

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**INTERNATIONAL LONGSHORE AND WAREHOUSE UNION and
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 19**
Petitioners/Cross-Respondents

and

PACIFIC MARITIME ASSOCIATION
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE
WORKERS, DISTRICT 160, LOCAL LODGE 289**
Intervenor

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE
WORKERS, DISTRICT 160, LOCAL LODGE 289**
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

**ON PETITIONS FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

**SUPPLEMENTAL REPLY BRIEF OF THE
NATIONAL LABOR RELATIONS BOARD**

LYNISA B. MICHALSKI
Acting Deputy General Counsel

PETER SUNG OHR
Associate General Counsel

RUTH E. BURDICK
Deputy Associate General Counsel

MEREDITH JASON
Assistant General Counsel

KIRA DELLINGER VOL
Supervisory Attorney

MICAH P. S. JOST
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0656
(202) 273-0264

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INTRODUCTION

Kinder Morgan is an anomaly. Congress enacted Section 8(b)(4)(D) in 1947 to end jurisdictional disputes. No party or amicus has produced a single other Board or court decision—from nearly eight decades of precedent—that applies secondary-boycott work preservation as a defense under that provision.

This case shows why. Under *Kinder Morgan*'s novel approach, if ILWU can demonstrate that its objectives are primary, not secondary, the Board cannot order ILWU *or* IAM to stop using coercion to get the maintenance work at Terminal 5. SSA will remain stuck between battling unions. That result is illogical and thwarts Congress's intent.

Nothing in the opening briefs justifies letting *Kinder Morgan*'s error stand. ILWU, PMA, and amicus ILA rely on out-of-context language from the *ILA* cases, but those cases do not support the notion that a union can wage a jurisdictional dispute in violation of Section 8(b)(4)(D) simply because its contractual claim to the work is lawfully primary due to an *ILA* work-preservation agreement. And decades of successful bargaining in the shipping industry before *Kinder Morgan* belie their insistence that *Kinder Morgan*'s approach is essential if parties are to negotiate collective-bargaining agreements that accommodate new technology and automation while preserving union work.

Until *Kinder Morgan*, it was clear that such work-preservation agreements were a factor to be weighed in the Section 10(k) process—not super-contracts that tie the Board’s hands when an innocent employer invokes that process. Here, the Board reasonably weighed ILWU’s agreement, IAM’s competing and equally binding contract, and other relevant factors in reaching its Section 10(k) decision. ILWU’s refusal to accept the Board’s resolution of the jurisdictional dispute and its coercion of SSA violates Section 8(b)(4)(D).

ARGUMENT

I. There Is No Coherent Defense of *Kinder Morgan*

ILWU and PMA concede that the Board, with court approval, applies *Teamsters Loc. 107 (Safeway Stores, Inc.)*, 134 NLRB 1320 (1961), to analyze work-preservation claims under Section 8(b)(4)(D). (ILWU Br. 6, 25, 29; PMA Br. 21-22.) No one argues that ILWU has satisfied *Safeway*. Instead, ILWU, PMA, and ILA argue that *International Longshore & Warehouse Union v. NLRB (Kinder Morgan)*, 978 F.3d 625 (9th Cir. 2020), correctly interpreted the *ILA* cases as providing an alternative work-preservation defense that the Board must also recognize in Section 8(b)(4)(D) cases where a collective-bargaining agreement seeks to preserve work in the face of increased automation. That claim is unsupported and illogical.

A. ILWU, PMA, and ILA Take the *ILA* Cases Out of Context

ILWU (Br. 5-6, 20-21, 26-29), PMA (Br. 6-9), and ILA (Br. 13-14, 16-17) misapply the *ILA* cases. Those cases did not, as ILWU incorrectly represents (Br. 27), mention Section 8(b)(4)(D). The issue there was whether ILA had a work-preservation objective that was primary—and thus lawful under Section 8(b)(4)(B)—or a secondary objective, which Section 8(b)(4)(B) prohibits.

In answering that question, the Supreme Court recognized that “the *purpose* of preserving for the contracting employees themselves work traditionally done by them” is considered “primary” under the Act. *NLRB v. ILA*, 447 U.S. 490, 504 (1980) (“*ILA I*”) (quoting *NLRB v. Pipefitters*, 429 U.S. 507, 517 (1977) (emphasis added)). Because that purpose is primary, enforcement of legitimate work-preservation agreements does not violate Section 8(b)(4)(B)’s prohibition on secondary boycotts, even if it harms third parties. *Id.* at 507 n.22.

The Supreme Court did not say that the Act favors work-preservation agreements over other collective-bargaining agreements, as ILWU (Br. 5, 27) and PMA (Br. 8) imply by quoting *ILA I*’s discussion of “primary purposes” out of context. The Act “encourage[es] the practice and procedure of collective bargaining” as to all matters of concern to labor and management—not just automation and technology. 29 U.S.C. § 151.

Nor did the *ILA* cases purport to establish an all-purpose affirmative defense to Section 8(b)(4) liability. Indeed, the analysis those cases prescribe for defining the work at issue makes no sense in the jurisdictional-dispute setting. (*Contra* ILWU Br. 26-27.) *ILA I* instructs the Board to analyze traditional work patterns and how technology has changed them in order to evaluate the union’s objective. The question is whether, in pursuing certain tasks, the union seeks to preserve work—a lawful, primary purpose—or “satisfy union objectives elsewhere,” which is an unlawful, secondary aim. *ILA I*, 447 U.S. at 511 (quotation omitted). That analysis recognizes that union objectives may appear primary or secondary depending on how, and from whose point of view, the work is defined—often the determinative issue in secondary-boycott cases. *See id.* at 507-10 (discussing examples). *See also, e.g., S.C. State Ports Auth. v. NLRB*, 75 F.4th 368, 375-77 (4th Cir. 2023) (upholding Board’s definition of work in Section 8(b)(4)(B) case), *cert. denied*, 144 S. Ct. 873 (2024)).

By contrast, defining the disputed work in a Section 8(b)(4)(D) case is typically straightforward. Here, all “parties stipulated that the work in dispute is the maintenance and repair work at Terminal 5 in the Port of Seattle, Seattle, Washington.” (DDD.2.) The question in a jurisdictional dispute, under *Safeway*, is whether the employer facing conflicting primary claims to that work is innocent of instigating the dispute and thus entitled to the Act’s protection. *Recon Refractory*

& Constr. Inc. v. NLRB, 424 F.3d 980, 981-82 (9th Cir. 2005). The *ILA* analysis does not inform that inquiry.

B. *Kinder Morgan* Conflicts with the Reasoned Precedent of the D.C. Circuit

In *Int'l Longshoremen's & Warehousemen's Union v. NLRB (Sea-Land Serv., Inc.)*, the D.C. Circuit rejected *ILA* secondary-boycott work preservation as a defense in a jurisdictional dispute. 884 F.2d 1407, 1412-13 (D.C. Cir. 1989). The opening briefs identify no defect in *Sea-Land's* reasoning.

ILWU argues that “*Sea-Land* did not address an automation/work-preservation agreement of the type at issue here.” (ILWU Br. 31.) But ILWU does not explain what other type of agreement would have been involved. Decades earlier, “[i]n 1959, PMA and [ILWU] entered into a coastwide mechanization agreement in an attempt to reconcile the need for the introduction of labor-saving machinery with the interests of [ILWU] in job security.” *NLRB v. ILWU, Loc. No. 50*, 504 F.2d 1209, 1214 (9th Cir. 1974). *See Sea-Land*, 884 F.2d at 1409 (noting that ILWU relied on its PMA collective-bargaining agreement).

In any event, *Sea-Land's* reasoning applies regardless of which contract ILWU invoked. As *Sea-Land* explained, a showing of *ILA* work-preservation establishes that a union's objective is primary, which is the ordinary starting point for a jurisdictional dispute. “[I]t is precisely because in a section 8(b)(4)(D) situation both disputes with the employer are, in a sense, primary, that the Act

provides a mechanism (section 10(k)) whereby the Board can resolve the dispute itself rather than merely proscribe coercion and let the dispute continue as it must do in a section 8(b)(4)(B) case.” *Sea-Land*, 884 F.2d at 1413.

ILWU also notes (Br. 31) that it did not challenge the Section 10(k) award in *Sea-Land*, as it does here. But under ILWU’s theory, that makes no difference. If *Kinder Morgan* stands, then *ILA* work preservation is “a complete defense against alleged violations of section 8(b)(4)(D), as well as against jurisdictional disputes under section 10(k).” *Kinder Morgan*, 978 F.3d at 637. Indeed, a defense to a Section 8(b)(4)(D) charge necessarily bars a Section 10(k) proceeding, because Section 10(k) comes into play only when there is reasonable cause to believe that a union has violated Section 8(b)(4)(D). *NLRB v. Plasterers’ Loc. Union No. 79 (Texas State Tile & Terrazzo Co.)*, 404 U.S. 116, 123-24 (1971). That is why, on remand in *Kinder Morgan*, the Board recognized that the law of the case precluded it from awarding the work, and quashed the notice of Section 10(k) hearing. (Board’s Supp’l Opening Br. 14, 22.)¹

¹ For the same reason, there is no merit to any suggestion (ILWU Br. 18 n.5; PMA Br. 23 n.3; SSA Br. 9) that the Court remand, without overturning *Kinder Morgan*, for the Board to reconsider its Section 10(k) award.

C. The Cases ILWU and PMA Cite Underscore *Kinder Morgan's* Error

The jurisdictional-dispute cases ILWU (Br. 21-22) and PMA (Br. 19-20) cite involving ILWU's work-preservation agreement confirm that *Kinder Morgan* was wrongly decided. Each case treated that agreement as a factor in the award of work under Section 10(k). *E.g.*, *NLRB v. ILWU, Loc. No. 50*, 504 F.2d 1209, 1216 (9th Cir. 1974); *ILWU (Albin Stevedore Co.)*, 144 NLRB 1443, 1448 (1963). In no case did that agreement "detract from the jurisdictional nature of the dispute." *ILWU (Am. Mail Line, Ltd.)*, 144 NLRB 1432, 1439 (1963).

Because an *ILA* work-preservation agreement is a factor in the Section 10(k) award, the Board here was right that ILWU's agreement did not foreclose a Section 10(k) award or a Section 8(b)(4)(D) order. *Kinder Morgan's* contrary holding that the agreement is a defense to both cannot stand.

D. No Policy Arguments Salvage *Kinder Morgan*

Claims that *Kinder Morgan* promotes labor peace and productivity (PMA Br. 1-2, 9-13; ILWU Br. 1-3, 32-33; ILA Br. 15-16, 19-20) are unsupported, and contravene the congressional policy decisions embedded in Sections 8(b)(4)(D) and 10(k). (*See* Board's Supp'l Opening Br. 11-14, 22-23, 27.) ILWU asserts that overturning *Kinder Morgan* "would decimate the longshore industry's settled expectations and render such contractual promises worthless." (ILWU Br. 32.) But the argument's premise is flawed. Before *Kinder Morgan*, the industry had no

reasonable expectation that *ILA* work-preservation agreements would stop the Board from resolving jurisdictional disputes. *Sea-Land* explicitly rejected that proposition in 1989, and no Board or court had ever previously accepted it. On the contrary, as cases like *ILWU, Local Number 50, supra*, demonstrate, unions and employers knew that *ILA* work-preservation agreements were part of the Board's work-award analysis. They negotiated such agreements nonetheless.

Kinder Morgan sows industrial strife by letting dueling unions pressure an innocent employer for the same work. And it creates uncertainty for parties whose appeals may be heard by either this Court or the D.C. Circuit, where *Sea-Land* controls. 29 U.S.C. § 160(e).

E. PMA's Remaining Arguments Fail

PMA appears to argue (Br. 24-26) that the Board refused, in the Section 8(b)(4)(D) proceeding, to allow ILWU to raise its *ILA* work-preservation defense. In fact, the Board noted that no union had argued work preservation in the Section 10(k) proceeding, as ILWU logically would have done if it had believed—prior to *Kinder Morgan*—that this was a work-preservation dispute. Instead, ILWU took the opposite position by stipulating that this was a classic jurisdictional dispute.

(D&O.1 n.2, 2.)²

² That SSA filed the initial charge against IAM, not ILWU, did not prevent ILWU from arguing that the dispute was about work preservation. *See, e.g., IAM, Dist. Lodge No. 160 (SSA Terminals)*, 373 NLRB No. 39, 2024 WL 1366818, at *3

Nevertheless, the Board considered ILWU’s work-preservation defense in the Section 8(b)(4)(D) proceeding. (D&O.1-2.) And it articulated its rationale for rejecting that defense: this is a Section 8(b)(4)(D) case, and ILWU failed to establish the elements of work preservation under the Board’s Section 8(b)(4)(D) precedent. (D&O.1-2.) The Board cited its caselaw setting forth the elements of Section 8(b)(4)(D) work preservation under *Safeway*. (D&O.1 n.6.) And it referenced *Sea-Land* and other cases applying that law—not Section 8(b)(4)(B) law—in the jurisdictional-dispute context. (D&O.2 n.8.)

Under *SEC v. Chenery Corp.*, which PMA cites (Br. 26), “a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.” 332 U.S. 194, 196 (1947). We seek enforcement of the Board’s Order solely on the grounds the Board invoked. *Chenery* is not offended by our request that the Court correct its own errant precedent, which precludes enforcement on those grounds.

(2024) (Section 8(b)(4)(D) charge was filed against IAM; Board addressed on the merits ILWU’s argument that notice of Section 10(k) hearing should be quashed because there was a work-preservation dispute); *IPTWIU (Recon Refractory & Const. Inc.)*, 339 NLRB 825, 826-28 (2003), *aff’d*, 424 F.3d 980 (9th Cir. 2005) (finding work-preservation dispute and granting motion to quash filed by charging-party union).

II. Substantial Evidence Supports the Board’s Section 10(k) Award

The Board’s Section 10(k) award of work to IAM is amply supported.³

A. The Board Properly Weighed the Two Contracts

There is no merit to ILWU and PMA’s insistence that the Board “disregarded” or even gave “negative weight” to ILWU’s contract. (ILWU Br. 23-24; PMA Br. 4, 13, 16-18, 23, 26.) The Board found, and no one disputes, that ILWU and IAM both had contracts covering SSA’s maintenance work at Terminal 5. (DDD.3.) The Board therefore found that “this factor does not favor awarding the work in dispute to employees represented by either union.” (DDD.3.)

Settled law supports that determination. *See NLRB v. N.Y. Lithographers & Photoengravers’ Union No. 1P*, 600 F.2d 336, 341 (2d Cir. 1979) (upholding Board’s determination that “conflicting contractual claims neutralize one another”); *ILWU (Am. President Lines)*, 369 NLRB No. 63, 2020 WL 2080217, at *6 (2020). Indeed, ILWU did not argue otherwise in the Section 10(k) proceeding.

³ SSA (Br. 22-28), PMA (Br. 15-16), and ILWU (Br. 18 n.5) assert that relevant facts have changed. As the Board’s motion to strike explains, no arguments or evidence concerning changed circumstances were ever presented to the Board, and the Court lacks jurisdiction to consider them. (Case No. 23-632, Dkt. 178.) If the Court remands for reconsideration of the Section 10(k) award, the Board respectfully requests that the Court permit the Board to determine, in the first instance, whether and to what extent SSA may properly seek to establish changed circumstances.

(DDD.2.) Its position was that “[b]oth collective bargaining agreements cover the work and thus this factor does not favor changing the status quo.”

(NLRBSER-17.)

Now, ILWU and PMA say their contract was superior to IAM’s because it preserved work in the context of automation. But IAM’s contract covered core maintenance work that IAM had performed for SSA in the Seattle region for decades. And it also explicitly preserved that work in the face of automation. (*See* 3-NLRBER-177 (“[A]ny future work created by advancements in technology or changes in existing technology necessary to perform all [maintenance] work will continue to be performed by the employees covered by this Agreement including but not limited to technology and automation.”).) No precedent supports giving IAM’s contract second-class treatment.

In cases where the Board gave significant weight to ILWU’s work-preservation agreement, there was no competing collective-bargaining agreement with PMA or its member-employer for the Board to weigh. (*See* ILWU Br. 21-22 and PMA Br. 19-20 (citing *Albin Stevedore*, 144 NLRB at 1448; *Am. Mail Line*, 144 NLRB at 1442)). *See also* *ILWU Loc. 10 (Howard Terminal)*, 147 NLRB 359, 366 (1964) (competing contracts, but Operating Engineers’ agreement “refer[red] primarily to work related to the construction industry”). Those cases support the Court’s observation that “[w]henver the Board determines that a collective

bargaining contract clearly and unambiguously binds an employer to one (and only one) union, then that union is almost invariably awarded the work.” *ILWU, Loc. No. 50*, 504 F.2d at 1220-21.⁴

ILWU also cites cases dealing with other unions (Br. 22), in which the Board discussed ILWU’s work-preservation agreement as evidence of industry practice, which was to assign the newly mechanized work of loading vessels by crane to longshoremen, not operating engineers. *Seafarers (Albin Stevedore Co.)*, 162 NLRB 1005, 1012 (1967); *Seafarers (Albin Stevedore Co.)*, 182 NLRB 633, 636 (1970). In this case, by contrast, evidence of industry practice as to maintenance work was in equipoise: IAM mechanics mainly performed it in Seattle, while ILWU mostly performed it at other nearby facilities. (DDD.4.)

B. The Board Reasonably Inferred SSA’s Preference for IAM

PMA (Br. 15), ILWU (Br. 13-15), and SSA (Br. 20-21) contend that because SSA declined to state its preference at the Section 10(k) hearing, the Board’s precedent barred it from determining what that preference was. That is not what the cases say.

When an employer denies that it has any preference, the Board has given that factor no weight. (DDD.3 (citing *Sign Painters Loc. 756 (Heritage Display)*),

⁴ In *ILWU, Local Number 50*, the Court rejected the Board’s factual finding that ILWU’s contract did not cover the work. 504 F.2d at 1215. Contrary to what PMA implies (Br. 18), no party argues a similar error here.

306 NLRB 818, 820 (1992)).) But where, as here, the employer has merely declined to express a preference, the Board has relied on other record evidence to infer one. (DDD.3 (citing *Eng'rs Loc. 150 (United Drilling)*, 337 NLRB 651, 653 (2002).) It is not arbitrary or capricious for the Board to distinguish between cases where an employer is genuinely indifferent and those where the employer, caught between two unions with which it has ongoing relations, is merely unwilling to state its preference outright. *See Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 568-69 (1st Cir. 2016) (noting “realm of reasonable discretion that an agency possesses to determine how to apply its own past precedents”).

ILWU, PMA, and SSA attack the Board’s reliance on the testimony of SSA representative Ed DeNike that, were it not for the ILWU contract, SSA would have assigned the work to IAM. But they overlook that DeNike explained his reasoning when he was asked whether he “would have preferred to have moved the IAM mechanics over to do the work.” (2-NLRBER-73.) The reason was not, as ILWU and SSA theorize, simply that he would have had to follow the IAM contract. (ILWU Br. 16-17, SSA Br. 11-12, 16-18.) Rather, DeNike testified, “[i]f we had *no contract obligations*,” SSA would have used the IAM-represented workers because SSA “knew the [IAM-represented] people who had been working for us at terminal 18 and 30.” (2-NLRBER-73 (emphasis added).) That explanation accords with testimony that DeNike told IAM at the time that “all things being equal, he

would . . . prefer if [IAM] continue[d] to do the maintenance work, but he was not going to pick any sides.” (2-NLRBER-130-31.)

In subsequent arbitration, ILWU repeatedly acknowledged that DeNike had conveyed SSA’s preference for IAM. ILWU’s counsel testified that DeNike “implied that SSA’s preference was that the work be assigned to [IAM]. And that’s what—how the Board saw it in its decision, too.” (MSUPPER-22.) Similarly, its representative testified the Board “found [an employer preference] when DeNike said he’d rather work with the IAM. If that’s not, you know, an expression of preference, then what is?” (MSUPPER-41.)

ILWU now criticizes the Board for relying on “its *own* findings on skill and economy” in assessing SSA’s preference. (ILWU Br. 17.) But “an employer’s preference is typically based on legitimate, traditional factors relevant to awarding work in dispute.” *Graphic Commc’ns Int’l Union, Loc. 508m (Jos. Berning Printing Co.)*, 331 NLRB 846, 848 (2000). As the Board’s panel brief explained (pp. 8-10, 52-60), ample record evidence supports the Board’s finding that many of those factors suggested SSA’s preference for IAM. (DDD.4 n.16.) The Board reasonably inferred that SSA preferred the union that it already used locally for similar work, which would provide more skilled and trained employees to do the work more efficiently and at lower cost.

ILWU implies that SSA—a “for-profit business” that initially assigned the work to ILWU—must have viewed those factors differently. (Br. 17; *see also* SSA Br. 18-19.) But it cites no supporting record evidence. SSA assigned the work to ILWU to comply with PMA’s advice. (DDD.2.) Contractual obligation may be a legitimate reason for preferring one union over another, as PMA (Br. 19) and ILWU (Br. 24) argue. But again, SSA never said it preferred ILWU.

Finally, SSA misunderstands the Board’s analysis of past practice as evidence of SSA’s preference. (Br. 17 n.3.) The Board recognized that SSA had no past practice at Terminal 5. (DDD.4 & n.17.) But IAM’s performance of the M&R work at Terminal 5 fell within SSA’s past practice of assigning IAM all its Port of Seattle M&R work. (DDD.3-4 & n.17.) That practice supports the Board’s finding that SSA preferred IAM.⁵

⁵ Other evidence of local practice also supports the award. Before SSA took over, IAM had exclusively maintained the cranes at Terminal 5 for the prior operator. And SSA itself had exclusively relied on IAM mechanics at Terminals 18 and 30 to maintain all the other container-handling equipment it planned to move to Terminal 5. (DDD.4; 2-NLRBER-78, 83, 132, 135.)

CONCLUSION

The Board respectfully renews its request that the Court overrule *Kinder Morgan*'s extension of secondary-boycott work preservation to the jurisdictional-dispute setting, deny the petitions for review, grant the Board's cross-application for enforcement, and enter a judgment enforcing the Board's Order.

Respectfully submitted,

/s/Kira Dellinger Vol
KIRA DELLINGER VOL
Supervisory Attorney

/s/Micah P.S. Jost
MICAH P.S. JOST
Attorney

National Labor Relations Board
1015 Half St. SE
Washington, DC 20570
(202) 273-0656
(202) 273-0264

LYNISA B. MICHALSKI
Acting Deputy General Counsel

PETER SUNG OHR
Associate General Counsel

RUTH E. BURDICK
Deputy Associate General Counsel

MEREDITH JASON
Assistant General Counsel

National Labor Relations Board

February 2026

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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Date February 23, 2026

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

INTERNATIONAL LONGSHORE AND)
WAREHOUSE UNION and)
INTERNATIONAL LONGSHORE AND)
WAREHOUSE UNION, LOCAL 19)
Petitioners/Cross-Respondents)

Nos. 23-632, 23-658,
23-780 and 23-793

and)

PACIFIC MARITIME ASSOCIATION)
Petitioner)

v.)

Board Case No.
19-CD-269637

NATIONAL LABOR RELATIONS BOARD)
Respondent/Cross-Petitioner)

and)

INTERNATIONAL ASSOCIATION OF)
MACHINISTS AND AEROSPACE WORKERS)
DISTRICT 160, LOCAL LODGE 289)
MACHINIST LOCAL 1173)
Intervenor)

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INTERNATIONAL ASSOCIATION OF)
MACHINISTS AND AEROSPACE WORKERS)
DISTRICT 160, LOCAL LODGE 289)
MACHINIST LOCAL 1173)
Petitioner)

v.)

NATIONAL LABOR RELATIONS BOARD)
Respondent)

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2026, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the ACMS system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate ACMS system.

/s/ Ruth E. Burdick
Ruth E. Burdick
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 23rd day of February 2026