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# The Art of Defending Against Union Slowdowns

By Michael Garone

In 2019 a federal jury in Portland, Oregon, awarded $93.6 million to terminal operator ICTSI Oregon, Inc. against the International Longshore and Warehouse Union (ILWU) and its affiliate ILWU Local 8. The jury concluded that the ILWU engaged in deliberate labor slowdowns with the objective to wrest certain maintenance and repair work from the members of another union, the International Brotherhood of Electrical Workers (IBEW). IBEW members had performed the work for nearly 40 years.

The jury concluded that the ILWU continued putting pressure on ICTSI over a four-year period between 2012 and 2016 – pressure that eventually caused ICTSI's two major ocean carriers to cease calling, leading to the eventual shutdown of Oregon's only container terminal.

The ILWU's pressure was considered "secondary" conduct and hence illegal because ICTSI did not control assignment of the work and therefore had no power to accede to the ILWU's demands. Rather, the Port of Portland, ICTSI's landlord at the terminal, retained sole control to assign the work over which the ILWU claimed jurisdiction.

What lessons can be drawn by vessel and terminal operators from the outcome of this landmark case?

First, they are not powerless in opposing union slowdowns. The slowdown is a potent tool and the ILWU has been found on numerous occasions to have utilized it, sometimes under the guise of "work to rule." Unlike strikes where employees completely stop work or walk off the job, slowdowns can be difficult to document accurately. Moreover, unions will often raise numerous excuses for their members' low productivity in an attempt to disguise their motives and actions. However, in the ICTSI case, the company presented a thorough statistical analysis of productivity by an economist who was able to demonstrate without question the substantial drop-off in productivity after the ILWU began its campaign to seize the IBEW jobs in 2012. The economist was also able to rule out the myriad reasons the ILWU asserted for low productivity by use of a powerful statistical tool called a regression analysis.

A second lesson that can be drawn from the case is that special attention must be paid to the motivations for the union's slowdowns. Unfortunately, federal law does not prohibit all forms of slowdowns. If slowdowns are for a primary and not a secondary object, unions and their members are often permitted to deliberately reduce their productivity, despite claiming full pay and benefits from their employers, to put pressure on employers to give unions what they want. But if an employer lacks the power or authority to give a union what it wants, then the slowdown has a prohibited secondary motive. In that case, the actions are illegal and the employer has a damage remedy against the union under a federal law known as Section 303 of the Labor Management Relations Act. This was the federal law under which ICTSI successfully brought its claim against the ILWU.

However, even if a union's motive is primary and not secondary, slowdowns, unlike strikes, are not considered by the National Labor Relations Board (NLRB) to be legally protected activity under federal labor law. As a result, while employers cannot normally discipline or fire employees simply for going on strike, employers are free to discipline or even discharge union members for engaging in slowdown activities. Thus, employers confronted with employees engaging in slowdowns, whether for a primary or secondary purpose, are free to take disciplinary actions against those employees. For ILWU members, this can include returning them to the hiring hall or filing employer complaints against them.

It is also important that employers be well informed about the legal mechanisms that can be used to stop slowdowns. In the ICTSI case, ICTSI filed unfair labor practice charges with the NLRB shortly after the ILWU began its slowdowns. ICTSI was able to demonstrate that the slowdowns had a secondary motive that made them illegal under the National Labor Relations Act. Because such cases are often complex, it is imperative that the employer work diligently to amass the evidence necessary to prove its case. If the NLRB is convinced that the slowdowns are illegal secondary conduct, the NLRB has a legal obligation to seek an injunction in federal court while unfair labor practice proceedings are ongoing.

Because NLRB processes are slow, these injunctions can sometimes last for years and are a powerful tool to stop illegal union conduct. Once a court issues an injunction, it is important that the employer continue to monitor productivity to ensure that the slowdowns and other coercive activity have stopped. In the ICTSI case, while a federal court issued an injunction against the ILWU shortly after it started the slowdowns, the ILWU did not comply. After considering statistical and other evidence, the federal court eventually held the ILWU in contempt of court for violating the injunction over the course of approximately 13 months.

It is also important to understand that the damage remedy available under the Labor Management Relations Act applies not just to vessel or terminal operators harmed by illegal secondary conduct. Any person or company harmed by the conduct can use this legal remedy against a union engaging in illegal secondary activity. This can include trucking companies, cargo owners, retailers, or other businesses.

The bottom line is that while companies besieged by union-directed slowdowns may feel powerless to resist, they are not. Though existing law could certainly use improvement, legal tools exist that employers can use to defend themselves and stop or deter such union activity. PMM

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