit employees.

(GC Exh. 2).[13]

ILA and USMX had different interpretations as to Section 7(b)'s intended purpose and application. USMX Chairman and CEO David Adam, a member of USMX's negotiating committee, testified the purpose

[13] The study referred to in Art. VII, Sec. 7(a) was never conducted.

was to protect/preserve the division of work as it was historically performed at the ports in the event of changes. USMX intended it to mean that port authorities, like SCSPA, could continue to use the hybrid model at new facilities, as long as the division of work remains the same as at the port's other terminals. (Tr. 188). Adam testified that if there was a new terminal developed at a port using the hybrid model, and there were changes made altering the historic division of work that existed at that port, USMX carrier-members would be prohibited from calling on that facility. (Tr. 190–193; 215–217).[14]

ILA Executive Vice President Dennis Daggett and ILA Vice President and Acting Delegate for Local 1422 Kenny Riley, both members of ILA's negotiating committee, testified the purpose was to contain the hybrid operating model to those existing terminals where it was used. (Tr. 263–266; 285–287). Riley testified the concern was that expanded use of the hybrid model would result in the loss of work at ports where all the container work, including the lift-equipment work, was performed by ILA-bargaining unit employees. (Tr. 286). According to Daggett, the purpose of Section 7 was to "redline" those existing terminals at the ports in Charleston, Wilmington, and Savannah using the hybrid model. USMX carrier-members could continue to call on those terminals without violating the Containerization Agreement, but they could not call on any new terminal where the container work was

[14] There was discussion based on anecdotal evidence about possible changes affecting ILA unit employees, e.g., automation, modifications to the workforce and job duties, the introduction of third parties, etc.

not all performed by ILA unit members, regardless of the port. (Tr. 266; 286–287).

Daggett further testified that USMX's counsel, Donato Caruso, agreed with ILA's interpretation during the 2013 negotiations. He recalls Caruso being asked exactly what Section 7(b) meant, particularly when ILA representatives voiced concern about the term "may be," and Caruso said it meant that "any new terminal that comes online, if it's not 100 percent ILA then the carriers cannot go there." (Tr. 284).

Caruso testified he did not recall making this statement, and it was USMX's view that Section 7(b), as written, would not prohibit carriers from calling on any new terminals operated by state authorities. (Tr. 302). He explained:

> [T]he theory there was to give notification that there was a possibility that ILA might be able to convince . . . an arbitrator that certain provisions in the [Master Contract] would prohibit the carriers from calling at a terminal that was not completely manned by ILA Labor. So – so we used the term ["may"] because we didn't want to give the impression that USMX agreed with that – with the Union's position. And we were really thinking . . . that there would be a need to have that issue resolved, possibly through arbitration.
>
> And conceivably, an arbitrator might rule that the provisions that I'm referring to apply to ports like Savannah and like Charleston, where . . . the port authorities actually operated the port. And . . . yet those port authorities were not parties to the contract. And it was possible that . . . [an] arbitrator might rule in favor of . . . the Union.

> But . . . it was my position to put [Section 7(b)] in . . . to have some notification . . . to those authorities. But my recollection is that, from the very beginning, it was always my opinion that if we were to try to apply those provisions . . . we would be probably engaging . . . in a possible violation of [Section 8(e) of the Act] because the port authorities involved are not parties to the [Master Contract]. And they were the ones who had control over the assignment of the work so that, if we were . . . to attempt to apply those provisions to them, that that might result in both parties being found guilty of [an] 8(e) violation.

(Tr. 303-305).[15]

Five years later, when USMX and ILA negotiated the current Master Contract, they made no changes to Article VII, Section 7. Daggett testified there were no discussions or proposals; they simply agreed to extend the language, as is. (Tr. 295). Caruso recalled that during a meeting with both sides he offered his opinion that Section 7(b) could not be applied to ports like Charleston and Savannah, where the state port authorities operate the terminals, because it would violate Section 8(e) of the Act. (Tr. 305).[16]

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[15] Caurso testified if the matter went to arbitration, it would be USMX's position that the Containerization Agreement would not apply because it had never been applied before to the ports in Charleston, Wilmington, and Savannah. And if the arbitrator agreed, that would end the issue, and the parties would have to deal with it in the future during negotiations. But if the arbitrator ruled those provisions applied, USMX likely would have sought to overturn that ruling in court on the grounds that it put USMX in the position of violating Sec. 8(e) of the Act. (Tr. 312–313).

[16] I credit Caruso over Daggett regarding these negotiations because Caruso's recollection and testimony were more logical

ILA and Local 1422, through Riley, have continued to maintain that all container work at new facilities should be performed by ILA-bargaining unit members. In a book published in 2020, entitled "Kenny Riley and Black Union Labor Power in the Port of Charleston," Riley was quoted as saying, "The port can build whatever terminals it wants, and it can put in the most expensive cranes and infrastructure it wants at any terminal it wants, but if no ships call on that terminal, then it just got a brand-new terminal with nothing there . . . if there are any new terminals built, and if they are not in compliance with the [Master Contract], the ships will not call on those facilities." (GC Exh. 10) (Tr. 100).

Unfair Labor Practices

A. *Communication Regarding Opening of the Leatherman Terminal*.

In 2020, SCSPA announced it intended to operate the Leatherman Terminal using the same hybrid operating model used at the Wando and New Charleston Terminals, with no change to the workforce or the scope/division of work between the state employees and the Local 1422 members. (Tr. 193). On June 8, 2020, David Adam sent SCSPA President and CEO James Newsome III a letter, stating:

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and consistent with the other evidence. Specifically, I do not credit Daggett that Caruso stated Sec. 7(b) meant carriers could not go to any new terminal where 100 percent of the container work was not performed by ILA members. It is inconsistent with Caruso's stated reasons for using the term "may," as opposed to "shall" or "will," in Art. VII, Sec. 7(b), as well as his concerns that having and enforcing such a requirement against state port authorities would result in USMX violating Sec. 8(e) of the Act.

> Please accept this letter as formal notification by [USMX] pursuant to Article VII, Section 7(b) of the [Master Contract] that USMX employer-members may be prohibited from using the new facility being developed by [SCSPA] at the Charleston Navy Yard if the work at that facility is not performed by Master Contract bargaining-unit employees.

(GC Exh. 5).

After receiving this letter, Newsome and Adam spoke. Newsome asked Adam whether ILA and USMX would be willing to submit the operating model issue to arbitration. Adam responded that might happen down the road, but currently there was no conflict/grievance to be arbitrated because the Leatherman Terminal had not yet opened. (Tr. 183–184; 196).

In August and September 2020, Newsome communicated with representatives from several USMX carrier-members about SCSPA's plan to operate the Leatherman Terminal using the same hybrid operating model as at the Wando and North Charleston Terminals. The details of those communications are reflected in the record. Several representatives questioned, or expressed concern over, whether ILA had agreed to the use of that operating model, and some made references to Article VII, Section 7 of the Master Contract. Newsome responded there was no need for ILA to agree because SCSPA was not subject to the Master Contract and it was simply continuing to use the same the hybrid model at the new terminal that it had been using at the Port of Charleston for nearly 50 years. A few of the representatives expressed reluctance about having their ships call on the new terminal, while others indicated they would refuse, absent a resolution on the

matter. (GC Exhs. 6, 7, 18) (Tr. 62–63; 72–76).[17] Some of those same representatives informed Newsome the matter likely would need to be resolved through arbitration. (Tr. 63–65, 77).

At the end of September or in early October, Adam and Newsome had additional conversations, and Adam notified Newsome that ILA and USMX had different positions regarding the Leatherman Terminal. He stated ILA interpreted the Master Contract to mean that USMX carrier-members could not call on the Leatherman Terminal if the container work was not performed by ILA-bargaining unit employees, but USMX interpreted it to mean that carrier-members could call on the Leatherman Terminal as long as the division of work between the state employees and the Local 1422 members remained the same as it was at the other terminals at the Port of Charleston. There was additional discussion between Newsome and Adam about submitting the matter to arbitration, but Adam again would not commit to doing so at that time because the terminal had not yet opened. (Tr. 209–211).[18]

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[17] Several of the representatives Newsome communicated with were also on the USMX Board of Directors. However, the communications indicate each was "speaking" solely in their role as representatives of their individual company or alliance, and not on behalf of USMX. I, therefore, decline to attribute their statements to USMX.

[18] Adam expected a grievance would be filed once the Leatherman Terminal opened, and it was clearer how the work was going to be performed. But before that happened, SCSPA and the State filed the instant charges. As ILA explained at the hearing, the reason it filed a lawsuit instead of pursuing a grievance against USMX was its concern that a grievance, unlike a lawsuit, could be construed as coercive if filed by ILA, and despite repeated requests, USMX refused ILA's requests to file a grievance or otherwise initiate arbitration.

On October 6, 2020, Newsome met with ILA representatives, including Dennis Daggett. Newsome explained the history and rationale for the hybrid model at South Atlantic ports, like Charleston, and that deviation from that model would put those ports at a competitive disadvantage. During the meeting, Daggett asked Newsome how SCSPA could say it respected ILA if ILA did not have all the jobs at the Charleston terminals. (Tr. 82–83).

On January 6, 2021, Riley and Newsome participated in a conference call with South Carolina lawmakers, as well as others, to discuss the Leatherman Terminal.[19] (GC Exh. 8). During this call, Riley stated ILA and Local 1422 were interested in consuming all the jobs at the Leatherman Terminal. He added that he has opposed the use of the hybrid operating model throughout his 24-year career as a union officer, and that the model was the exception, not the rule, regarding work jurisdiction. He also stated he initially sought to transition away from allowing the hybrid model to the model where ILA-bargaining unit members performed all the container work, but USMX would not agree. He said the next step was to "redline" all existing terminals using the hybrid model and allow them to continue operating that way but require that any new terminal be operated differently. He stated Charleston just happened to be the "first terminal up to bat." Also, there was a discussion that SCSPA wanted the dispute resolved through arbitration, but that neither ILA nor

[19] A partial recording and a transcript were introduced into evidence. (GC. Exh. 8). Exhibit A of the General Counsel's post-hearing brief includes various corrections to the transcript of that recording. Upon my review of the recording and the transcript, as well as there being no objection from any of the other parties, I accept the corrections.

USMX expressed a willingness to do so. Newsome stated that, as a result, SCSPA intended to file a charge with the Board, which it did that day.[20]

B. *Original and Amended Lawsuit in New Jersey State Court*

On March 30, 2021, SCSPA opened the Leatherman Terminal and began operating it using the hybrid model. There is no evidence that the work performed by state employees at the Leatherman Terminal differed in any way from the other Port of Charleston terminals. The same is true regarding the work the Local 1422 members performed there.

On about April 9, Hapag-Lloyd became the first USMX carrier-member to call on the new terminal. (Tr. 104). On April 21, Orient Overseas Container Line Limited became the second. (Tr. 104). On April 22, ILA filed a lawsuit in New Jersey Superior Court against Hapag-Lloyd and USMX seeking $200 million in damages based on Hapag-Lloyd's decision to contract with non-bargaining unit labor at the Leatherman Terminal. The lawsuit alleges USMX and the carrier-members violated Article I, Section 3 of the Master Contract and Sections 1, 2, and 9 of the Containerization Agreement.[21] (GC Exh. 3). The lawsuit states the Containerization Agreement requires Hapag-Lloyd

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[20] On March 18, 2021, the ILA, Local 1422, and USMX entered into an agreement to avoid a Sec. 10(l) injunction proceeding, agreeing not to take action to enforce Art. VII, Sec. 7(b) of the Master Contract at the Leatherman Terminal while the (first) consolidated complaint was being litigated. (SCSPA Exh. 1(a)).

[21] As stated, the parties' stipulation states the references to Sec. 4 of the Containerization Agreement in the original and amended lawsuits were incorrect, and those references should be to Art. 9.

and all other covered USMX carrier-members to use ILA-bargaining unit employees to load and discharge containers on and off their ships, and perform all other container work, at any marine terminal at which their ships call on the East and Gulf Coasts of the United States. The covered carriers have discretion and are free to change which marine terminal that they bring their cargo to, so long as when a shipping carrier relocates its operations to another terminal on the East or Gulf Coasts of the United States it must go to a terminal that uses ILA-bargaining unit employees to perform all related container work. The lawsuit further states the Leatherman Terminal, as a new terminal, is not one of the terminals recognized under the existing Master Contract that covered carriers may call. At various times, ILA reached out to USMX for assurances the container work at the Leatherman Terminal would be performed by ILA-bargaining unit employees, but USMX failed to provide those assurances, and it had carriers call on that terminal even though non-bargaining unit employees would be employed to handle containers there. (GC Exh. 3).

In addition to the claim for breach of the Master Contract, the lawsuit alleges tortious interference with contract, tortious interference with prospective economic advantage, and civil conspiracy. As a remedy, the lawsuit seeks monetary damages in the amount of $200 million, plus attorney's fees, interest, and costs. It does not seek to enjoin the performance of work by non-ILA bargaining unit employees or require the work at issue be assigned to ILA-bargaining unit members. (GC Exh. 3).

On April 26, ILA amended its lawsuit to include Orient Overseas Container Line Limited as a defendant and increased its damages demand to $300 million.

(GC Exh. 4). The lawsuit was later removed to the United States District Court for the District of New Jersey and is currently stayed during the pendency of the complaints at issue. (USMX Exh. 7). Neither the original nor the amended lawsuit makes any reference to Article VII, Section 7(b) of the Master Contract.

C. *Response to Lawsuits*

Within two weeks of the ILA filing its lawsuit, five USMX carrier-members contacted SCSPA and demanded to change their scheduled calls from the Leatherman Terminal to the Wando Terminal, because they did not want to get enmeshed in the above lawsuit. SCSPA controls on what terminal the ships are assigned to call. Some of those carriers threatened to have their ships bypass the Port of Charleston altogether in favor of the Port of Savannah if they were not allowed to change terminals. SCSPA eventually granted their requests to change terminals and call on the Wando Terminal.

LEGAL ANALYSIS

A. *Allegations*

The General Counsel's first consolidated complaint alleges that USMX, ILA, and Local 1422 violated Section 8(e) of the Act by entering into, and later reaffirming, the "hot cargo" provision in Article VII, Section 7 of the Master Contract. ILA, USMX, and Local 1422 defend the provision does not violate Section 8(e), and, even if it did, the allegations are untimely. The General Counsel's second consolidated complaint alleges ILA violated Section 8(b)(4)(ii)(A) and (B) of the Act by filing the original and amended lawsuits against USMX, Hapag-Lloyd, and Orient Overseas Container Line Limited, with the unlawful secondary objects of: (1) forcing or requiring USMX

and its employer-members to enter into and enforce an agreement with ILA prohibited by Section 8(e); and (2) forcing or requiring USMX and other persons engaged in commerce or in an industry affecting commerce to cease doing business with SCSPA, the State of South Carolina, and other persons. It further alleges ILA violated Section 8(e) by filing the lawsuits interpreting and giving effect to an agreement in which USMX and its employer-members agreed not to do business with another person. ILA defends that its lawsuit to enforce cited provisions of the Master Contract and the Containerization Agreement is lawful conduct with a primary object of preserving unit work.

B. *Overview of Legal Precedent*

Section 8(e) prohibits an employer and a labor organization from entering into any contract or agreement, express or implied, whereby the employer agrees "to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person." Section 8(b)(4)(ii) makes it unlawful for a labor organization to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce" in furtherance of certain unlawful objects, which include "(A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by Section 8(e) [and] (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . ."

Sections 8(b)(4) and 8(e) prohibit secondary, not primary, conduct. See *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967). See also *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692

(1951) (Congress intended to preserve a union's right to bring pressure on offending employers in primary labor disputes, while shielding unoffending employers or persons from pressures in controversies not their own.). If the object of the union's conduct is to put direct pressure on the employer with whom the union has a dispute, the conduct is primary and lawful. If, on the other hand, the object of the union's conduct, taken as a whole, is to bring indirect pressure on the primary employer by involving neutral or secondary employers or persons in the dispute, the conduct is secondary and unlawful. Often, the union will have more than one goal, but so long as an object of the conduct is secondary, the conduct is unlawful. *Denver Building Council*, 341 U.S. at 689.

The various linguistic formulae and evidentiary mechanisms employed to describe the primary/secondary distinction are not talismanic, nor can they substitute for analysis. See generally *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 386–390 (1969). The inquiry is often an inferential and fact-based one, at times requiring the drawing of lines "more nice than obvious." *Electrical Workers v. NLRB*, 366 U.S. 667, 674 (1961). An overview of the landmark decisions is instructive to the understanding of the issues presented.

In *National Woodwork,* the Supreme Court was confronted with a contractual clause stating members of the carpenters bargaining unit would not handle doors which had been fitted prior to being furnished on the job. The use of precut and prefitted doors from manufacturers would eliminate preparatory work union members traditionally performed on the jobsite. 386 U.S. at 615–616. When precut and prefitted doors were delivered to a project, the union members refused to

install them. Charges were filed alleging the clause violated Section 8(e) and the members' refusal to handle the doors violated Section 8(b)(4). The Supreme Court held the clause to be lawful because it was intended to protect and preserve work customarily performed by unit employees, pointing out that Congress in enacting Section 8(b)(4) did not intend to eliminate the distinction between union pressures directed toward "primary" objectives and identical pressures aimed at "secondary" objectives. Id. at 620. According to the Court, the relevant inquiry for determining whether an agreement or activity is for a primary or secondary object is "whether, under all the surrounding circumstances, the [u]nion's objective was preservation of work for [bargaining unit] employees, or whether the [conduct was] tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees." Id. at 644–645.

Although the Court found the clause to be lawful, it held the result would have been different had the clause been applied as a "sword" to reach out and acquire new work rather than as a "shield" to retain work traditionally performed by unit employees. 386 U.S. at 630. It distinguished the case from *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945), in which it found the union's "closed shop" agreements that obligated signatory contractors and manufacturers to only purchase and sell equipment from other signatories, which led to a monopoly, to be unlawful.

Also, the Court recognized but reserved ruling on those unlawful situations where the union's object for enforcing the contract is "to monopolize jobs or acquire

new job tasks when their own jobs are not threatened . . .” Id. at 630–631.

In *NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York*, 429 U.S. 507, 528–530 (1977), the Supreme Court considered a clause in the agreement between the union and the subcontractor requiring that any pipe threading and cutting be done by unit employees at the jobsite. The general contractor required that the subcontractor purchase certain precut piping for the project. When the precut piping arrived on the job, the union members working for the subcontractor refused to install them. The Board held the work stoppage constituted unlawful secondary pressure in that the subcontractor, the primary employer, could not assign the work to the union, even if it wanted to do so. The Court upheld the Board's decision, finding the strike's objective was “not to preserve [unit work], but to aggrandize, [the union's] position and that of its members.” Id. at 528 fn. 16. In reaching this conclusion, the Court held the lawfulness of the work preservation provision provided no defense to the union's unlawful secondary conduct:

> The substantial question before us is whether, with or without the collective-bargaining contract, the union's conduct at the time it occurred was proscribed secondary activity within the meaning of [§8(b)(4)]. If it was, the collective-bargaining provision does not save it. If it was not, the reason is that [§8(b)(4)(B)] did not reach it, not that it was immunized by the contract. Thus, regardless of whether an agreement is valid under §8(e), it may not be enforced by means that would violate §8(b)(4).

Id. at 520–521.

In *NLRB v. Longshoremen ILA,* 447 U.S. 490 (1980) (*ILA I*), the Supreme Court considered rules adopted by the union and a maritime employer association to help minimize the effects of containerization on the multi-port bargaining unit. The rules stated, in relevant part, that cargo containers owned or leased by marine shipping companies that otherwise would be loaded or unloaded within the local port area (defined as anywhere within a 50-mile radius of the port) instead must be loaded or unloaded by bargaining-unit longshoremen at the pier. The Board found the rules unlawful work acquisition rather than work preservation because the unit employees had never performed the work at issue at the location in question. The Supreme Court disagreed. It held that, to be valid, a work preservation agreement must pass a two-part test: (1) it must have as its objective the preservation of work traditionally performed by employees represented by the union; and (2) the contracting employer must have the power to give the employees the work in question–the so-called "right of control" test. Id. at 504. The rationale of the second test is that if the contracting employer cannot assign the work, it is reasonable to infer that the agreement has a secondary objective, which is, to influence whoever does have such power over the work. Id. "Were the latter the case, [the contracting employer] would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary." Id. at 505 (quoting *National Woodwork*, supra, at 644–645).

The Court further held that when work preservation agreements result from technological changes, the definition of work "requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed

circumstances created by the technological advance." 447 U.S. at 507. The focus always must be "on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work," and on how the agreement attempts to preserve jobs impacted by the introduction of new technologies. Id. The Court remanded the case for the Board to examine the scope of the work the unit traditionally performed.

On remand, the Board found some of the work to be functionally related to the traditional work of the unit employees, making enforcement of those rules lawful work preservation. For the rest, the Board found the union was unlawfully attempting to acquire work eliminated through containerization.

On appeal, in *NLRB v. Longshoremen ILA*, 473 U.S. 61 (1985) (*ILA II*), the Court concluded the Board again erred by focusing on the extra-unit effects of the rules and by finding that work eliminated by technology could never be the object of a work preservation agreement. The Court found the union's objective consistently had been to preserve longshore work and the carriers had the power to control assignment of that work because they owned or leased the containers used for transport. It also concluded that when "the objective of an agreement and its enforcement is so clearly one of work preservation, the lawfulness of the agreement under §§8(b)(4)(B) and 8(e) is secure absent some other evidence of secondary purpose." Id. at 81–82. Thus, the rules were held valid irrespective of their effects outside the bargaining unit because there was no object to disrupt the business relations of a neutral employer. Id. at 79. In reaching this conclusion, the Court commented on the work preservation/work acquisition dichotomy:

> [W]hile we acknowledge that the (preservation/acquisition) dichotomy may be susceptible to wooden application, we are not prepared to abandon it. The "acquisition" concept in the work preservation area originated in *National Woodwork*, where we distinguished *Allen Bradley*, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945), as involving "a boycott to reach out to monopolize jobs or acquire new job tasks *when [union members'] own jobs are not threatened.*" 386 U.S., at 630–631, 87 S.Ct., at 1260–1261 (emphasis added); see n. 15, supra. An agreement bargained for with the objective of work preservation in the face of a genuine job threat, however, is not "acquisitive" in the sense that concept was used in *National Woodwork*, even though it may have the incidental effect of displacing work that otherwise might be done elsewhere or not be done at all. See *Pipefitters*, 429 U.S., at 510, 526, 528–529, n. 16, 97 S.Ct., at 894, 902, 902–903, n. 16. Yet as the facts of *Allen Bradley* demonstrate, an agreement that reserves work for union members may also have an unlawful secondary objective. The preservation/acquisition dichotomy, when employed with the *Allen Bradley* distinction firmly in mind, can serve the useful purpose of aiding the inquiry regarding unlawful secondary objectives when an agreement attempts to secure work but "jobs are not threatened."

ILA II, 473 U.S. 61, 79 fn 19.

C. *Article VII, Section 7 is Not Facially Unlawful Under Section 8(e)*

The General Counsel first argues that Article VII, Section 7(b) of the Master Contract, on its face, violates Section 8(e) of the Act because it restricts USMX

and its carrier-members from doing business with SCSPA at the Leatherman Terminal if the container work, including the lift-equipment work, was not performed by ILA-bargaining unit employees.[22] USMX, ILA, and Local 1422 defend that the provision is merely a notice requirement, and its prohibition is permissive, not proscriptive. As such, they argue there is no agreement prohibiting carrier-members from calling on the Leatherman Terminal. They also argue that even if the provision had an unlawful object, the Section 8(e) allegation is untimely because the parties entered into the 2018-2024 Master Contract well prior to the six-month period in Section 10(b) of the Act.

In *General Teamsters, Local 982 (J.K. Barker Trucking Co.)*, 181 NLRB 515, 517 (1970), enfd sub. nom. 450 F.2d 1322 (D.C. Cir. 1971), the Board set forth the following principles in determining whether a contractual clause violates Section 8(e):

> [I]f the meaning of the clause is clear, the Board will determine forthwith its validity under 8(e); where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law. On the other hand, if the clause is ambiguous, the Board will not presume unlawfulness, but will consider extrinsic evidence to determine whether the clause was

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[22] As an instrumentality of the State of South Carolina, SCSPA is not an employer within the meaning of Section 2(2) of the Act., but it is a "person" engaged in commerce within the meaning of Sec. 2(1), (6), and (7) of the Act when evaluating a "labor dispute" involving secondary activity. See generally, *Plumbers, Steamfitters, Refrigeration, Petroleum Fitters, and Apprentices of Local 298 v. County of Door,* 359 U.S. 354, 358 (1959). See also *Electrical Workers Local 3*, 220 NLRB 785, 786 (1975); *Longshoremen Local 16 (City of Juneau)*, 176 NLRB 889 (1969).

> intended to be administered in a lawful or unlawful manner. In the absence of such evidence, the Board will refuse to pass on the validity of the clause.

Article VII, Section 7(b) is not clearly unlawful on its face. The provision does not require USMX or its carrier-members to boycott the Leatherman Terminal or to cease doing business with SCSPA or any other employer or person. It requires that USMX formally notify any port authority contemplating the development of or intending to develop a new container handling facility that USMX members "may be prohibited" from using the facility if the work there is not performed by bargaining-unit employees.[23] The General Counsel argues the phrase "may be prohibited" should be interpreted to mean "will be prohibited."[24] When interpreting contractual terms, the Board gives

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[23] SCSPA and the State of South Carolina argue Art. VII, Sec. 7(b) does not apply because they were well beyond "contemplating the development of or intending to develop" the Leatherman Terminal when the parties added Art. VII, Sec. 7(b) in 2013, and certainly when Adam sent his June 8 "notification" letter to Newsome.

[24] The State and SCSPA contend that Adam admitted on the stand that "may" in Section 7(b) held no practical importance because ILA's unlawful objective of acquiring work is the only possible trigger for carriers being prohibited from calling on a terminal under that provision. This contention is simply incorrect. Adam testified that, from USMX's perspective, the purpose of Sec. 7(b) was to protect/preserve the division of work *as it was historically performed* at these ports. He stated USMX's carrier-members could call on any new terminal as long as the division of work remained the same as at other terminals at that same port. If the division of work changed, e.g., the port authority expanded its workforce or had state employees perform work historically done by ILA-members, Adam testified that carrier-members then could not call on that terminal.

them their "ordinary and reasonable meaning." *Silver State Disposal Service, Inc.*, 326 NLRB 84, 85 (1998). See also *Supreme Sunrise Food Exchange, Inc.*, 105 NLRB 918, 920 (1953). The word "may" is ordinarily construed to mean permissive and discretionary; whereas the words "will" or "shall" mean imperative or mandatory. See *The Variable Meaning of Words; Interpretation or Construction of Particular Words and Phrases,* 11 Williston on Contracts § 30:10 (4th ed.) (May 2021 Update). See also *Kingdomware Techs., Inc. v. United States*, ___ U.S. ____ 136 S. Ct. 1969, 1977 (2016) ("Unlike the word "may,' which implies discretion, the word 'shall' usually connotes a requirement."). The parties are aware of this distinction because they use "may" and "shall" throughout the Master Contract to differentiate between discretionary and mandatory terms. See e.g., Article IV (Local Fringe Benefit Contributions), Article V (Utilization of Work Force), Articles VII-IX (Jurisdiction), Article XIV (Grievance Procedure), and Article XV (Accommodations) of the Master Contract. (GC Exh. 2). Absent evidence to the contrary, I decline to interpret Article VII, Section 7(b) as reflecting an agreement to require anything unlawful.

Section 7(b)'s failure to define the circumstances where carriers would be prohibited from calling on the new terminal does not make the provision ambiguous. Even if did, the extrinsic evidence does not establish the parties agreed to administer the provision in an unlawful manner. In fact, aside from requiring notification, ILA and USMX do not agree how Section 7(b) should be administered in relation to other provisions in the Master Contract. During negotiations, they discussed the matter, generally, but they reached no agreement. ILA's view was that covered carriers would be prohibited from calling on the new facility if all the

container work was not performed by ILA-bargaining unit employees. USMX's view was that covered carriers could not be prohibited from calling on the new facility, so long as the division of the work between the bargaining unit and non-bargaining unit employees was the same as at the other facilities at that same port. USMX anticipated that once a new facility was finally constructed, ILA would argue to an arbitrator that the other provisions in the Master Contract supported its interpretation, which is why USMX proposed using "may be prohibited" in Section 7(b), because it wanted to preserve its argument that it did not agree with ILA's interpretation. Additionally, Caruso told ILA representatives during subsequent negotiations that USMX's view was the parties could not require state-operated ports, like Charleston, which are not parties to the agreement, to use ILA-bargaining unit members to perform all container work at a new facility, without potentially violating Section 8(e) of the Act.

D. *No Timely "Agreement" to Restrict Carriers from Doing Business with SCSPA in Violation of Section 8(e)*

The General Counsel next argues that in communications with SCSPA between June 2020 and January 2021, representatives from USMX, ILA, and Local 1422 made statements reflecting an (implied) agreement to interpret and apply Article VII, Section 7(b) in a manner that violated Section 8(e) of the Act. To violate Section 8(e), the agreement, express or implied, must be "entered into" within the six-month period set forth in Section 10(b) of the Act. The Board has held the words "to enter into" must be interpreted broadly and encompass the concepts of initial execution, reaffirmation, maintenance, or enforcement of any

agreement within the scope of Section 8(e). See *Dan McKinney Co.*, 137 NLRB 649, 653–657 (1962). A unilateral attempt to enforce a facially unlawful provision within the Section 10(b) period is sufficient to reaffirm the agreement. See *General Truck Drivers Local 467*, 265 NLRB 1679, 1681 (1982), enfd. mem. 723 F.2d 915 (9th Cir. 1983); *Chicago Dining Room Employees Local 42 (Clubmen, Inc.)*, 248 NLRB 604, 607 (1980). However, where, as here, the provision is not facially unlawful, the reaffirmation must be bilateral. See *Sheet Metal Workers Local 27 (AeroSonics, Inc.)*, 321 NLRB 540, 540 fn.3 (1996).

The General Counsel contends that Riley, Adam, and representatives from USMX carrier-members made statements reflecting or reaffirming a timely agreement to prohibit USMX carrier-members from calling on the Leatherman Terminal if the container work, including the lift-equipment work, was not all performed by unit members. Riley's cited statements clearly show ILA and Local 1422 wanted, and claimed the right, to perform all container work at the Leatherman Terminal. USMX, however, did not agree. Adam advised Newsome about the disagreement, stating that USMX believed that carrier-members could call on the Leatherman Terminal as long as the division of work between the state employees and ILA-members remained the same as at the Wando and North Charleston Terminals. Newsome acknowledged the dispute and asked Adam multiple times to submit the matter to arbitration for a decision, and Adam stated it would need to wait until after the Leatherman Terminal opened and began operating. The USMX carrier-member representatives that Newsome communicated with also recognized the disagreement when they asked him whether a resolution had been reached with ILA and expressed unwillingness to

accept scheduled calls to that terminal without such a resolution. A few also stated the matter likely would need to be submitted to an arbitrator. Overall, I find this evidence establishes disagreement, rather than agreement.

Based on the forgoing, I find the General Counsel has failed to establish ILA, USMX, and Local 1422 entered into, or reaffirmed, an agreement, express or implied, that violates Section 8(e) of the Act.

E. *ILA's Lawsuit Seeks Unlawful Interpretation of Master Contract Provisions and Threatens or Coerces USMX and its Carrier-Members to Not Do Business with the State and SCSPA in Violation of Section 8(b)(4)(ii)(A) and (B) and Section 8(e)*

1. The Parties' Arguments

The General Counsel argues that ILA's lawsuit violated Section 8(b)(4(ii)(A) and (B) of the Act by threatening, coercing, and restraining USMX and its carrier-members with the object(s) of: (1) converting facially valid Master Contract provisions into prohibitions that violate Section 8(e) of the Act; and (2) forcing or requiring USMX and its carrier-members to cease doing business with the State of South Carolina and SCSPA at the Leatherman Terminal. A good-faith prosecution of a reasonably based contract claim, by itself, is not unlawful under Section 8(b)(4)(ii). Rather, the validity of the prosecution, whether through a lawsuit or grievance, is determined under the principles of *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983), as interpreted and modified in *BE&K Construction Company*, 351 NLRB 451 (2007).[25] Under

[25] In fn. 5, the Supreme Court in *Bill Johnson's* held a lawsuit that is not baseless and retaliatory may violate the Act only if it

this standard, the pursuit of a claim is unlawful coercion only if it is both objectively and subjectively baseless when it is filed, or it is filed with an unlawful object. Id. See also *Road Sprinkler Fitters Local Union 669 (Firetrol Protection Systems, Inc.)*, 365 NLRB No. 83, slip op. at 1 fn. 3 (2017), enfd. 2018 WL 3020513 (unreported decision); *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990).

ILA's lawsuit claims that USMX and the two carrier-members violated Article 1, Section 3 of its Master Contract and Sections 1, 2, and 9 of its Containerization Agreement by calling on the Leatherman Terminal even though they knew that non-ILA bargaining unit employees would be employed to perform container work.[26] The lawsuit further claims that USMX and its carrier-members "intentionally and maliciously interfered without justification with the ILA's future ability . . . to preserve jobs for its members in accordance with the work jurisdiction provisions of the Master Contract, and to enforce the work jurisdiction provisions of the Master Contract." The General Counsel argues ILA filed the lawsuit with the object of forcing USMX and its carrier-members to agree that these facially valid provisions prohibited them from calling on the Leatherman Terminal unless bargaining-unit employees performed all container work, includ-

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is claimed to be federally preempted or has an objective that is illegal under federal law. 461 U.S. at 737 fn. 5. *BE&K* did nothing to change these exceptions.

[26] ILA's argument regarding USMX is that it was aware of the relevant contractual provisions and did nothing to dissuade its carrier-members from calling on the Leatherman Terminal.

ing the lift-equipment work, in violation of Section 8(b)(4)(ii)(A) and Section 8(e).

The General Counsel also argues that by filing the lawsuit ILA seeks to have USMX and its carrier-members cease doing business with the State and SCSPA at the Leatherman Terminal, in violation of Section 8(b)(4)(ii)(B). Under Board law, the "cease doing business" object includes a partial cessation. *Road Sprinkler Fitters*, supra, slip op. at 6 (citing to *NLRB v. Operating Engineers Local 825 (Burns & Roe)*, 400 U.S. 297, 304–305 (1971)). Section 8(b)(4)(ii)(B) prohibits a labor organization that has a labor dispute with a primary employer from pressuring other neutral employers who do not do business with the primary to increase its leverage in its dispute with the primary. See, e.g., *National Woodwork*, 386 U.S. at 622–627. A union that files a claim based on an interpretation of a collective-bargaining agreement with the object of acquiring work for its members, rather than to preserve the work they have traditionally performed, engages in unlawful secondary activity. Specifically, pursuing a claim based on a reading of a contract that would effectively convert a lawfully written provision into a de facto "hot cargo" provision is coercion of a neutral employer in violation of Section 8(b)(4)(ii)(B). However, such a claim is lawful despite the presence of a "cease doing business" object where the primary objective is preserving work for unit employees. *Id.* at 644–645.

The General Counsel next argues ILA's primary dispute is with the State and SCSPA, with the object of trying to obtain the lift-equipment work at the Leatherman Terminal, and it has enmeshed neutrals, USMX and its carrier-members, by threatening to file and filing the lawsuit. In so doing, ILA is alleged to have engaged in threatening, coercing, and restrain-

ing conduct with the object of getting USMX and its carrier-members not to use the Leatherman Terminal. The General Counsel asserts ILA's lawsuit achieved its desired effect by causing USMX carrier-members to demand that SCSPA accommodate their vessels at the Wando Terminal rather than the Leatherman Terminal, and by causing two USMX carrier-members to threaten to skip the Port of Charleston altogether if their request to call somewhere other than the Leatherman Terminal was not accommodated. By enmeshing neutrals into its primary dispute with the State and SCSPA, the General Counsel argues ILA violated Section 8(b)(4)(ii)(B).[27]

In its defense, ILA argues Congress did not intend to outlaw all secondary activity when it enacted and amended Section 8(b)(4); it only intended to prohibit certain conduct aimed at specific objectives. The two-part inquiry for determining if there is a violation is: (1) whether the union's conduct is threatening, coercive, or restraining, and (2) whether it is for a proscribed purpose or object. Citing to *Bill Johnson's* and *BE&K*, among other cases, ILA argues that the First Amendment precludes the Board from finding a well-founded lawsuit, as opposed to a contractual grievance, to be unlawful conduct, because such a finding would inter-

[27] The General Counsel, the State, SCSPA, and USMX contend ILA violated the March 18, 2021 agreement the parties reached after the initial consolidated complaint issued by filing the lawsuit. ILA contends it took pains to abide by its assurances, noting that the Leatherman Terminal is currently open and operating and staffed by ILA members who have not engaged in any strikes, slowdowns, or picketing. ILA also argues its lawsuit does not seek injunctive relief, only damages. Moreover, the lawsuit does not mention Art. VII, Sec. 7 of the Master Contract. The General Counsel argues this omission was deliberate to avoid an obvious Sec. 8(e) violation.

fere with the union's constitutional right to petition the government. ILA further argues that if its conduct is not unlawful, it is unnecessary to determine whether its object was unlawful, because both are required for a violation. The Board rejected a similar argument in *Road Sprinkler Fitters*, supra slip op. at 1 fn. 3, where it held it may enjoin a lawsuit that has an illegal objective under federal law without violating the First Amendment, regardless of whether the lawsuit had an objectively reasonable basis or was filed in good faith. Id.

The issue, therefore, is whether ILA had a lawful work preservation object for filing and amending the lawsuit. As stated, to be valid, the work preservation agreement must: (1) address work traditionally performed by bargaining-unit employees, and (2) the contracting employer must have the right to control who performs the disputed work.

2. Prior Work Preservation vs. Work Acquisition Cases in Maritime Industry

Since *ILA I and II*, the Board and courts have applied the work preservation test in evaluating agreements covering container-handling terminals in the maritime industry, with mixed results.

In *Longshoremen ILA Local 1291 (Holt Cargo Systems, Inc.)*, 309 NLRB 1283 (1992), the agreement required that covered carriers use ILA unit employees to perform all container work, including maintenance and repair. Holt operated at a pier in Gloucester City, New Jersey where it provided stevedoring and warehousing services to three covered carriers that did not directly employ anyone to maintain or repair their shipping containers or chassis. Holt performed this work for the carriers using employees represented by

the Machinists Union, who had performed this work for several years and had been awarded the work, over the ILA, following a 10(k) hearing. Holt later began stevedoring operations at the Packer Avenue Marine Terminal in Philadelphia, where it intended to transfer and consolidate all its operations. It assigned the maintenance and repair work at Packer Avenue Terminal to its Machinists employees. The ILA filed a grievance against the three covered carriers for using non-ILA unit employees to perform the work there, in violation of the agreement. The Board held the grievance violated Section 8(b)(4)(ii)(B) finding ILA's object was to acquire, rather than preserve, work, because its unit employees had never performed the disputed work at that location. In reaching this conclusion, the Board did not consider and, therefore, did not determine the scope of the appropriate bargaining unit.

In *Bermuda Container Lines, Ltd. v. Longshoremen ILA*, 192 F.3d 250 (2d Cir. 1999), the agreement contained terms virtually identical to those in this case. It required that covered carriers employ ILA unit employees to perform all the container work at all ports along the East and Gulf Coasts where covered carriers call to load and unload their ships. Bermuda Container Lines ("BCL"), a covered carrier, sought to relocate a part of its operations from the Port of New York, where ILA-represented employees performed the container-handling work, to the Port of Salem, New Jersey, where non-union labor would have performed that work. The ILA filed a grievance alleging the move would divert work away from the unit employees, in violation of the agreement's work jurisdiction/no-subcontracting provisions. The ruling on the grievance was that BCL was free to relocate the covered work to the Port of Salem but it would incur

liquidated damages of $2,000 for each container that non-ILA workers handled.

BCL filed a federal lawsuit seeking to vacate the ruling, arguing that enforcing the agreement beyond the Port of New York was unlawful secondary activity in violation of Section 8(e), because ILA was using the agreement to acquire the longshoremen work at the Port of Salem, which is work the ILA unit employees had never performed.[28] The Second Circuit rejected this argument:

> [The agreements'] inclusive language indicates that the agreement not only defined the bargaining unit but also the primary employment relationship on a coastwide basis. We reject BCL's attempt to narrow the employment relationship to include only employees of [particular terminals]. The Containerization Agreement was designed to preserve the work of ILA employees in the coastwide bargaining unit and was directed at BCL by virtue of its status in the multi-employer bargaining association . . . . BCL's proposed move to Salem would deplete the number of longshore jobs available to ILA workers in the port of New York and divert them to non-union labor in Salem. This effect would directly hurt existing members of the bargaining unit, and . . . prohibiting BCL's pro-

[28] BCL also filed a charge with the Board alleging the ILA violated Sec. 8(e) of the Act when it filed the grievance and/or obtained the award because the ILA converted the agreement's no-subcontracting clause into an unlawful union signatory clause that applied outside the New York port. The General Counsel's Division of Advice concluded the containerization provisions were valid work preservation provisions that required BCL to use unit employees to service its ships in Salem, which was within the coastwide bargaining unit.

> posed move preserves work within the primary employment relationship.

192 F.2d at 257.

The Court ultimately concluded the contractual provisions at issue had a valid work preservation object directed at the primary employment relationship, and, therefore, were legal under the Act, as was ILA's filing and pursuit of the grievance. Id. at 258.[29]

In *American President Lines v. ILWU*, 611 Fed.Appx. 908, 911 (9th Cir. 2015), the agreement required that covered carriers use ILWU-represented employees to load and unload containers from their ships. The Ninth Circuit held the provision at issue had the lawful primary object of preserving work for the bargaining unit. In reaching this conclusion, the Court held that, in the shipping industry, the bargaining unit is comprised of the multiple employers who are signatory to the operative collective-bargaining agreement, at all covered ports. The inquiry, therefore, is

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[29] The State and SCSPA also cite to *Marrowbone Development Co. v. United Mine Workers of America*, 147 F.3d 296 (4th Cir. 1998), in which the Fourth Circuit in applying the work preservation test determined that even though the employees were covered under a national agreement, the appropriate unit for comparison was the employees represented by the local union, not members of the other locals covered under the same agreement, because Sec. 8(e) "evinces a preference for comparing only the jobs of the particular employer's employees directly affected by the dispute, and not all job descriptions represented in all of a union's various locals" and "regardless of whether the agreement is national in scope, in determining whether it preserves or acquires work, the analysis must focus on the work of the local employees and not those elsewhere." Id. at 303. The key distinction is the local union in that case was the certified bargaining representative of the unit of employees working for the employer at the plant at issue.

whether employees in the coastwide bargaining unit traditionally performed the work at issue, not whether unit employees at a particular port(s) did. The Court, consistent with *ILA I* and *II*, also concluded the carrier-employers had the right to control the disputed work because they owned or leased the containers used to transport goods. Id.

In *Longshoremen ILWU Local 4,* 367 NLRB No. 64 (2019), enf. denied 978 F.3d 625 (9th Cir. 2020), the agreement stated the employer would use its best efforts to preserve covered work for the ILWU work force, which included the movement of cargo on or off ships of any type, and on docks. There was a Section 10(k) jurisdictional dispute between ILWU and IBEW over the electrical maintenance and repair work at a Vancouver, Washington terminal. The Board awarded the work to the IBEW. But before the issuance of that decision, the dispute was arbitrated, and the arbitrator awarded the work to the ILWU. The IBEW filed charges alleging ILWU violated Section 8(b)(4) of the Act. The administrative law judge found the ILWU lawfully sought to preserve bargained-for work performed by other employees in the coastwide bargaining unit. The Board reversed, holding the proper inquiry is "whether employees have performed work for the specific employer, not whether employees in the multiemployer bargaining unit as a whole [did]." 367 NLRB No. 64, slip op. at 4. Further, the Board found the evidence presented, which consisted of testimony from a handful of ILWU-represented employees that performed some disputed work for covered employers and job postings seeking to hire ILWU members for positions that require electrical skills, to be insufficient to establish the coastwide unit traditionally performed the disputed work. Id.

The Ninth Circuit declined to enforce, holding, in relevant part, that the Board performed an "impermissibly narrow construction of the work preservation doctrine" by incorrectly making prior performance of the specific work by unit employees at the specific facility a "talisman," and in so doing, "eluded the inferential and fact-based inquiry required" under *ILA I* and *II*. 978 F.3d at 639–640.[30]

The General Counsel, the State, and SCSPA rely upon the Board decisions in *ILA Local 1291* and *ILWU Local 4* to contend the work preservation test is not met in this matter because: (1) ILA-bargaining unit employees have never performed the lift-equipment work at any of the Port of Charleston Terminals; and (2) SCSPA has the exclusive right to control who performs that work because it owns the necessary equipment. ILA, in contrast, maintains that *Bermuda Container* applies and the test is met here because: (1) the Master Contract covers a coastwide bargaining unit, and employees in that unit have historically performed the lift-equipment work for covered carriers at other ports along the East and Gulf Coasts; and (2) USMX carrier-members ultimately have the right to control who performs the work because they determine which ports they call on to load and unload their owned or leased containers, as evidenced by those

[30] The Court held the Board erred by deeming *ILA I* and *II* inapplicable and reserved only for complex cases of technological displacement, finding, instead, the *ILA* cases applied to both the simple and more complex cases. 978 F.3d at 639. The Court held regardless of the scope, "the inquiry remains the same: focused on bargaining unit workers rather than non-unit workers currently doing the same or similar work; unconcerned with the work's precise location; and accommodative toward change (or even the threat of change), including the elimination of traditional work." Id.

carrier-members that demanded SCSPA redirect their scheduled calls from the Leatherman Terminal to the Wando Terminal, as well as those carriers that threatened to bypass the Port of Charleston altogether if they were not redirected away from the Leatherman Terminal.[31]

3. The Master Contract is a Valid Work Preservation Agreement

The Master Contract indicates the parties intended for a single, multi-port bargaining unit. Article I, Section 2 recognizes that ILA is the exclusive bargaining representative of *all* longshoremen, clerks, checkers, and maintenance employees employed on ship and terminals in *all* ports on the East and Gulf Coasts of the United States, inclusive from Maine to Texas. All references in the Master Contract are to bargaining-*unit* employees. For example, Article II, Section 5 states the work described in the jurisdiction provisions are not to be performed by supervisors or other "non-bargaining unit employees." Article VII, Section 7(a) and (b) refer to the work performed by "Master Contract-bargaining unit employees." Article VII, Section 11 reaffirms ILA's jurisdiction as set forth in the Master Contract, from the point at which the container/cargo comes within the control of the "Master Contract-bargaining-unit members."[32]

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[31] The underlying service agreements between the carrier-members and SCSPA were not presented. As such, the details about the parties' rights and obligations are unknown, aside from Newsome's testimony that SCSPA has the authority to assign what terminal a carrier's ship calls on at the Port of Charleston.

[32] Contrary to the State and SCSPA's argument, I find no indication the parties intended for multiple sub-units with their own scope and contractual arrangements based on geographic location. That is not to say that geography plays no role in the

This language, as well as the contractual similarities with *Bermuda Container*, lead me to conclude that a coastwide unit is appropriate, and there is no dispute that unit employees working at all other ports along the East and Gulf Coasts, except in Charleston, Wilmington, and Savannah, have traditionally performed all the lift-equipment work at issue. The cases relied upon by the General Counsel, the State, and the SCSPA for port-specific units are distinguishable. In *Longshoremen ILA Local 1291*, the Board did not address the appropriateness of the coastwide unit, and unlike *ILWU Local 4*, this case does not involve a jurisdictional dispute between unions claiming work that has been decided through the 10(k) process, and, as stated, there is no dispute employees in the coastwide unit have traditionally performed the lift-equipment work at other ports. Additionally, while SCSPA controls the lift-equipment work at the Port of Charleston Terminals, the USMX carrier-members, like the carrier-members in *ILA I* and *II,* own or lease their containers, and, therefore, determine what ports they call on, which ultimately gives the carriers the right to control who performs the lift-equipment work

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enforcement of relevant provisions of the Master Contract. As discussed, the Containerization Agreement requires that covered carriers and their agents employ ILA-bargaining unit members to perform all container work when they call on ports on the East and Gulf Coast, and it prohibits them from contracting out that work to non-ILA unit employees. However, for nearly 50 years, these provisions have not been applied or enforced against covered carriers that call on the Port of Charleston, where the container work is divided between ILA unit and non-ILA unit employees. The same holds true for the ports in Wilmington and Savannah. As stated, the origin and rationale for this it is not clear from the record, but there is no indication the parties intended to carve out, individually or collectively, these three South Atlantic ports from the multi-port bargaining unit.

on their containers. Thus, under the circumstances presented, I conclude the cited provisions in the Master Contract and Containerization Agreement constitute a valid work preservation agreement.

4. ILA's Lawsuit Seeks Work Acquisition, Not Work Preservation

As discussed, however, a valid work preservation agreement does not shield a union from liability under Section 8(b)(4) when it uses the agreement as a sword to achieve an unlawful, secondary object. *Pipefitters*, 429 U.S. at 520–521. See also *Elevator Constructors*, 289 NLRB at 1095. The Supreme Court has held enforcement of a valid work preservation agreement is lawful *in the face of a threat to unit jobs*, as long as the object is not to monopolize jobs or acquire job tasks outside the unit. *ILA II*, 473 U.S. at 79. See also *National Woodwork*, 386 U.S. at 630; *Pipefitters*, supra at 528–30. See also *Air Line Pilots Ass'n (ABX Air, Inc.),* 345 NLRB 820, 822–823 (2005), enf. denied, 525 F.3d 862 (9th Cir. 2008). Therefore, a condition precedent to finding a lawful work preservation object is evidence of an actual or anticipated threat to unit jobs. See generally *Painters & Allied Trades Dist. Council No. 51 (Manganaro Corp.)*, 321 NLRB 158, 168 fn. 27 (1996) (actual threat of job loss not necessary because the anticipation of a threat can by itself motivate a desire to preserve the work traditionally performed by the unit employees). Cf. *Retail Clerks Local 324 (Ralphs Grocery)*, 235 NLRB 711 (1978) (no work preservation objective where no evidence of unit employees being replaced or any diminution of unit work); *Service Employees, Local 32B-32J (Nevins Realty)*, 313 NLRB 392, 400 (1993) enfd. in relevant part 68 F.3d 490 (D.C. Cir. 1995) ("Where, as here, the unit employees have not lost the work they performed,

let alone [been] threatened with such loss, it is a non-sequitur to assert that the work the union wants to preserve is fairly claimable by the unit"); and *Teamsters Local 25 (Emery Worldwide)*, 289 NLRB 1395, 1397 (1988) (object not work preservation when employees had not lost any work).

ILA relies upon *Bermuda Container*, in which the carrier at issue planned to relocate unit work to another terminal where it would be performed by non-unit employees, resulting in the loss of unit work. Here, however, there is no evidence of any actual or anticipated threat to unit work, only vague speculation.[33] ILA argues, without any evidentiary support, that the unfettered expansion of terminals in Charleston will "by its nature" result in USMX and its carrier-members diverting work from other ports where ILA members perform all the container work to Charleston, to the detriment of the coastwide unit. In addition to lacking any evidentiary support, this argument ignores that Charleston is primarily a regional port. According to Newsome, approximately 30 percent of the cargo delivered there is consumed within the Charleston area, and the "great preponderance" of the rest is consumed in upstate South Carolina, in the Greenville and Spartanburg areas, where BMW, Michelin, and other major customers are located. He further testified that 20-25 percent of the cargo that

[33] ILA argues that because it is enforcing the Master Contract and the Containerization Agreement as it relates to the Leatherman Terminal, and not the Wando and North Charleston Terminals, or the terminals at the ports in Wilmington or Savannah, it is not engaging in unlawful, secondary activity. I reject this argument because, as stated, as a complete cessation is not required for a violation of Sec. 8(b)(4)(ii)(A) or (B). *Road Sprinkler Fitters*, supra, slip op. at 6

goes outside of South Carolina goes to North Carolina, Tennessee, and Alabama. A minimal amount of the cargo ends up in the Midwest, and none in the Northeast. (Tr. 143). ILA offered nothing to refute this evidence, only supposition that "discretionary cargo" work might migrate from ILA-controlled ports to Charleston.[34] I find such evidence is insufficient to establish a threat to unit jobs to lawfully invoke the contractual work preservation provisions.

What is not lacking is the evidence of ILA's desire to obtain all the container work at the Leatherman Terminal, as well as at any future container-handling facilities. ILA denies this, but the evidence tells another story. In the 2020 book about his battles with the South Carolina ports, ILA Vice President and Local 1422 Delegate Kenneth Riley foreshadowed ILA's plan: "The port can build whatever terminals it wants, and it can put in the most expensive cranes and infrastructure it wants at any terminal it wants, but if no ships call on that terminal, then it just got a brand-new terminal with nothing there . . . if there are any new terminals built, and if they are not in compliance with the [Master Contract], the ships will not call on those facilities." ILA Executive Vice President Dennis Daggett chastised Newsome about not assigning all container work at the Leatherman Terminal to ILA members during their October 2020 conversation. Later, during the January 6, 2021 telephone conversation with South Carolina lawmakers, Riley stated that ILA and its local affiliates were interested in consuming all the jobs at the Leatherman Terminal, and were

[34] Discretionary cargo is cargo that can move to one or more ports based upon inland economics. (Tr. 142).

interested in preventing further expansion of the hybrid model.[35]

Based on the foregoing, I conclude ILA's object for its lawsuit against USMX and its carrier-members was work acquisition, not work preservation. I further conclude ILA filed its lawsuit with the object of forcing USMX and its carrier-members to agree that facially valid provisions contained in the Master Contract and Containerization Agreement prohibited them from calling on the Leatherman Terminal unless bargaining-unit employees performed all container work, including the lift-equipment work, in violation of Sections 8(b)(4)(ii)(A) and 8(e). Finally, I conclude that by its lawsuit, ILA also sought to have USMX and its carrier-members cease doing business with the State and SCSPA at the Leatherman Terminal, in violation of Section 8(b)(4)(ii)(B).

CONCLUSIONS OF LAW

1. Hapag-Lloyd (America) LLC and Orient Overseas Container Line, Ltd. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Longshoremen's Association, AFL-CIO, CLC ("ILA") and International Longshoremen's Association, AFL-CIO, CLC, Local 1422 ("ILA") are labor organizations within the meaning of Section 2(5) of the Act.

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[35] Despite this evidence, ILA's brief states it "does not care about the work at one terminal in a mid-size port in the Southeast" and "would be happy if it never gets 'the work' at Leatherman," because it is only interested in the integrity of the bargaining unit as a whole and ensuring that carriers not divert cargo outside the unit.

3. ILA filed its lawsuit against United States Maritime Alliance, Ltd. ("USMX") and Hapag-Lloyd (America) LLC and Orient Overseas Container Line Limited with unlawful objects, in violation of Section 8(b)(4)(ii)(A) and (B) and Section 8(e) of the Act.

4. USMX, ILA and Local 1422 did not enter into or reaffirm any agreement, express or implied, that violates Section 8(e) of the Act.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended.[36]

ORDER

International Longshoremen's Association, AFL-CIO, CLC ("ILA"), its officers, agents, and representatives, shall

1. Cease and desist from

(a) Seeking to enforce or apply through litigation the Master Contract, including Article I, Section 3 and Sections 1, 2, and 9 of our Containerization Agreement, to require any United States Maritime Alliance, Ltd. ("USMX") carrier-member not to call at the Leatherman Terminal because employees of the State of South Carolina are performing covered work there.

(b) Pursuing litigation against USMX, or its carrier-members, where an object of the lawsuit is either (1) to force or require any USMX or its carrier-members to enter into or give effect to an agreement, express or

[36] If no exceptions are filed as provided by Sec. 102.48 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

implied, whereby any employer with whom it does not have a primary dispute ceases or refrains or agrees to cease doing business with any other person, or (2) threaten, restrain, or coerce USMX or its carrier-members to cease doing business with the South Carolina State Ports Authority, the State of South Carolina, or any other person.

(c) Threatening, coercing, or restraining any employer engaged in commerce or in an industry affecting commerce, where an object thereof is either (1) to force or require any employer to enter into or give effect to an agreement, express or implied, whereby any employer with whom it does not have a primary dispute ceases or refrains or agrees to cease doing business with any other person, or (2) to force or require any person to cease doing business with any other person.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Act.

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

(a) Within 14 days from the date of the Board's Order, move to dismiss of our lawsuit against USMX, Hapag-Lloyd (America) LLC, and Orient Overseas Container Line, Ltd., filed on April 22, 2021 and amended on April 26, 2021.

(b) Within 14 days from the date of the Board's Order, reimburse USMX, Hapag-Lloyd (America) LLC and Orient Overseas Container Line, Ltd. for all reasonable expenses and legal fees, with interest, incurred in defending against the lawsuit.

(c) Within 14 days after service by the Region, post at the ILA's business office a copy of the attached notice marked "Appendix."[37] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the COVID-19 pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if ILA customarily communicates with its employees by electronic means. Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the ILA's authorized representative, shall be posted by ILA and maintained for 60 consecutive days in conspicuous places including all places where notices to employees/members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if ILA customarily communicates with its employees/members by such means. Reasonable steps shall be taken by ILA to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, ILA has

[37] If this Order is enforced by a judgment of a United States court of appeals, the words in each of the notices referenced herein reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

gone out of business or closed the facility involved in these proceedings, ILA shall duplicate and mail, at its own expense, a copy of the notice to all current and former members of the Union and current and former employees employed by the Employer at any time since March 30, 2021.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

Dated, Washington, D.C., September 16, 2021,

/s/ Andrew S. Gollin
Andrew S. Gollin
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT interpret our Master Contract, including Article I, Section 3 and Sections 1, 2, and 9 of our Containerization Agreement, to require any United States Maritime Alliance, Ltd. ("USMX") carrier-member not to call at the Leatherman Terminal because employees of the State of South Carolina are performing work there.

WE WILL NOT pursue litigation against USMX, or its carrier-members, where an object of the lawsuit is either (1) to force or require any USMX or its carrier-members to enter into or give effect to an agreement, express or implied, whereby any employer with whom it does not have a primary dispute ceases or refrains or agrees to cease doing business with any other person, or (2) threaten, restrain, or coerce USMX or its carrier-members to cease doing business with the

South Carolina State Ports Authority, the State of South Carolina, or any other person.

WE WILL NOT threaten, coerce, or restrain any employer engaged in commerce or in an industry affecting commerce, where an object thereof is either (1) to force or require any employer to enter into or give effect to an agreement, express or implied, whereby any employer with whom it does not have a primary dispute ceases or refrains or agrees to cease doing business with any other person, or (2) to force or require any person to cease doing business with any other person.

WE WILL move to dismiss of our lawsuit against USMX, Hapag-Lloyd (America) LLC, and Orient Overseas Container Line, Ltd. filed on April 22, 2021 and amended on April 26, 2021.

WE WILL reimburse USMX, Hapag-Lloyd (America) LLC, and Orient Overseas Container Line, Ltd. for all reasonable expenses and legal fees, with interest, incurred in defending against the lawsuit.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, CLC

Dated: _____

By: _____
(Representative)
(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a

charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

4035 University Parkway, Ste. 200
Winston Salem, NC 27106-3275
Telephone: (336)631-5201
Hours of Operation: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/10-CE-271046 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE