FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION; INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 19, *Petitioners*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent*, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160, LOCAL LODGE 289, *Intervenor*.	No. 23-632 NLRB No. 19-CD-269637 OPINION
PACIFIC MARITIME ASSOCIATION, *Petitioner*, v. NATIONAL LABOR RELATIONS	No. 23-658 NLRB No. 19-CD-269637

BOARD,
Respondent,

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

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION; INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 19,
Respondents,

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

No. 23-780

NLRB No. 19-CD-269637

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160, LOCAL LODGE 289, *Petitioner*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent*,	No. 23-793 NLRB No. 19-CD-269637

On Petition for Review of an Order of the National Labor Relations Board

Argued and Submitted March 24, 2026
Pasadena, California

Filed August 20, 2026

Before: Mary H. Murguia, Chief Judge, and Ronald M. Gould, Milan D. Smith, Jr., Morgan B. Christen, Bridget S. Bade, Kenneth K. Lee, Daniel A. Bress, Lawrence VanDyke, Lucy H. Koh, Holly A. Thomas and Salvador Mendoza, Jr., Circuit Judges.

Opinion by Judge Christen

SUMMARY[*]

Labor Law

The en banc court denied petitions for review by the International Longshore and Warehouse Union (ILWU) and the Pacific Maritime Association (PMA) and granted a cross-petition for enforcement by the National Labor Relations Board of the Board's order awarding the right to perform maintenance and repair work for SSA Terminals, LLC to the International Association of Machinists and Aerospace Workers (IAM).

Two labor unions, ILWU and IAM, claimed the right to perform the same maintenance and repair work for SSA Terminals pursuant to their respective collective bargaining agreements in what is known as a "jurisdictional dispute"—a conflict arising from overlapping scopes of work within each union's contract. Recognizing that an employer caught in the middle of a jurisdictional dispute is ill-equipped to resolve it, Congress amended the National Labor Relations Act (NLRA) to empower the Board to decide which of the competing unions shall be awarded the work and deemed the failure of the non-prevailing union to respect the Board's decision an unfair labor practice.

SSA Terminals invoked § 8(b)(4)(D) of the NLRA and asked the Board to decide which union should be awarded the maintenance and repair work. The Board awarded the work to IAM. ILWU then filed a grievance, alleging that SSA Terminals violated its collective bargaining agreement

[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

by failing to defend its right to do the work during the Board's proceedings, and an arbitrator ruled in ILWU's favor. The following month, IAM and SSA filed an unfair labor practice charge with the Board alleging that ILWU violated § 8(b)(4)(D) of the NLRA by pursuing a grievance intended to coerce SSA Terminals to reassign the work to ILWU in contravention of the Board's decision. The Board determined that ILWU violated § 8(b)(4)(D) by failing to comply with the Board's decision, and rejected ILWU's work-preservation defense, in which ILWU argued that the arbitration was a permissible work-preservation activity because it sought to pressure SSA Terminals to comply with its contractual obligation to assign the maintenance and repair work to ILWU.

The sole issue the en banc court resolved was whether a union charged with violating § 8(b)(4)(D) may invoke the work-preservation defense described in *National Labor Relations Board v. International Longshoremen's Association (ILA)*, 447 U.S. 490, 504 (1980). The en banc court held that (1) the *ILA* work-preservation defense is not a defense to an unfair labor practice charge under § 8(b)(4)(D) of the NLRA for failure to abide by the Board's resolution of a jurisdictional dispute, and (2) overruled the passage in *International Longshore & Warehouse Union v. National Labor Relations Board (Kinder Morgan)*, 978 F.3d 625 (9th Cir. 2020), that stated otherwise.

In *ILA*, the Supreme Court explained that by enacting § 8(b)(4)(B), Congress intended to prohibit unions from engaging in secondary activity (activity directed at a third-party with the goal of coercing that party to take some action against the employer with whom the union has a dispute) while allowing unions to engage in primary activity (activity a union undertakes directly against its contracting employer for the purpose of preserving work traditionally performed by union members). The Supreme Court acknowledged that the work-preservation defense can defeat an accusation of secondary activity in violation of § 8(b)(4)(B).

The en banc court held that, although *ILA* work-preservation can be a defense to a § 8(b)(4)(B) unfair labor practice charge, it does not necessarily follow that the defense applies to a § 8(b)(4)(D) charge because the theoretical bases for each charge are different. Section 8(b)(4)(B) seeks to preserve the right of labor organizations to bring pressure on offending employers in primary labor disputes without involving a third-party, and the inquiry is whether the union's conduct is primary. In contrast, § 8(b)(4)(D) presupposes primary activity because each union in a jurisdictional dispute seeks to secure work from its own employer. Accordingly, the *ILA* work-preservation defense is inapplicable to a § 8(b)(4)(D) charge.

The en banc court therefore denied ILWU's and PMA's petitions and granted the Board's cross-petition for enforcement.

In a concurrently filed memorandum disposition, the en banc court addressed whether substantial evidence supported the Board's work-assignment decision and IAM's petition challenging the adequacy of the remedy imposed by the Board.

COUNSEL

Kathleen Foley (argued), Zimmer Citron & Clarke LLP, Washington, D.C.; Michael E. Kenneally (argued), James D. Nelson, and Jonathan C. Fritts, Morgan Lewis & Bockius LLP, Washington, D.C.; Gregory Nelson, Morgan Lewis & Bockius LLP, New York, New York; Robert S. Remar, Law Office of Robert Remar, San Francisco, California; Kirsten Donovan, ILWU Coast Longshore Division, San Francisco, California; Ira L. Gottlieb, Julie Gutman-Dickinson, Erica Deutsch, and Sarah W. True, Bush Gottlieb A Law Corporation, Glendale, California; Robert H. Lavitt, Travis Lavenski, and Julian Gonzalez, Barnard Iglitzin & Lavitt LLP, Seattle, Washington; Lindsay R. Nicholas, Leonard Carder LLP, Oakland, California; Geoffrey J. Rosenthal, Morgan Lewis & Bockius LLP, Philadelphia, Pennsylvania; for Petitioners.

Micah P.S. Jost (argued), Attorney; Kira D. Vol, Supervising Attorney; David Habendtreit and Meredith Jason, Assistant General Counsel; Ruth E. Burdick, Deputy Associate General Counsel; Peter S. Ohr, Associate General Counsel; Lynisa B. Michalski and Stephanie Cahn, Acting Deputy General Counsel; William B. Cowen, Acting General Counsel; Jennifer A. Abruzzo, General Counsel; National Labor Relations Board, Washington, D.C.; for Respondent.

David A. Rosenfeld (argued), Weinberg Roger & Rosenfeld, Emeryville, California, for Intervenor.

John P. Sheridan and Daniel Wolff, Mazzola Mardon PC, New York, New York, for Amicus Curiae International Longshoreman's Association.

OPINION

CHRISTEN, Circuit Judge:

Two labor unions claim the right to perform the same maintenance and repair work for SSA Terminals, LLC pursuant to their respective collective bargaining agreements. There is no dispute that both unions, ILWU[1] and IAM,[2] are entitled to the work under their contracts, and the parties further agree that the employer cannot award the work to one union without breaching its contractual obligations to the other. This sort of dispute is known as a "jurisdictional dispute" because it is a conflict arising from overlapping scopes of work within each union's contract.

Congress has recognized that an employer caught in the middle of a jurisdictional dispute is ill-equipped to resolve it. Regardless of the union to which the employer assigns the work, the other union may picket or strike. With the potential of a never-ending dispute in mind, Congress amended the National Labor Relations Act (NLRA) to empower the National Labor Relations Board (Board) to decide which of the competing unions shall be awarded the work. Congress deemed the failure of the non-prevailing union to respect the Board's decision an unfair labor practice.

Here, the Board awarded SSA Terminals' equipment maintenance and repair work to IAM. ILWU responded by

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[1] For simplicity, we use "ILWU" to refer to the International Longshore and Warehouse Union and the International Longshore and Warehouse Union - Local 19.

[2] We use "IAM" to refer to the International Association of Machinists and Aerospace Workers, District 160, Local Lodge 289.

pursuing a grievance and arbitration against SSA Terminals. That prompted a new proceeding before the Board in which SSA Terminals and IAM accused ILWU of an unfair labor practice for failing to abide by the Board's decision. ILWU asserted a "work-preservation" defense, as described by the Supreme Court in *National Labor Relations Board v. International Longshoremen's Association* (*ILA*), 447 U.S. 490, 504 (1980). The Board rejected ILWU's defense, and the parties petitioned for review of the Board's assignment-of-work determination and, separately, review of its unfair labor practice charge ruling.[3]

A three-judge panel of our court vacated the Board's order because it was bound by our decision in *International Longshore & Warehouse Union v. National Labor Relations Board* (*Kinder Morgan*), 978 F.3d 625 (9th Cir. 2020). Sitting en banc, we now overrule the statement in *Kinder Morgan* that an *ILA* work-preservation defense may defeat an unfair labor practice charge for failure to abide by the Board's resolution of a jurisdictional dispute. We therefore deny the petitions challenging the Board's order and grant the Board's cross-petition for enforcement.[4]

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[3] In our concurrently filed memorandum disposition, we address whether substantial evidence supported the Board's work-assignment decision and IAM's petition challenging the adequacy of the remedy imposed by the Board (No. 23-793).

[4] We consolidated ILWU's, Pacific Maritime Association's, and IAM's petitions for review, as well as the Board's cross-petition for enforcement, all of which arise from the same Board order. We also granted IAM leave to intervene and granted leave to the International Longshoremen's Association to file an amicus brief in support of ILWU's and Pacific Maritime Association's petitions for review. We deny SSA Terminals' opposed motion for leave to file an amicus brief because the proposed amicus brief raises issues and seeks remedies not

I.

A.

SSA Terminals, LLC (SSA Terminals or SSA) operates container terminals in the Port of Seattle. A container terminal is a port built for large container ships. These ships require specialized equipment to load and unload cargo. SSA Terminals is responsible for maintaining the specialized equipment used at its terminals, and it assigns that work—which the parties refer to as "maintenance and repair work"—to union-represented employees pursuant to separate collective bargaining agreements. Relevant for our purposes, SSA Terminals was bound by collective bargaining agreements with both ILWU and IAM. SSA Terminals' agreement with IAM gave IAM-represented mechanics the right to perform the maintenance and repair work at SSA's Puget Sound Region container terminals. This agreement anticipated modernization by requiring that "any future work created by advancements in technology or changes in existing technology necessary to perform all [maintenance and repair] work will continue to be performed by the employees covered by this Agreement including but not limited to technology and automation."

SSA Terminals is a member of the Pacific Maritime Association (PMA), a multi-employer association, and the PMA has a collective bargaining agreement with ILWU. As a PMA-member employer, SSA Terminals is bound by the agreement. Section 1.72 of that agreement allows PMA-member employers to introduce automation at their

briefed by the parties. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1053 n.11 (9th Cir. 2009). We deny IAM's and the Board's pending motions to strike SSA's amicus brief as moot.

terminals—but in exchange, the agreement expands the scope of ILWU's jurisdiction to cover "installation, reinstallation, removal, maintenance and repair, and associated cleaning of such new technologies." Section 1.76 of the agreement requires PMA-member employers to defend the assignment of work to ILWU "in any legal proceeding."

Prior to 2018, SSA Terminals employed workers represented by ILWU and IAM at container terminals it operated in the Port of Seattle. ILWU stevedores secured ocean-going vessels and moved cargo to and from the vessels.[5] IAM-represented mechanics maintained and repaired equipment at the terminals, including the equipment used to load and unload cargo. IAM performed maintenance and repair work for a different operator at Terminal 5, which functioned as a container terminal until it closed in 2014.

In 2018, SSA Terminals decided to reopen Terminal 5, modernize it, and relocate some operations there. SSA Terminals signed a lease and spent one year modernizing Terminal 5. Terminal 5 is no more than a five- to ten-minute drive from other terminals operated by SSA. Terminal 5 reopened in 2019.

The reopening of Terminal 5 triggered SSA Terminals' contractual obligations under both collective bargaining agreements. PMA asserted that SSA Terminals was required to assign the Terminal 5 maintenance and repair work to ILWU. Though SSA Terminals had never assigned maintenance and repair work to ILWU at a container terminal in the Port of Seattle, it assigned the Terminal 5

[5] Stevedores manage the loading and unloading of ships. *See Stevedore*, *Black's Law Dictionary* (12th ed. 2024).

work to ILWU. IAM threatened to picket and strike if the work was not reassigned to its members. To prevent IAM from doing so, SSA Terminals invoked § 8(b)(4)(D) of the NLRA and asked the Board to decide which union should be awarded the work.[6]

B.

Subject to three conditions that are not disputed here, once a § 8(b)(4)(D) unfair labor practice charge is filed, § 10(k) of the NLRA authorizes the Board to conduct a hearing and determine which of the competing unions shall be awarded the disputed work. *See* 29 U.S.C. § 160(k). The Board's determination of a jurisdictional dispute under § 10(k) is not immediately reviewable, but it may be challenged through future unfair labor practice proceedings if there is a subsequent allegation of a § 8(b)(4)(D) violation for failure to comply with the Board's § 10(k) decision. *Henderson ex rel. NLRB v. Int'l Longshoremen's & Warehousemen's Union Loc. 50* (*Henderson*), 457 F.2d 572, 577 (9th Cir. 1972).

Here, following a § 10(k) hearing in July 2020, the Board awarded the Terminal 5 maintenance and repair work to IAM. The Board found: (1) SSA Terminals preferred IAM; (2) "the factors of skills and trainings, and economy and efficiency" favored IAM; and (3) IAM's experience performing the maintenance and repair work at Terminal 5, during a period when it was operated by the previous employer, all counseled in favor of IAM. By October of that

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[6] Following the parties' convention, we refer to both § 8(b)(4)(i)(B) and (D) and § 8(b)(4)(ii)(B) and (D) of the NLRA as § 8(b)(4)(B) and (D), respectively. For purposes of this opinion, the distinction between § 8(b)(4)(i)(B) and (D) and § 8(b)(4)(ii)(B) and (D) are immaterial.

year, SSA Terminals had reassigned the Terminal 5 maintenance and repair work to IAM.

ILWU filed a grievance, alleging that SSA Terminals violated section 1.76 of its collective bargaining agreement by failing to defend its right to do the work during the Board's § 10(k) proceedings. More specifically, ILWU argued that SSA Terminals violated section 1.76 because it refused to state a preference for ILWU during the § 10(k) hearing. ILWU pursued its grievance to arbitration, and asked the arbitrator to direct SSA Terminals to "assign the [maintenance and repair] work at Terminal 5 to the ILWU workforce," to nullify SSA Terminals' right to automate its operations until it complies with the terms of the collective bargaining agreement at Terminal 5, and to order SSA Terminals to compensate ILWU for the lost work opportunity from any future Terminal 5 work not performed by ILWU. The arbitrator decided in ILWU's favor and ordered SSA Terminals to "pay lost work opportunity claims for any future [Terminal 5 maintenance and repair] work not performed by ILWU-represented Mechanics." The arbitration award acknowledged that whether such a remedy may be "subject to unknown future unfair labor practice charges or other legality" would be "judged in other forums." The following month, IAM and SSA filed an unfair labor practice charge with the Board. In it, they alleged that ILWU violated § 8(b)(4)(D) of the NLRA by pursuing a grievance intended to coerce SSA Terminals to reassign the work to ILWU in contravention of the Board's § 10(k) decision.

Board complaints are heard by administrative law judges (ALJs), who make "findings of fact, conclusions of law, and . . . [provide] recommendations for the proper disposition of the case" to the Board. 29 C.F.R. § 102.45(a). Before the

ALJ, ILWU did not dispute that pursuing its grievance in defiance of the § 10(k) award may violate § 8(b)(4)(D). Instead, it argued that the arbitration was a permissible work-preservation activity because it sought to pressure SSA Terminals to comply with its contractual obligation to assign the Terminal 5 work to ILWU. ILWU specifically invoked a work-preservation defense, which was first described in *National Woodwork Manufacturers Association v. National Labor Relations Board*, 386 U.S. 612 (1967). The Supreme Court further elaborated upon the work-preservation defense in *ILA*, 447 U.S. 490 (1980).

The ALJ rejected ILWU's work-preservation defense and found that ILWU violated § 8(b)(4)(D) by failing to comply with the Board's § 10(k) decision. The Board affirmed this ruling. ILWU and PMA petitioned our court for review, challenging the Board's § 8(b)(4)(D) ruling and its underlying § 10(k) award. The Board cross-petitioned to enforce its decision. IAM intervened in support of the Board and filed a separate petition challenging the adequacy of relief ordered by the Board.

In support of their petitions for review, ILWU and PMA invoke our decision in *Kinder Morgan*, which they read to allow ILWU to assert an *ILA* work-preservation defense in a § 8(b)(4)(D) proceeding. A three-judge panel of our court vacated the Board's order, holding that in light of our decision in *Kinder Morgan*, ILWU was allowed to assert an *ILA* work-preservation defense in response to the § 8(b)(4)(D) unfair labor practice charge. One member of the panel wrote separately to urge our court to reconsider *Kinder Morgan* en banc. We granted the Board's and IAM's petitions for en banc review and vacated the three-judge panel opinion. We also granted ILWU's motion to permit supplemental briefing. Having considered the parties' supplemental briefing and oral argument, we are persuaded that the work-preservation defense asserted by ILWU does not defeat a § 8(b)(4)(D) charge arising from the failure to comply with the Board's resolution of a jurisdictional dispute.

II.

We have jurisdiction pursuant to § 10(e) and (f) of the National Labor Relations Act. 29 U.S.C. § 160(e), (f). We review de novo questions of law and "exercise [our] independent judgment in deciding whether an agency has acted within its statutory authority." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

III.

A.

By definition, jurisdictional disputes arise when multiple unions seek to enforce irreconcilable contractual rights to perform the same work for the same employer, such that the employer cannot assign the work to one union without breaching its obligations to the other. *See USCP-WESCO, Inc. v. NLRB*, 827 F.2d 581, 583–85 (9th Cir. 1987). Jurisdictional disputes have disruptive consequences and were historically the cause of extended work stoppages. *See* Comm. on Labor & Pub. Welfare, Legislative History of the Labor Management Relations Act, 1947, at 951–52 (1974). Before the mid-twentieth century, the Board typically did not wade into jurisdictional disputes. *See NLRB v. Radio & Television Broad. Eng'rs Union, Loc. 1212* (*CBS*), 364 U.S. 573, 580 (1961). Instead, unions and employers set up independent and joint tribunals to arbitrate the disputes themselves. *Id.* These efforts fell short, and "widely expressed dissatisfaction with jurisdictional strikes" continued. *Id.* The severity of the detrimental effects of jurisdictional disputes and ensuing strikes spurred President Truman to urge Congress in 1947, "if the 'rival unions are unable to settle such disputes themselves, provision must be made for peaceful and binding determination of the issues.'" *Id.* (citation omitted).

Congress responded by amending the NLRA to establish a two-part mechanism for the Board to resolve jurisdictional disputes. *Id.* at 581–82. Section 8(b)(4)(D) deems it an unfair labor practice for a labor organization to "forc[e] or requir[e] any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization," unless the employer is acting in defiance of a Board order. 29 U.S.C. § 158(b)(4)(D). The Supreme Court has explained that § 8(b)(4)(D) "must be read in light of [§] 10(k) with which it is interlocked." *NLRB v. Plasterers' Loc. Union No. 79* (*Texas Tile*), 404 U.S. 116, 123 (1971). A complaint filed pursuant to § 8(b)(4)(D) triggers a process described in § 10(k) that requires the Board to award contested work so long as three conditions are met. Specifically, the Board must verify that there exists:

> reasonable cause to believe that (1) a union has used a proscribed means—such as picketing or threatening to picket—to enforce its claim to the work in dispute; (2) there are competing claims to the disputed work between rival groups of employees; and

> (3) there is no agreed-upon method for resolving the dispute voluntarily.

Recon Refractory & Constr. Inc. v. NLRB, 424 F.3d 980, 988 (9th Cir. 2005); *see also Texas Tile*, 404 U.S. at 123–24. Here, the Board deemed these three conditions satisfied because IAM had threatened to strike if the Terminal 5 maintenance and repair work was not reassigned to it, and the other two conditions were uncontested.

In a § 10(k) proceeding, the Board looks to a variety of factors to decide which union or group of employees is entitled to perform the disputed work. The factors include employer preference, the relative skills of the competing groups, industry practice, and whether considerations of economy and efficiency of operations favor one group of employees over the other. *Texas Tile*, 404 U.S. at 132 n.26. If the Board determines that the employees represented by the union that was originally charged with the unfair labor practice are entitled to perform the disputed work, the Board will dismiss the unfair labor practice charge as to that union. 29 C.F.R. § 102.91.

If, after the Board issues its § 10(k) ruling, the non-prevailing union attempts to coerce the employer into reassigning the disputed work to it, any person may file a new complaint alleging an unfair labor practice under § 8(b)(4)(D). *See id.* In a § 10(k) proceeding, "the Board need only find that there is reasonable cause to believe that a [§] 8(b)(4) (D) violation has occurred, while in the [§] 8(b)(4)(D) proceeding itself the Board must find by a preponderance of the evidence that the [charged] union has violated [§] 8(b)(4)(D)." *Int'l Tel. & Tel. Corp., Commc'ns Equip. & Sys. Div. v. Local 134, Int'l Bhd. of Elec. Workers* (*ITT*), 419 U.S. 428, 447 (1975) (citation omitted). In this way, the initial § 10(k) award provides "the parties a sort of 'advisory opinion' that previews the Board's probable assessment of the merits." *Kinder Morgan*, 978 F.3d at 634 (quoting *ITT*, 419 U.S. at 446). "It is not, however, a binding, final disposition," and it may be challenged only in the course of review of a subsequent final § 8(b)(4)(D) order. *Id.*; *see also Henderson*, 457 F.2d at 577. The threat of a follow-on § 8(b)(4)(D) charge operates as the de facto enforcement scheme for the Board's § 10(k) decision.

Here, the Board's § 10(k) ruling awarded the maintenance and repair work at Terminal 5 to IAM. ILWU initiated a grievance and an arbitration proceeding against SSA Terminals, seeking compensation for its lost work. ILWU does not deny that seeking an arbitral award of in-lieu payments for lost work may amount to "coercion" pursuant to § 8(b)(4)(D), nor could it. *See Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Loc. 200*, 611 F.3d 483, 492 (9th Cir. 2010) ("[A]llowing the losing party in a 10(k) dispute to pursue payments for work that the Board awarded to employees other than those involved in the grievance necessarily subverts the Board's 10(k) award." (alteration in original) (quoting *Iron Workers Loc. 433*, 309 NLRB 273, 274 (1992))); *Int'l Longshoremen's & Warehousemen's Union, Loc. 32 v. Pac. Mar. Ass'n*, 773 F.2d 1012, 1018 (9th Cir. 1985); *Sheet Metal Workers Int'l Ass'n*, 357 NLRB 1577, 1578–79 (2011). Instead, ILWU argues that its grievance and arbitration were permissible because ILWU sought to persuade SSA Terminals to comply with its contractual obligations to assign Terminal 5 work to ILWU. In other words, ILWU contends that by pursuing its grievance and arbitration, it merely sought to preserve work it was contractually entitled to perform, not to extract additional work from SSA Terminals. The sole issue we resolve here is whether a union charged with violating § 8(b)(4)(D) may invoke the *ILA* work-preservation defense.

B.

To understand the *ILA* work-preservation defense, it is necessary to understand the function served by § 8(b)(4)(B) of the NLRA, and the difference between "primary" and "secondary" activity. In *ILA*, the Supreme Court explained that by enacting § 8(b)(4)(B), Congress intended to prohibit secondary activity while allowing unions to engage in primary activity. 447 U.S. at 504; *see also NLRB v. Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters of N.Y. & Vicinity, Loc. Union No. 638* (*Pipefitters*), 429 U.S. 507, 510 (1977). Primary activity is any activity a union undertakes directly against its contracting employer "for the purpose of preserving work traditionally performed by union members," even if the union's demands may have the collateral effect of causing the employer to cease employing members of a different union. *Pipefitters*, 429 U.S. at 510; *see also NLRB v. Int'l Longshoremen's Ass'n* (*ILA II*), 473 U.S. 61, 78 & n.18 (1985) (explaining that primary activity is permissible even when it has "severe" consequences for "the employment opportunities of employees not represented by the union" (quoting *ILA*, 447 U.S. at 507 n.22)).

By contrast, secondary activity encompasses activity directed at a third-party with the goal of coercing that party to take some action against the employer with whom the union has a dispute. *ILA*, 447 U.S. at 503–04; *Nat'l Woodwork*, 386 U.S. at 623–25. A union acting with a secondary purpose aims to "disrupt the business relations of a neutral" third-party. *ILA II*, 473 U.S. at 79. For example, a union in the building industry engages in primary activity when it refuses to install doors precut by a manufacturer because it aims to safeguard its traditional work of cutting and fitting doors at construction sites. *See Nat'l Woodwork*, 386 U.S. at 617, 645–46. A union engages in secondary activity if, in an effort to pressure its employer to retain delivery work for union drivers, it pickets neutral retailers selling the employer's products to induce those retailers to cease doing business with the employer. *See Pye v. Teamsters Loc. Union No. 122*, 61 F.3d 1013, 1022 (1st Cir. 1995); *Nat'l Woodwork*, 386 U.S. at 626 n.16 (explaining that "[t]he gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute [with the union], but upon some third party who has no concern in it" and that the aim of a secondary boycott "is to compel [the third party] to stop business with the employer in the hope that this will induce the employer to give in to his employee's demands" (quoting *Int'l Bhd. of Elec. Workers, Loc. 501 v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951))).

Section 8(b)(4)(B) addresses Congress's concern with secondary activity by making it an unfair labor practice for a union to "forc[e] or requir[e] any person . . . to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(B). The Supreme Court's *ILA* decision articulated a two-part work-preservation test to determine whether an activity is a permissible primary activity or a secondary activity proscribed by § 8(b)(4)(B). First, to qualify as a primary activity, the activity "must have as its objective the preservation of work traditionally performed by employees represented by the union." *ILA*, 447 U.S. at 504; *see also Kinder Morgan*, 978 F.3d at 637 (explaining that "the dispositive measure" between primary and secondary activities is the purpose of the challenged conduct). "Second, the contracting employer must have the power to give the employees the work in question." *ILA*, 447 U.S. at 504. This requirement excludes activities intended to exert indirect pressure on union employers via tactics aimed at third parties. *Id.* at 504–05 (explaining that where the second prong of the *ILA* work-preservation defense test is not met, "it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever *does* have such power over the work" (emphasis added)).

In *ILA*, the Supreme Court acknowledged that the work-preservation defense can defeat an accusation of secondary activity in violation of § 8(b)(4)(B). *See id.* at 503–04; *see also Pipefitters*, 429 U.S. at 510; *Nat'l Woodwork*, 386 U.S. at 622; *Hous. Insulation Contractors Ass'n v. NLRB*, 386 U.S. 664, 668–69 (1967). The Court has not extended this defense to a § 8(b)(4)(D) charge.

C.

Although *ILA* work-preservation can be a defense to a § 8(b)(4)(B) charge, it does not necessarily follow that the defense applies to a § 8(b)(4)(D) charge because "the theoretical bases for each charge are different." *Int'l Longshoremen's & Warehousemen's Union v. NLRB* (*Sea-Land*), 884 F.2d 1407, 1412 (D.C. Cir. 1989) (citation omitted). As explained, § 8(b)(4)(B) seeks to "preserv[e] the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes," without involving a third-party. *Nat'l Woodwork*, 386 U.S. at 626–27 (citation omitted). The § 8(b)(4)(B) inquiry therefore turns on whether the union's conduct is primary—i.e., whether it is directed at "the labor relations of the contracting employer *vis-à-vis* his own employees"—or instead improperly targets neutral third-parties. *Id.* at 645. In contrast, § 8(b)(4)(D) *presupposes* primary activity because each union in a jurisdictional dispute seeks to secure work from its own employer that it is contractually entitled to perform. A primary dispute becomes a "jurisdictional dispute" only when rival unions claim the same work from the same employer. That is, unlike a § 8(b)(4)(B) charge, a § 8(b)(4)(D) charge inherently involves primary pressure directed at the employer who has the power to assign the disputed work.

The Supreme Court has explained that Congress enacted § 8(b)(4)(D) and § 10(k) as intertwined provisions "to protect employers and the public from the detrimental economic impact of 'indefensible' jurisdictional strikes." *Texas Tile*, 404 U.S. at 130 (footnote omitted). To this end, § 10(k) requires the Board to provide conclusive resolutions to jurisdictional disputes, thereby avoiding intractable and "intolerable" labor conflicts. *CBS*, 364 U.S. at 580. The Supreme Court has relied on Congress's strong indictment of jurisdictional disputes to bolster the Board's mandate to resolve them. For instance, the Supreme Court has required the Board to make affirmative awards of disputed work rather than accepting the employer's initial assignment of work as determinative, *id.* at 582 (explaining that § 10(k) "was designed to provide . . . an effective compulsory method of getting rid of what were deemed to be the bad consequences of jurisdictional disputes"), and the Court has directed the Board to proceed to a § 10(k) hearing if two disputing unions, but not the employer, agree on a private mode of dispute resolution, *Texas Tile*, 404 U.S. at 136–37.

Allowing an *ILA* work-preservation defense to a § 8(b)(4)(D) charge would undermine Congress's intent to "solve the knotty problem of wasteful work stoppages due to [jurisdictional] disputes." *CBS*, 364 U.S. at 580. This is so because, by definition, all unions in a true jurisdictional dispute can claim that they aim to preserve their right to perform the disputed work pursuant to their contracts. If a union could avoid liability for a § 8(b)(4)(D) unfair labor practice charge simply by characterizing defiance of the Board's § 10(k) determination as "work preservation," the Board's ability to provide final resolutions to jurisdictional disputes would be thwarted. The interpretation that ILWU and PMA advocate permits an end run around the scheme Congress enacted to resolve jurisdictional disputes. As the Supreme Court has explained, the potential for a follow-on § 8(b)(4)(D) charge is the only way to "implement the Board's [§] 10(k) decision." *Texas Tile*, 404 U.S. at 127. Having reviewed these interlocking provisions, we are persuaded that the *ILA* work-preservation defense is inapplicable to a § 8(b)(4)(D) charge.

D.

ILWU's and PMA's arguments to the contrary are unavailing. First, they invoke our decision in *Kinder Morgan*, a case involving facts analogous to those in this appeal. There, two unions, ILWU and the Electrical Workers union, laid claim to the same work. *Kinder Morgan*, 978 F.3d at 629. After a § 10(k) hearing, the Board awarded the work to the Electrical Workers, but ILWU continued to seek the work by pursuing a grievance before an arbitrator. *Id.* at 631–32. The arbitrator found that ILWU was entitled to the work. *Id.* at 632. After ILWU attempted to enforce the arbitral award, the Electrical Workers filed an unfair labor practice charge with the Board under § 8(b)(4)(D). *Id.* ILWU presented a work-preservation defense, which the Board rejected. *Id.* at 633 & n.10.

Notably, the Board did not argue before the three-judge panel in *Kinder Morgan*, as it does now, that the *ILA* work-preservation defense is inapplicable to a § 8(b)(4)(D) charge.[7] *See id.* at 634–37. And as far as we can tell, neither did the parties. Instead, in *Kinder Morgan*, the Board focused its argument on its contention that its § 10(k) decision precluded ILWU from relitigating certain arguments at a subsequent § 8(b)(4)(B) hearing. *See id.* We rejected that position, relying on our own precedent and Supreme Court authority establishing that § 10(k) determinations do not have preclusive effect in follow-on § 8(b)(4)(D) proceedings. *Id.* at 630. The Board argued in the alternative that ILWU could not satisfy the *ILA* work-preservation defense because it could not show: (1) that its objective was to preserve work it traditionally performed; and (2) that the contracting employers had the power to assign the work. *See id.* at 637–42. Our decision in *Kinder Morgan* vacated the Board's ruling that ILWU violated § 8(b)(4)(D). *Id.* at 643. In doing so, we stated that "[a] valid work preservation objective provides a complete defense against alleged violations of [§] 8(b)(4)(D), as well as against jurisdictional disputes under [§] 10(k)." *Id.* at 637. This part of our decision in *Kinder Morgan* departed from the D.C. Circuit's decision in *Sea-Land*, 884 F.2d 1407. *Sea-Land* held that a union accused of violating § 8(b)(4)(D) for failing to abide by an adverse § 10(k) decision cannot invoke the *ILA* work-preservation defense because such a defense undermines the Board's ability to conclusively resolve jurisdictional disputes. *See id.* at 1411–13. We are persuaded by the reasoning in *Sea-Land*.

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[7] We grant ILWU's motion to take judicial notice of the Board's Answering Brief before the *Kinder Morgan* court.

The Supreme Court cases cited in *Kinder Morgan* do not support a contrary result because they involved § 8(b)(4)(B) charges arising from allegations of secondary activities. *See Kinder Morgan*, 978 F.3d at 637–38 (citing *Nat'l Woodwork*, 386 U.S. at 644–46; *ILA*, 447 U.S. at 503–07; *ILA II*, 473 U.S. at 79–82). The case *Kinder Morgan* cites that directly considers the availability of a work-preservation defense to a § 8(b)(4)(D) charge was *Recon*, 424 F.3d 980. *See Kinder Morgan*, 978 F.3d at 637. Somewhat confusingly, *Recon* involved a *different* type of work-preservation defense.

The work-preservation defense in *Recon* stemmed from the Board's decision in *Highway Truckdrivers & Helpers, Local 107* (*Safeway*), 134 NLRB 1320 (1961). *See Recon*, 424 F.3d at 987–91. There, the Board held that a bona fide jurisdictional dispute does not exist where an employer reassigns work, from one union with a contractual right to perform it to another union that had no previous claim to the work, because "[s]ections 8(b)(4)(D) and 10(k) were designed to resolve competing claims between *rival groups of employees*, . . . not to arbitrate disputes between a union and an employer where no such competing claims are involved." *Safeway*, 134 NLRB at 1322 (emphasis added). *Safeway* explained that the dispute there was not a jurisdictional dispute at all. *Id.* at 1323. Rather, the employer created the dispute by his unilateral action, and except for the employer's decision to reallocate the union's work, the employees to whom the employer transferred the work would have had no valid claim to it. *Id.*; *see also CBS*, 364 U.S. at 582 (explaining that § 8(b)(4)(D) and § 10(k) presume "that the employer has been placed in a situation where he finds it impossible to secure the benefits of stability from" his contracts with two competing unions, "not because he refuses to satisfy the unions").

Unlike the parties in *Safeway*, all parties to this dispute agree that this case presents a "classic jurisdictional dispute," in which both unions are contractually entitled to perform SSA Terminals' maintenance and repair work. As such, the work-preservation defense described in *Safeway* does not apply. Though the parties did not litigate the question in *Kinder Morgan*, the *Safeway* work-preservation defense—which really asks whether there is a jurisdictional dispute to begin with—does not lend support to the proposition that the *ILA* work-preservation defense is available to defend against a § 8(b)(4)(D) charge.

Finally, ILWU and PMA urge us to hold that the *ILA* work-preservation defense should at least apply to a § 8(b)(4)(D) charge where the accused union's activities were an attempt to enforce a bargained-for work modernization clause that anticipates changes in the way work is performed. We are not persuaded. First, as we have explained, the statutory scheme is not designed to allow circumvention of the Board's § 10(k) determination without consequence. Second, ILWU's and PMA's suggested exception offers little in the way of a limiting principle because work modernization clauses aimed at preserving union work in the face of advances in technology are commonplace. Both collective bargaining agreements at issue in this dispute, for example, contain work modernization clauses.

ILWU and PMA also stress that bargained-for modernization clauses are beneficial to all concerned because they minimize the risk of labor disputes and serve to preserve work for unions. We acknowledge the important benefits of work modernization clauses, *see Kinder Morgan*, 978 F.3d at 639–40, but the concern that the Board will disregard bargained-for contract provisions is unfounded. Indeed, the Board necessarily considers the terms of the parties' collective bargaining agreements when deciding the merits of their respective claims to the disputed work. *See Texas Tile*, 404 U.S. at 132 n.26; *Int'l Ass'n of Machinists, Lodge No. 1743*, 135 NLRB 1402, 1410–11 (1962). Nor does today's decision relieve the Board of its obligation to take a holistic approach when defining a labor organization's "traditional work," a task that is particularly important—and nuanced—when a jurisdictional dispute arises from technological advances in an employer's operations. *See ILA*, 447 U.S. at 505–08 (directing the Board to take a holistic approach when defining "traditional work" to avoid the risk of forcing unions and employers into "intransigence" when adapting to new technology).

IV.

Allowing the *ILA* work-preservation defense to defeat a § 8(b)(4)(D) charge for failing to abide by a § 10(k) decision would frustrate the scheme Congress enacted to conclusively resolve jurisdictional disputes. Accordingly, we hold that *ILA* work-preservation is not a defense to an unfair labor practice charge under § 8(b)(4)(D) and overrule the passage in *Kinder Morgan* that states otherwise.[8] The petitions of

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[8] Pursuant to *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943), ILWU and PMA urge us to not consider the Board's argument to overrule *Kinder Morgan* in part because it was not a ground the Board relied upon when adjudicating the § 8(b)(4)(D) charge. *Chenery* does not prevent us from determining whether a prior decision of our court is correct as a matter of law. *See Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 304 (D.C. Cir. 2015) (explaining that *Chenery* applies to "determination[s]

ILWU (No. 23-632) and PMA (No. 23-658) challenging the Board's order are **DENIED** and the Board's cross-petition for enforcement (No. 23-780) is **GRANTED**.

specially entrusted to an agency's expertise" and not determinations that "a court usually makes"); *see also Loper Bright*, 603 U.S. at 373–74.