

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 20 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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

MEMORANDUM*

PACIFIC MARITIME ASSOCIATION,

Petitioner,

v.

No. 23-658

NLRB No.
19-CD-269637

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

NATIONAL LABOR RELATIONS
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

No. 23-793

WORKERS, DISTRICT 160, LOCAL
LODGE 289,

Petitioner,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

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

Before: MURGUIA, Chief Judge, and GOULD, M. SMITH, CHRISTEN, BADE,
LEE, BRESS, VANDYKE, KOH, H.A. THOMAS and MENDOZA, Circuit
Judges.

Statement by Judge VANDYKE.

ILWU¹ and IAM² both claim the right to perform certain maintenance and
repair work for SSA Terminals, LLC.³ The National Labor Relations Board

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.

³ In the concurrently filed opinion, we hold that the 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), is not
available to defend against a § 8(b)(4)(D) charge arising from a true jurisdictional
dispute.

awarded the disputed work to IAM after a § 10(k) proceeding. *See* 29 U.S.C. § 160(k). When ILWU failed to comply with the Board’s award, the Board found that ILWU had committed an unfair labor practice pursuant to § 8(b)(4)(D) of the National Labor Relations Act (NLRA). *See id.* § 158(b)(4)(D).⁴ Both unions, along with the Pacific Maritime Association (PMA), petition for review of the Board’s § 8(b)(4)(D) decision and its underlying § 10(k) determination. Because the parties are familiar with the facts, we do not recount them here. We have jurisdiction pursuant to § 10(e) and (f) of the NLRA. *Id.* § 160(e), (f). We deny the petitions for review and grant the Board’s cross-petition for enforcement.

“We review the Board’s findings of fact for substantial evidence.” *Recon Refractory & Constr. Inc. v. NLRB*, 424 F.3d 980, 986 (9th Cir. 2005) (citing 29 U.S.C. § 160(e)). Under this deferential standard, we must affirm the Board if the relevant evidence is such that “a reasonable mind might accept it as adequate to support a conclusion—even if it is possible to draw a contrary conclusion from the evidence,” and even if we would have made a “different choice under de novo review.” *Int’l All. of Theatrical Stage Emps., Loc. 15 v. NLRB*, 957 F.3d 1006, 1013 (9th Cir. 2020) (citation modified).

⁴ For ease, we refer to both § 8(b)(4)(i)(D) and 8(b)(4)(ii)(D) of the NLRA as § 8(b)(4)(D).

1. ILWU and PMA argue that the Board's § 10(k) decision to award the disputed work to IAM was not supported by substantial evidence. We disagree. Edward DeNike, SSA Terminals' Chief Operating Officer and its parent company's Executive Vice President, provided probative testimony. DeNike initially declined to expressly state a preference between ILWU and IAM. When asked to give one, he first answered, "[i]n the interest of trying to be fair to all of the workers . . . I'm not going to give you a preference" because "[i]f I prefer one, I'm going to have a problem with the other." However, DeNike went on to explain that if SSA Terminals "had no contract obligations," it would have hired the IAM-represented mechanics who had previously completed the maintenance and repair work for SSA Terminals at nearby container terminals. Past practice also supported the Board's decision to award the work to IAM because IAM-represented mechanics previously handled the maintenance and repair work for the Terminal 5 cranes when Terminal 5 was operated by a different employer. Moreover, IAM maintained an apprenticeship program that ensured "a union-wide level of skills and training." DeNike also testified that it would be more economical to employ IAM-represented mechanics because: (1) ILWU-represented employees work nine hours a day but are paid for ten, whereas IAM-represented employees work eight hours a day and are paid for eight; (2) if SSA Terminals used ILWU, it would need to employ approximately fifteen mechanics,

but if SSA Terminals used IAM, it would need to hire only seven or eight; (3) ILWU's "hiring hall" requires employers to pay fees; and (4) IAM-represented mechanics provide their own tools or would be able to move tools from other terminals to Terminal 5, while SSA Terminals would need to purchase tools for ILWU. Finally, because IAM-represented mechanics already worked at nearby terminals, SSA Terminals could easily transfer or substitute mechanics as needed.

ILWU and PMA argue that the Board "disregarded" and gave "negative weight" to the work-preservation clause in ILWU's collective bargaining agreement. Both ILWU's and IAM's collective bargaining agreements had work-preservation clauses that covered the maintenance and repair work at Terminal 5, and the Board reasonably determined that the collective bargaining agreement factor was neutral.

2. ILWU and PMA next argue that the Board's decision was arbitrary and capricious. They allege that in prior cases the Board inferred a preference only when the record did not include the employer's expression of a preference and gave no weight to the employer preference factor when, as here, the employer expressly disclaimed a preference. According to ILWU and PMA, in this case the Board departed from its prior practice without sufficient reasoning.

Contrary to ILWU's and PMA's assertion, the Board did not ignore its precedent; the Board distinguished it. The Board explained that "although [it] has

found the employer preference factor to have no bearing on a case where an employer expressly stated that it did not have a preference, the Board has not limited itself to considering the employer's explicit preference (or refusal to state one) and has relied on other evidence presented during a hearing to make a conclusion as to the employer's preference." Rather than acting in an arbitrary and capricious manner, the Board explained its reasoning and distinguished the facts of this case from circumstances in which an employer expressly stated that it did not have a preference. The Board's factual finding is supported by substantial evidence and entitled to deference.

3. IAM's petition contends that although the Board's conclusion was correct, its remedies were inadequate. We disagree. Section 10(c) of the NLRA empowers the Board, upon finding an unfair labor practice, to issue a remedial order requiring "affirmative action" that "will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). A party attacking a Board remedy as insufficient "must show that the remedy is clearly inadequate in light of the Board's findings." *Fresh Fruit & Vegetable Workers Loc. 1096 v. NLRB*, 539 F.3d 1089, 1101–02 (9th Cir. 2008) (citation modified). Here, the Board ordered ILWU to cease and desist from using unlawful means to obtain SSA Terminals' maintenance and repair work at Terminal 5, to request that the arbitrator vacate his award, and to post notices at ILWU's Seattle offices instructing its members not to "threaten, coerce, or restrain

SSA Terminals.” IAM has not demonstrated that these remedies are “clearly inadequate.” *Id.* at 1102 (citation omitted). Indeed, the remedies imposed by the Board are in line with remedies the Board has ordered in analogous jurisdictional disputes. *See, e.g., Longshoreman ILWU Loc. 13*, 290 NLRB 616, 617 (1988).

For the foregoing reasons, ILWU’s petition for review (No. 23-632) is **DENIED**; PMA’s petition for review (No. 23-658) is **DENIED**; IAM’s petition for review (No. 23-793) is **DENIED**; and the Board’s cross-petition for enforcement (No. 23-780) is **GRANTED**. Each party shall bear its own costs.

International Longshore and Warehouse Union, et al. v. National Labor Relations Board, No. 23-632+

AUG 20 2026

Statement of VANDYKE, Circuit Judge:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

While I join the concurrently filed opinion partially overruling *International Longshore & Warehouse Union v. National Labor Relations Board* (*Kinder Morgan*), 978 F.3d 625 (9th Cir. 2020), and holding that the work-preservation defense does not defeat an unfair labor practice charge for failing to adhere to the National Labor Relations Board’s resolution of a jurisdictional dispute between two unions, I do not join this related memorandum disposition. Rather than reaching the merits of the parties’ petitions addressed by the en banc panel majority in the memorandum disposition, I would have exercised our discretion to remand this case to the three-judge panel to reconduct its analysis of the Board’s decision in light of our concurrently filed opinion’s holding. *See Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1135 (9th Cir. 2006) (en banc) (“Although an en banc court takes a case, not an issue, en banc, it has the discretion to decide the entire case or only the parts of the case that formed the basis for the en banc call.”); *McDaniels v. Kirkland*, 813 F.3d 770, 781 (9th Cir. 2015) (en banc) (“Remand to the original three-judge panel of issues extraneous to an en banc call is at times a useful mechanism to conserve judicial resources and achieve an expeditious resolution of issues on appeal.”).