

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 November 15, 2024
San Francisco, California

Filed June 18, 2025

Before: Sidney R. Thomas and Eric D. Miller, Circuit
Judges, and Lee H. Rosenthal, District Judge.*

Opinion by Judge Miller;
Concurrence by Judge Miller

* The Honorable Lee H. Rosenthal, United States District Judge for the Southern District of Texas, sitting by designation.

SUMMARY*

National Labor Relations Act

The panel (1) granted petitions for review by the International Longshore and Warehouse Union (ILWU) and the Pacific Maritime Association (PMA), (2) denied a petition for review by the International Association of Machinists and Aerospace Workers (IAM), (3) denied a cross-petition for enforcement by the National Labor Relations Board, and (4) vacated the Board's order directing ILWU to cease and desist from pursuing maintenance work for SSA Terminals at Terminal 5 in the Port of Seattle.

This case arose from a jurisdictional dispute between ILWU and IAM, both of which claimed the right under collective bargaining agreements to perform maintenance work for SSA. Pursuant to section 10(k) of the National Labor Relations Act, SSA asked the Board to decide which union should perform the work. The Board assigned the work to IAM, prompting ILWU to pursue a grievance against SSA under its collective bargaining agreement, seeking the value of the work assigned to IAM.

After an arbitrator found in ILWU's favor, SSA filed an unfair labor practice charge against ILWU, alleging that ILWU violated section 8(b)(4)(D) of the Act because its pursuit of the grievance was intended to coerce SSA into assigning the work to ILWU. ILWU defended itself by invoking the work-preservation defense, which protects "primary" union activity—activity intended to accomplish

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

some goal within the confines of the employer-employee relationship—as opposed to impermissible “secondary” union activity—activity that has the goal of inducing an employer to take action against a third party with which the union has a dispute. See *NLRB v. International Longshoremen’s Ass’n (ILA)*, 447 U.S. 490 (1980).

The Board determined that the work-preservation defense is not available in pure jurisdictional disputes, like this one, where multiple unions have valid contractual entitlements to the disputed work directly with the employer. The Board ordered ILWU to cease and desist from pursuing the maintenance work at Terminal 5.

The panel held that the Board’s position was foreclosed by *International Longshore and Warehouse Union v. NLRB (Kinder Morgan)*, 978 F.3d 625, 637 (9th Cir. 2020), which held that “[a] valid work-preservation objective provides a complete defense against alleged violations of section 8(b)(4)(D), as well as against jurisdictional disputes under section 10(k).” Pursuant to *Kinder Morgan*, a union charged with an unfair labor practice under section 8(b)(4)(D) may raise a work-preservation defense even when the union is not alleged to have engaged in illegal secondary activity. The Board erred by refusing to entertain ILWU’s work-preservation defense under *Kinder Morgan*. Accordingly, the panel vacated the Board’s order and remanded for the Board to evaluate the merits of the defense in the first instance.

Concurring, Judge Miller wrote separately to express his view that *Kinder Morgan* was wrongly decided and should be reconsidered en banc. Because the *ILA* work-preservation defense allows a union to demonstrate that it did not act with an illegal secondary objective, the Board has

historically entertained the defense only when a union is alleged to have engaged in secondary activity in violation of section 8(b)(4)(B). *Kinder Morgan* applied an affirmative defense that the Supreme Court created to cabin the reach of one statutory provision, section 8(b)(4)(B), to cases arising under a separate statutory provision, section 8(b)(4)(D). Grafting the *ILA* work-preservation defense onto section 8(b)(4)(D), as *Kinder Morgan* did, undermines the jurisdictional dispute-resolution scheme enacted by Congress. It is not supported by precedent, creates a circuit conflict, and undermines Congress's decision to empower the Board to resolve jurisdictional disputes.

COUNSEL

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Micah P.S. Jost (argued), Attorney; Kira D. Vol, Supervising Attorney; David Habrndtreit, Assistant General Counsel; Ruth E. Burdick, Deputy Associate General Counsel; Peter S. Ohr, Associate 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.

OPINION

MILLER, Circuit Judge:

Sometimes multiple unions have irreconcilable contractual rights to perform the same work for the same employer. The resulting disputes—which the employer cannot resolve without breaching its obligations to one of the unions—are known as “jurisdictional disputes.” See *USCP-WESCO, Inc. v. NLRB*, 827 F.2d 581, 583 (9th Cir. 1987).

This case arises out of a jurisdictional dispute between the International Longshore and Warehouse Union (ILWU) and the International Association of Machinists and Aerospace Workers (IAM). Both claim the right under collective bargaining agreements to perform certain work for SSA Terminals. Unable to resolve the dispute itself, SSA asked the National Labor Relations Board to decide which union should perform the work. The Board assigned the work to IAM, prompting ILWU to pursue a grievance under its collective bargaining agreement. The Board then filed an unfair labor practice charge against ILWU, alleging that its pursuit of the grievance was illegal. ILWU defended itself by invoking the work-preservation defense. That defense protects “primary” union activity—that is, activity intended to accomplish some goal within the confines of the employer-employee relationship. See *NLRB v. International Longshoremen’s Ass’n (ILA)*, 447 U.S. 490, 504 (1980). But the Board determined that the defense does not apply in disputes, like this one, where multiple unions have valid

contractual entitlements to the disputed work directly with the employer.

Whatever the merits of the Board’s position as a matter of first principles, it is foreclosed by our decision in *International Longshore and Warehouse Union v. NLRB* (*Kinder Morgan*), 978 F.3d 625 (9th Cir. 2020). We therefore grant the petitions challenging the Board’s order and deny the Board’s cross-petition for enforcement.

I

ILWU represents longshore workers at ports along the Pacific Coast, including the Port of Seattle. It has a longstanding collective-bargaining relationship with the Pacific Maritime Association (PMA), an association of businesses that employ longshore workers. *See Kinder Morgan*, 978 F.3d at 630. ILWU and PMA have negotiated a master collective bargaining agreement, the Pacific Coast Longshore Contract Document (PCLCD), which is binding on all PMA-member employers.

For many decades, ILWU and PMA have quarreled over the extent to which PMA-member employers may use technology to replace the work traditionally performed by union longshore workers. In 2008, ILWU and PMA addressed that issue when they negotiated the current version of the PCLCD. Section 1.72 allows PMA-member employers to introduce automation at their marine terminals. In exchange, it expands ILWU’s jurisdiction to cover the “installation, reinstallation, removal, maintenance and repair, and associated cleaning of such new technologies”—which we will refer to simply as “maintenance work”—at certain qualifying ports.

In 2018, SSA Terminals, a PMA-member employer, began operating Terminal 5 of the Port of Seattle as a marine terminal, making Terminal 5 subject to section 1.72. But that presented a conflict. Although section 1.72 required SSA to assign the maintenance work to mechanics represented by ILWU, SSA had a separate bilateral collective bargaining agreement with IAM, guaranteeing IAM-represented mechanics the right to “perform all [maintenance] work . . . at all Puget Sound Region Intermodal, Marine or Container Terminals,” including Terminal 5. SSA initially assigned the maintenance work to mechanics represented by ILWU. In response, IAM threatened “economic action” at Terminal 5. Caught in the middle of the jurisdictional dispute between the two unions, SSA turned to the Board for help.

The National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (29 U.S.C. § 151 *et seq.*), as amended by the Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947), establishes a two-step mechanism to allow the Board to resolve jurisdictional disputes. First, section 8(b)(4)(D) makes it an unfair labor practice to “threaten, coerce, or restrain” an employer with the object of forcing that employer to “assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization.” 29 U.S.C. § 158(b)(4)(D). Second, when the Board finds cause to believe that section 8(b)(4)(D) has been violated, section 10(k) empowers it to hold a hearing and to award the disputed work to one of the competing unions. 29 U.S.C. § 160(k). The Board considers a variety of factors at a 10(k) hearing, including the skills of the competing unions, the unions’ history of performing the relevant work, the employer’s preference, the different collective bargaining agreements, and the economic efficiency of the employer’s

business. See *International Ass'n of Machinists, Lodge 1743*, 135 N.L.R.B. 1402, 1410–11 (1962).

SSA invoked that mechanism here. First, it filed an unfair labor practice charge against IAM, alleging that its threat of “economic action” violated section 8(b)(4)(D). That triggered section 10(k), so the Board held a hearing to determine if the disputed work should be awarded to mechanics represented by ILWU or to those represented by IAM. After considering the relevant factors, the Board assigned the work to IAM-represented mechanics.

ILWU refused to accept the Board’s decision, instead pursuing a grievance under the PCLCD seeking the value of the work assigned to IAM. ILWU alleged that SSA had violated section 1.76—which requires SSA to “defend” the assignment of work to ILWU-represented mechanics “in any legal proceeding”—by failing to state a preference for ILWU-represented mechanics at the section 10(k) hearing. An arbitrator found that SSA had violated section 1.76 and ordered it to pay ILWU for “lost work opportunity claims for any future [Terminal 5 maintenance] work not performed by ILWU-represented [m]echanics.”

From SSA’s perspective, the arbitration award made the Board’s section 10(k) determination a nullity: SSA could either reassign the work back to ILWU or else be forced to pay twice. So SSA filed another unfair labor practice charge with the Board. This time, SSA, joined by PMA, alleged that ILWU had violated section 8(b)(4)(D) because pursuing the grievance was intended to coerce SSA into assigning the work to mechanics represented by ILWU rather than IAM. See 29 U.S.C. § 158(b)(4)(D).

The unfair labor practice charge proceeded to a hearing before an ALJ. ILWU did not dispute that pursuing a

grievance in defiance of a section 10(k) award can violate section 8(b)(4)(D). Rather, it argued that its conduct was immunized by the work-preservation affirmative defense. Specifically, ILWU argued that pursuing the grievance was “primary” activity because it sought to accomplish a goal within the confines of its relationship with SSA—namely, to get SSA to honor its contractual obligations to assign the maintenance work to ILWU workers. The ALJ rejected ILWU’s defense, and the Board affirmed. The Board held that the work-preservation defense is unavailable in pure jurisdictional disputes. Permitting a union to raise that defense, it observed, would subvert Congress’s intention to “afford employers protection when their actions conform to a Board determination under section 10(k).” The Board ordered ILWU to cease and desist from pursuing the maintenance work at Terminal 5 and to notify its mechanics of their obligation to do the same.

Four petitions followed, all of which have been consolidated here. ILWU and PMA each petition for review of the Board’s order finding that ILWU violated section 8(b)(4)(D). They argue that the Board erred in rejecting ILWU’s work-preservation defense. In the alternative, they contend that the Board’s section 10(k) work award was not supported by substantial evidence. IAM also petitions for review. Although it agrees with the Board’s legal and factual conclusions, it argues that the Board’s remedy is inadequate to prevent ILWU from illegally pursuing disputed work at Terminal 5 and other terminals along the Pacific Coast. Finally, the Board cross-petitions for enforcement of its order. *See* 29 U.S.C. § 160(e), (f).

II

The parties agree on several preliminary points. They agree that this is a genuine jurisdictional dispute: ILWU and IAM both had valid contracts with SSA (or in ILWU's case, with PMA, to which SSA was bound), and SSA could not simultaneously comply with its obligations under both contracts. They also agree that when both ILWU and IAM pursued the maintenance work, it was appropriate for the Board to resolve the dispute under section 10(k). They even agree that ILWU's pursuit of a grievance in arbitration constituted a *prima facie* violation of section 8(b)(4)(D).

They disagree, however, on whether ILWU ought to have been permitted to raise a work-preservation defense to SSA's section 8(b)(4)(D) charge against ILWU. Confusingly, two different doctrines both called the "work-preservation defense" are potentially relevant here.

The first, which we have already discussed, is described in the Supreme Court's decision in *ILA*, 447 U.S. 490, and typically applies to unfair labor practice charges under section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B). That work-preservation defense draws a line between primary union activity, which is permissible, and secondary union activity, which is not. *See National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 622–26 (1967) (explaining that, in drafting the Act, Congress was particularly concerned with the evils of secondary activity). Primary activity is aimed at a dispute between an employer and its employees (or the union that represents those employees). *See Kinder Morgan*, 978 F.3d at 637. For example, a union engages in primary activity if it pickets the premises of its members' employer to induce the employer to offer better terms to its members. Secondary activity, by contrast, is directed at one employer but has the

goal of inducing that employer to take some action against a third party with which the union has a dispute. *See National Woodwork*, 386 U.S. at 622. For example, a union engages in secondary activity if it pickets a construction site to pressure the general contractor to fire its subcontractor because that subcontractor has hired non-union workers. In that scenario, the union exerts direct pressure on the general contractor, who is presumably neutral in the dispute between the union and the subcontractor, with the goal that the general contractor will take some action against the subcontractor.

To show that its conduct was primary, not secondary, a union invoking the work-preservation defense must satisfy a two-part test. First, the union must show that its conduct “ha[d] as its objective the preservation of work traditionally performed by employees represented by the union.” *ILA*, 447 U.S. at 504. “Second, the contracting employer must have the power to give the employees the work in question.” *Id.*

The Board argues that because the *ILA* work-preservation defense exists to separate permissible primary activity from impermissible secondary activity, it can be invoked only when a union is alleged to have engaged in secondary activity—that is, when a union is accused of conducting a secondary boycott in violation of section 8(b)(4)(B). *See* 29 U.S.C. § 158(b)(4)(B). As the Board explains, a pure jurisdictional dispute—which involves an alleged violation of section 8(b)(4)(D)—necessarily does not involve such allegations. That is because a jurisdictional dispute is really an aggregation of two or more primary disputes: Each union vying for the work has a contract directly with the employer, and each union is attempting to get that employer to take some action within the confines of

the employer-employee relationship. See *International Longshoremens' & Warehousemen's Union v. NLRB*, 884 F.2d 1407, 1412–13 (D.C. Cir. 1989). Applying the *ILA* work-preservation defense in that context would give every union an automatic defense to section 8(b)(4)(D) charges, gutting the Board's section 10(k) authority to resolve jurisdictional disputes.

Instead, the Board says, the only work-preservation defense that applies here is the one articulated in the Board's decision in *Highway Truck Drivers & Helpers, Local 107 (Safeway)*, 134 N.L.R.B. 1320 (1961). Under that doctrine, a union can compel the Board to drop section 8(b)(4)(D) charges and quash notice of a section 10(k) hearing if the union shows that the case is actually a "work preservation dispute" between the employer and the union, not a jurisdictional dispute between two unions. *Id.* at 1323. To demonstrate that such a dispute exists, the union must show that it previously performed the work at issue for that employer (and therefore is not seeking to expand its work jurisdiction) and that the employer precipitated the dispute by unilaterally taking some action adverse to the union (usually, by reassigning the work). See, e.g., *Recon Refractory & Const. Inc. v. NLRB*, 424 F.3d 980, 990 (9th Cir. 2005); *Steel, Paper House, Chem. Drivers & Helpers Loc. 578*, 280 N.L.R.B. 818, 820 (1986). Unlike the *ILA* work-preservation defense, the *Safeway* work-preservation defense is not an affirmative defense; it is a way of showing that a putative jurisdictional dispute is not a jurisdictional dispute at all.

Because all parties to this case have conceded that it is a classic jurisdictional dispute—and thus that it is *not* a work-preservation dispute—they agree that the *Safeway* work-preservation defense does not apply. The Board ascribes a

further consequence to that concession: The jurisdictional nature of the dispute makes the *ILA* work-preservation defense inapplicable, too. If we were writing on a blank slate, we might find the Board's argument persuasive. But the Board's argument is foreclosed by our decision in *Kinder Morgan*.

Kinder Morgan involved a jurisdictional dispute between ILWU and another union, the Electrical Workers, over maintenance work at a marine terminal operated by Kinder Morgan, a PMA-member employer. 978 F.3d at 628–29. Kinder Morgan had historically subcontracted that work “to a subcontractor which employed workers under its own [collective-bargaining agreement] with the Electrical Workers.” *Id.* at 631. When that arrangement persisted after the PCLCD became effective and expanded the scope of the longshoremen's work, ILWU demanded the work for its mechanics. *See id.* The Electrical Workers threatened to picket the Kinder Morgan terminal, and Kinder Morgan asked the Board to invoke section 10(k) to resolve the dispute. *See id.*

The Board awarded the work to the Electrical Workers, and ILWU continued to seek the work by pursuing grievance procedures. *See Kinder Morgan*, 978 F.3d at 631–32. The Board then filed an unfair labor practice charge against ILWU under section 8(b)(4)(D) based on the grievance. *See id.* at 632. ILWU invoked the work-preservation affirmative defense, arguing that the grievance was intended to preserve the work that it bargained for in the PCLCD and was directed at the employer, Kinder Morgan, with the power to assign the work. *See id.* The Board rejected that argument. *See id.* at 632–33.

We reversed the Board's order. See *Kinder Morgan*, 978 F.3d at 630. We held that “[a] valid work-preservation objective provides a complete defense against alleged violations of section 8(b)(4)(D), as well as against jurisdictional disputes under section 10(k).” *Id.* at 637. Thus, we explained, a union can avoid liability under section 8(b)(4)(D) by satisfying the two-part test outlined in *ILA*. See *id.* at 637–38 (citing *ILA*, 447 U.S. at 504). And we emphasized that the work-preservation defense can accommodate situations in which a union has not historically performed the precise work at issue but has bargained for the work to preserve its traditional work patterns in the face of technological changes that eliminated jobs. See *id.* at 638 (citing *ILA*, 447 U.S. at 506).

The Board's conclusion that the *ILA* work-preservation defense was inapplicable here cannot be reconciled with our decision in *Kinder Morgan*. Both cases involve jurisdictional disputes that the Board validly resolved under its section 10(k) authority. In both cases, ILWU lost in the section 10(k) proceedings and then attempted to undermine the Board's award in arbitration, which led the Board to pursue unfair labor practices charges under section 8(b)(4)(D). In this case, ILWU fights that charge by pointing to the same contractual entitlement to work that it pointed to in *Kinder Morgan*. Having allowed it to do so there, we must allow it to do so here.

The Board contests this conclusion on two grounds. Neither is persuasive. First, it points out that *Kinder Morgan*, unlike this case, involved allegations of secondary activity. See 978 F.3d at 633 n.10. Specifically, the Board there alleged that ILWU attempted to pressure Kinder Morgan to cease doing business with the subcontractor that hired the Electrical Workers rather than ILWU mechanics. See *id.* at

632. In the Board's view, that secondary-activity allegation made it appropriate for the court to permit ILWU to raise the work-preservation defense, but the lack of a comparable allegation makes it inappropriate here.

While the Board is correct that there was an allegation of secondary activity in *Kinder Morgan*, that was not the only allegation to which we held that the work-preservation defense applied. To the contrary, we held that "[a] valid work preservation objective provides a complete defense against alleged violations of section 8(b)(4)(D), as well as against jurisdictional disputes under section 10(k)." 978 F.3d at 637. We made it clear that allegations of secondary activity do not support charges under section 8(b)(4)(D), nor do they give rise to disputes resolved under section 10(k). As we noted in *Kinder Morgan*, the secondary-boycott allegations there were brought under section 8(b)(4)(B). *Id.* at 633 n.10. Thus, *Kinder Morgan* must mean that the *ILA* work-preservation defense provides a "complete defense against alleged violations of section 8(b)(4)(D)" *in addition to* allegations of secondary activity brought under section 8(b)(4)(B). *Id.* at 637. It is for that reason that the court found it unnecessary to "address [section 8(b)(4)(B)] separately" when delineating the scope of the defense. *See id.* at 633 n.10.

Second, the Board suggests that our reading of *Kinder Morgan* is in tension with our decision in *Recon*, 424 F.3d 980. That case involved a dispute between a construction company, Recon, and a union, the Bricklayers. *See id.* at 981. To reduce costs, Recon fired employees represented by the Bricklayers and reassigned their work to employees represented by another union, IPTW. *See id.* at 982. The Bricklayers filed a grievance and a lawsuit for breach of contract, and IPTW threatened economic action if Recon

reassigned the work to the Bricklayers. *See id.* at 984. Recon asked the Board to resolve the dispute under section 10(k), but the Board refused to do so because it found that Recon had precipitated the dispute by unilaterally reassigning the work to employees represented by IPTW. *See id.* at 985. Citing *Safeway*, the Board found that the conflict was “not a jurisdictional dispute suitable for resolution under § 10(k)” but rather a “work preservation dispute” between Recon and the Bricklayers that had to be resolved through arbitration. *See id.* at 985; *accord USCP-WESCO*, 827 F.2d at 583. We affirmed, describing the showing that the Bricklayers made to avoid adjudication of the dispute under section 10(k) as an invocation of “a work preservation defense.” *Recon*, 424 F.3d at 988–89 (quoting *International All. of Theatrical & Stage Emps.*, 337 N.L.R.B. 721, 723 (2002)).

But our decision in *Recon* did not say, as the Board contends, that the *Safeway* work-preservation defense is the *only* defense that is available when a union is alleged to have violated section 8(b)(4)(D) in the context of a jurisdictional dispute. Nor could it have—the Board’s finding that Recon precipitated the dispute there meant that no genuine jurisdictional dispute existed, and the Board declined to enter a section 10(k) work award for that reason. *See Recon*, 424 F.3d at 985. The court in *Recon* had no occasion to decide whether a union enmeshed in a genuine jurisdictional dispute can rely on the *ILA* work-preservation defense to avoid liability for conduct contravening an adverse section 10(k) award. That is the central question in this case, and *Kinder Morgan* is the only decision from our circuit that answers it.

In sum, *Kinder Morgan* compels us to hold that a union charged with an unfair labor practice under section 8(b)(4)(D) may raise the *ILA* work-preservation defense

even when the union is not alleged to have engaged in illegal secondary activity. The Board’s refusal to entertain the work-preservation defense under *Kinder Morgan* was error, so we remand to the Board to evaluate the merits of the defense in the first instance. Because our conclusion that the Board erred requires vacatur of the Board’s order, we do not reach ILWU’s alternative argument that the underlying section 10(k) work award was not supported by substantial evidence. For the same reason, we also do not reach IAM’s argument that the remedy required by the order was insufficient.

* * *

ILWU’s petition for review (No. 23-632) and PMA’s petition for review (No. 23-658) are granted; IAM’s petition for review (No. 23-793) and the Board’s cross-petition for enforcement (No. 23-780) are denied. Costs shall be taxed against IAM in No. 23-793 and against the Board in Nos. 23-632, 23-658, and 23-780.

VACATED and REMANDED.

MILLER, Circuit Judge, concurring:

I join the court’s opinion, which correctly applies our decision in *International Longshore and Warehouse Union v. NLRB (Kinder Morgan)*, 978 F.3d 625 (9th Cir. 2020). I write separately to express my view that *Kinder Morgan* was wrongly decided. *Kinder Morgan* applies an affirmative defense that the Supreme Court created to cabin the reach of one statutory provision, section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(B), to cases arising under a separate statutory provision, section

8(b)(4)(D), *id.* § 158(b)(4)(D). It is not supported by precedent; it creates a circuit conflict; and it undermines Congress's decision to empower the Board to resolve jurisdictional disputes.

Under section 8(b)(4)(B), it is 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). Section 8(b)(4)(B) proscribes only secondary union activity; it does not prohibit “any primary strike or primary picketing.” *Id.*; see *National Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 620 (1967). That is, a union violates section 8(b)(4)(B) only when it attempts to prevail in a dispute with one employer by involving another employer that is neutral to that dispute. But if a union’s conduct is aimed at a dispute within the employer-employee relationship—in other words, if it is primary—the union does not violate section 8(b)(4)(B).

To distinguish between permissible primary conduct and impermissible secondary conduct, the Supreme Court developed the work-preservation defense. The defense requires a two-part showing. First, the union’s conduct “must have as its objective the preservation of work traditionally performed by employees represented by the union.” *NLRB v. International Longshoremen’s Ass’n (ILA)*, 447 U.S. 490, 504 (1980). By focusing on work historically performed by the union’s members, the first part of the test ensures that the union is truly attempting to *preserve* existing work rather than attempting to *acquire* new work. Second, the union must show that “the contracting employer [has] the power to give the employees the work in question.” *Id.* If the employer does not have that power, “it is reasonable to infer that the agreement has a secondary objective, that is, to influence

whoever does have such power over the work.” *Id.* at 504–05.

Because the *ILA* work-preservation defense allows a union to demonstrate that it did not act with an illegal secondary objective, the Board has historically entertained the defense only when a union is alleged to have engaged in secondary activity in violation of section 8(b)(4)(B). *See, e.g., International Longshoremen’s Ass’n*, 372 N.L.R.B. No. 36 (Dec. 16, 2022) (dismissing a section 8(b)(4)(B) charge under the work-preservation defense); *Teamsters Nat’l Auto. Transporters Indus. Negotiating Comm.*, 335 N.L.R.B. 830, 832 (2001) (same). We have done the same. *See, e.g., Associated Gen. Contractors of California, Inc. v. NLRB*, 514 F.2d 433, 438 (9th Cir. 1975) (rejecting work-preservation defense raised against section 8(b)(4)(B) charges after determining that the union’s objective was work acquisition).

That changed in *Kinder Morgan*. There, we held that the *ILA* work-preservation defense can be raised “against alleged violations of section 8(b)(4)(D),” in addition to alleged violations of section 8(b)(4)(B). 978 F.3d at 637. Section 8(b)(4)(D) addresses jurisdictional disputes, which arise when two unions have valid contractual claims to the same work and one or both of those unions seeks to secure the work for its employees through means such as picketing. Fearing the labor instability that jurisdictional disputes generate, Congress directed the Board to resolve those disputes through section 10(k), 29 U.S.C. § 160(k). *See NLRB v. Radio & Television Broad. Eng’rs Union*, 364 U.S. 573, 580 (1961). A section 10(k) work award is not independently binding but is enforced through section 8(b)(4)(D). *See NLRB v. Plasterers’ Loc. Union No. 79*, 404 U.S. 116, 126–27 (1971). If the union that is not

awarded the work complies with the Board's work award, the initial section 8(b)(4)(D) charges will be dismissed. *See id.* at 127. But if that union continues to pursue the disputed work, a further section 8(b)(4)(D) complaint will issue, and the union will likely be found guilty of an unfair labor practice. *See id.*

In the context of section 8(b)(4)(D), the Board has recognized a different (but confusingly similarly named) work-preservation defense. *See Highway Truck Drivers & Helpers, Local 107 (Safeway)*, 134 N.L.R.B. 1320 (1961). The *Safeway* work-preservation defense allows a union to compel the Board to drop section 8(b)(4)(D) charges and quash notice of a section 10(k) hearing if it can show that the case is actually a work-preservation dispute between the employer and the union, and not a jurisdictional dispute between two unions. *Id.* at 1323. But it was never meant to apply where, as here, two unions have a genuine jurisdictional dispute.

Grafting the *ILA* work-preservation defense onto section 8(b)(4)(D), as *Kinder Morgan* did, undermines the jurisdictional dispute-resolution scheme enacted by Congress. The Board's section 10(k) work award is effective because of the prospect of a follow-on section 8(b)(4)(D) charge. But a union entangled in a jurisdictional dispute now has little reason to worry about that section 8(b)(4)(D) charge because it will almost always be able to escape section 8(b)(4)(D) liability by raising the work-preservation defense that prevailed in *Kinder Morgan*. That is because every jurisdictional dispute, by its nature, involves two irreconcilable primary disputes—each one between the employer who has the authority to control the work and a union whose collective bargaining agreement seeks to preserve the union's work jurisdiction. *See International*

Longshoremen's & Warehousemen's Union v. NLRB (Sea-Land), 884 F.2d 1407, 1408 (D.C. Cir. 1989). By providing the disappointed union with a reliable affirmative defense to the prospective section 8(b)(4)(D) charge, *Kinder Morgan* renders the section 10(k) work award illusory by removing the union's incentive to comply with it.

No precedent supports that result. *Kinder Morgan* cited several Supreme Court cases in support of its holding, but each of those cases involved charges brought under section 8(b)(4)(B), not section 8(b)(4)(D). See *National Woodwork*, 386 U.S. at 644–46; *ILA*, 447 U.S. at 503–13; *NLRB v. International Longshoremen's Ass'n*, 473 U.S. 61, 79–82 (1985). And an affirmative defense available in the section 8(b)(4)(B) context should not be reflexively imported to the section 8(b)(4)(D) context because “the theoretical bases for each charge are different.” *Sea-Land*, 884 F.2d at 1412 (quoting *International Longshoremen's & Warehousemen's Union, Loc. 62-B v. NLRB*, 781 F.2d 919, 922 (D.C. Cir. 1986)). Indeed, the only other circuit to have squarely confronted this question concluded that the *ILA* work-preservation defense does *not* immunize conduct charged under section 8(b)(4)(D). See *id.* at 1410–13. In so holding, the District of Columbia Circuit intimated what the facts here make clear: Permitting a union to raise the work preservation defense to a section 8(b)(4)(D) charge would unravel the mechanism that Congress created to enable the Board to resolve jurisdictional disputes. See *id.* at 1413.

Attempting to defend *Kinder Morgan*, ILWU argues that allowing a union to raise the section 8(b)(4)(B) *ILA* work-preservation defense to a section 8(b)(4)(D) charge fosters labor peace by assuring contracting parties that their negotiated compromises will be respected. The problem, of course, is that while deference to contractual solutions may

be ILWU's preferred method of ensuring labor peace, it was not Congress's. Congress concluded that jurisdictional disputes should be resolved by the Board under its section 10(k) authority. And although Congress empowered the Board to *consider* the parties' collective bargaining agreements in the section 10(k) hearing, it left to the Board alone the task of weighing that factor against the other relevant considerations. See *International Ass'n of Machinists, Lodge 1743*, 135 N.L.R.B. 1402, 1405–10 (1962); 29 U.S.C. § 160(k).

As a three-judge panel, we are bound by *Kinder Morgan*, which compels us to vacate the Board's order. But the court should reconsider it en banc.