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**MEMORANDUM OPINION, U.S. COURT OF  
APPEALS FOR THE NINTH CIRCUIT  
(AUGUST 22, 2025)**

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NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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SAMSON TUG AND BARGE CO., INC,

*Plaintiff-Appellant,*

and

MARINE ENGINEERS' BENEFICIAL, AFL-CIO,

*Plaintiff,*

v.

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, ALASKA LONGSHORE  
DIVISION; INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, UNIT 222,

*Defendants-Appellees.*

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No. 24-5730

D.C. Nos. 3:20-cv-00108-TMB  
3:20-cv-00248-TMB-MMS

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App.2a

SAMSON TUG AND BARGE CO., INC,

*Plaintiff-Appellee,*

v.

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, ALASKA LONGSHORE  
DIVISION; INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, UNIT 222,

*Defendants-Appellants.*

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No. 24-6017

D.C. No. 3:20-cv-00108-TMB

Appeal from the United States District Court for the  
District of Alaska Timothy M. Burgess,  
Circuit Judge, Presiding

Argued and Submitted  
August 15, 2025 Anchorage, Alaska

Before: GRABER, OWENS, and  
R. NELSON, Circuit Judges.

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**MEMORANDUM\***

Plaintiff Samson Tug and Barge Company brought claims under the Labor Relations Management Act against Defendants International Longshore and Warehouse Union, Alaska Longshore Division and Unit 222. Plaintiff appeals from the summary judgment

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

entered in favor of Defendants. We have jurisdiction under 28 U.S.C. § 1291. Reviewing *de novo*, *Donnell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008), we affirm.

1. Defendants are entitled to a complete defense as to Plaintiff's claims under the work preservation doctrine. *See NLRB v. Int'l Longshoremen's Ass'n*, 473 U.S. 61, 81–82 (1985) (holding that when the objective of an agreement and the purpose behind its enforcement is “work preservation,” the union does not violate 29 U.S.C. § 158(b)(4)(B) or § 158(e)(6)); *Int'l Longshore & Warehouse Union v. NLRB*, 978 F.3d 625, 637 (9th Cir. 2020) (holding that a “valid work preservation objective provides a complete defense against alleged violations of section 8(b)(4)(D) . . .”).

Here, the longshore work conducted at the Womens Bay terminal falls under the purview of the All-Alaska Longshore agreement (“AALA”) because the terminal is owned by Matson Navigation Company, which is an employer that is a signatory to the AALA. The AALA provides that Defendants’ members “shall operate all cargo handling equipment on facilities owned or operated by Signatory Employers for movement and handling of the cargo/equipment on behalf of the Employer . . . and [n]on-signatory employees shall not operate any cargo handling equipment on facilities owned or operated by Signatory Employers beyond an area designated and agreed to jointly by the parties.” (Emphasis added). Moreover, Defendants’ members had in fact performed work at the terminal for two years, before pursuing arbitration. Accordingly, Defendants’ pursuit of arbitration was for a valid work preservation purpose.

2. The district court erred by denying as moot Defendants’ motion for Rule 11 sanctions, without

considering the motion on the merits. An entry of summary judgment does not render a pending motion for Rule 11 sanctions moot. *See Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 631 (9th Cir. 2016) (“Even where one issue in a case has been rendered moot, others may remain.”).

AFFIRMED in part, REVERSED in part, and REMANDED for additional proceedings consistent with this disposition. The parties shall bear their own costs on appeal.

**JUDGMENT IN A CIVIL ACTION,  
U.S. DISTRICT COURT FOR  
THE DISTRICT OF ALASKA  
(SEPTEMBER 12, 2024)**

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UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF ALASKA

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SAMSON TUG AND BARGE, CO., INC.,

*Plaintiff,*

v.

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, ALASKA LONGSHORE  
DIVISION, and ILWU, UNIT 222,

*Defendant.*

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Civil Action No. 3:20-cv-00108-TMB

Civil Action No. 3:20-cv-00248-TMB

Before: Timothy M. BURGESS, U.S. District Judge.

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**JUDGMENT IN A CIVIL ACTION**

- DECISION BY COURT. This action came to trial or decision before the Court. The issues have been tried or determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

App.6a

THAT Plaintiff's claims in its Third Amended Complaint are DISMISSED with prejudice.

APPROVED:

/s/ Timothy M. Burgess  
U.S. District Judge

Candice M. Duncan  
Clerk of Court

Date: September 12, 2024

*Note: Award of prejudgment interest, costs and attorney's fees are governed by D. Ak. LR 54.1, 54.2, and 58.1.*

**ORDER ON MOTIONS FOR SUMMARY  
JUDGMENT, U.S. DISTRICT COURT FOR  
THE DISTRICT OF ALASKA  
(AUGUST 22, 2024)**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

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SAMSON TUG AND BARGE, CO., INC.,

*Plaintiff,*

v.

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, ALASKA LONGSHORE  
DIVISION, and ILWU, UNIT 222,

*Defendant.*

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Civil Action No. 3:20-cv-00108-TMB  
Civil Action No. 3:20-cv-00248-TMB  
Consolidated

(DKTS. 231, 232, 249, 270)

Before: Timothy M. BURGESS, U.S. District Judge.

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**ORDER ON MOTIONS  
FOR SUMMARY JUDGMENT  
(DKTS. 231, 232, 249, 270)**

## I. Introduction

The matter comes before the Court on Defendants International Longshore and Warehouse Union, Alaska Longshore Division, and International Longshore and Warehouse Division, Unit 222's (collectively, "ILWU") Motion for Summary Judgment (the "Motion")<sup>1</sup> and Plaintiff Samson Tug and Barge Co., Inc.'s ("Samson") Motion for Partial Summary Judgment on Affirmative Defenses (the "Cross-Motion").<sup>2</sup> Pursuant to Federal Rule of Civil Procedure ("Rule") 56, ILWU seeks "summary judgment dismissing all Plaintiff Samson Tug and Barge Co., Inc.'s claims on the grounds that there are no genuine issues of material fact warranting trial, and that ILWU is entitled to judgment as a matter of law."<sup>3</sup> Samson opposes the Motion,<sup>4</sup> and "moves for partial summary judgment against [ILWU]... dismissing [ILWU's] non-neutral affirmative defense and work preservation affirmative defense."<sup>5</sup> ILWU

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<sup>1</sup> Dkt. 232 (ILWU's Redacted Notice of Motion and Motion for Summary Judgment); Dkt. 270 (ILWU'S Unredacted Notice of Motion and Motion for Summary Judgment).

<sup>2</sup> Dkt. 231 (Samson's Motion for Partial Summary Judgment on Affirmative Defenses); Dkt. 249 (Samson's Corrected Motion for Partial Summary Judgment as to Affirmative Defenses). Samson also filed a Motion for Partial Summary Judgment on Liability. Dkt. 230 (Samson's Motion for Partial Summary Judgment on Liability); Dkt. 245 (Samson's Motion for Partial Summary Judgment as to Liability Under NLRA Section 8(b)(4)).

<sup>3</sup> Dkt. 270 at 2.

<sup>4</sup> Dkt. 274 (Samson's Response in Opposition to ILWU's Motion for Summary Judgment).

<sup>5</sup> Dkt. 249 at 8.

opposes the Cross-Motion,<sup>6</sup> and requested oral argument,<sup>7</sup> but the Court finds that it would not be helpful. For the reasons stated below, the Court GRANTS ILWU’s Motion at Dockets 232 and 270 and DENIES Samson’s Cross-Motion at Dockets 231 and 249.

## II. Background

### A. Procedural History.

This case arises from alleged unfair labor practices committed by ILWU under Section 303 of the Labor Management Relations Act (“LMRA”).<sup>8</sup>

ILWU Alaska Longshore Division and ILWU, Unit 222 are unincorporated labor organizations representing longshore workers in certain Alaskan ports, including the Port of Kodiak.<sup>9</sup> ILWU is party to a multi-employer collective bargaining agreement called the ILWU All Alaska Longshore agreement (“AALA”), along with Matson Navigation Company of Alaska (“Matson”), American President Lines, Ltd. (“APL”), CMA Terminals of Alaska (“CMAT-A”), and other

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<sup>6</sup> Dkt. 271 (ILWU’s Response in Opposition to Samson’s Motion for Partial Summary Judgment on Affirmative Defenses).

<sup>7</sup> Dkt. 270 at 1.

<sup>8</sup> See Dkt. 225 (Samson’s Third Amended Complaint for Damages) at 2; Dkt. 270 at 10–11.

<sup>9</sup> Dkt. 225 at 3; Dkt. 270 at 10–11; Dkt. 270-23 (Corrected Declaration of Dennis Young) at 2; Dkt. 270-13 (All Alaska Longshore agreement) at 83 (listing Kodiak as an “ILWU Port”).

signatory employers.<sup>10</sup> The AALA was in effect at all relevant times in this matter, and covers the Port of Kodiak.<sup>11</sup>

The AALA requires signatory employers<sup>12</sup> to “use [their] best efforts and act in good faith in preserving as much as possible all of the work covered by this Contract for the registered work force.”<sup>13</sup> ILWU asserts that “registered work force” refers to “all ILWU longshore workers in all covered ports.”<sup>14</sup> A Letter of Understanding (“LOU No. 12”) implementing the AALA requires that “ILWU Longshoremen shall operate all cargo[-]handling equipment on facilities owned or operated by Signatory Employers for movement and handling of the cargo/equipment on behalf of the Employer.”<sup>15</sup> It further prohibits “[n]on-signatory employees [from] operat[ing] any cargo[-]handling equipment on facilities owned or operated by Signatory

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<sup>10</sup> Dkt. 225 at 5; Dkt. 270 at 11; Dkt. 13 (Declaration of Dennis Young in Support of ILWU’s Motion to Dismiss Petition to Vacate Arbitration Award) at 2; *see also* Dkt. 270-13 at 73–140.

<sup>11</sup> Dkt. 270 at 11; Dkt. 270-23 at 3.

<sup>12</sup> The AALA defines a signatory employer as “[a]n Employer in a port covered by this Contract Document who is signatory to this agreement or joins the Association of Employers signatory hereto subsequent to the execution [who] becomes subject to this Contract Document. Employers working a port covered by this agreement, must sign this agreement.”). Dkt. 270-13 at 83 (setting out AALA § 1.81).

<sup>13</sup> Dkt. 270-13 at 107 (setting out AALA § 7.641).

<sup>14</sup> Dkt. 270 at 13.

<sup>15</sup> Dkt. 270-14 (Letter of Understanding No. 12) at 26.

Employers beyond an area designated and agreed to jointly by the parties.”<sup>16</sup>

All AALA employers employ longshore workers in all covered ports based on a single, centrally governed list of registered longshore workers statewide.<sup>17</sup> Further, ILWU longshore workers’ benefits are centrally administered by ILWU and AALA signatory employers, allowing employees to receive benefits from pooled funds, earned annually through combined hours worked for any signatory employers in any covered ports.<sup>18</sup>

Samson is an Alaska corporation that operates tug and barge services within the State of Alaska.<sup>19</sup> Samson is not a party to or beneficiary of the AALA or any other agreements or contracts with ILWU.<sup>20</sup> Samson leases space from Matson in the Port of Kodiak to conduct its operations there.<sup>21</sup> Historically, Samson employed Marine Engineers’ Beneficial Association, AFL-CIO (“MEBA”) members at the terminal to load and unload cargo, including cargo for

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<sup>16</sup> *Id.*

<sup>17</sup> Dkt. 270 at 12; Dkt. 270-23 at 4.

<sup>18</sup> Dkt. 270 at 12; Dkt. 270-23 at 4–5.

<sup>19</sup> Dkt 225 at 3–4

<sup>20</sup> *Id.*; Dkt. 270-23 at 5.

<sup>21</sup> Dkt. 225 at 4–5; *see* Dkt. 270-13 (agreement to Amend Lease) at 32–34; Dkt. 270-14 (Second agreement to Amend Lease) at 133–55.

American President Lines, Inc. (“APL”).<sup>22</sup> Samson has never employed ILWU-represented employees.<sup>23</sup>

In 2015, the Kodiak Joint Port Labor Relations Committee and AALA bargaining parties formalized an agreement for operations in the Port of Kodiak at a dock owned by LASH Corporation (“LASH”), a non-AALA employer.<sup>24</sup> This agreement established a “neutral zone” to operate the LASH Dock, where Samson employees would drop APL containers after unloading, and ILWU workers would pick them up and load them onto Samson’s barges.<sup>25</sup> This neutral zone operation was binding on all AALA employers at the Port of Kodiak, including Matson.<sup>26</sup> Samson subleased a portion of the LASH Dock to APL to operate this neutral zone.<sup>27</sup>

On August 5, 2016, Samson and Matson renegotiated the terms of their lease agreement, modifying Samson’s lease from a multi-year to a month-to-month term, with a right of termination with 30 days’ notice by either party.<sup>28</sup> On or around March 1, 2017, Matson

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<sup>22</sup> Dkt. 225 at 3–4. According to the parties, APL is a party to the AALA, while Samson and MEBA are not. Dkt. 175 (ILWU Motion to Compel) at 5.

<sup>23</sup> Dkt. 270 at 13.

<sup>24</sup> *Id.* at 15; Dkt. 270-23 at 7.

<sup>25</sup> Dkt. 270 at 15–16; Dkt. 270-23 at 7–8.

<sup>26</sup> Dkt. 270 at 15–16; Dkt. 270-23 at 7–8.

<sup>27</sup> Dkt. 270 at 15; Dkt. 270-23 at 7; *see* Dkt. 270-14 at 133–155.

<sup>28</sup> Dkt. 270 at 16; Dkt. 270-23 at 8; Dkt. 270-13 at 32–34; Dkt. 270-14 at 133–55.

purchased the LASH Dock from LASH, renaming it Womens Bay Terminal and assuming LASH's sublease with Samson with the month-to-month modification.<sup>29</sup> ILWU was not involved in or aware of this renegotiation.<sup>30</sup> But ILWU asserts, and Matson concedes, that this lease gave Matson greater "control over [Samson's] day-to-day operations" than LASH had, both because Matson could pressure Samson with the threat of eviction on one month's notice and because Matson owned the terminal and could set rates.<sup>31</sup>

According to ILWU, in early 2018, Matson informed APL that it would no longer ship APL's cargo.<sup>32</sup> ILWU states that Matson then ordered Samson, under threat of eviction, to terminate its sublease with APL at Womens Bay Terminal and to cease handling APL cargo at that location, eliminating the neutral zone at LASH Dock.<sup>33</sup> Samson reportedly complied.<sup>34</sup>

After the LASH Dock neutral zone was eliminated, APL moved its operations to another pier in the Port of Kodiak ("Pier II"), which had different needs for

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<sup>29</sup> Dkt. 270-13 (LASH Warranty Deed) at 6–7; Dkt. 270 at 16; Dkt. 270-23 at 8.

<sup>30</sup> Dkt. 270 at 17 n.6, 26; Dkt. 270-23 at 8, 12–13.

<sup>31</sup> Dkt. 270 at 16; Dkt. 270-23 at 8; Dkt. 270-11 (Deposition of Jennifer Tungul) at 47.

<sup>32</sup> Dkt. 175 at 6.

<sup>33</sup> Dkt. 270 at 17; Dkt. 270-22 (Declaration of Gary Fincher) at 3–4; Dkt. 270-23 at 8.

<sup>34</sup> Dkt. 175 at 6.

workers, particularly truck drivers.<sup>35</sup> ILWU states that up until this point, APL had been hiring ILWU longshore workers pursuant to the AALA and a 2015 agreement between APL and Matson.<sup>36</sup> ILWU asserts that Matson “unilaterally broke this agreement, which eliminated work opportunities for ILWU” at Womens Bay Terminal.<sup>37</sup> ILWU alleges that it “lost all of the truck driving work [there], amounting to approximately 3,600 hours of work per year,” and lost work and advancement opportunities for the approximately 21 casual workers who worked as truck drivers “almost exclusively” at Womens Bay Terminal.<sup>38</sup>

ILWU proceeded to file a grievance against Matson, seeking assignment of work at Womens Bay Terminal to ILWU-represented longshore workers under the AALA.<sup>39</sup> On June 3, 2019, Alaska Arbitrator Herald C. Ugles found that Matson’s ownership of the dock facility at Womens Bay did not violate sections of the AALA and denied ILWU’s grievance.<sup>40</sup> Specifically, the Alaska Arbitrator found that “Samson’s operation at the . . . dock was not a subterfuge for Matson operating without [ILWU] participation.”<sup>41</sup> ILWU appealed the decision to the Alaska Area

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<sup>35</sup> Dkt. 270 at 18; Dkt. 270-22 at 4.

<sup>36</sup> Dkt. 270 at 18.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; Dkt. 270-22 at 4–5.

<sup>39</sup> Dkt. 270 at 19; Dkt. 270-23 at 8–9.

<sup>40</sup> Dkt. 270-13 (Alaska Arbitrator’s Decision) at 8–9.

<sup>41</sup> *Id.*

Committee and then to the Coast Arbitrator, John Kagel.<sup>42</sup>

On February 13, 2020, Coast Arbitrator Kagel issued an Opinion & Decision vacating the Alaska Arbitrator decision and finding that the AALA and LOU No. 12 required Matson to assign all cargo-handling work at Womens Bay Terminal to ILWU-represented longshore workers (the “February 2020 Award”).<sup>43</sup> Coast Arbitrator Kagel found that the AALA was enforceable because “[Matson] had substantial leverage over Samson, including by terms of its lease[.]”<sup>44</sup> Further, he noted that

[LOU No. 12] Section 3, by its own language, goes further, barring non-signatory, non-ILWU employees from operating cargo[-]handling equipment on the Matson owned dock for any shipper, whether they are signatory Employers other than Matson, or others, without [ILWU] agreement. . . . The Alaska Arbitrator found that Matson had no financial interest in Samson’s operation, other than rent, and that Samson’s operation at the LASH dock [Womens Bay Terminal] was not a subterfuge for Matson operating without [ILWU] participation. However, while that conclusion is not disputed, that alone is not what the agreement requires, for the agreement must be applied as written . . . and

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<sup>42</sup> Dkt. 270 at 19; Dkt. 270-23 at 10.

<sup>43</sup> Dkt. 270-13 (Coast Arbitrator’s February 13, 2020 Decision) at 10–18.

<sup>44</sup> *Id.* at 17.

Section 3 of the LOU cannot be ignored. The agreement requires it be so enforced.<sup>45</sup>

Therefore, pursuant to the AALA and LOU No. 12, in the February 2020 Award, Coast Arbitrator Kagel ordered Matson to ensure that ILWU-represented longshore workers handled Samson cargo operations at Womens Bay Terminal.<sup>46</sup>

On March 4, 2020, Matson and ILWU reached an agreement to implement the February 2020 Award.<sup>47</sup> Under this agreement, “(1) Matson [would] comply with [the] Coast Arbitrator[‘s] . . . [A]ward, and (2) ILWU [would] accept time in lieu (*i.e.* unpaid wages and benefits) *from Matson* until Matson negotiated a terminal service agreement with Samson and obtained necessary cargo[-]handling equipment to perform the work.”<sup>48</sup> As a result, ILWU submitted “time in lieu” cards to Matson consistent with agreed-upon minimum manning at Womens Bay Terminal.<sup>49</sup>

On May 5, 2020, President of ILWU Alaska Longshore Division Dennis Young (“Young”) contacted MEBA and proposed a compromise whereby MEBA would disclaim work at Pier II and ILWU would disclaim work at Womens Bay Terminal on non-

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<sup>45</sup> *Id.* at 16–17.

<sup>46</sup> *Id.* at 18.

<sup>47</sup> Dkt. 270 at 20; Dkt. 270-23 at 10–11.

<sup>48</sup> Dkt. 63 (ILWU’s Response in Opposition to Samson’s Motion for Preliminary Injunction) at 11 (emphasis in original); *see* Dkt. 270-23 at 11.

<sup>49</sup> Dkt. 270 at 21; Dkt. 270-15 (Petition to Vacate Arbitration Decision) at 70.

AAALA cargo, which would preserve the workforces of both unions.<sup>50</sup> The email also reported that “Matson met with Samson to discuss options that the ILWU [had] discussed with [Matson],” including: (1) recognize ILWU jurisdiction at Pier II in Kodiak, while allowing Samson to continue operations at Womens Bay Terminal for the purposes of moving Samson equipment and cargo; (2) use ILWU members to perform all longshore services at Womens Bay Terminal, allowing Samson to pick up and deliver cargo via truck; or (3) terminate Samson’s lease of the Womens Bay Terminal.<sup>51</sup> However, ILWU asserts that Matson never responded to this proposal.<sup>52</sup>

On June 16, 2020, Samson entered into a Terminal Services agreement with Matson to continue its cargo operations at Womens Bay Terminal with its MEBA employees, so long as Samson reimbursed Matson and paid additional “time in lieu” wages for ILWU-claimed work (“Terminal Services agreement”).<sup>53</sup>

In October 2020, Samson filed a Complaint against ILWU for damages under Section 303 of the Labor Management Relations Act (“LMRA”).<sup>54</sup> In its Com-

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<sup>50</sup> Dkt. 270 at 21–22; Dkt. 270-13 at 19 (providing email from Dennis Young to MEBA employees).

<sup>51</sup> Dkt. 270-13 at 19.

<sup>52</sup> *Id.* at 28; Dkt. 225-6 (Young Email).

<sup>53</sup> Dkt. 270-14 (Terminal Services agreement) at 95–103; Dkt. 270 at 26.

<sup>54</sup> Case No. 3:20-cv-00248-TMB, Dkt. 1 (Complaint). This is Samson’s sole remaining claim. The Court dismissed Samson’s petition to vacate an arbitration award and claim for injunctive

plaint, Samson alleged ILWU violated National Labor Relations Act (“NLRA”) Sections 8(b)(4)(ii)(A), (B), and (D), and 8(e) by threatening, coercing, or restraining an employer with the objective of forcing it to assign work to a particular union instead of another.<sup>55</sup> Samson argued ILWU acted coercively by “seeking an arbitration order, in a proceeding to which Samson was not a party, that sought to require Samson’s landlord [Matson] to use its substantial leverage to force Samson to hire ILWU members.”<sup>56</sup>

ILWU alleges it first learned of Samson and Matson’s Terminal Services agreement on December 7, 2020, through a filing in this case.<sup>57</sup> Before then, it alleges, “Matson did not inform ILWU of the agreement’s existence, of its terms generally, of its terms allowing for Samson to continue using its own labor at Womens Bay Terminal, of its terms for Matson to pass time in lieu charges to Samson, of its terms for Samson to indemnify Matson, or of its terms specifying that Samson’s sole remedy would be against ILWU.”<sup>58</sup> On December 29, 2020, ILWU sought a ruling from Coast Arbitrator Kagel asking him to enforce the February 2020 Award and find Matson in violation of its terms by entering into an agreement with Samson that allowed Samson’s employees to continue per-

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relief. Case No. 3:20-cv-00108-TMB, Dkt. 82 (Order); Dkt. 85 (Order).

<sup>55</sup> Case No. 3:20-cv-00248-TMB, Dkt. 1.

<sup>56</sup> Dkt. 143 (Memorandum in Support of Second Motion to Amend Complaint) at 3.

<sup>57</sup> Dkt. 270 at 26; Dkt. 270-23 at 12–13.

<sup>58</sup> Dkt. 270 at 27.

forming work Matson was required to designate to ILWU-represented longshore workers.<sup>59</sup>

On October 4, 2021, Coast Arbitrator Kagel granted ILWU’s motion to enforce the February 2020 Award (“October 2021 Award”).<sup>60</sup> Coast Arbitrator Kagel found Matson in violation of the Award’s terms, noting that the agreement between Samson and Matson “purported to honor [LOU No. 12] . . . then [] effectively cancelled that provision by Samson’s ability to ‘request’ to supply its own, non-ILWU cargo-handling labor, [] reimbursing Matson for Matson paying in-lieu to the ILWU[,] [and]. . . provid[ing] that Samson would not sue Matson, and would also indemnify Matson, if necessary.”<sup>61</sup> He ordered all AALA employers, including Matson, not to “permit or enter into any agreement permitting nonsignatory employees to operate cargo-handling equipment on any facilities they own or operate without reaching a written agreement with ILWU, designating an area where such nonsignatory employees may work in the Ports of Kodiak and Dutch Harbor.”<sup>62</sup>

On September 13, 2023, Young filed a Motion for Enforcement and Remedy requesting that Coast Arbitrator Kagel enforce the February 2020 Award

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<sup>59</sup> *Id.*

<sup>60</sup> Dkt. 270-17 (Coast Arbitrator’s October 4, 2021 Decision) at 80–89; Dkt. 270 at 30–31; Dkt. 270-23 at 13.

<sup>61</sup> Dkt. 270-17 at 87–88.

<sup>62</sup> *Id.* at 81.

and his October 2021 Award.<sup>63</sup> Young also asked Arbitrator Kagel to issue an order directing Matson to “(1) pay to ILWU any and all damages awarded to Samson, against ILWU, for the time in lieu payments invoiced by Matson to Samson pursuant to the Terminal Services agreement and (2) reimburse ILWU for any legal fees and costs incurred in defense of this lawsuit—both prospectively and retrospectively.”<sup>64</sup> On September 22, 2023, Matson provided Samson with ILWU’s request and notified Samson of Matson’s intent to seek indemnity from Samson for costs and damages resulting from ILWU’s claims, pursuant to Samson’s contractual obligations to Matson under the Terminal Services agreement.<sup>65</sup>

On October 6, 2023, Samson moved to amend its Complaint to add factual allegations that ILWU filed the September 2023 Motion for Enforcement Remedy and that Matson notified Samson of its intent to seek indemnity.<sup>66</sup> Samson also moved to update its damages to include “such other damages relating to and caused by the claims arising from” these allegations and to remove all allegations against International Longshore and Warehouse Union, which was no longer a party to

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<sup>63</sup> Dkt. 270-40 (ILWU Motion for Enforcement and Remedy) at 2–4.

<sup>64</sup> *Id.* at 4; Dkt. 270 at 52; Dkt. 270-23 at 14.

<sup>65</sup> Dkt. 270-41 (Matson Letter) at 2–3; Dkt. 270 at 52; Dkt. 270-23 at 14; Dkt. 270-38 (Tungul Email) at 25–26.

<sup>66</sup> Dkt. 212 (Motion to Amend Second Amended Complaint for Damages) at 10–11.

the case.<sup>67</sup> Samson claimed that ILWU misuse[d] . . . the arbitration process” and “interpret[ed] [the AALA] to require Matson [to] use its substantial leverage to force Samson to hire ILWU members,” which it argued “makes [the AALA] an illegal ‘Hot Cargo’ agreement under 29 U.S.C. §§ 158(b)(4)(ii)(A) and 158(e).”<sup>68</sup> Samson maintained that in filing the Motion for Enforcement and Remedy, ILWU “[sought] enforcement of an illegal hot cargo agreement which would result in further monetary damages to Samson.”<sup>69</sup> Construing Samson’s motion as a motion to supplement, the Court granted Samson’s Motion to Amend.<sup>70</sup> Samson filed its Third Amended Complaint on February 20, 2024, “incorporat[ing] these recent actions by Defendants in the factual bases for Samson’s claims for relief.”<sup>71</sup>

On October 9, 2023, Young sent another letter to Coast Arbitrator Kagel, “urging him to also order Matson to (1) cease and desist from enforcing or applying Article VII of its [Terminal Services agreement] with Samson; (2) withdraw its notice of

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<sup>67</sup> *Id.* at 14–15.

<sup>68</sup> Dkt. 213 (Memorandum in Support of Motion to Amend Second Complaint for Damages) at 3. A “hot cargo agreement” is an unfair labor practice defined under 29 U.S.C. § 158(e) as a contract or agreement prohibiting an employer from conducting business with any other person or employer. 29 U.S.C. § 158(e). Hot cargo agreements are “unenforceable and void” unless an exception applies. *Id.*

<sup>69</sup> Dkt. 213 at 4.

<sup>70</sup> Dkt. 224 (Order Granting Motion to Amend/Correct).

<sup>71</sup> Dkt. 225 (Third Amended Complaint).

indemnification to Samson; and (3) inform Samson that pursuant to his October 4, 2021 award, Matson is prohibited from enforcing or applying Article VII of the [Terminal Services agreement].”<sup>72</sup>

**B. ILWU’s Motion for Summary Judgment.**

On April 30, 2024, ILWU filed the present Motion requesting summary judgment, arguing that “there are no genuine issues of material fact warranting trial, and that ILWU is entitled to judgment as a matter of law.”<sup>73</sup> ILWU provides four reasons.<sup>74</sup>

First, it argues that “Samson’s Section 303 claim fails as a matter of law.”<sup>75</sup> It submits that its “work preservation objective is a complete defense to Samson’s claims because [it] had a colorable claim that the work in dispute is fairly claimable and Matson had the right to control it.”<sup>76</sup> Pointing to United States Supreme Court and National Labor Relations Board (“NLRB”) precedents routinely upholding work preservation agreements, ILWU argues that the “ILWU Alaska longshore bargaining unit has always been similarly recognized as comprising the statewide ‘pool of longshore workers’ represented by the ILWU and employed by various employers, including carriers like Matson

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<sup>72</sup> Dkt. 270-42 (Young October 2023 Letter) at 2.

<sup>73</sup> Dkt. 232; Dkt. 270.

<sup>74</sup> Dkt. 270 at 2.

<sup>75</sup> *Id.* at 35.

<sup>76</sup> *Id.* at 32.

and APL, under the AALA in all covered ports throughout Alaska.”<sup>77</sup>

Further, ILWU argues that the February 2020 Award does not violate Section 8(e) of the NLRA because it “is a lawful work preservation application of the AALA” and “merely preserves traditional longshore work for ILWU bargaining unit employees” but “does not satisfy secondary union objectives.”<sup>78</sup> Specifically, ILWU notes that the Award is lawful under the work preservation doctrine because it is “fairly claimable in that it has been traditionally performed by ILWU longshore workers, and Matson had the right to control the work,” *i.e.*, “the power to assign cargo[-]handling work at Womens Bay Terminal to ILWU longshore workers.”<sup>79</sup>

Moreover, ILWU suggests that regardless of whether the February 2020 Award was lawful, Samson’s claims fail because “ILWU lost bargaining unit cargo[-]handling work at the exact location of the work in question.”<sup>80</sup> Therefore, it asserts, it “had a colorable claim for lawful work preservation in enforcing its collective bargaining agreement against Matson,” which “leaves Samson without a triable material question of fact.”<sup>81</sup>

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<sup>77</sup> *Id.* at 35–36.

<sup>78</sup> *Id.* at 37.

<sup>79</sup> *Id.* at 36–41.

<sup>80</sup> *Id.* at 43.

<sup>81</sup> *Id.* at 41–43.

ILWU also argues that Samson's claims fail because ILWU did not violate Section 8(b)(4)(D).<sup>82</sup> Citing NLRB decisions, it suggests that "it is not unlawful for a union to file 'arguably meritorious work assignment grievances prior to the issuance of the Board's 10(k) determination.'"<sup>83</sup> Aside from ILWU lawfully pursuing its own grievance, it submits that "Samson cannot point to any action causing its purported damages other than the pursuit and enforcement of the Coast Arbitrator's Award and there is no Section 10(k) award affecting the work in question."<sup>84</sup> Therefore, "[its] theory under Section 8(b)(4)(D) also fails as a matter of law because under *Georgia-Pacific*, there is no NLRA coercion as that term is understood and applied by the NLRB."<sup>85</sup>

Second, ILWU argues that Samson is not a neutral employer and therefore cannot make a Section 303 claim.<sup>86</sup> Rather, as a "third party company to whom an employer might divert work to escape the contract with a union," Samson "[became] entangled in the vortex of the primary dispute between the contractor [Matson] and the union [ILWU]" by "knowingly assist[ing] [Matson] in connection with the labor dispute."<sup>87</sup> It alleges that "Samson (1)

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<sup>82</sup> *Id.* at 43–44.

<sup>83</sup> *Id.* at 43–44 (quoting *Longshoremen ILWU Loc. 7 (Georgia-Pac.)*, 291 NLRB 89, 90 (1988)).

<sup>84</sup> *Id.* at 44.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 44–47.

<sup>87</sup> *Id.* at 45.

coordinated with Matson on preparing, filing, and litigating this lawsuit in support of their joint venture to repudiate the Coast Arbitrator's Award; (2) entered into an agreement with Matson to enable Matson to avoid its contractual obligations to ILWU; and (3) manufactured its purported damages by agreeing to pay time in lieu to Matson with the intent to sue ILWU to recover the money.”<sup>88</sup> As such, it argues Samson cannot make a Section 303 claim because it is not a neutral employer.<sup>89</sup>

Third, ILWU suggests that even if there is a triable issue on ILWU's work preservation and neutrality affirmative defenses, “Samson's intervening actions further preclude a jury from finding that ILWU caused any of its claimed damages.”<sup>90</sup> Instead, it asserts that “Matson's and Samson's actions, not ILWU's[,] are superseding causes to Samson's alleged damages of paying Matson time in lieu,” and “[t]here is no genuine dispute that ILWU did not cause Samson to enter into the agreement with Matson that allowed Matson to charge Samson for time in lieu” and that it “could not have done so as [ILWU] [was] completely unaware that the agreement even existed.”<sup>91</sup>

Fourth, ILWU argues that “Samson cannot avoid summary judgment by relying on other allegations in the [Third Amended Complaint] because none are

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<sup>88</sup> *Id.* at 46.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 47–48.

<sup>91</sup> *Id.* at 48.

supported by evidence.”<sup>92</sup> Rather, it notes that Samson can only point to ILWU lawfully “(1) pursuing the grievance against Matson to Coast Arbitrator Kagel, and (2) enforcing the resulting Coast Arbitrator’s Award” as the cause of its damages.<sup>93</sup> ILWU indicates that, as Samson concedes, there is no evidence in the record that ILWU made any demands on Samson nor insisted Matson charge Samson for time in lieu.<sup>94</sup> Moreover, ILWU argues that Samson incurred no damages as a result of ILWU seeking enforcement of the February 2020 and October 2021 Awards.<sup>95</sup> Rather, it suggests that any damages Samson incurred were caused by “Matson[‘s] violat[ion] [of] the Award by entering into the agreement with Samson instead of complying with the [A]ward by ensuring ILWU labor was used for all cargo[-]handling at Women’s Bay Terminal.”<sup>96</sup>

### **C. Samson’s Opposition.**

Opposing, Samson argues that “ILWU fails to satisfy the requirements of either [the work preservation or neutrality] affirmative defense” and asks the Court to “deny ILWU’s and grant Samson’s [partial

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<sup>92</sup> *Id.* at 48–52.

<sup>93</sup> *Id.* at 48.

<sup>94</sup> *Id.* at 49–51.

<sup>95</sup> *Id.* at 51–52.

<sup>96</sup> *Id.*

summary judgment] motions” as to these defenses accordingly.<sup>97</sup>

**1. Work historically performed by Samson’s MEBA union bargaining unit employees, and which ILWU never performed, is not fairly claimable by ILWU.**

First, Samson argues that ILWU cannot meet either prong of the work preservation affirmative defense.<sup>98</sup> Regarding the first prong, whether the work in dispute is “fairly claimable,” it asserts that “work historically performed by Samson’s MEBA union bargaining unit employees, and which ILWU never performed, is not fairly claimable by ILWU” because “it is not possible to preserve work ILWU had never performed.”<sup>99</sup> Further, Samson suggests that the work preservation defense is unavailable because ILWU used the AALA as “a sword to achieve to an unlawful secondary object—here not work preservation but rather work acquisition” by “appropriat[ing] ‘work that is not theirs’ historically performed by another bargaining unit.”<sup>100</sup>

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<sup>97</sup> Dkt. 274 at 12–13.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 13, 38.

<sup>100</sup> *Id.* at 22, 38.

**2. Matson did not have a legal right to control Samson from utilizing its MEBA-represented employees.**

Regarding the second prong, whether the employer had the “right to control” the work in question, Samson argues that “Matson did not have a legal right to control Samson from utilizing its MEBA-represented employees who had performed Samson’s cargo[handling] work at Womens Bay for over 35 years.”<sup>101</sup> Characterizing Matson and Samson’s relationship as that of “landlord” and “tenant,” Samson argues that “a landlord does not, absent some contractual terms absent here, have the right to control its tenant’s workforce.”<sup>102</sup> Rather, it alleges “ILWU engaged in a classic boycott by submitting a grievance that was then used to exert unlawful pressure on Samson’s union and on Matson to exert secondary pressure Samson,” constituting coercive practices in violation of Section 8(b)(4).<sup>103</sup>

**3. ILWU cannot establish Samson’s loss of neutrality under the ally doctrine.**

Second, Samson argues that ILWU cannot establish Samson’s loss of neutrality under the ally doctrine.<sup>104</sup> It quotes NLRB decisions articulating that “absent employment controls not present here, a building owner is a person separate and apart from

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<sup>101</sup> *Id.* at 21.

<sup>102</sup> *Id.* at 43.

<sup>103</sup> *Id.* at 43–44.

<sup>104</sup> *Id.* at 44–52.

[the contractor performing services on the property, even if they share economic interests.]”<sup>105</sup> Instead, arguing that “ILWU must establish that the neutral company ‘exercises substantial, actual, and active control over the working conditions of the primary’s employees’ to relinquish the protections of Section 8(b)(4),” Samson maintains that ILWU “wholly fails to provide any evidence” of Matson’s control over Samson.<sup>106</sup> It further submits that “Samson and Matson [are not] so intertwined as to be a single employer under the NLRA” and that “ILWU does not even allege that there [is] any common ownership between [them],” nor “any common management, any centralized control of labor relations, or any interrelationship of operations.”<sup>107</sup> Samson also suggests that ILWU’s cites to NLRB cases involving “struck work” to support its neutrality defense are inapposite because “there was no strike or struck work” here.<sup>108</sup>

**4. Events are sufficient to create a question of material fact on whether ILWU’s conduct materially contributed to damages that should be resolved by a jury.**

Further, Samson argues that “[t]he issue of whether ILWU’s misconduct materially contributed to

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<sup>105</sup> *Id.* at 45 (quoting *SEIU (General Maintenance Co.)*, 329 NLRB 638, 640 n.19 (1999)).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 51.

<sup>108</sup> *Id.*

damages suffered by Samson is a question of fact for the jury” and that “ILWU’s contention on causation of [its] damages is misguided.”<sup>109</sup> Rather, it asserts that ILWU’s grievance produced the February 2020 Award, which in turn prompted Matson to force Samson to pay time in lieu invoices to continue Samson’s operations at Womens Bay Terminal.<sup>110</sup> It suggests these events “are sufficient to create a question of material fact on whether ILWU’s conduct materially contributed to damages” “that should . . . be resolved by a jury.”<sup>111</sup>

**5. Assertion that a grievance alone cannot be coercion under Section 8(b)(4)(D).**

Samson also argues that ILWU cannot invoke *Georgia-Pacific Corp v. NLRB*<sup>112</sup> for its assertion that a grievance alone cannot be coercion under Section 8(b)(4)(D).<sup>113</sup> It notes that the Court previously held that “29 U.S.C. § 158(b)(4)(ii)(D) does not limit the avenues for such grievances” and “Section 303 provides concurrent jurisdiction to hear Samson’s claims.”<sup>114</sup> Moreover, it alleges ILWU did not merely file a grievance but engaged in “substantial economic

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<sup>109</sup> *Id.* at 52.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 52–53.

<sup>112</sup> 982 F.2d 130 (D.C. Cir 1989).

<sup>113</sup> Dkt. 274 at 53–54.

<sup>114</sup> *Id.* (quoting Dkt. 85 (Order Granting in Part and Denying in Part Motion to Dismiss) at 20)).

coercion” by “demand[ing] that Samson either recognize ILWU jurisdiction in unrelated facilities, replace ILWU workers with MEBA workers, or be evicted.”<sup>115</sup>

**6. Samson is entitled to discovery on the Third Amended Complaint.**

Separately, Samson argues that it is entitled to discovery on the Third Amended Complaint and “respectfully requests that the Court defer consideration of this part of ILWU’s motion and allow Samson to take discovery” accordingly.<sup>116</sup> It also alleges that “ILWU mischaracterized the conduct of [Samson’s President, George Baggen] and Samson’s counsel and took their statements out of context.”<sup>117</sup> Specifically, it alleges that ILWU misrepresented statements from Baggen’s deposition testimony.<sup>118</sup>

**D. ILWU’s Reply.**

Replying to Samson’s Opposition, ILWU maintains that “there are no genuine, disputed material facts that would preclude summary judgment.”<sup>119</sup> It argues that its Motion must be granted for three reasons.<sup>120</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 54–55.

<sup>117</sup> *Id.* at 55.

<sup>118</sup> *Id.* at 55–59.

<sup>119</sup> Dkt. 289 (ILWU’s Reply in Support of ILWU’s Motion for Summary Judgment).

<sup>120</sup> *Id.* at 9–10.

**1. Samson “fails to apply governing law setting forth the limited conditions where a union’s successful prosecution of a grievance violates LMRA Section 303.”**

First, ILWU argues that Samson “fails to apply governing law setting forth the limited conditions where a union’s successful prosecution of a grievance violates LMRA Section 303.”<sup>121</sup> Regarding Samson’s Section 8(e) claim, ILWU argues that Samson “fails to respond [to its argument] . . . that Section 8(e) only prohibits agreements restricting an employer’s business relations if the union has a secondary objective” and “wrongfully conflates the outcome of a work preservation agreement with the motive of the agreement.”<sup>122</sup> Citing Supreme Court precedent and NLRB authority, it suggests instead that where “the purpose of the grievance or arbitration award is work preservation, the resulting award does not violate Section 8(e) ‘even though it may seriously affect neutral third parties.’”<sup>123</sup>

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<sup>121</sup> *Id.* at 9.

<sup>122</sup> *Id.* at 10–12.

<sup>123</sup> *Id.* at 10 (quoting *NLRB v. ILA (“ILA II”)*, 473 U.S. 61, 78 n.18 (1985); citing *NLRB v. ILA (“ILA I”)*, 447 U.S. 490, 507 (1980)).

**2. The only arguable coercion is ILWU's successful pursuit and enforcement of an arbitration decision against Matson.**

Further, ILWU notes that Samson agrees that Samson's claims "fail if *either* the Award does not violate Section 8(e) *or* ILWU had a colorable work preservation object in pursuing the Award."<sup>124</sup> However, it argues "Samson contorts this straightforward description of the legal framework" to claim that ILWU argues "Samson does not have a valid Section 303 claim because [it] has made no separate allegation of coercion."<sup>125</sup> ILWU disputes this characterization and clarifies that "[u]nder the evidence, the only arguable coercion is ILWU's successful pursuit and enforcement of an arbitration decision against Matson."<sup>126</sup>

**3. Samson is precluded from arguing any "coercion" by ILWU other than the pursuit of the Coast Arbitrator's Award.**

ILWU also contends that "Samson is precluded from arguing any 'coercion' by ILWU other than the pursuit of the Coast Arbitrator's Award and, regardless, further fails to identify any admissible evidence supporting such conduct."<sup>127</sup> Although it argues

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<sup>124</sup> *Id.* at 13 (emphasis in original).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 13–14.

Samson sought to “expand the alleged coercive conduct at issue in the instant matter to ‘any form of economic pressure of a compelling or restraining nature’ and ‘economic pressure outside of the arbitration,’” ILWU notes that Samson “fail[s] to identify any conduct [in discovery] by ILWU other than the pursuit of the grievance against Matson and enforcement of the arbitration award against Matson.”<sup>128</sup> Moreover, ILWU suggests that even if the Court were to allow Samson to introduce evidence of alleged coercive conduct outside of discovery, “the evidence Samson points to establishes nothing more than (1) the existence of the Coast Arbitrator’s Award, (2) the fact that ILWU contacted MEBA in an effort to reach a jurisdictional compromise prior to the NLRB’s issuance of the Section 10(k) Award regarding assignment of work at Pier II in Kodiak, (3) the fact that Matson had control over cargo[-]handling at Womens Bay Terminal in part through threat of eviction, and (4) the fact that Samson paid large sums of money to Matson under a terminal services agreement that ILWU did not know existed.”<sup>129</sup> Pointing to George Baggen’s declaration, ILWU alleges that “Samson attempts to convert evidence that Matson indeed had and exercised control over Samson’s cargo[-]handling[] into evidence that the ILWU exercised coercion beyond the mere pursuit and enforcement of the arbitration award.”<sup>130</sup> ILWU

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<sup>128</sup> *Id.* at 14–15.

<sup>129</sup> *Id.* at 15.

<sup>130</sup> *Id.* at 16–17.

argues that this “only shows Matson’s economic coercion of Samson—not any coercion by ILWU.”<sup>131</sup>

Further, regarding Samson’s Section 8(b)(4)(D) claim, ILWU notes that it “has not pursued its grievance following a contrary Section 10(k) Award” and argues that “Samson fails to acknowledge the change in facts from its motion to dismiss, where Samson alleged other economic coercion, to summary judgment, where there is no admissible evidence of other economic coercion.”<sup>132</sup> Because “Samson has conceded . . . that ILWU engaged in no such other economic coercion and Samson has failed to introduce admissible evidence of other economic coercion,” ILWU argues that it is entitled to summary judgment.<sup>133</sup>

**4. Samson fails to apply governing law concerning ILWU’s work preservation object and maintains there is no genuine dispute that ILWU had a colorably lawful claim to the work in dispute.**

Second, turning to its affirmative defenses, ILWU argues “Samson fails to apply governing law concerning ILWU’s work preservation object” and maintains “there is no genuine dispute that ILWU had a colorably lawful claim to the work in dispute.”<sup>134</sup> Regarding the first prong, ILWU asserts that “[t]here

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<sup>131</sup> *Id.* at 17.

<sup>132</sup> *Id.* at 18.

<sup>133</sup> *Id.* at 17–18.

<sup>134</sup> *Id.* at 18–19.

is no dispute that the work [it] claimed in its grievance against Matson was traditional longshore work that is not only unambiguously covered by the AALA, but also is work that AALA unit employees traditionally have and do perform throughout the state, including in Kodiak.”<sup>135</sup> It contests Samson’s claim that the work cannot be fairly claimable because ILWU has never performed the exact work at Womens Bay Terminal.<sup>136</sup> Rather, it suggests the fairly claimable test turns on whether “it is of the type traditionally performed by the bargaining unit, regardless of exact location because the units are multi-port and multi-employer.”<sup>137</sup> It also asserts Samson misinterprets and misapplies relevant case law, and that other authorities upon which it relies are readily distinguishable on the facts.<sup>138</sup>

### **5. Matson had and exercised its right to control work in dispute.**

Regarding the second prong, ILWU maintains that “Matson had and exercised its right to control

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<sup>135</sup> *Id.* at 25.

<sup>136</sup> *Id.* at 20.

<sup>137</sup> *Id.* at 22 (citing *Bermuda Container Lines, Ltd. v. ILA*, 192 F.3d 250, 257 (2d Cir. 1999); *California Cartage Co. v. NLRB*, 822 F.2d 1203, 1207 (D.C. Cir. 1987) (enforcing in relevant part *Longshoremen ILWU (California Cartage)*, 278 NLRB 220, 220, 223–24 (1986)); *Longshoremen & Warehousemen Local 10 (Howard Terminal)*, 147 NLRB 359, 360 n.2 (1964); *Longshoremen & Warehousemen (Ind.) Local 19 (American Mail Line, Ltd.)*, 144 NLRB 1432, 1434, 1440–42 (1963); *Alaska Steamship Co. (ILWU Local 62)*, 172 NLRB 1200, 1201 (1968)).

<sup>138</sup> Dkt. 289 at 23 n.8, 24.

work in dispute.”<sup>139</sup> It notes that Matson “instruct[ed] Samson to stop handling APL cargo, even going so far as to prevent Samson from powering APL’s refrigerated containers there” and “dictate[d] the terms under which Samson performed cargo[-]handling at Womens Bay Terminal, including choosing to require Matson perform all cargo[-]handling work at the terminal.”<sup>140</sup> Contesting Samson’s claim that this test requires a “legal right to control,” ILWU cites *NLRB v. ILA (“ILA II”)*<sup>141</sup> for the proposition that “the longshoremen’s employers . . . have the ‘right to control’ container loading and unloading work by virtue of their ownership or leasing control of the containers.”<sup>142</sup> Thus, it submits, “by virtue of its ownership of the Womens Bay Terminal and lease with Samson, Matson had the right to control how cargo is handled at the terminal, *i.e.* the work in dispute.”<sup>143</sup> It further disputes Samson’s claims that ILWU exerted pressure on Samson, noting that ILWU instead “pressured Matson through the pursuit of the grievance, the primary employer, to comply with the AALA.”<sup>144</sup> Therefore, ILWU argues, the work

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<sup>139</sup> *Id.* at 25.

<sup>140</sup> *Id.* at 25–26.

<sup>141</sup> 473 U.S. 61, 74, n.12 (1985).

<sup>142</sup> Dkt. 289 at 28.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 27.

preservation doctrine offers a complete defense to Samson's claims.<sup>145</sup>

**6. Samson forfeited its neutrality by intentionally entangling itself in the dispute with Matson.**

Third, turning to its neutrality defense, ILWU maintains that Samson “forfeited its neutrality by intentionally entangling itself in the dispute with Matson.”<sup>146</sup> ILWU contests Samson's argument that ILWU's affirmative defense is limited to the ally doctrine and that struck work and single employer tests are the only ways in which neutrality may be lost.<sup>147</sup> ILWU clarifies that it “*is NOT asserting that Samson is an ‘ally’ of Matson*”<sup>148</sup>; rather, because Samson “was clearly taking a position in favor of [the primary employer],” it “was not a neutral secondary employer entitled to the protections of § 8(b)(4).”<sup>149</sup> Further, although Samson “attempts to explain away its extensive collaboration with Matson by asserting that its counsel and Matson's counsel have been colleagues for years,” ILWU notes that “[t]here is no explaining away the extensive evidence that Samson knowingly entangled itself into Matson's dispute with ILWU” and the “factual relationship between Samson

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<sup>145</sup> *Id.* at 28.

<sup>146</sup> *Id.* at 29.

<sup>147</sup> *Id.* at 29–31.

<sup>148</sup> *Id.* at 29–30 (emphasis in original).

<sup>149</sup> *Id.* at 30–31 (quoting *T.H. Eifert, Inc. v. United Association of Journeymen*, 422 F.Supp.2d 818, 835–36 (W.D. Mich. 2006)).

and Matson” indicates that Samson lost its status and accompanying NLRA protections as a neutral third party.<sup>150</sup>

**7. Samson has failed to provide evidence of causation to support a viable claim under Section 303.**

Separately, ILWU argues that Samson has failed to provide evidence of causation to support a viable claim under Section 303.<sup>151</sup> Disputing Samson’s claim that “causation is a question of fact for the jury,” ILWU cites *Celotex Corp. v. Catrett*<sup>152</sup> and submits that “summary judgment must be granted if ILWU shows an absence of evidence of causation.”<sup>153</sup> Reasoning that ILWU did not, and could not have, caused Samson to enter into an agreement that ILWU did not even know about, ILWU instead asserts that “Samson’s voluntary actions entering into the agreement with Matson, making payments to Matson, and collaborating on this lawsuit before filing it were superseding acts breaking the chain of causation.”<sup>154</sup> Therefore, a reasonable jury could not find that ILWU caused Samson’s damages.<sup>155</sup>

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<sup>150</sup> *Id.* at 31.

<sup>151</sup> *Id.* at 31–32.

<sup>152</sup> 477 U.S. 317 (1986).

<sup>153</sup> Dkt. 289 at 32 (citing *Celotex Corp.*, 477 U.S. at 322–24).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

ILWU also alleges Samson made “intentionally misleading statements to the Court” by “characterizing [the testimony of George Baggen] as ‘technically’ or ‘arguably’ true.”<sup>156</sup> It alleges that Baggen “repeatedly presented sworn testimony to this Court which at least appears to misleadingly omit material information in an effort to obtain a favorable ruling on its first motion for preliminary injunction,” and suggests that he even admitted to adjusting his responses in subsequent questioning to attain a favorable ruling.<sup>157</sup> It notes that although Samson dismisses these statements as being “taken out of context” and “technically true,” “Baggen’s prior offen[s]e provides further grounds to grant ILWU’s motion to strike [his] sham declarations.”<sup>158</sup>

### **E. Samson’s Cross-Motion for Partial Summary Judgment.**

Filed concurrently with ILWU’s Motion, Samson’s Cross-Motion asserts ILWU’s “affirmative defenses are misguided and without legitimate support.”<sup>159</sup>

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 33.

<sup>159</sup> Dkt. 249 at 8.

**1. There was no common ownership and no common management [by Matson] of Samson's day-to-day activities at the terminal.**

First, regarding ILWU's neutrality defense, Samson argues that the "defense does not apply because (1) ILWU did not strike the Womens Bay [T]erminal in Kodiak, and (2) Samson was not owned by and did not have an integrated business operation with the Womens Bay [T]erminal landlord that required treatment as a single employer."<sup>160</sup> It suggests that the "ally doctrine defense" only applies in two instances: (1) when there is "struck work," and (2) when there is "common ownership control" over the disputed work, such that the primary and second employers are sufficiently integrated to constitute a single employer or enterprise.<sup>161</sup> Noting that there was no struck work in this case, Samson argues that "[t]here was no common ownership and no common management [by Matson] of Samson's day-to-day activities at the terminal," nor was there "integration of the two companies."<sup>162</sup>

**2. This is not a work preservation case, but instead a work acquisition one.**

Second, regarding ILWU's work preservation defense, Samson argues this defense also "does not apply because (1) ILWU used the arbitration process as a work acquisition sword to acquire cargo[-]handling

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 21.

<sup>162</sup> *Id.* at 24.

work at the Womens Bay terminal performed by Samson's MEBA union employees for over 35 years, and (2) Samson's landlord did not have the power to assign the cargo[-]handling work performed by Samson's union employees to ILWU members."<sup>163</sup> It suggests that the standard for determining whether a contracting clause violates Section 8(e) or "merely preserv[es] . . . work traditionally done by bargaining unit employees" is "whether the ILWU employees historically performed Samson's cargo[-]handling work at Womens Bay."<sup>164</sup> Because ILWU had never performed Samson's cargo-handling work at Womens Bay, Samson argues "this is not a work preservation case, but instead a work acquisition one."<sup>165</sup> Moreover, Samson argues that "it is beyond dispute that Matson as the contracting employer did not have the power to assign the work at the Womens Bay terminal from Samson's MEBA union employees to ILWU members."<sup>166</sup> Thus, "it is reasonable to infer that the arbitration proceeding had an unlawful secondary objective to influence whoever had such power over that work," rendering the work preservation defense unavailable to ILWU.<sup>167</sup>

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<sup>163</sup> *Id.* at 8–9.

<sup>164</sup> *Id.* at 29 (quoting *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 644–46 (1967); *Marrowbone Dev. Co. v. District 17, UMW*, 147 F.3d 296, 302 (4th Cir. 1998)).

<sup>165</sup> *Id.* at 29–30.

<sup>166</sup> *Id.* at 31.

<sup>167</sup> *Id.* at 30–31.

## **F. ILWU's Opposition.**

Opposing, ILWU argues that Samson's Cross-Motion "fails to address the relevant facts or governing legal standard."<sup>168</sup>

### **1. ILWU is entitled to a work preservation defense.**

Regarding its work preservation defense, ILWU suggests Samson errs in "focus[ing] on the work of employees outside the bargaining unit, specifically Samson's MEBA-represented employees, instead of the work of the state-wide ILWU bargaining unit."<sup>169</sup> Rather, in light of the Supreme Court's holding in *ILA II*,<sup>170</sup> ILWU notes that "[t]he effect of work preservation[] agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant."<sup>171</sup>

### **2. ILWU is entitled to a neutrality defense.**

Regarding its neutrality defense, ILWU argues that the factual record demonstrates that "Samson knowingly and intentionally inserted itself within the vortex of ILWU's primary dispute with Matson through extensive collaboration and coordination to file this lawsuit, entered into agreements that caused Samson's alleged damages, and otherwise assisted

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<sup>168</sup> Dkt. 271 at 9.

<sup>169</sup> *Id.* at 8 (international quotations omitted).

<sup>170</sup> 473 U.S. 61 (1985).

<sup>171</sup> Dkt. 271 at 8 (quoting *ILA II*, 473 U.S. at 78).

Matson in avoiding its contractual obligations to ILWU.”<sup>172</sup> It suggests these interactions deprive Samson of the protections of NLRA Section 8(b)(4) and LMRA Section 303.<sup>173</sup> Moreover, although Samson argues the “ally” doctrine is unavailable to ILWU, ILWU clarifies that it does not premise its defense on the ally doctrine.<sup>174</sup> Instead, it suggests “the [neutrality] defense applies more broadly where an employer who would otherwise be neutral ‘engaged in a common course of conduct subversive of the purposes of [the NLRA]’ together with the primary employer.”<sup>175</sup> Thus, for a “third party who ‘has entangled himself in the vortex of the primary dispute’ between union and employer,” ILWU argues there are no such protections under the NLRA.<sup>176</sup>

### G. Samson’s Reply.

Replying, Samson argues that ILWU’s Opposition fails to sustain either of its affirmative defenses.<sup>177</sup> As to the work preservation defense, citing *U.S. Naval*

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<sup>172</sup> *Id.* at 9.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 40.

<sup>175</sup> *Id.* at 38 (quoting *Local 363, International Brotherhood of Teamsters (Roslyn Americana Corp.)*, 214 NLRB 868, 873–74 (1974)).

<sup>176</sup> *Id.* at 38–39 (quoting *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 627 (1967)).

<sup>177</sup> Dkt. 294 (Samson’s Reply to ILWU’s Opposition to Motion for Partial Summary Judgment as to ILWU’s Non-Neutral and Work preservation Affirmative Defenses) at 7–8.

*Supply Center*,<sup>178</sup> it again asserts that “a longshore union with a multi-employer agreement cannot try to appropriate the work at a terminal historically performed by another union bargaining unit” and suggests that ILWU’s reliance on cited case law is misplaced.<sup>179</sup> Rather, because “ILWU never performed the more involved cargo[-]handling work of unloading, and reconfiguring cargo for efficient discharge at subsequent ports that was performed by Samson’s MEBA-represented employees for over 35 years at the Womens Bay [T]erminal,” Samson argues ILWU cannot not fairly claim such work.<sup>180</sup> Further, Samson contests ILWU’s arguments regarding Matson’s right to control Samson, alleging that “ILWU tries to invent a new rule out of whole cloth about Matson’s leverage over Samson because of the month-to-month lease.”<sup>181</sup> Instead, it suggests the lease conferred upon Matson a “de facto power” that involved “no contractual power or legal right to dictate the terms of employment of Samson’s employees, or who would perform Samson’s cargo[-]handling work at the terminal.”<sup>182</sup>

As to the neutrality defense, Samson again asserts that a third party may only lose its neutrality under the ally doctrine or the single enterprise doctrine, arguing that ILWU’s “attempt to invent a

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<sup>178</sup> 195 NLRB 273 (1972).

<sup>179</sup> Dkt. 294 at 11 (citing *ILA Local 1248 (U.S. Naval Supply Center)*, 195 NLRB 273, 274 (1972)).

<sup>180</sup> *Id.* at 15–16.

<sup>181</sup> *Id.* at 17–18.

<sup>182</sup> *Id.*

new doctrine” should be rejected.<sup>183</sup> It argues that neither of the two doctrines applies because “there is no strike or struck work involved here, and Samson has not taken over any work that had been done by Matson,” and because Samson and Matson are separate entities and their relationship was, at its core, one of landlord and tenant.<sup>184</sup> And, even if the employers retain “some economic interdependence,” Samson argues this is insufficient to deprive the third party of its neutrality.<sup>185</sup> It also seeks to distinguish ILWU’s cited authority, arguing that such cases “involved performance of struck work or concerted refusal to handle goods” or the “actual and active control over the management policies and/or labor relations of the primary employers,” and are therefore distinguishable.<sup>186</sup>

### III. Legal Standard

#### A. Summary Judgment.

Summary judgment is appropriate where, viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmoving party,<sup>187</sup> “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judg-

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<sup>183</sup> *Id.* at 23.

<sup>184</sup> *Id.* at 21.

<sup>185</sup> *Id.* at 24 (quoting *NLRB v. Service Employees Union Local 77*, 1986 WL 236051, at \*23 (9th Cir. 1986)).

<sup>186</sup> *Id.* at 23–25 (citing *SEIU (General Maintenance Co.)*, 329 NLRB 638 (1999), *enfd.*, 52 Fed. Appx. 357 (9th Cir. 2002)).

<sup>187</sup> *Scott v. Harris*, 550 U.S. 372, 378 (2007).

ment as a matter of law.”<sup>188</sup> Material facts are those which might affect the outcome of the case.<sup>189</sup> A genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the non-moving party.”<sup>190</sup> “There is no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion.”<sup>191</sup> A movant’s burden may be met by “‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.”<sup>192</sup>

Once a movant has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify facts which show a genuine issue for trial.<sup>193</sup> “[W]hen simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified and submitted in sup-

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<sup>188</sup> Fed. R. Civ. P. 56(a); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986); *Jensinger v. Nev. F. Credit Union*, 24 F.3d 1127, 1130–31 (9th Cir. 1994).

<sup>189</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986) (“Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”).

<sup>190</sup> *Id.* at 248.

<sup>191</sup> *Mills v. Wood*, No. 4:10-CV-00033-RRB, 2015 WL 2100849, at \*1 (D. Alaska May 6, 2015), *aff’d in part*, 726 F. App’x 631 (9th Cir. 2018) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

<sup>192</sup> *Celotex*, 477 U.S. at 325.

<sup>193</sup> *Id.* at 323–24.

port of both motions, and in opposition to both motions, before ruling on each of them.”<sup>194</sup> Finally, “[w]here . . . the case turns on a mixed question of fact and law and the only disputes relate to the legal significance of undisputed facts, the controversy is a question of law suitable for disposition on summary judgment.”<sup>195</sup>

## B. Relevant Provisions.

Section 303 of the LLARA, codified at 29 U.S.C. § 187, provides a private cause of action in district court to a party injured by a union’s unfair labor practice, as that term is defined by the NLRA.<sup>196</sup> Section 8(b)(4) of the NLRA, codified at 29 U.S.C. § 158(b)(4), makes it an unfair labor practice to “threaten, coerce,

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<sup>194</sup> *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1134 (9th Cir. 2001).

<sup>195</sup> *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1262 (9th Cir. 2016) (quoting *Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011)).

<sup>196</sup> 29 U.S.C. §§ 187(a) (“It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.”), (b) (“Whoever shall be injured in his business or property by reason or [1] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.”); see *Atchison, Topeka & Santa Fe RR v. Teamsters Local 70*, 511 F.2d 1193, 1195 (9th Cir. 1975).

or restrain any person<sup>197</sup> engaged in commerce or in an industry affecting commerce.”<sup>198</sup> Specifically, Section 8(b)(4)(ii) prohibits the use of coercion to “forc[e] or requir[e]”:

- (A) . . . any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by § 8(e);
- (B) . . . 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, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9;
- . . .
- (D) . . . any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining

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<sup>197</sup> “The term ‘person’ includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.” 29 U.S.C. § 152(1).

<sup>198</sup> 29 U.S.C. § 158(b)(4)(ii).

the bargaining representative for employees performing such work[.]<sup>199</sup>

Further, Section 8(e) prohibits “hot cargo agreements” as an unlawful labor practice, stating that:

any labor organization and any employer [from] enter[ing] into any contract or agreement, express or implied, whereby such employer ceases or refrains or 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, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.<sup>200</sup>

#### **IV. Discussion**

ILWU moves for summary judgment primarily on two bases: (1) ILWU is entitled to the work preservation defense because the work in dispute at Womens Bay Terminal was fairly claimable by ILWU, and Matson had the right to control it; and (2) Samson is not a neutral third party protected by the NLRA because it intentionally involved itself in the ongoing dispute between ILWU and Matson.<sup>201</sup>

Samson cross-moves for partial summary judgment, asserting that neither affirmative defense is

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<sup>199</sup> 29 U.S.C. §§ 158(b)(4)(ii)(A), (B), (D).

<sup>200</sup> 29 U.S.C. § 158(e).

<sup>201</sup> Dkt. 270 at 32–47.

available to ILWU because (1) work historically performed by Samson's MEBA-represented employees is not fairly claimable and Matson lacked the legal right to control it, and (2) Samson and Matson are separate entities without an integrated business operation, and thus Samson is a neutral third party entitled to NLRA protections.<sup>202</sup>

The Court concludes that ILWU is entitled to summary judgment. First, the Court considers whether ILWU is entitled to the work preservation affirmative defense, including whether it had a colorable claim for lawful work preservation, whether the work in dispute is fairly claimable, and whether Matson had a right to control it. For the reasons described below, the Court concludes that ILWU is entitled to the work preservation affirmative defense, which provides a complete defense to Samson's Section 303 claims.

Next, the Court turns to whether ILWU is also entitled to the neutrality affirmative defense, including whether Samson was a neutral third-party employer. After reviewing the factual record and relevant case law, the Court concludes that Samson is not a neutral employer. Therefore, Samson is barred from making a Section 303 claim.

Finally, the Court considers the parties' remaining arguments, including whether there is sufficient evidence of ILWU's coercive behavior or causation to sustain Samson's Section 303 claims, and whether further discovery regarding ILWU's Motion for Enforcement and Remedy would furnish evidence to overcome ILWU's affirmative defenses. The Court concludes

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<sup>202</sup> Dkt. 249 at 17–24.

that, based on the record before it, there are no genuine issues of material fact warranting trial, and further discovery is unnecessary because ILWU's recent actions are not coercive within the meaning of the NLRA. Therefore, the Court grants ILWU summary judgment.

**A. ILWU is entitled to a complete defense under the work preservation doctrine.**

The Court concludes that Samson's Section 303 claims fail because there is no triable issue of fact that ILWU's pursuit of its grievance and enforcement of the Award violated Section 8(b)(4). ILWU's interpretation of its contract rights is colorable given case law applicable to collective bargaining agreements involving multi-employer, multi-port longshore work. Moreover, given that the cargo-handling work in Kodiak is fairly claimable by ILWU and that Matson has the power to assign such work to ILWU workers, the interpretation of the AALA advanced by ILWU and adopted by the Coast Arbitrator in the February 2020 Award and October 2021 Award is a lawful work preservation interpretation, and thus, there is no violation of Section 8(b)(4)(ii). Therefore, Samson's Section 303 claim fails as a matter of law.

**1. Samson does not identify "substantial economic coercion" outside of ILWU's pursuit of its grievance.**

As a threshold matter, the Court finds that Samson has not alleged or produced evidence to substantiate any prohibited coercion within the meaning of Section 8(b)(4) beyond allegations that ILWU's grievance was coercive.

Samson is suing ILWU pursuant to Section 303 of the LMRA to recover damages stemming from the arbitration instigated by ILWU, which Samson alleges was an illegal unfair labor practice under Sections 8(b)(4)(ii)(A), (B), and (D) of the NLRA.<sup>203</sup> All three subsections prohibit union coercion.<sup>204</sup> Subsection (A) prohibits coercing an employer to enter into an agreement which is prohibited by Section 8(e) of the NLRA.<sup>205</sup> Section 8(e) prohibits “hot cargo” agreements, in which a union and an employer agree that the employer will not handle the goods of another or will cease doing business with another person, and include “union signatory” agreements that prohibit an employer from subcontracting with any business who does not use union labor.<sup>206</sup> Subsection (B) prohibits coercing any employer to cease doing business with another party, regardless of any agreement.<sup>207</sup> And subsection (D) prohibits coercive activity for the purpose of forcing an employer to assign work to workers represented by one union over another.<sup>208</sup>

Although Samson broadly alleges ILWU went beyond merely filing a grievance and engaged in “sub-

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<sup>203</sup> See generally Dkt. 225.

<sup>204</sup> See 29 U.S.C. § 158(b)(4)(ii).

<sup>205</sup> 29 U S C § 158(b)(4)(ii)(A)

<sup>206</sup> 29 U.S.C. § 158(e); see also *Am. President Lines, Ltd. v. Int’l Longshore and Warehouse Union, Alaska Longshore Div., Unit 60*, 721 F.3d 1147, 1152 n.3 (9th Cir. 2013).

<sup>207</sup> 29 U.S.C. § 158(b)(4)(ii)(B).

<sup>208</sup> 29 U.S.C. § 158(b)(4)(ii)(D).

stantial economic coercion,”<sup>209</sup> it has not identified any actions taken by ILWU, other than pursuing its grievance and enforcing the Coast Arbitrator’s Awards, that are coercive or caused its damages. Samson suggests that Young’s March 2020 email to MEBA is coercive by “demand[ing] that Samson either recognize ILWU jurisdiction in unrelated facilities, replace ILWU workers with MEBA workers, or be evicted.”<sup>210</sup> However, this email was directed to MEBA employees and appeared to be ILWU’s attempt to seek resolution in the wake of arbitration to preserve both entities’ workforces.<sup>211</sup> Samson has not proffered evidence to support how Young’s email impacted or directly or indirectly caused Samson’s alleged damages. As ILWU notes, Samson could not identify how this email “threatened, coerced, or restrained” it during its Rule 30(b)(6) deposition.<sup>212</sup> Rather, the only actions Samson points to in its Third Amended Complaint and interrogatories are ILWU’s “interpretation of the AALA,” “proceeding to arbitration with the objective of using the AALA and [LOU No. 12] . . . to cause Matson to cease doing business with Samson, and to cause Samson to cease doing business with its non-ILWU represented employees,” and ILWU’s subsequent Motion for Enforcement and Remedy seeking to enforce the February 2020 and October 2021 Awards.<sup>213</sup> Thus,

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<sup>209</sup> Dkt. 274 at 53–54.

<sup>210</sup> *Id.*

<sup>211</sup> Dkt. 270-13 at 19.

<sup>212</sup> Dkt. 270 at 48–49; Dkt. 270-3 (G. Baggen Depo. Vol I), 101:3–10, 102:8–14, 103:20–107:21, 110:18–111:25, 233:11–234:15).

<sup>213</sup> Dkt. 225 at 7–11.

the Court’s analysis is limited to ascertaining whether these specific actions constituted coercion within the meaning of Section 8(b)(4)(ii).

Further, although Samson alleges that “[t]he undisputed material facts show ILWU exerted economic pressure outside of arbitration to threaten and coerce Matson and Samson,” its remaining allegations point solely to Matson’s and Samson’s actions.<sup>214</sup> Although Samson claims it was pressured into such an agreement to avoid being evicted under its lease, such effects were attributable directly to Samson’s and Matson’s actions, notably: (1) Samson’s decision to amend its lease agreement with Matson; (2) the Terminal Services agreement between the parties to enforce the February 2020 Award requiring Samson to pay time in lieu wages for ILWU-claimed work, and (3) Matson’s exercising control and influence over Samson’s cargo-handling work. Such actions are not attributable to ILWU. Further, if they were attributable, the factual record reflects that the only identifiable actions ILWU took to support such claims are its pursuit of its grievance and its efforts seeking subsequent enforcement of the arbitration awards.

Having concluded that Samson failed to allege or substantiate claims of “substantial economic coercion” outside of arbitration, the Court must then determine whether ILWU’s pursuit of its grievance, including the arbitration awards and its efforts to enforce them, constitute “coercion” within the meaning of NLRA Sections 8(b)(4)(ii)(A), (B), and (D).

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<sup>214</sup> Dkt. 274 at 19.

**2. ILWU’s grievance presented a colorable claim for work preservation and was not unlawful within the meaning of Section 8(b)(4).**

The Court finds that ILWU’s grievance and subsequent pursuit of the February 2020 and October 2021 Awards did not constitute “coercion” under Section 8(b)(4)(ii) and presented a colorable claim for lawful work preservation in enforcing its collective bargaining agreement against Matson.

Section 303 provides a damages remedy for a union’s unfair labor practices.<sup>215</sup> “In rare cases, the union can commit a predicate unfair labor practice through its conduct in an arbitration proceeding.”<sup>216</sup> The United States Supreme Court has clarified that “[Section] 303 provides a remedy only for violations of [Section] 8(b)(4) of the Act, which, in turn, requires proof of coercion.”<sup>217</sup> Coercion for the purposes of Section 8(b)(4) claims does not mean “only strikes or picketing, but . . . any form of economic pressure of a compelling or restraining nature.”<sup>218</sup> For instance, if a union acts with “forbidden secondary purpose” in arbitration proceedings,<sup>219</sup> such as “disrupt[ing] the

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<sup>215</sup> *Shepard v. NLRB*, 459 U.S. 344, 351 (1983).

<sup>216</sup> *Am. President Lines, Ltd. v. Int’l Longshore & Warehouse Union, Alaska Longshore Div., Unit 60*, 721 F.3d 1147, 1149 (9th Cir. 2013)

<sup>217</sup> *Shepard*, 459 U.S. at 351.

<sup>218</sup> *Associated Gen. Contractors of Cal., Inc. v. NLRB*, 514 F.2d 433, 438 (9th Cir. 1975).

<sup>219</sup> *ILA II*, 473 U.S. 61, 79 (1985).

business relations of a neutral employer,”<sup>220</sup> “claim[ing] work [] different from that traditionally performed by the bargaining unit employees,”<sup>221</sup> “acquir[ing] completely new jobs,”<sup>222</sup> or “benefit[ing] other than the signatory employer’s employees,”<sup>223</sup> this constitutes illegal “secondary” activity and is coercive within the meaning of Section 8(b)(4).<sup>224</sup> A union may also violate Section 8(b)(4) by pursuing a grievance through arbitration if it advances an improper interpretation of a contractual clause with an unlawful secondary purpose or pursues an agreement “tactically calculated to satisfy union objectives elsewhere.”<sup>225</sup>

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 81.

<sup>222</sup> *California Cartage Co. v. NLRB*, 822 F.2d 1203, 1207 (D.C. Cir. 1987) (citing *NLRB v. Enterprise Ass’n*, 429 U.S. 507, 521–23 (1977)).

<sup>223</sup> *Id.* (citing *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 645 (1967)).

<sup>224</sup> *ILA II*, 473 U.S. at 79; *California Cartage Co.*, 822 F.2d at 1207.

<sup>225</sup> *Nelson v. Int’l Bhd. of Elec. Workers, Local Union No. 46*, 899 F.2d 1557, 1562 (9th Cir. 1990), *overruled on other grounds by Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449 (9th Cir. 1994) (quoting *Nat’l Woodwork*, 386 U.S. at 644) (finding “no evidence . . . that the Union engaged in any other conduct aimed at coercing compliance with its interpretation of the agreement by the Chapter or by any other party” where the Union’s “conduct enjoined by the district court goes beyond that ‘persuasively related’ to the Union’s efforts to enforce the CIR’s arbitration award through the grievance procedure”); *see also Truck Drivers, Union Local 705 v. NLRB*, 820 F.2d 448, 452 (D.C. Cir. 1987) (remanding to the NLRB to “explicitly deal with petitioner’s primary argument that by filing a grievance it was merely seeking enforcement of a

Such a violation “occurs the moment the union pursues arbitration with an unlawful secondary motive . . . not if or when the union succeeds in persuading the arbitrator to sustain its grievance.”<sup>226</sup>

However, a union’s actions are not coercive for the purposes of Section 8(b)(4) if they are aimed at “primary union activity,” such as preserving work for the union’s bargaining unit employees.<sup>227</sup> Indeed, “bona fide work preservation agreements and their enforcement may constitute protected primary goals” under the NLRA.<sup>228</sup> If a grievance presents a colorable claim for work preservation, its pursuit does not constitute coercion under Section 8(b)(4) and is a complete defense to Section 303 claims.<sup>229</sup> “The rele-

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lawful provision of its collective bargaining agreement”); *Am. President Lines, Ltd. v. Int’l Longshore & Warehouse Union*, 997 F. Supp. 2d 1037, 1043 (D. Alaska 2014), *aff’d*, 611 F. App’x 908 (9th Cir. 2015) (“A union’s pursuance of a grievance through arbitration can be considered coercive under section 8(b)(4) if that grievance is based on an interpretation of a collective bargaining agreement that furthers an unlawful object. That is, it is coercive if a union pursues an interpretation of a collective bargaining agreement in arbitration that promotes secondary union activity and not primary work preservation activity.”).

<sup>226</sup> *Am. President Lines, Ltd. v. Int’l Longshore & Warehouse Union, Alaska Longshore Div., Unit 60*, 721 F.3d 1147, 1155 (9th Cir. 2013).

<sup>227</sup> See *ILA II*, 473 U.S. 61, 74–76, 78–79 (1985); see also *Am. President Lines, Ltd.*, 997 F. Supp. 2d at 1043.

<sup>228</sup> *ILA II*, 473 U.S. at 79.

<sup>229</sup> See *Nat’l Woodwork*, 386 U.S. at 644–46 (noting that whether a union violated Sections 8(b)(4)(ii)(A) and (B) “cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union’s objective was preservation of work for

vant inquiry is whether the union’s efforts are directed at matters involving the labor relations of the contracting employer vis-à-vis his own employees.”<sup>230</sup> “The effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral employer.”<sup>231</sup>

The NLRB has consistently held that union grievances made for the purpose of preserving work present “colorable claims” and are not coercive within the meaning of Section 8(b)(4).<sup>232</sup> Absent evidence of

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[the union’s] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere” and that “the Union’s maintenance of [a bargaining agreement] provision was not a violation” of either subsection); *ILWU v. NLRB (Kinder Morgan)*, 978 F.3d 625, 637 (9th Cir. 2020) (“A valid work preservation objective provides a complete defense against alleged violations of [S]ection 8(b)(4)(D).”).

<sup>230</sup> *Am. President Lines, Ltd. v. Int’l Longshore & Warehouse Union*, 997 F. Supp. 2d 1037, 1043 (D. Alaska 2014), *aff’d*, 611 F. App’x 908 (9th Cir. 2015).

<sup>231</sup> *ILA I*, 447 U.S. 490, 507 n.22 (1980).

<sup>232</sup> *See Heavy, Highway, Bldg. & Const. Teamsters*, 227 NLRB 269, 274 (1976) (“We do not agree, however, that the filing and processing of grievances limited to seeking enforcement of . . . the contract was also violative of Section 8(b)(4). It does not appear from the record that the grievances were filed for the purpose of accomplishing an unlawful object. Rather, it appears that they were filed as a means of enforcing a colorable contract right. Such conduct is not, in our view, the kind of tactic calculated to restrain or coerce employees or employers in the exercise of rights guaranteed by the Act.” (internal citations omitted)); *In re Newspaper and Mail Deliveries Union*, 337 NLRB 608, 608

unlawful threats, a union's efforts to enforce contract provisions to preserve bargaining unit work are lawful, despite impacts on third party contractors.<sup>233</sup> Regarding the longshore industry, courts have held that a union's efforts to require signatory employers to comply with work preservation clauses in multi-port, multi-employer agreements were primary union activity and did not violate the NLRA, even if the union sought an interpretation that prevented subcontracting outside the bargaining unit.<sup>234</sup>

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(2002) (finding union violated Section 8(b)(4) because it “brought its grievance to the impartial chairman in order to accomplish an unlawful object—preventing the subcontracting of delivery work to a nonunion company”; *Teamsters Local 83 (Cahill Trucking)*, 277 NLRB 1286, 1290 (1985) (“Threats to file a grievance and the filing of a grievance to enforce a colorable contract claim do not violate the Act.”).

<sup>233</sup> *Teamsters Local 83 (Cahill Trucking)*, 277 NLRB at 1290.

<sup>234</sup> See *Am. President Lines, Ltd. v. Int'l Longshore & Warehouse Union*, 997 F. Supp. 2d 1037, 1044 (D. Alaska 2014), *aff'd*, 611 F. App'x 908 (9th Cir. 2015) (citing *Bermuda Container Line Ltd. v. Int'l Longshoremen's Ass'n*, AFL-CIO, 192 F.3d 250 (2d Cir. 1999)); *id.* at 1045 (holding that although “ILWU's interpretation of the AALA amount[ed] to a prohibition,” it was one “directed at the primary employers collectively, on subcontracting out work covered under the AALA” for the purposes of “contracting employers to hire bargaining unit employees either directly or indirectly through other signatory employers” and “[was] colorable [in the context of] collective bargaining agreements involving multi-employer, multi-port longshore work” because it pursued “a lawful work preservation agreement.”); *Am. President Lines, Ltd. v. Int'l Longshore & Warehouse Union*, 611 F. App'x 908, 912 (9th Cir. 2015) (affirming this district in *American President Lines*, and holding that “[t]he ILWU did not pursue an impermissible secondary objective when engaging in its arbitration efforts to require APL to honor [the AALA] and therefore did not violate the NLRA” because such an interpretation of the award

Here, ILWU asserts that “there is no genuine dispute that [it] had a lawful, colorable claim” because its “objective was to preserve bargaining unit work by enforcing its contract with Matson, APL, and other AALA Employers.”<sup>235</sup> It notes that it has performed such cargo-handling work in Kodiak for decades, and that the AALA and LOU No. 12 broadly restrict cargo-handling by non-ILWU workers at Womens Bay Terminal without its express written consent.<sup>236</sup> As such, it submits its grievance was filed for the lawful purpose of preserving work for the bargaining unit and was not coercive within the meaning of Section 8(b)(4).<sup>237</sup> Samson argues that ILWU’s interpretation of the AALA and LOU No. 12 is unlawful because it seeks to “aggrandize” and expand ILWU’s existing cargo-handling work by forcing Matson to cease doing business with Samson or require Samson to join the AALA.<sup>238</sup>

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was “permissible . . . [and] not repugnant to the NLRA.”); *see also* *Bermuda Container Line Ltd. v. Int’l Longshoremen’s Ass’n, AFL-CIO*, 192 F.3d 250, 257 (2d Cir. 1999) (holding that union’s grievance to enforce subcontracting prohibition under multi-employer, multi-port longshore agreement was lawful under NLRA because bargaining unit was comprised of union-represented employees on a “coast-wide basis” and union’s grievance and interpretation of agreement sought to “preserve the work of [union] employees in the coast-wide bargaining unit and was directed at [the employer] by virtue of its status in the multi-employer bargaining association.”).

<sup>235</sup> Dkt. 270 at 42.

<sup>236</sup> *Id.* at 42–43.

<sup>237</sup> *Id.* at 43.

<sup>238</sup> Dkt. 274 at 32.

The Court finds that ILWU's grievance had a colorable claim for work preservation and was not unlawful within the meaning of Section 8(b)(4). *American President Lines v. Int'l Longshore & Warehouse Union*<sup>239</sup> and *Bermuda Container Line v. Int'l Longshoremen's Association*<sup>240</sup> are instructive. In those cases, unions had colorable claims for work preservation because they filed grievances to enforce subcontracting prohibitions in longshore bargaining agreements for the purpose of preserving work for employees in the coast-wide bargaining units.<sup>241</sup> Here, ILWU lost bargaining unit cargo-handling work at Womens Bay Terminal, including approximately 3,600 hours of work per year and the loss of 21 casual truck drivers.<sup>242</sup> As a result, ILWU filed its grievance for the purpose of enforcing bargaining longshore agreements—the AALA and LOU No. 12—to preserve work for its ILWU-represented employees in the bargaining unit at Womens Bay Terminal in Kodiak, an AALA-covered port.<sup>243</sup> Contrary to Samson's assertions, the factual record reflects that ILWU's efforts to enforce the bargaining agreement were motivated by a lawful primary union activity—work preservation—and not

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<sup>239</sup> 997 F. Supp. 2d 1037 (D. Alaska 2014), *aff'd*, 611 F. App'x 908 (9th Cir. 2015).

<sup>240</sup> 192 F.3d 250 (2d Cir. 1999).

<sup>241</sup> *See Am. President Lines*, 611 F. App'x at 912; *Bermuda Container Line*, 192 F.3d 257–58; *Am. President Lines*, 997 F. Supp. 2d at 1044.

<sup>242</sup> Dkt. 270-22 at 4–5.

<sup>243</sup> *See* Dkt. 270-23 at 8–9.

by “an unlawful secondary objective to interfere with Samson’s business.”<sup>244</sup>

Moreover, although ILWU’s interpretation may effectively prevent Matson from subcontracting with employees outside the bargaining unit (such as Samson’s), this is a consequence of Matson’s status as a signatory to a multi-employer collective bargaining agreement. As noted by the Supreme Court in *ILA II*, impacts on third party employers like Samson are irrelevant absent evidence of secondary union activity.<sup>245</sup> Indeed, the Ninth Circuit has noted that “[s]ome disruption of the business relationships between the primary and secondary employers ‘is the necessary consequence of the purest form of primary activity.’”<sup>246</sup> Therefore, consistent with Ninth Circuit and NLRB authority, the Court finds ILWU had a colorable claim for work preservation in the context of a multi-employer, multi-port pool of longshore workers because it was aimed at preserving work for its employees in the bargaining unit, and therefore was not coercive under Section 8(b)(4). Further, because ILWU had a colorable claim for work preservation, it has a complete defense to Samson’s Section 303 claims.

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<sup>244</sup> Dkt. 274 at 20.

<sup>245</sup> *ILA II*, 473 U.S. 61, 78 (1985)).

<sup>246</sup> *Surf City Steel, Inc. v. Int’l Longshore & Warehouse Union*, 780 F. App’x 467, 471 (9th Cir. 2019).

**3. ILWU’s interpretation of the AALA and LOU No. 12 is a lawful work preservation agreement under Section 8(e).**

Having concluded ILWU had a colorable claim to work preservation to sustain its grievance, the Court next turns to whether the AALA and LOU No. 12 can be considered a lawful work preservation agreement as applied to the cargo-handling work in dispute.<sup>247</sup>

The Court finds that there is no triable issue that ILWU’s interpretation of the AALA violated Section 8(b)(4)(ii)(A) or Section 8(e). Under Section 8(b)(4)(ii)(A), a union may not coerce an employer to enter a “hot cargo agreement” prohibited by Section 8(e).<sup>248</sup> A “hot cargo agreement” is an unfair labor practice defined under 29 U.S.C. § 158(e) as a contract or agreement prohibiting an employer from conducting business with any other person or employer.<sup>249</sup> Hot cargo agreements are “unenforceable and void” unless an exception applies.<sup>250</sup> “A ‘union signatory’ clause, which prohibits the employer from subcontracting

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<sup>247</sup> See *Am. President Lines, Ltd. v. Int’l Longshore & Warehouse Union*, 997 F. Supp. 2d 1037, 1045 (D. Alaska 2014), *aff’d*, 611 F. App’x 908 (9th Cir. 2015).

<sup>248</sup> See 29 U.S.C. §§ 158(b)(4), 158(e); *Am. President Lines, Ltd. v. Int’l Longshore & Warehouse Union, Alaska Longshore Div., Unit 60*, 721 F.3d 1147, 1153 (9th Cir. 2013).

<sup>249</sup> 29 U.S.C. § 158(e).

<sup>250</sup> *Id.*

with all employers who are not union signatories, is one such agreement.”<sup>251</sup>

To support a valid claim under Section 303, “[a]n alleged violation of Section 8(b)(4)(ii)(A) ‘necessarily rises or falls’ on a violation of Section 8(e).”<sup>252</sup> If the agreement or provision does not constitute a hot cargo agreement in violation of Section 8(e), a union’s actions do not violate Section 8(b)(4)(ii)(A).<sup>253</sup> “[A] union’s efforts to enforce—through arbitration—a clause that violates Section 8(e) may constitute . . . a violation of Section 8(b)(4)(ii)(A).”<sup>254</sup> Further, a contract may violate Section 8(e) if it is a “secondary agreement” “directed tactically toward a neutral employer in a labor dispute not his own.”<sup>255</sup>

However, Section 8(b)(4) does not “reach employees’ activity to pressure their employer to preserve for themselves work traditionally done by them” and Section 8(e) “does not prohibit agreements made and

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<sup>251</sup> *NLRB v. Hotel & Rest. Emps. & Bartenders’ Union*, 623 F.2d 61, 67 (9th Cir. 1980) (“[I]t is well settled that union signatory clauses violate section 8(e).”).

<sup>252</sup> *Am. President Lines*, 611 F. App’x at 910.

<sup>253</sup> *ILA II*, 473 U.S. 61, 81–82 (1985) (“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) [and Section 8(b)(4)(A)] is secure absent some other evidence of secondary purpose.”).

<sup>254</sup> *Am. President Lines*, 611 F. App’x at 910.

<sup>255</sup> *California Cartage Co. v. NLRB*, 822 F.2d 1203, 1207 (D.C. Cir. 1987).

maintained for that purpose.”<sup>256</sup> Rather, agreements that impose restrictions on an employer for the primary purpose of preserving work for the bargaining unit’s workforce do not violate Section 8(e).<sup>257</sup> “If the union’s sole objective is to influence the signatory employer’s labor relationship with his own employees, the employer clearly is not neutral and the agreement is primary rather than secondary.”<sup>258</sup> Therefore, even where an agreement “may seriously affect neutral third parties,” it does not violate Section 8(e) provided the union’s actions in pursuing the agreement is motivated by work preservation.<sup>259</sup>

“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.’”<sup>260</sup> “In order for a clause to qualify as a lawful work preservation clause that does not violate Section 8(e)’s prohibition

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<sup>256</sup> *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 635 (1967).

<sup>257</sup> *ILA II*, 473 U.S. at 74; *Nat’l Woodwork*, 386 U.S. at 635; see also *Newspaper & Mail Deliverers (Hudson News)*, 298 NLRB 564, 566–68 (1990) (“We find that the Union’s action when it learned [of subcontracting in violation of the bargaining agreement] was with the object of preventing [the employer] from siphoning off the unit employees’ work, a primary and lawful objective.”).

<sup>258</sup> *California Cartage Co.*, 822 F.2d at 1207.

<sup>259</sup> *ILA II*, 473 U.S. at 78 n.18.

<sup>260</sup> *ILA I*, 447 U.S. 490, 504 (1980) (quoting *Nat’l Woodwork*, 386 U.S. at 644–45).

on hot cargo agreements, the clause must meet two elements: (1) the clause's objective must be the preservation of work for union members rather than a secondary goal; and (2) the employer must have a 'right [to] control,' *i.e.*, the power to assign the work."<sup>261</sup> In other words, courts must assess whether the disputed work is "fairly claimable" by the union, and whether the employer has the "right to control" the disputed work.<sup>262</sup>

Here, Samson posits that ILWU's interpretation of the AALA, accepted by the Coast Arbitrator, transforms the AALA and the LOU No. 12 into an illegal "hot cargo agreement" because it requires Matson to refrain from doing business with Samson.<sup>263</sup> ILWU argues instead that its interpretation of the AALA and the arbitration awards incorporating its interpretation are lawful under the work preservation doctrine because cargo-handling at Womens Bay Terminal is fairly claimable and Matson had the power to assign it.<sup>264</sup> The Court concludes that ILWU's interpretation of the AALA is lawful under the work preservation doctrine because the evidence reflects ILWU had a work preservation object in preserving cargo-handling work at Womens Bay Terminal for its

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<sup>261</sup> *Am. President Lines, Ltd. v. Int'l Longshore & Warehouse Union*, 611 F. App'x 908, 910 (9th Cir. 2015) (citing *ILA II*, 473 U.S. 61, 76 (1985)).

<sup>262</sup> *Id.*

<sup>263</sup> Dkt. 213 at 44.

<sup>264</sup> Dkt. 270 at 36–41.

workforce, and Matson had the right to control the disputed work.

**a. Cargo-handling work at Womens Bay Terminal is fairly claimable.**

Turning to the first prong of the work preservation test, the Court finds that cargo-handling work at Womens Bay Terminal is fairly claimable because it is work traditionally performed by ILWU longshore workers. To determine whether disputed work is fairly claimable, courts consider whether it is “work traditionally performed by employees represented by the union”<sup>265</sup> “or the functional equivalent of that work.”<sup>266</sup> “[T]he analytical focus must be ‘on the work of the bargaining unit employees, not on the work of other employees . . . doing the same or similar work.’”<sup>267</sup>

In the context of the longshore industry, the Supreme Court in *NLRB v. International Longshoremen’s Association, AFL-CIO (“ILA I”)*<sup>268</sup> observed that “the work of longshoremen has historically been the loading and unloading of ships” and that this forms “the beginning of the analysis.”<sup>269</sup> Moreover, the union seeking to preserve bargaining unit work need not have performed the exact work in dispute for a work

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<sup>265</sup> *ILA I*, 447 U.S. 490, 504 (1980).

<sup>266</sup> *California Cartage Co. v. NLRB*, 822 F.2d 1203, 1207 (D.C. Cir. 1987).

<sup>267</sup> *ILA II*, 473 U.S. at 77–78.

<sup>268</sup> 447 U.S. 490 (1980).

<sup>269</sup> *Id.* at 509.

preservation agreement to be lawful.<sup>270</sup> Indeed, an otherwise valid work preservation agreement is lawful even if “longshoremen have never previously performed work at the exact same location.”<sup>271</sup> Where arbitrators make findings of fact in underlying arbitration regarding longshore work, “[i]t is up to the district court to determine whether to defer to or uphold those findings and, if it does, what effect those factual findings have on [the parties’] legal arguments.”<sup>272</sup>

The Ninth Circuit affirmed that cargo-handling work in covered ports under the AALA is fairly claimable for the purposes of the work preservation doctrine. In *American President Lines, Ltd. v. International Longshore and Warehouse Union*,<sup>273</sup> a case similarly involving the rights of ILWU longshore workers under the AALA, this district considered whether cargo-handling work at Seward, a covered port under the AALA, was fairly claimable.<sup>274</sup> The court first cited findings by the Alaska Arbitrator concluding that ILWU work had previously performed

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<sup>270</sup> See *id.* at 508–09; *California Cartage Co.*, 822 F.2d at 1207 (finding “functional relationship between consolidating cargo onto pallets and stuffing containers” under longshore bargaining agreement).

<sup>271</sup> *California Cartage Co.*, 822 F.2d at 1207.

<sup>272</sup> *Am. President Lines, Ltd. v. Int’l Longshore & Warehouse Union, Alaska Longshore Div., Unit 60*, 721 F.3d 1147, 1157 n.7 (9th Cir. 2013).

<sup>273</sup> 997 F. Supp. 2d 1037 (D. Alaska 2014), *aff’d*, 611 F. App’x 908 (9th Cir. 2015).

<sup>274</sup> *Id.* at 1046.

the disputed cargo-handling work in Seward.<sup>275</sup> Next, the court noted that because “the bargaining unit employees include all longshore workers represented by the ILWU doing work at certain Alaska ports for multi-employers under the AALA,” “the court must look to the work done by the bargaining unit employees as a whole and not with reference to the particular employment practices of an individual employer.”<sup>276</sup> Looking at longshore work in Seward, the Court found that

[i]t is undisputed that bargaining unit employees have performed cargo-handling work in covered Alaska ports, including Seward, pursuant to the AALA. [The employer] hired ILWU to perform such work in Seward prior to 2003. [The employer] was and is an employer bound by the AALA. Thus, the ILWU has handled cargo in Seward under the AALA in the past. The work is fairly claimable.<sup>277</sup>

Affirming, the Ninth Circuit observed that “[i]n the shipping industry, the bargaining unit is comprised of the multiple employers who are signatory to the operative collective bargaining agreement” and that “ILWU historically performed stevedoring work in Seward for [a current signatory employer].”<sup>278</sup> Thus, “the stevedoring work in Seward [was] fairly claimable

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<sup>275</sup> *Id.* at 1045.

<sup>276</sup> *Id.* at 1046.

<sup>277</sup> *Id.*

<sup>278</sup> *Am. President Lines*, 611 F. App'x at 911.

by the Union” and “no genuine issue of material fact remained on the issue.”<sup>279</sup> The court also cited *Bermuda Container Line Ltd. v. Int’l Longshoremen’s Ass’n*<sup>280</sup> for the proposition that the work preservation doctrine applies to multi-port agreements governing longshore bargaining units.<sup>281</sup> In *Bermuda*, the Second Circuit held that a bargaining agreement “covering all ports on the Atlantic and Gulf coasts from Maine to Texas” “not only defined the bargaining unit but also the primary employment relationship on a coast-wide basis” and “was designed to preserve the work of [Union-represented] employees in the coast-wide bargaining unit and [] directed at [the employer] by virtue of its status in the multi-employer bargaining association.”<sup>282</sup>

Further, the D.C. Circuit in *California Cartage Co. v. NLRB*<sup>283</sup> held that because a multi-port, multi-employer longshore bargaining unit defined the scope of fairly claimable longshore work, this broadly included the “functional equivalent” of such work.<sup>284</sup> In that case, the court considered whether a supplement to a longshore bargaining agreement between ILWU and a signatory employer violated Section 8(e) by requiring that employer-owned containers be packed and

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<sup>279</sup> *Id.*

<sup>280</sup> 192 F.3d 250 (2d Cir. 1999).

<sup>281</sup> *Am. President Lines*, 611 F. App’x at 911.

<sup>282</sup> *Bermuda Container Line Ltd.*, 192 F.3d at 257.

<sup>283</sup> 822 F.2d 1203 (D.C. Cir. 1987).

<sup>284</sup> *Id.* at 1208.

unpacked by ILWU longshore workers.<sup>285</sup> The court agreed with the NLRB that the supplement was legal under Section 8(e) because it “was intended to preserve the ILWU’s traditional work—loading and unloading cargo on and off ship, including ‘the unitizing of cargo to be shipped and the breaking down of cargo units for delivery—by securing the functional equivalent of that work, stuffing and unstuffing modern containers.’<sup>286</sup> Further, the court observed that although some of the work claimed under the supplement was performed away from the docks, while the longshoremen’s traditional work occurred at the docks, “the fact that longshoremen have never previously performed work at the exact same location does not prevent the work sought from being the functional equivalent of work the longshoremen have performed.”<sup>287</sup>

Here, Samson argues that cargo-handling at Womens Bay Terminal is not fairly claimable because it is “work historically performed by Samson’s MEBA union bargaining unit employees, and which ILWU never performed.”<sup>288</sup> To support this claim, Samson notes that its MEBA-represented employees have performed cargo-handling work there for 35 years; Samson has never employed ILWU-represented longshore workers to perform Samson’s cargo-handling work there; and Samson and MEBA are not parties to

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<sup>285</sup> *Id.* at 1206–07.

<sup>286</sup> *Id.* at 1207.

<sup>287</sup> *Id.*

<sup>288</sup> Dkt. 274 at 13.

the AALA.<sup>289</sup> ILWU contends that such work is fairly claimable because the AALA covers such work; ILWU longshore workers historically have performed the cargo-handling on and off barges, including at the Port of Kodiak for decades; and they lost bargaining unit work at that location under Matson's agreement with Samson.<sup>290</sup>

The Court concludes that cargo-handling at Womens Bay Terminal in Kodiak is fairly claimable by ILWU. In the February 2020 Award, Coast Arbitrator Kagel made a factual determination that under the AALA, Matson must use ILWU-represented employees at Womens Bay Terminal for handling Matson's cargo if it ever used the terminal for its own cargo.<sup>291</sup> Additionally, he noted that, pursuant to an earlier arbitration, the AALA also required APL cargo to be handled by ILWU-represented personnel at Womens Bay Terminal.<sup>292</sup> Thus, Arbitrator Kagel concluded that ILWU workers had previously performed the disputed cargo-handling work in Kodiak.

Consistent with *American President Lines*, the Court agrees with ILWU that these findings should be

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<sup>289</sup> *Id.* at 24–38.

<sup>290</sup> Dkt. 270 at 38–40.

<sup>291</sup> Dkt. 270-13 at 12 (“Matson, apparently under the LASH dock lease with Samson which Matson as lessor now controlled, required Samson, as a condition of continuing to operate there, to drop any handling of APL cargo, which then occurred. Matson does not use the facility for its own cargo, and has admitted that if it ever did, such work would be handled by ILWU-represented personnel under the agreement.”).

<sup>292</sup> *Id.* at 11–12.

given significant weight, particularly given Arbitrator Kagel's familiarity with the longshore industry.<sup>293</sup> However, even considering the issue independent of the Coast Arbitrator's findings, the Court concludes that the cargo-handling work is fairly claimable based on the factual record and substantial case law involving longshore bargaining agreements. When interpreting such agreements, courts routinely look to the work of the bargaining unit employees.<sup>294</sup> Here, the bargaining unit consists of all employees under the AALA, and it is undisputed that ILWU-represented employees have performed cargo-handling work for AALA employers, including Matson, at covered Alaska ports, including Kodiak, for several years.<sup>295</sup> Matson had previously hired ILWU workers to perform cargo-handling work in Kodiak and is an employer bound by the AALA.<sup>296</sup> Moreover, it is undisputed that ILWU lost work opportunities at Womens Bay Terminal for its represented employees because of Matson's elimination of the neutral zone and subsequent agreement with Samson.<sup>297</sup> Because

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<sup>293</sup> *Am. President Lines, Ltd.*, 997 F. Supp. 2d at 1045; *Am. President Lines, Ltd. v. Int'l Longshore and Warehouse Union, Alaska Longshore Div., Unit 60*, 721 F.3d 1147, 1157 n.7 (9th Cir. 2013).

<sup>294</sup> See *ILA I*, 447 U.S. at 507.

<sup>295</sup> Dkt. 270-23 at 6 ("As required by the work preservation provisions of the AALA, longshore workers have loaded and unloaded containers, including empty and cargo-laden, for AALA signatory employers, including Matson and APL, at ports throughout Alaska, including the Port of Kodiak for decades.").

<sup>296</sup> *Id.*

<sup>297</sup> Dkt. 270-22 at 5.

ILWU has performed cargo-handling work in Kodiak in the past, and Womens Bay Terminal is owned by Matson, the cargo-handling work there is fairly claimable by ILWU.<sup>298</sup>

Citing to case law largely outside the longshore industry, Samson argues that the disputed work is not fairly claimable because ILWU has not historically performed work *for Samson* at Womens Bay Terminal, and that its efforts amount to “job aggrandizement” and “an attempt to acquire new work” from Samson’s MEBA employees.<sup>299</sup> However, this position is not aligned with how courts routinely interpret work preservation agreements in multi-employer, multi-port longshore bargaining disputes. Contrary to Samson’s assertions, under *American President Lines, Bermuda, and California Cartage*, disputed longshore work may be fairly claimable under a multi-employer, multi-port agreement even if longshoremen have never previously performed work at the precise location and even if such work is the functional equivalent of work historically performed. Here, the Court must determine whether cargo-handling in Kodiak is fairly claimable under the AALA, considering the work of the Alaska-wide, multi-employer bargaining unit. As noted in *Bermuda*, cargo-handling work may be fairly claimable if the coast-wide bargaining unit has traditionally performed such work. The Court is not persuaded by Samson’s attempts to distinguish substantial case law interpreting longshore agreements and

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<sup>298</sup> See *Am. President Lines, Ltd.*, 997 F. Supp. 2d at 1046; *Am. President Lines, Ltd.*, 611 F. App’x at 1154.

<sup>299</sup> Dkt. 274 at 30–31.

declines to adopt Samson's narrow view of fairly claimable work. Thus, the work is fairly claimable.

**b. Matson had the right to assign cargo-handling work at Womens Bay Terminal to ILWU.**

Turning to the second prong of the work preservation test, the Court finds that Matson also had the right to assign cargo-handling work in the Port of Kodiak to ILWU. Under the right to control test, "the contracting employer must have the power to give the employees the work in question."<sup>300</sup> "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."<sup>301</sup> "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."<sup>302</sup> The critical inquiry is whether "the pressures exerted were directed at the right person, *i.e.*, at the primary in the dispute."<sup>303</sup> In the context of the longshore industry, the Supreme Court in *ILA II* held that "the longshoremen's employers . . . have the 'right to control' container loading and unloading work by virtue of

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<sup>300</sup> *ILA I*, 447 U.S. 490, 504 (1980).

<sup>301</sup> *Id.* at 504–05.

<sup>302</sup> *Id.* at 505 (quoting *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 644–45 (1967)).

<sup>303</sup> *Loc. 438 United Pipe Fitters*, 201 NLRB 59, 64 (1973), *enfd* 490 F.2d 323 (4th Cir. 1973).

their ownership or leasing control of the containers.”<sup>304</sup> This right to control exists because employers “prescribe the conditions under which [the containers they own or lease] may be released to shippers, consolidators, truckers, and warehousemen who might otherwise choose to utilize the containers so as to violate the Rules.”<sup>305</sup>

Here, the undisputed facts show that Matson had the right to assign cargo-handling work to ILWU. First, Coast Arbitrator Kagel noted in his February 2020 Award that “the record showed that while Matson did collect rent from Samson, it also had substantial leverage over Samson, including by the terms of its lease, as demonstrated by Samson ceasing APL operations there on Matson’s demand.”<sup>306</sup> Further, in deposition testimony, Samson acknowledged that Matson determined “how [Samson] handled cargo, with the choice that [it] would leave” Womens Bay Terminal, and the evidence reflects that Matson instructed Samson to cease handling APL cargo, including powering APL’s refrigerated containers.<sup>307</sup> Matson also acknowledged that it exercised control over the cargo-handling work and informed ILWU that it would abide by the February 2020 Award by

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<sup>304</sup> *ILA II*, 473 U.S. 61, 74, n.12. (1985).

<sup>305</sup> *American Trucking Associations, Inc. v. NLRB*, 734 F.2d 966, 978 (4th Cir. 1984).

<sup>306</sup> Dkt. 270-13 at 17.

<sup>307</sup> Dkt. 270 at 40; Dkt. 270-3 at 45–46; Dkt. 270-13 at 70; *see also* Young Depo., 71:9–17, 72:15– 73:7; Kniazowski Depo., 55:5–11, 56:11–18, 57:25–58:5; Tentis-Major Depo., 40:7–17; Morgan Depo., 113:20–114:2, 115:9–21.

employing ILWU-represented workers at Womens Bay Terminal.<sup>308</sup> As Matson wielded and exercised control over and “prescribe[d] the conditions under which [the containers they own or lease] may be” handled at Womens Bay Terminal, beyond merely receiving rent from Samson, the Court concludes it had the right to control such work.<sup>309</sup>

Samson instead argues that “Matson’s role as landlord did not allow it to dictate Samson’s relationship with its employees” and as such it “did not have a legal right to control Samson from utilizing its long-time MEBA union employees.”<sup>310</sup> However, Samson fails to provide authority to support this argument and ignores leading case law on the issue. Under *ILA II*, the Supreme Court characterized the right to control not as a “legal” right, but rather as the practical right to decide and exercise constructive control over the conditions under which cargo was handled.<sup>311</sup> Further, in *American President Lines, Ltd. v. International Longshore and Warehouse Union*,<sup>312</sup>,

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<sup>308</sup> Dkt. 270-23 at 8; Young Depo., 127:12–128:10; 130:18–131:8; Tungul Depo., 94:24–95:4.

<sup>309</sup> See *American Trucking Associations, Inc. v. NLRB*, 734 F.2d 966, 978 (4th Cir. 1984).

<sup>310</sup> Dkt. 274 at 43.

<sup>311</sup> *ILA II*, 473 U.S. 61, 81 (1985) (“It must not be forgotten that the relevant inquiry under §§ 8(b)(4)(B) and 8(e) is whether a union’s activity is primary or secondary—that is, whether the union’s efforts are directed at its *own employer on a topic affecting employees’ wages, hours, or working conditions that the employer can control.*” (emphasis added)).

<sup>312</sup> 611 F. App’x 908 (9th Cir. 2015).

the Ninth Circuit held that APL had the right to control because it could choose whether and under what terms to contract with a connecting carrier such as Samson and how its cargo would be handled.<sup>313</sup> As ILWU notes in its briefing, Matson exercised a similar right to control how cargo was handled at Womens Bay Terminal by virtue of its ownership of the terminal and its lease with Samson.<sup>314</sup> Therefore, consistent with these Supreme Court and Ninth Circuit decisions, the Court concludes that Matson had a right to control cargo-handling at Womens Bay Terminal.

Finding that both prongs of the work preservation test are satisfied, the Court concludes that ILWU's interpretation of the AALA is not a "hot cargo agreement" but a lawful work preservation agreement, and therefore that ILWU is entitled to a complete defense under the work preservation doctrine. Because there is no material dispute that ILWU's pursuit and enforcement of the Award violated Section(e), it has a complete defense to Samson's Section 303 claims.

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<sup>313</sup> *Id.* at 911 (finding employer had right to control cargo-handling where it admitted "[it] control[led] where . . . containers go, when they go, how many go, where they go when they get there, and who takes them there" and that it "ha[d] a choice in deciding whether or not to employ a connecting carrier who refuses to hire ILWU labor in [the AALA-covered port].").

<sup>314</sup> Dkt. 270 at 40–41.

**4. Even if the AALA and Awards were not lawful under Section 8(e), there is insufficient evidence of coercion to sustain a valid Section 8(b)(4) (ii)(A) claim against ILWU.**

The Court also finds that even if ILWU's interpretation of the AALA violated Section 8(e), its "colorable claim" for lawful work preservation provides a complete defense to Samson's claims of coercion under Section 8(b)(4). The Ninth Circuit and the NLRB have routinely held that even if collective bargaining agreements violate Section 8(e), Section 303 claims may still fail where there is no separate allegation or evidence of coercion.<sup>315</sup>

As previously discussed, there is no material dispute that ILWU had a colorable claim to work preservation to sustain its grievance and enforce the February 2020 Award.<sup>316</sup> ILWU is a single, multi-

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<sup>315</sup> See *Atchison, T. & S. F. Ry. Co. v. Locs. Nos. 70, 85, & 315, of Intern, Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 511 F.2d 1193, 1195 (9th Cir. 1975) ("Plaintiff argues that in order to effectuate fully the Congressional purpose expressed in [Section 303], the court should read this highly specific provision as embracing [Section 8(e)] as well as [Section 8(b)(4)] within the grounds for suit in the district court. Congress is perfectly free to broaden the scope of [Section 303] in the manner urged by plaintiff; this court is not free to do so. The court must presume that Congress, in its 1959 amendments adding [Section 8(e)] to the NLRA, could have amended [Section 303] with equal facility, had it chosen to do so."); *Teamsters (California Dump Truck)*, 227 NLRB 269, 274 (1976); *In re Newspaper and Mail Deliveries Union (NYP Holdings, Inc.)*, 337 NLRB 608, 608 (2002); *Teamsters Local 83 (Cahill Trucking)*, 277 NLRB 1286, 1290 (1985).

<sup>316</sup> See *supra* section IV.A.2.

port, multi-employer bargaining unit that performs cargo-handling work in Kodiak.<sup>317</sup> Moreover, its work preservation clause in the AALA, notably LOU No. 12, broadly protects cargo-handling work for ILWU-represented workers at Womens Bay Terminal, unless ILWU expressly agrees otherwise.<sup>318</sup> Further, it is undisputed that ILWU lost bargaining unit cargo-handling work at Womens Bay Terminal as a result of Matson's agreement with Samson.<sup>319</sup> Therefore, the Court concludes that regardless of whether the AALA and subsequent February 2020 Award violated Section 8(e), ILWU had a colorable claim for work preservation that precludes Samson's Section 8(b)(4)(ii)(A) claim.

**5. There is no evidence of coercion to sustain a valid Section 8(b)(4)(ii)(D) claim against ILWU.**

The Court also concludes that there is no material dispute as to whether ILWU violated Section 8(b)(4)(ii)(D). Under that provision, a union may not engage in coercive activity for the purpose of forcing an employer to assign work to workers represented by one union over another.<sup>320</sup> A valid work preservation objective provides a complete defense against alleged

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<sup>317</sup> Dkt. 270 at 11.

<sup>318</sup> *Id.* at 13.

<sup>319</sup> *Id.* at 18; *see* Dkt. 270-22.

<sup>320</sup> 29 U.S.C. § 158(b)(4)(ii)(D).

violations of section 8(b)(4)(ii)(D).<sup>321</sup> “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.”<sup>322</sup> “The effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral employer.”<sup>323</sup> “In a word, the dispositive measure is purpose, not effect.”<sup>324</sup> “Given this clear primary objective to preserve work in the face of a threat to jobs, extra-unit effects of a work preservation agreement alone provide an insufficient basis for concluding that the agreement has an unlawful secondary objective. Absent some additional showing of an attempt ‘to reach out to monopolize jobs,’ that is, proof of an attempt ‘not to preserve, but to aggrandize,’ such an agreement is lawful.”<sup>325</sup>

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<sup>321</sup> *ILWU v. NLRB (Kinder Morgan)*, 978 F.3d 625, 637 (9th Cir. 2020) (“A valid work preservation objective provides a complete defense against alleged violations of [S]ection 8(b)(4)(D).”).

<sup>322</sup> *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 645 (1967).

<sup>323</sup> *ILA I*, 447 U.S. 490, 507 n.22 (1980); see *The N.Y. Presbyterian Hosp.*, 354 NLRB 71, 77 (2009) (“[U]nions and employers are entitled to negotiate contracts that ‘preserve’ unit work by way of no-subcontracting or similar clauses, even if the enforcement of such agreements may cause the contracting employer to cease doing business with someone else.”).

<sup>324</sup> *Int’l Longshore & Warehouse Union v. Nat’l Lab. Rels. Bd.*, 978 F.3d 625, 637 (9th Cir. 2020).

<sup>325</sup> *ILA II*, 473 U.S. 61, 79 (1985).

Further, courts have held that a union does not violate Section 8(b)(4)(D) by filing “grievances against an employer for money payments in lieu of work performed by members of another union which the grievant claimed should have been assigned to it under the contract, so long as the Board had not awarded that work to the other union in a proceeding under [Section] 10(k) of the Act.”<sup>326</sup> The NLRB has further held that it is not unlawful for a union to file “arguably meritorious work assignment grievances prior to the issuance of the Board’s 10(k) determination.”<sup>327</sup>

For Samson to have a viable claim under Section 8(b)(4)(ii)(D), there must be evidence to suggest ILWU engaged in some degree of coercion, other than permissible activity like filing its grievance with lawful motivation and enforcing the February 2020 Award.<sup>328</sup> Here, though, there is no evidence ILWU engaged in any coercive behavior in pursuing its lawful grievance or that it pursued its grievance for any other purpose than preserving work for its bargaining employees. This Court previously held in this case that “coercion” supporting the Section 8(b)(4)(ii)(D) claim can include the grievance itself and “economic pressure outside of

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<sup>326</sup> *Georgia-Pacific Corp. v. NLRB*, 892 F.2d 130, 131 (D.C. Cir. 1989), *affirming Longshoremen ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 89 (1988); *ILWU v. NLRB*, 884 F.2d 1407, 1413 (D.C. Cir. 1989).

<sup>327</sup> *Georgia-Pacific*, 291 NLRB at 89.

<sup>328</sup> Alternatively, Samson could support a claim by showing that the February 2020 Award deviates from a Section 10(k) decision. But there is no Section 10(k) decision affecting the disputed work in this case.

the arbitration.”<sup>329</sup> However, the grievance was lawfully motivated by work preservation, and Samson has failed to point to anything other than the grievance and ILWU’s efforts to enforce the resulting award. Thus, despite the Ninth Circuit’s broad interpretation of “coercion,”<sup>330</sup> the factual record does not reflect any economic pressure exerted on Matson or Samson outside of arbitration to sustain this claim.

Moreover, as the Supreme Court noted in *ILA II*, even if the effect on non-union members as a result of the grievance may be severe, this is ultimately irrelevant to the validity of the agreement absent evidence of some secondary purpose.<sup>331</sup> As such, the Court concludes there is no evidence to sustain Samson’s Section 8(b)(4)(ii)(D) claim. Because ILWU has satisfied the work preservation test, and there is no evidence of coercion, ILWU is entitled to a complete defense under the work preservation doctrine, and Samson’s Section 303 claims fail.

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<sup>329</sup> See Dkt. 129 (Order Denying ILWU’s Motion for Certification & Stay) at 13; *Samson Tug and Barge Co., Inc. v. ILWU*, 2022 WL 94411, at \*4-6 (D. Alaska Jan. 10, 2022).

<sup>330</sup> *Associated Gen. Contractors of Cal., Inc. v. NLRB*, 514 F.2d 433, 438 (9th Cir.1975).

<sup>331</sup> *ILA II*, 473 U.S. 61, 78 (1985) (“The effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant . . . so long as the union had no forbidden secondary purpose.”).

**B. ILWU is entitled to a complete defense under the neutrality doctrine.**

Having concluded that ILWU is entitled to a complete defense under the work preservation doctrine, the Court need not find that ILWU is entitled to a defense under the neutrality doctrine. However, even if the work preservation doctrine was not available to ILWU, the Court nonetheless concludes that Samson's Section 303 claims alternatively fail because the factual record before it reflects that Samson is not a neutral employer. As such, ILWU is also entitled to a complete defense under the neutrality doctrine, and Samson's Section 303 claims fail as a matter of law.

In *National Woodwork Manufacturers Association v. NLRB*,<sup>332</sup> the Supreme Court held that Section 8(b)(4) was drafted to protect a neutral employer "only from union pressures designed to involve him in disputes not his own."<sup>333</sup> "The rationale [behind Section 8(b)(4)] . . . was the inapplicability of the provision's central theme, the protection of neutrals against secondary pressure, where the secondary employer against whom the union's pressure is directed has entangled himself in the vortex of the primary dispute."<sup>334</sup> In other words, "[t]he purpose of [Section] 8(b)(4) is to protect secondary employers who are neutral, not those who knowingly assist the primary

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<sup>332</sup> 386 U.S. 612 (1967).

<sup>333</sup> *Id.* at 625–26.

<sup>334</sup> *Id.* at 627.

employer in connection with the labor dispute.”<sup>335</sup> Thus, there is no Section 8(b)(4) protection for a non-neutral employer against primary union activities.<sup>336</sup>

To determine whether an employer is neutral, courts “consider[] on a case-by-case basis the factual relationship . . . in light of Congress’ intent ‘to protect employers who are wholly unconcerned’ and not involved in the labor dispute between the primary employer and the union.”<sup>337</sup> In the case of third party companies to whom an employer might divert work, the third party is not a neutral employer if operations are sufficiently integrated with the employer such that they are “either a single employer, a joint or common venture, a ‘straight line’ operation within the Board’s understanding of that term, or [share] an alliance of interest,”<sup>338</sup> or the companies “engage[] in a common course of conduct subversive to the purposes of [the NLRA].”<sup>339</sup> For instance, if an employer’s conduct undermines a union’s contractual bargaining agreement with its employers or “knowingly assists [an employer] in connection with [a] labor dispute,”

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<sup>335</sup> *Kable Printing Co. v. NLRB*, 545 F.2d 1079, 1085 (7th Cir. 1976).

<sup>336</sup> *Id.*

<sup>337</sup> *NLRB v. Local 810, Steel, Metals, Alloys and Hardware Fabricators*, 460 F.2d 1, 6 (2d Cir. 1972) (quoting *Vulcan Materials Co. v. United Steelworkers of America*, 430 F.2d 446, 451, 453 (5th Cir. 1970)).

<sup>338</sup> *Painters Dist. Council 51 (Management Corp.)*, 299 NLRB 618, 634 (1990).

<sup>339</sup> *Loc. 363, Int’l Bhd. of Teamsters*, 214 NLRB 868, 872–73 (1974).

even if the companies are not operationally integrated, the employer is considered a non-neutral employer.<sup>340</sup> Such a finding provides a complete defense to Section 303 claims.<sup>341</sup>

Here, the factual record is replete with extensive communications between Samson and Matson regarding this case and the underlying labor dispute. The record reflects that the employers had substantial communications about challenging the Coast Arbitrator's Award, developing this lawsuit against ILWU, engaging in agreements contravening the AALA and LOU No. 12, exchanging legal research, calculating damages in this case to account for time in lieu payments from Samson to Matson, and collaborating on Samson's motion for a preliminary injunction.<sup>342</sup> The Court concludes that, pursuant to *National Woodwork*, these facts are sufficient to determine that Samson "entangled [itself] in the vortex of" and "knowingly assist[ed] [Matson] in connection with" the underlying labor dispute between ILWU and Matson.

Samson incorrectly asserts that ILWU is not entitled to the neutrality defense because it is only limited to cases involving "struck work," which did not

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<sup>340</sup> See *Kable Printing Co. v. NLRB*, 545 F.2d 1079, 1085 (7th Cir. 1976); *Loc. 363, Int'l Bhd. Of Teamsters*, 214 NLRB 868, 872-73 (1974).

<sup>341</sup> *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 627 (1967).

<sup>342</sup> Dkt. 270-3 at 280:15-22, 284:15-285:17, 289:1-3; Dreyfus Depo., 88:13-89:13; G. Baggen Depo., Vol. II, 582:22-583:13; G. Baggen Depo. Vol. II, 563:16-569:25, 583:14-585:25, Kniazowski Depo., 82:6-84:1; see Dkt. 270 at 27-30.

occur here, or where the primary and neutral employers are designed a “single employer.”<sup>343</sup> Samson also suggests that merely sharing an economic interest with another company, such as that between landlord and tenant, is insufficient to deprive a third party of its neutrality and that ILWU must establish that it “exercises substantial, actual, and active control over the working conditions of the primary’s employees.”<sup>344</sup>

The Court disagrees with this limited interpretation of the scope of Section 8(b)(4) neutrality. Rather, the Supreme Court in *National Woodwork* noted that Section 8(b)(4) only protects third parties from “union pressures designed to involve him in disputes not his own.”<sup>345</sup> Moreover, other courts<sup>346</sup> and

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<sup>343</sup> Dkt. 274 at 13.

<sup>344</sup> *Id.* at 45.

<sup>345</sup> *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 625–26 (1967); *see also Associated Gen. Contractors of California, Inc. v. NLRB*, 514 F.2d 433, 437 (9th Cir. 1975) (“Congress enacted Section 8(b)(4)(B) and Section 8(e) to shield unoffending employers from union pressures designed to involve them in disputes not their own. The other subsections of Section 8(b)(4) were similarly intended to protect employers in the position of neutrals between contending parties.” (internal citations omitted)).

<sup>346</sup> *See Kable Printing Co. v. NLRB*, 545 F.2d 1079, 1085 (7th Cir. 1976) (affirming NLRB decision “reject[ing] [plaintiff’s] argument that the ally doctrine cannot apply if the work being done by the secondary employers is not ‘struck work’ because the primary employer does not intend to do the work again at any time in the future,” and noting that although “the ally doctrine was developed in cases in which there was struck work in the sense in which [plaintiff] uses that term. . . . the rationale of those cases supports the Board’s decision here: The purpose of s 8(b)(4) is to protect secondary employers who are neutral, not those who

numerous NLRB decisions have held that an employer may lose neutrality in cases where there is no struck work or the third party and primary employer are “single employers.”<sup>347</sup> Indeed, courts have held that a third party loses its Section 8(b)(4) neutrality where it “clearly tak[es] a position in favor of [the primary employer].”<sup>348</sup> Therefore, based on the factual record before it, the Court agrees that Samson is not a neutral employer entitled to protections under Section 8(b)(4). As such, ILWU is entitled to a complete defense under the neutrality doctrine, and Samson’s Section 303 claims fail.

**C. Samson fails to provide evidence it was injured “by reason of” a Section 8(b)(4) violation.**

The Court separately concludes that Samson’s Section 303 claims fail because Samson has not identified how ILWU’s actions caused its alleged dam-

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knowingly assist the primary employer in connection with the labor dispute.”).

<sup>347</sup> See *Painters Dist. Council 51*, 299 NLRB 618, 634 (1990) (listing “single employer” as but one example among many of when an employer may be deprived of its neutrality for the purposes of Section 8(b)(4)); *Roslyn Americana Corp.*, 214 NLRB 868 (1974).

<sup>348</sup> See *T.H. Eifert, Inc. v. United Association of Journeymen*, 422 F.Supp.2d 818, 835–36 (W.D. Mich. 2006) (holding that employer “was in no way neutral to the dispute” because it “vigorously [sought] to ensure that [its] employees went to work for [plaintiff] after [employer] ceased operating its own business” and thus “even if the Court were to find that [defendant union’s] conduct was not primary in its purpose, it would conclude that [the employer] was not a neutral secondary employer entitled to the protections of [Section] 8(b)(4)”).

ages. Subsection (b) of Section 303 provides that whoever is injured “by reason of any violation of subsection (a) of this section shall recover the damages by him sustained and the cost of suit.”<sup>349</sup> The injured party “[may] not recover damages under [S]ection 303 by showing only that the Union violated [S]ection 8(b)(4)[] and that [it] [was] within the class of persons afforded a remedy by [S]ection 303.”<sup>350</sup> Rather, it “must also show [it] [was] injured in [its] business or property by reason of the violation.”<sup>351</sup> “Reading [S]ection 303 in this manner, injury occurred ‘by reason of particular unlawful conduct if such conduct ‘materially contributed’ to the injury . . . or was a ‘substantial factor’ in bringing it about, ‘notwithstanding other factors contributed also.’”<sup>352</sup> “The requirement that the unlawful objective must have ‘materially contributed’ to the loss or have been a ‘substantial factor’ in bringing it about[] will prevent windfall recoveries by employers negligibly affected by a violation, and protect the union’s right to strike for primary objectives where such objectives, standing alone, would have caused the strike, but the unlawful objective, standing alone, would not.”<sup>353</sup> However, a “superseding

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<sup>349</sup> 29 U.S.C. § 187(b); see *Mead v. Retail Clerks Int’l Ass’n, Loc. Union No. 839, AFL-CIO*, 523 F.2d 1371, 1376 (9th Cir. 1975) (noting that “[i]n the antitrust context, the ‘by reason of’ language is read as incorporating common law principles of causation”).

<sup>350</sup> *Mead*, 523 F.2d at 1376.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* at 1379.

cause relieves the actor of liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm.”<sup>354</sup> A party is entitled to summary judgment if there is an absence of evidence showing causation.<sup>355</sup>

Here, Samson broadly asserts that ILWU caused its alleged damages because “ILWU’s grievance led to the Coast Arbitrator’s award and the award led directly to Samson being forced to pay time in lieu invoices from Matson in order to continue its operation at the

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<sup>354</sup> *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir. 1995) (quoting Restatement (Second) of Torts § 440 cmt. b (1965)).

<sup>355</sup> *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986) (“[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial. The moving party is ‘entitled to a judgment as a matter of law’ because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.”); *Sacramento Valley Chapter of the Nat. Elec. Contractors Ass’n (NECA) v. Int’l Bhd. of Elec. Workers (IBEW)-Int’l Off. (I-O)*, 637 F. Supp. 1417, 1426 (E.D. Cal. 1986) (finding that “Union has made a prima facie showing that none of the clauses in issue was a weighty motive for either initiation of the strike or its prolongation, thus shifting the burden to plaintiff under summary judgment practice to show a ‘genuine’ issue of material fact. Because . . . plaintiffs have not produced evidence sufficient to require trial, the Union’s motion for summary judgment will be granted.”).

terminal.<sup>356</sup> However, even absent ILWU's affirmative defenses, the Court concludes that any damages sustained by Samson were attributed to Samson's and Matson's actions, not ILWU's. ILWU sought a grievance to enforce the AALA and LOU No. 12, and subsequently engaged in communications with Matson to enforce the February 2020 Award at Womens Bay Terminal.<sup>357</sup> In contrast, Samson and Matson entered into a lease<sup>358</sup> and the Terminal Services Agreement,<sup>359</sup> allowing Matson to charge Samson for time in lieu, and the entities appeared to engage in substantial communications in developing Samson's lawsuit against ILWU.<sup>360</sup> As ILWU reasons, "[t]here is no genuine dispute that ILWU did not cause Samson to enter into the agreement with Matson" because ILWU "could not have done so as [it] [was] completely unaware that the agreement even existed."<sup>361</sup> Moreover, as ILWU notes, Matson informed Samson of its intent to seek indemnity largely because "Matson violated the Award by entering into the agreement with Samson instead of complying with the award by ensuring ILWU labor was used for all cargo handling

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<sup>356</sup> Dkt. 274 at 52.

<sup>357</sup> Dkt. 270 at 19; Dkt. 270-13 at 19.

<sup>358</sup> Dkt. 270-13 at 32-34.

<sup>359</sup> Dkt. 270-14 at 95-103.

<sup>360</sup> See Dkt. 270 at 20-25; Maglio Dec., ¶ 13, Dreyfus Depo., 61:9-14, 62:15-22, 63:19-65:7, 73:9-11; G. Baggen Depo. Vol. II, 535:14-537:19; Young Dec., ¶ 31; Tungul Depo., 95:8-25, 100:23-101, 142:22-144:3.

<sup>361</sup> Dkt. 270 at 48.

at Women's Bay Terminal.<sup>362</sup> Thus, the Court concludes Matson's and Samson's own actions are superseding events in the chain of causation, and that Samson's alleged damages were not "by reason of" ILWU's actions in lawfully pursuing its grievance.

Samson separately suggests that question of causation is a question of fact appropriate for a jury's determination.<sup>363</sup> But there is no genuine issue of material fact that ILWU's conduct materially contributed to Samson's damages. On this record, a reasonable jury could not find that ILWU caused Samson's damages under Section 303, and therefore summary judgment is appropriate.

**D. Further discovery is unnecessary in light of ILWU's affirmative defenses.**

Finally, turning to Samson's argument that further discovery regarding its allegations in its Third Amended Complaint and ILWU's Motion for Enforcement and Remedy would provide further evidence of coercive behavior, the Court concludes that such discovery is unnecessary because it could not overcome ILWU's affirmative defenses. Although sufficient to sustain a supplemental pleading to amend Samson's complaint under the liberal pleading standards of Rule 15,<sup>364</sup> ILWU's recent actions in pursuing

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<sup>362</sup> *Id.* at 51–52.

<sup>363</sup> *Id.* at 52–53.

<sup>364</sup> *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258–59 (9th Cir. 2010) (“[Rule 15] is to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits.”);

enforcement of the February 2020 Award and October 2021 Awards were part of its continuing efforts to preserve work for bargaining unit members under the AALA.

Further, Matson's claim for indemnity arose from its prior agreement with Samson regarding time in lieu payments,<sup>365</sup> and as such would not furnish evidence pointing to ILWU's coercion of either Matson or Samson. Indeed, Samson acknowledged that it could not identify specific evidence that ILWU forced Matson to charge Samson or add a time in lieu requirement to the terminal services agreement between them, nor explain how the February 2020 Award forced Matson to enter into such an agreement.<sup>366</sup> Thus, the Court concludes that ILWU's subsequent actions to enforce the February 2020 and October 2021 Awards did not constitute economic coercion within the meaning of Section 8(b)(4), and further discovery would not supply such evidence to overcome ILWU's affirmative defenses.

## V. Conclusion

For the foregoing reasons, the Court GRANTS ILWU's Motion at Dockets 232 and 270 and DENIES Samson's Cross-Motion at Dockets 231 and 249. Accordingly, all remaining motions are hereby DENIED AS MOOT. Therefore, all of Samson's claims in its Third Amended Complaint are DISMISSED with pre-

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*see also AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006) (noting that Rule 15 is construed liberally).

<sup>365</sup> Dkt. 270-41 at 2–3.

<sup>366</sup> Dkt. 270-3 at 158:3–10, 180:4–13.

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judice and the Clerk of Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 22nd day of August, 2024.

/s/ Timothy M. Burgess  
U.S. District Judge

**ORDER DENYING PETITION FOR  
REHEARING EN BANC, U.S. COURT OF  
APPEALS FOR THE NINTH CIRCUIT  
(SEPTEMBER 30, 2025)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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SAMSON TUG AND BARGE CO., INC,

*Plaintiff-Appellant,*

and

MARINE ENGINEERS' BENEFICIAL, AFL-CIO,

*Plaintiff,*

v.

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, ALASKA LONGSHORE  
DIVISION; INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, UNIT 222,

*Defendants-Appellees.*

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No. 24-5730

D.C. Nos. 3:20-cv-00108-TMB

3:20-cv-00248-TMB-MMS

District of Alaska, Anchorage

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SAMSON TUG AND BARGE CO., INC,

*Plaintiff-Appellee,*

v.

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, ALASKA LONGSHORE  
DIVISION; INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, UNIT 222,

*Defendants-Appellants.*

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No. 24-6017

D.C. No. 3:20-cv-00108-TMB  
District of Alaska, Anchorage

Before: GRABER, OWENS, and  
R. NELSON, Circuit Judges.

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**ORDER**

Judges Owens and R. Nelson have voted to deny the petitions for rehearing en banc, and Judge Graber has so recommended.

The full court has been advised of the petitions for rehearing en banc, and no judge of the court has requested a vote on them.

The petitions for rehearing en banc, Docket No. 80 (Case No. 24-5730), and Docket No. 73 (Case No. 24-6017), are DENIED.

**STATUTORY PROVISION AND  
JUDICIAL RULE INVOLVED**

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**29 U.S.C. § 158**

**Unfair labor practices**

- (a) UNFAIR LABOR PRACTICES BY EMPLOYER. It shall be an unfair labor practice for an employer—
- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157];
  - (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [29 USCS § 156], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
  - (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment

or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [29 USCS § 159(a)], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [29 USCS § 159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

- (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;
- (5) to refuse to bargain collectively with the representatives of his employees, subject to

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the provisions of section 9(a) [29 USCS § 159(a)].

- (b) UNFAIR LABOR PRACTICES BY LABOR ORGANIZATION. It shall be an unfair labor practice for a labor organization or its agents—
- (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
  - (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;
  - (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) [29 USCS § 159(a)];
  - (4)
    - (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry

affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

- (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsec. (e) of this section];
- (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, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [29 USCS § 159]: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

- (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 [29 USCS § 159];
- (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

*Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided, further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor

organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

- (5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;
- (6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and
- (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as

their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

- (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act [29 USCS § 159(c)],
- (B) where within the preceding twelve months a valid election under section 9(c) of this Act [29 USCS § 159(c)] has been conducted, or
- (C) where such picketing has been conducted without a petition under section 9(c) [29 USCS § 159(c)] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) [29 USCS § 159(c)(1)] or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ mem-

bers of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b) [this subsection].

- (c) **EXPRESSION OF VIEWS WITHOUT THREAT OF REPRISAL OR FORCE OR PROMISE OF BENEFIT.** The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.
- (d) **OBLIGATION TO BARGAIN COLLECTIVELY.** For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-

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bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

- (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
- (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
- (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
- (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) [29 USCS § 159(a)], and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended [29 USCS §§ 158, 159, 160], but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) [this subsection] shall be modified as follows:

- (A) The notice of section 8(d)(1) [para. (1) of this subsection] shall be ninety days; the notice of section 8(d)(3) [para. (3) of this subsection] shall be sixty days; and the contract period of section 8(d)(4) [para. (4) of this subsection] shall be ninety days.
- (B) Where the bargaining is for an initial agreement following certification or recognition, at

least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3) [para. (3) of this subsection].

- (C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.
- (e) ENFORCEABILITY OF CONTRACT OR AGREEMENT TO BOYCOTT ANY OTHER EMPLOYER; EXCEPTION. It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible [unenforceable] and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided fur-

ther, That for the purposes of this subsection (e) and section 8(b)(4)(B) [subsec. (b)(4)(B) of this section] the terms “any employer”, “any person engaged in commerce or an industry affecting commerce”, and “any person” when used in relation to the terms “any other producer, processor, or manufacturer”, “any other employer”, or “any other person” shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

- (f) AGREEMENT COVERING EMPLOYEES IN THE BUILDING AND CONSTRUCTION INDUSTRY. It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsec. (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [29 USCS § 159] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in

such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsec. (a)(3) of this section]: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [29 USCS § 159(c) or (e)].

- (g) NOTIFICATION OF INTENTION TO STRIKE OR PICKET AT ANY HEALTH CARE INSTITUTION. A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act [subsec. (d) of this section]. The notice shall state the date and

time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

**29 U.S.C. § 187**

**Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages**

- (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended [29 USCS § 158(b)(4)].
- (b) Whoever shall be injured in his business or property by reason or [of] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof [29 USCS § 185] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

**9th Cir. Rule 36-2**

A written, reasoned disposition shall be designated as an OPINION if it:

- (a) Establishes, alters, modifies or clarifies a rule of federal law, or
- (b) Calls attention to a rule of law that appears to have been generally overlooked, or
- (c) Criticizes existing law, or

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- (d) Involves a legal or factual issue of unique interest or substantial public importance, or
- (e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or
- (f) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.