

Local 48, International Brotherhood of Painters and Allied Trades of the United States and Canada, AFL-CIO and Manganaro Corporation of New England and Worcester Local No. 6 of the International Union of Bricklayers, Masons and Plasterers. Case 1-CD-667

14 September 1983

DECISION AND DETERMINATION OF DISPUTE

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Manganaro Corporation of New England, herein called the Employer, alleging that Local 48, International Brotherhood of Painters and Allied Trades of the United States and Canada, AFL-CIO, herein called the Painters or Respondent, had 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 an employee of the Employer who was at all times material herein represented by Worcester Local No. 6 of the International Union of Bricklayers, Masons and Plasterers, herein called the Plasterers.

Pursuant to notice, a hearing was held before Hearing Officer Don Firenze on 1 December 1982. The Employer and the Painters appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.¹ No party filed a brief; the positions of the parties as stated at the hearing have been duly considered.

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 made 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 parties stipulated, and we find, that the Employer, a Massachusetts corporation with its principal place of business in Malden, Massachusetts, is engaged as a construction contractor in the business of providing masonry and drywall services. During the past year, the Employer purchased

goods directly from outside the State having a value of \$50,000. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Painters and the Plasterers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is a masonry and drywall construction subcontractor whose home office is in Malden, Massachusetts. The Employer was awarded the subcontract to perform interior drywall work, masonry, and exterior stucco work in the construction of two high-rise apartment buildings known as the Bell Pond Housing Project in Worcester, Massachusetts. The masonry work began in September 1981 and was completed the following September; the exterior stucco work began in April 1982 and was also completed in September 1982; the drywall work began in December 1981 but was assigned to a painting contractor for completion following the instant dispute. The drywall work included the application of a gypsum product, named Q.T., to the underside of concrete ceilings so as to simulate acoustical plaster ceilings. The product is a dry powder that may be mixed with either water or vinyl latex paint, with the paint providing better consistency for adherence. At the Bell Pond project, the Q.T. was mixed in a bucket with paint, put into the hopper of a spray gun apparatus, and sprayed onto the ceiling surface to about a one-eighth inch thickness.

The Employer utilized plasterers and painters to perform different job duties at the Bell Pond project. The geographical jurisdiction of the Plasterers' and Painters' locals involved here encompassed the Worcester, Massachusetts, jobsite but not the Employer's home office. The Employer is, however, signatory to collective-bargaining agreements with both locals; the agreements apply when the Employer works within their geographical jurisdiction.

The Q.T. application work commenced about 30 August 1982. The spray application was assigned to one particular plasterer from the Employer's home area.²

¹ Although the Plasterers was served with a notice of hearing, it did not enter an appearance as a party at the hearing.

² In September 1982, the Employer had a crew at the Bell Pond project of about eight painters and about three or four plasterers. Of the
Continued

In early September 1982, the Employer received a letter, dated 2 September 1982, from the chairman of the Painters' Joint Trade Board, a local panel established to participate in the resolution of contract disputes under the Painters' collective-bargaining agreement. That letter notified the Employer that charges had been brought against it by the Painters' business manager concerning the assignment of the spray application of acoustical material at "the Bell Hill [sic] Housing Project" and summoned the Employer to a 14 September 1982 meeting. Enclosed in the letter was a copy of the Painters' charges which explicitly stated that plasterers had been discovered spraying acoustical material at "the Bell Hill [sic] Housing Project" and alleged that the Employer was in violation of the contract by assigning this work, which it claimed to be painters' work, to plasterers. The Employer did not respond to the summons, nor was the Plasterers a party to the 14 September 1982 meeting. Subsequently on 24 October 1982, the Employer received a letter, dated 23 September 1982, from the secretary of the Joint Trade Board stating that, based on the evidence available, the Employer had been found guilty on all counts of the contract violation charges. It was further stated that the Board was assessing the Employer a fine of \$50 for nonregistration (presumably of the Q.T. work), and \$250 in liquidated damages and, additionally, notified the Employer that the Painters was instructed to remove its men within 48 hours of receipt of the letter if the assignment to plasterers was not changed to painters. On 26 October 1982 the Painters' business manager told those painters employed by the Employer on the Bell Pond project not to come back to work. Those painters thereafter stayed off the job for 2 weeks after which they were employed by another subcontractor who completed the Employer's work.

It is noted that the Painters' business manager claimed that on or about 30 August 1982 the Plasterers' representative told him the plasterer doing Q.T. spraying would be instructed to leave the job. However, the plasterer was not pulled off the job. The Painters' business manager testified that he was subsequently told by the same Plasterers representative that the Plasterers was not going to pull the assigned plasterer off the job.

eight painters, who were applying joint compound to drywall, six were hired out of the Painters' local involved here and two were from the Employer's home area. The plasterers, then utilized for the exterior stucco work in addition to the one involved in the Q.T. spraying work, were all from the Employer's home area. While employed on the Bell Pond project, these plasterer employees were covered by the terms of the Employer's collective-bargaining agreement with the Plasterers and were accordingly represented by the Plasterers.

B. *The Work in Dispute*

The work in dispute involves the spraying of a gypsum product, named Q.T., on concrete ceilings at the Bell Pond Housing Project in Worcester, Massachusetts.

C. *The Contentions of the Parties*

The Painters maintains that the only basis for assignment of the Q.T. spray application work to the plasterer is the fact of the Employer's assignment. Otherwise, the Painters asserts that its collective-bargaining agreement encompasses the disputed work as illustrated by the Joint Trade Board's issuance of a decision finding the Employer's assignment to be in violation of the contract. It also asserts that area practice is 100 percent in favor of the Painters, and further that training, recognized skills, and the fact that painters are occasionally assigned the work by the Employer all support an award to employees represented by the Painters. The Painters claims the area practice factor is bolstered by the Plasterers' initial asserted willingness to pull the plasterer off the job as well as by its nonattendance at the hearing, thus inferentially evidencing its lack of claim to the work. Finally, it disputes the Employer's contention that there is an economic advantage in using its own plasterer.

The Employer asserts that the collective-bargaining agreement with the Plasterers more clearly covers the disputed work than the collective-bargaining agreement with the Painters. It contends that its assignment to its own plasterer should be upheld on the basis of its own preference and practice as well as economy and efficiency. It further disputes the Painters' contention of a 100 percent area practice in view of its own repeated assignment of the disputed work to a plasterer. The Employer counters the Painters' other area practice arguments by noting that the assigned plasterer continued to work and that no inference could be drawn from the Plasterers' nonattendance at the hearing.

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.

It is clear that the Painters claimed the disputed work assigned to the plasterer and had its members cease work for the Employer when the work was not reassigned to its members. Moreover, for the

purposes of the instant hearing, the parties stipulated that there is probable cause to believe the Painters violated Section 8(b)(4)(D).³ Further, the Employer and the Painters agreed that there is no currently viable agreed-upon method for voluntary resolution of this work assignment dispute.

Therefore, on the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no currently viable agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

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 factors.⁴ 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.⁵

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

1. Collective-bargaining agreements

As described above, the Employer is party to collective-bargaining agreements with both the Plasterers and the Painters. The Plasterers' contract describes its craft jurisdiction as:

All exterior or interior plastering, plain and ornamental, when done with stucco, cement and lime mortars on patent materials, artificial marble work, when applied in plastic form, composition work in all its branches, the covering of all walls, ceilings, soffits, piers, columns of any part of a construction of any sort when covered with any plastic material in the usual methods of plastering whether hand or machine applied, is the work of the plasterer. The casting and sticking of all ornaments of plaster or plastic compositions, the cutting and filling of cracks. All cornices molding, coves and bull noses shall be run in place on rods

³ We find the evidence pertaining to an alleged initial statement by a Plasterers' representative and the nonattendance of the Plasterers at the hearing do not demonstrate that the Plasterers ceded any claim to the disputed work to the Painters; rather, the record as a whole indicates the Plasterers affirmatively refrained from ceding its claim. Even if the Plasterers had renounced a claim to the work, we would find a cognizable dispute under Sec. 8(b)(4)(D) existed here between the Painters and the plasterer employee of the Employer who continued working on the project. See *Electrical Workers Local 153 (Commercial Electronics)*, 197 NLRB 934 (1972).

⁴ *NLRB v. Electrical Workers Local 1212 [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

⁵ *Machinists Lodge 1743 (J. A. Jones Construction Co.)*, 135 NLRB 1402 (1962).

and white mortar screeds and with a regular mold, and all substitutes of any kind, when applied in plastic form with a trowel, or substitute for same, is the work of the plasterer.

A pertinent part of the terms of employment provision of the Plasterers' contract states:

All interior and exterior plastering of Portland Cement, stucco, imitation stone or any other patent or plastics, or epoxy matrix for exposed aggregate shall be the work of the plasterers.

The Painters' contract describes the craft jurisdiction of employees covered thereunder as:

All house, sign, pictorial, coach, car, automobile, carriage, aircraft, machinery, ship and railroad equipment, mural and scenic painters:

All decorators, paperhangers, hard wood finishers, grainers, glaziers, varnishers, enamelers and gilders:

All glass workers, to wit: Setters of art glass, prism glass, leaded glass, automobile glass and protection glass, bevelers, cutters, glaziers in lead or other metals, shade workers, silverers, scratch polishers, embossers, engravers, designers, painters on glass, chippers, mosaic workers, benders, cementers, flat glass, or wheel cutters and other workers in glass used in construction of buildings or for architectural or decorative purposes:

All sign hangers and erectors, building and repairing same. Drywall pointing, taping and finishing.

We do not view anything in the craft-jurisdiction description in the Painters' contract to encompass the work in dispute. In fact, a Painters International representative testified that nothing in the Painters' contract mentions Q.T. work or a comparable or similar material to Q.T. Whereas, the Plasterers' contract in its references to "Plastering . . . of all walls, ceilings . . . in the usual methods of plastering whether hand or machine applied," may reasonably be interpreted as covering the work in dispute.⁶ We find this factor favors assignment of the work to the employee represented by the Plasterers.

2. The Employer's practice and preference

The plasterer to whom the Employer assigned the Q.T. spraying has performed such work for the Employer for about 15 years. This plasterer is

⁶ In this regard, we note that Q.T. is a gypsum product, and a dictionary description of gypsum describes its component use in making plaster.

always the Employer's employee of choice to perform such work based on his experience and skill. In the past 5 years, approximately 90 percent of all Q.T. spraying work performed by the Employer has been assigned to plasterers. Only when the preferred plasterer was already working on a job has the Employer assigned the work to painters. On those occasions when the Employer does assign painters to perform the disputed work, it normally assigns those who have previously been employed by the Employer and have exhibited the skill to perform the work. In view of the Employer's demonstrated preference for the plasterer, we find this factor clearly favors assignment of the work to the employee represented by the Plasterers who was performing the work.

3. Relative skills and tools utilized

There was testimony to the fact that spraying of Q.T. is highly skilled work and requires substantial experience and training. The basic spray gun used to apply Q.T. is the same as that used by painters.⁷ However, the attachments used for Q.T. spraying are substantially different, normally bigger and bulkier, from those used to spray paint. The Employer attested to the skill of the plasterer who is normally assigned the Q.T. spraying work. There was other evidence that painter apprentices learn to spray acoustical and textured materials and further that painters on occasion use spray guns with larger nozzles than those used for Q.T. It appears that the plasterer who performed the work as well as painters have the necessary job skills to perform the disputed work. Thus, this factor does not favor employees represented by either the Plasterers or the Painters in this jurisdictional work dispute.

4. Economy and efficiency of operation

The manning requirements of the Painters and Plasterers are not comparable when the Employer brings its own employees from out of the Unions' jurisdictional area instead of obtaining employees through the Unions. Thus, the Employer must employ three employees referred by the Painters for each painter it may itself bring from out of the area, while it must employ only one local plasterer for each plasterer it may bring from outside the area.⁸ Because of the skilled nature of the work, the Employer's practice had been to use its own plasterer or, if necessary, a chosen painter of demonstrated skill. As it appears that the Employer had

not previously performed the disputed work in the Painters' geographical jurisdiction, a painter dispatched by the Painters would have been an employee of undemonstrated skills. On the other hand, had the Employer assigned a painter from outside the area with whose skills it was familiar, it would incur the added expense of three painters obtained through the Painters.⁹ Accordingly, we find that this factor favors an award of the work to the employee represented by the Plasterers who was performing the work.

5. Area and industry practice

The Painters introduced in evidence a list of about 42 projects in the Union's geographical jurisdiction on which painters performed the work of spraying textured acoustical plaster-paint mixtures on ceilings. The Painters' business manager since 1979 testified that he was not aware of any projects in the Worcester, Massachusetts, area or the entire geographical jurisdiction of the Union on which painters were not assigned to do the work and on which members of the Plasterers were assigned to do the disputed work rather than members of the Painters.

With respect to industry practice, a Painters International representative testified that within the past 10 years he was not aware of any occasions in his area of responsibility—the New England States—when Plasterers successfully obtained Q.T. spraying work in a dispute with Painters. The Painters also introduced in evidence a 1979 edition "Jurisdictional Handbook" published by the Painters International Union. The handbook contained 10 decisions, concerning disputes between Painters and Plasterers over spray application of textured material, issued during the period 1970 to 1973, which awarded the work to employees represented by the Painters. The decisions, some of which were issued by the appeals board under the Plan for Settlement of Jurisdictional Disputes in the Building and Construction Industry and some of which were issued by the Impartial Jurisdictional Disputes Board, concerned disputes in Florida, Maryland, Ohio, Michigan, Kentucky, Minnesota, and New York. In contrast, the Employer pointed to its history of utilizing a plasterer to perform the disputed work on jobsites in eastern Massachusetts. The Employer introduced two 1980 decisions of the Impartial Jurisdictional Disputes Board for the Construction Industry awarding the application of Q.T.

⁷ It is noted that the Employer provided the spray gun equipment at the Bell Pond Housing project, and that the Employer never gets involved in regular spray painting.

⁸ All the plasterers employed at the Bell Pond project in September 1982 were brought by the Employer from its home area as the Plasterers did not have many plasterer employees to supply.

⁹ While the Painters suggested that, in order to achieve the 3-1 manning, the Employer could have utilized a nonlocal painter for the Q.T. spraying and substituted a local painter for one of the two nonlocal painters doing drywall work, the Employer stated that such manning would have jeopardized the drywall operation.

at Washington, D.C., jobsites to plasterers instead of painters; one 1979 decision of the Joint Administrative Committee, sitting as an Appeals Board under the Plan for Settlement of Jurisdictional Disputes in the Construction Industry, awarding the spray application of Q.T. at an undisclosed location to plasterers instead of painters; and one 1973 decision of the Appeals Board under the above-described plan awarding the spray application of textured materials on concrete ceilings in Pennsylvania, Minnesota, and Indiana to plasterers instead of painters.

It appears that the Worcester, Massachusetts, area practice favors assignment of the disputed work to employees represented by the Painters. However, the significance of this factor is diminished because the Employer came from another area and used its own employees to perform the work.¹⁰

As the Employer and the Painters both presented evidence of job assignments and decisions concerning locations outside the vicinity of the immediate dispute in support of their respective positions, we find the factor of industry practice is inconclusive in determining the instant dispute.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that the Employer's employee who is represented by the Plasterers is entitled to perform the work in dispute. We reach this conclusion relying on the Employer's collective-bargaining agreement with the Plasterers, the Employer's practice and preference, and economy and efficiency of oper-

ation, which factors, on balance, outweigh the factor of area practice. In making this determination, we are awarding the work in question to the employee who is represented by the Plasterers, but not to that Union or its members. 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 findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. An employee of Manganaro Corporation of New England, who is represented by Worcester Local No. 6 of the International Union of Bricklayers, Masons and Plasterers, is entitled to perform the work of spraying a gypsum product, named Q.T., on concrete ceilings at the Bell Pond Housing Project in Worcester, Massachusetts.

2. Local 48, International Union of Painters and Allied Trades of the United States and Canada, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Manganaro Corporation of New England 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 48, International Union of Painters and Allied Trades of the United States and Canada, AFL-CIO, shall notify the Regional Director for Region 1, 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.

¹⁰ See *Sheet Metal Workers' Local Union 41 (B & W Metals Co.)*, 231 NLRB 122 (1977), in which area practice was not considered determinative when an employer is from another State or area and uses its own employees to perform the disputed work.