Local 13, Bricklayers, Masons & Plasterers International Union of North America, AFL-CIO *and* Bjork Builders, Ltd. Case 22-CD-384

November 23, 1982

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Bjork Builders, Ltd., herein called the Employer, alleging that Local 13, Bricklayers, Masons & Plasterers International Union of North America, AFL-CIO, herein called Bricklayers, violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to the Employer's unrepresented employees.

Pursuant to notice, a hearing was held before Hearing Officer William F. Grant on July 29, 1982. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The record indicates, and we find, that the Employer, a New Jersey corporation with a place of business in Franklin Lakes, New Jersey, is engaged in the business of constructing industrial, institutional, and commercial buildings. During the past year, the Employer derived gross revenues in excess of $50,000, and purchased goods and materials valued in excess of $50,000 directly from suppliers located outside the State of New Jersey. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that Bricklayers is a labor organization within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

On June 7, 1982, the Employer entered into a contract with Fairfield Factory Market Mall of Hawthorne, New Jersey, for the renovation of a building called Fairfield Market Square in Fairfield, New Jersey. The renovation included the installation of new entrances, elevators, facades, and sidewalks, which required the performance of various types of concrete and masonry work. The Employer commenced work on the project on June 9 using its own employees who are not represented by any labor organization.

On the morning of June 14, Kenneth Bjork, the Employer's president, received a telephone call from Joseph D'Argenio, business agent for Local 694, Laborers International Union of North America, AFL-CIO, herein called Laborers. D'Argenio asked Bjork why he had not called Laborers for any men. Bjork explained to D'Argenio that he was a "merit shop" contractor and had no agreements with any hiring halls or local unions. D'Argenio then informed Bjork that there was "no way [he] could work any way but union in Essex County" and that, if Bjork expected to build this job, he would have to use D'Argenio's men. Bjork was further advised by D'Argenio that he was going to picket the job. The next morning, about a dozen pickets—unidentified by signs—appeared at the jobsite.

Late in the afternoon on June 15, Bjork received a telephone call from Robert Thompson, business agent for Local 1342 United Brotherhood of Carpenters and Joiners of North America, AFL-CIO, herein called Carpenters, who asked Bjork why he had not called Carpenters for any men. Bjork gave Thompson the same answer he gave D'Argenio the day before. At the end of their conversation, Thompson stated that he would like to meet Bjork, to which Bjork replied that he would be at the jobsite the next day. Thompson also stated that he was going to do anything he could to get his men on the job.

On the morning of June 16, approximately 25 pickets without signs appeared at the jobsite. D'Argenio also was there. When Bjork arrived at the site, he introduced himself to D'Argenio, who proceeded to swear at Bjork and tell him "there was no way [he] was going to build this job." Bjork went back to his office and reported the incident to the police. That afternoon, Bjork returned to the jobsite for a meeting with the architect and the heating contractor. When he arrived, he noticed D'Argenio and four other men talking with the pickets. Bjork approached the five men and invited

them to step inside a doorway. Besides D'Argenio, the group included Thompson for Carpenters, a Mr. Daly for Bricklayers,[1] and two unnamed representatives for Electricians and Plumbers locals.

At this meeting, Bjork told the Electricians and Plumbers representatives that the owner of the mall was going to award a separate contract for such work and that no plumbing or electrical work was being done at that time. Bjork was informed by the representatives of Carpenters, Bricklayers, and Laborers that he was never going to build the job unless they got the work. The same representatives also stated that they would continue to picket the job. The Bricklayers representative stated that the Employer was putting his men out of work. Bjork replied that if he hired employees represented by Bricklayers he would be putting his own men out to work. Daly also asked Bjork about the wages he was paying his employees. The meeting broke up, and the union representatives went outside and talked to the pickets.

About 15 minutes later, a man identifying himself as a mason from Newark told Bjork that he wanted employment and wanted to know how much the Employer paid bricklayers or masons. Bjork replied that there were no set wage rates and that wages depended on the skill of the individual. Bjork also told him that, if he wished to fill out an employment application, Bjork would be happy to consider him for employment. After refusing to fill out an application, Bjork saw the man walk over to the picket line and talk to some of the pickets. Bjork also saw the man on the picket line a day or two later.

The picketing continued from June 15 to July 21. On a few occasions, pickets carried signs bearing legends to the effect that the project did not meet area standards for various named trades. Although Bjork did not recall seeing any Bricklayers signs, Daly admitted that two bricklayers carrying signs were on the picket line on the morning of June 16. Daly further testified, however, that he removed the two pickets right after the meeting on June 16 and that they had not returned to the jobsite since.[2]

[1] Bjork testified at the hearing that it was only after the June 16 meeting that Daly was identified to him as the man who represented Bricklayers at the meeting. Bjork stated, however, that he was uncertain that the Mr. Daly at the meeting was the same Mr. Daly who was representing Bricklayers at the hearing. Daly testified at the hearing that he had in fact represented Bricklayers at the meeting, although he recalled the meeting as having occurred on the morning of June 16.

[2] When asked by the Hearing Officer why he had removed the pickets, Daly refused to elaborate beyond stating that it was "because things were said between Mr. Bjork and other business agents."

B. *The Work in Dispute*

The notice of hearing describes the work in dispute as involving "demolition rubbish removal and mason tending; laying concrete blocks and finishing concrete slabs; and carpentry, installation of gypsum board and acoustical ceiling, and setting forms for footings." However, it is clear from the record that the instant dispute involves block and brick laying, concrete finishing, pouring of concrete, and patching of masonry work.[3]

C. *Contentions of the Parties*

At the hearing, the Employer in essence took the position that the instant dispute is properly before the Board, based on Bricklayers participation in a joint demand with other unions for the work in dispute, and on Bricklayers participation in the picketing at the jobsite. With regard to the merits of the dispute, it appears that the Employer contends that the work in dispute should be awarded to its unrepresented employees based on the factors of Employer practice, assignment, and preference; employee skills and training; and economy and efficiency of operations.

At the hearing, Bricklayers took the position that its picketing on June 16 was solely for the purpose of informing the public that the "prevailing wages and conditions were not being abided by" on the job. Bricklayers presented no evidence at the hearing with respect to the merits of the dispute.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

As indicated above, at a meeting on June 16, representatives of the several local unions made a joint demand on the Employer for the assignment of work—including the work in dispute herein—to employees represented by them. It is uncontroverted that Bricklayers was one of the unions represented at that meeting. It is also uncontroverted that picketing occurred at the Employer's jobsite from June 15 to July 21, 1982, and that Bricklayers participated in the picketing, albeit for a limited time. Although the picket signs, including those

[3] The notice of hearing described the work in dispute based on three charges filed by the Employer, i.e., the instant charge and separate charges alleging that Laborers and Carpenters had engaged in conduct violative of Sec. 8(b)(4)(D) of the Act. Subsequently, and before the hearing in the instant case, the cases involving Laborers and Carpenters were severed and the charges against them were withdrawn.

carried by Bricklayers, apparently referred to the project's alleged substandard wages and working conditions, there is insufficient evidence in the record to support a finding that the picketing by Bricklayers was solely for the purpose of publicizing the Employer's alleged failure to meet area standards, particularly since Bricklayers representative Daly had no knowledge of the Employer's wages prior to the picketing and at no time sought to ascertain the Employer's working conditions. Under these circumstances, we find that, at the time it engaged in picketing, Bricklayers failed to make a bona fide attempt to determine whether the Employer in fact failed to conform to area standards.[4] Based on the foregoing and on the record as a whole, we find that an object of Bricklayers conduct was to force or require the Employer to assign the disputed work to employees represented by it rather than to the Employer's unrepresented employees. Therefore, we conclude that reasonable cause exists to believe that a violation of Section 8(b)(4)(D) of the Act has occurred.

No party contends, and the record contains no evidence showing, that an agreed-upon method for the voluntary adjustment of this dispute exists to which all parties are bound. Accordingly, we find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various relevant factors.[5] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[6]

The following factors are relevant in making the determination of the dispute before us:

1. Certification and collective-bargaining agreements

Bricklayers has never been certified as collective-bargaining representative for a unit of the Employer's employees. The Employer has no collective-bargaining agreement with Bricklayers, or with any other labor organization. Accordingly, this factor is not helpful to our determination.

2. Employer assignment, practice, and preference

The Employer, since its incorporation in 1976, has consistently assigned work similar to that in dispute to its unrepresented employees according to their particular skills. Consistent with this practice, the Employer assigned the disputed work at the Fairfield Market Square project to its unrepresented employees. We find, therefore, that the Employer's assignment and practice favors an award to the Employer's unrepresented employees.

Through the testimony of its president, the Employer expressed its preference for assigning the disputed work to its own employees who have demonstrated the necessary skills. Accordingly, we find that this factor, although not entitled to controlling weight, tends to favor an award to the Employer's unrepresented employees.

3. Area practice

The record indicates that some employers in the northern New Jersey area use employees represented by Bricklayers and some do not to perform work similar to that in dispute. We therefore find that the factor of area practice is inconclusive.

4. Relative skills and training

It is undisputed that the Employer's employees possess the requisite skills to perform the disputed work and that they have performed this work to the Employer's satisfaction in the past and on this project. The work appears to require a high degree of skill, dexterity, and training. As noted above, Bricklayers presented no evidence on the merits; therefore, it has not shown that employees represented by it possess the requisite skills to perform the disputed work. Accordingly, we find that this factor favors an award to the Employer's unrepresented employees.

5. Economy and efficiency of operations

The Employer presented undisputed testimony that using its own employees, who are multiskilled, results in greater efficiency in the assignment or work. Further, since the employees can perform a variety of tasks, there is no time on the job when the employees stand idle, thereby resulting in greater economy of operations. Thus, since Bricklayers presented no evidence showing that it would be as efficient or economical to utilize employees represented by it to perform the disputed work, we find that this factor favors an award to the Employer's unrepresented employees.

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[4] See, e.g., *Essex County Building and Construction Trades Council and its Constituent Members, et al. (Index Construction Corporation)*, 243 NLRB 249, 252 (1979); *Painters and Drywall Finishers, Local No. 79, affiliated with International Brotherhood of Painters and Allied Trades, AFL-CIO (Richard O'Brien Plastering Co.)*, 213 NLRB 788, 790 (1974).

[5] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO* [*Columbia Broadcasting System*], 364 U.S. 573 (1961).

[6] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that the Employer's unrepresented employees are entitled to perform the work in dispute. We reach this conclusion based on the facts that the Employer's assignment is consistent with its past practice and preference; the Employer's employees possess the requisite skills and training to perform the work in dispute; and such assignment appears to be both economical and efficient. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing factors and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. The unrepresented employees of Bjork Builders, Ltd., are entitled to perform block and brick laying, concrete finishing, pouring of concrete, and patching of masonry work at the Employer's Fairfield Market Square project in Fairfield, New Jersey.

2. Local 13, Bricklayers, Masons & Plasterers International Union of North America, AFL–CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Bjork Builders, Ltd., to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local 13, Bricklayers, Masons & Plasterers International Union of North America, AFL–CIO, shall notify the Regional Director for Region 22, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.