

**Sheet Metal Worker's International Association,
Local No. 9 and J. A. Jones Construction Co.¹
and Carpenters District Council of Denver and
Vicinity, Case 27-CD-223**

5 August 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 charges filed by J. A. Jones Construction Co. (the Employer), alleging that Sheet Metal Workers' International Association, Local No. 9 (Sheet Metal Workers), 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 employees represented by Sheet Metal Workers rather than to employees represented by Carpenters District Council of Denver and Vicinity (Carpenters).

Pursuant to notice, a hearing was held before Hearing Officer Michael J. Belo, on 10 February 1983, at Denver, Colorado. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer, Sheet Metal Workers, and Carpenters filed briefs.

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 rulings made by the Hearing Officer 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 is a Delaware corporation with its primary office located in Charlotte, North Carolina, where it is engaged as a general contractor in the building and construction industry. At all material times herein, it has been engaged at the United Bank Center Project, 1707 Sherman Street, Denver, Colorado, in the construction of an office building. During the 12 months preceding the hearing, in the course of its operations in Colorado, the Employer purchased and received goods and materials valued in excess of \$50,000 directly from suppliers located

outside the State of Colorado. Accordingly, we find 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 ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Sheet Metal Workers and Carpenters 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 general contractor engaged in the construction of the United Bank Building in Denver, Colorado. It originally had a subcontract with a sheet metal subcontractor, Builders Service Bureau, for the erection and installation of metal toilet partitions in the bathrooms of the building. There are two bathrooms per floor in the 52-story building, with a total of seven partitions per floor to be installed. According to the Employer's project manager, however, closer examination of the subcontract in late 1982 revealed that Builders Service Bureau had not contracted to drill, tap, and place studs in the overhead steel structural members from which the partitions would be hung. The project manager testified that Builders Service Bureau said the Ironworkers claimed this work. The Employer renegotiated the Builders Service Bureau contract so that the latter was obligated only to supply the metal partitions. The Employer then asked for and received a bid from another sheet metal subcontractor, whose employees were represented by Sheet Metal Workers, for the installation of the partitions, but the Employer rejected the bid as too high. On 7 January 1983 the Employer assigned the erection and installation of the metal partitions to its own employees, represented by Carpenters, with which it has a collective-bargaining agreement, and those employees began the work on 10 January 1983.

On or about 14 January 1983, Sheet Metal Workers business representative spoke to the Employer's project manager, claimed the work of erecting and installing the toilet partitions, and advised the latter that there might be picketing if the work was not given to employees represented by Sheet Metal Workers. The project manager said he was willing to assign the work to employees represented by either Union if the two Unions could agree on which one would do the work. However, when the Employer's project manager received no response from the two Unions, he continued to

¹ The name of the Employer appears as amended at hearing.

assign the work in dispute to employees represented by Carpenters. On 14 January 1983 the Employer's project manager was approached by a member of Sheet Metal Workers who was employed as a superintendent by a sheet metal subcontractor on the project and told that he should expect trouble and probably a picket line on the job over the assignment he had made of the toilet partition work. On the next working day, 17 January, Sheet Metal Workers placed pickets at various gates at the project with signs stating that the Employer paid substandard wages and benefits. As a result, approximately 70 percent of the employees on the project did not work that day. Pursuant to an agreement between the attorneys for the Employer and Sheet Metal Workers, the pickets were withdrawn in the late afternoon of 17 January 1983 and had not returned as of the date of the hearing. As of the date of the hearing, approximately 30 percent of the toilet partition work had been completed.

B. The Work in Dispute

The work in dispute is the erection and installation of metal toilet partitions at the Employer's construction project, the United Bank Building, a 52-story office building in Denver, Colorado.

C. Contentions of the Parties

The Employer and Carpenters contend there is reasonable cause to believe Sheet Metal Workers violated Section 8(b)(4)(D) of the Act and that there is no agreed-upon method for the adjustment of the dispute. Both contend that the work in dispute should be awarded to employees represented by Carpenters on the basis of their collective-bargaining agreement, economy and efficiency of operations, Employer and area practice, and the Employer's preference.

Sheet Metal Workers contends that the work in dispute should be awarded to employees represented by it based on Employer, area, and industry practice, economy and efficiency of operations, interunion agreements, and Joint Board decisions.

D. Applicability of the Statute

Before the Board may proceed with a determination of 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 noted above, it is undisputed that on 13 January 1983 the Sheet Metal Workers business agent approached the Employer's project manager, made

a demand for the work in dispute, and advised that there might be picketing if the toilet partition work was not reassigned. When the Employer continued to assign the work to the employees represented by Carpenters on 14 January 1983, a member of Sheet Metal Workers, who was employed as a superintendent by a sheet metal subcontractor on the project, advised the Employer's project manager that he could expect trouble and probably a picket line if the assignment was not changed. The next working day, Sheet Metal Workers members picketed the jobsite, and, although the picket signs stated that the Employer paid substandard wages, Sheet Metal Workers business agent testified that he was concerned with the assignment of work to his members and not with the amount of wages being paid to those already doing the work. Finally, the parties stipulated that there was reasonable cause to believe that Section 8(b)(4)(D) of the Act had been violated. Based on the foregoing, and the record as a whole, we find that reasonable cause exists to believe that an object of the picketing by Sheet Metal Workers was to force the Employer to assign the work in dispute to employees represented by Sheet Metal Workers and that a violation of Section 8(b)(4)(D) has occurred.

At the hearing, the Employer and Carpenters stipulated that there was no agreed-upon method for the voluntary adjustment of the instant dispute. Although at the hearing Sheet Metal Workers reserved its position with respect to the stipulation, in its brief Sheet Metal Workers specifically stated that it makes no contention that the dispute was not properly before the Board for determination on the merits. We therefore find that there is no agreed-upon method for the voluntary adjustment of the dispute. Accordingly, we find 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 factors.² The Board had held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience reached by balancing those factors involved in a particular case.³

² *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).

³ *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

1. Certifications and collective-bargaining agreements

Neither of the Unions involved herein has been certified by the Board as the collective-bargaining representative for a unit of the Employer's employees. It is undisputed that at all relevant times Carpenters had a collective-bargaining agreement with the Employer. The jurisdictional provisions of the collective-bargaining agreement between Carpenters and the Employer contain language sufficient to encompass the work in dispute.⁴ In view of the fact that the collective-bargaining agreement encompasses the work in dispute, the Employer's assignment of such work to employees represented by Carpenters, and the fact that Sheet Metal Workers has no collective-bargaining agreement with the Employer, we find the factor of collective-bargaining agreements tends to favor an award of the disputed work to employees represented by Carpenters.

2. Economy and efficiency of operations

Originally, the Employer had subcontracted the disputed work to a subcontractor who had a collective-bargaining agreement with Sheet Metal Workers, but, when a previously omitted task increased the toilet partition project cost beyond the Employer's budget, other ways to complete the disputed work were sought. The choices considered were using the Employer's own employees represented by Carpenters or using a subcontractor who had a collective-bargaining agreement with Sheet Metal Workers. The Employer chose to use his own employees represented by Carpenters because the estimated cost of that choice was one half the cost of using the subcontractor. The Employer's project manager testified that, with one-third of the disputed work done, the cost was within budget. He further testified that employees represented by Carpenters could perform other work when not doing toilet partition work, thereby resulting in greater flexibility and economy. Sheet Metal Workers has not shown that employees represented by it could perform other work. Accordingly, we find that the factor of economy and efficiency of operations favors awarding the work in dispute to employees represented by Carpenters.

⁴ Thus, the jurisdictional provisions refer to the following work:

The installation of all frame work, partitions of any material to include metal studs, floor and ceiling runners, braces or any nailable or screwable frame existence or similar construction.

Erection of all wood, metal, plastics and composition partitions:

[T]he installation, tying and connection of all types of light iron and metal studs and all types of light iron furring erected to receive the material specified in this Article, including but not limited to gypsum wall board, walls, partitions, ceiling heat panels . . . is specifically included in the work covered by this Agreement.

3. Relative skills

The record reveals that both groups of employees possess the necessary skills to perform the work in dispute. We therefore find that the factor of relative skills is not helpful to our determination.

4. Employer and area practice

The undisputed testimony of the Employer's project manager and of the managers for three other general contractors in the Denver area was that toilet partition work is either done by their own employees who are represented by Carpenters or, if done by subcontractors, then by employees represented by Sheet Metal Workers. Each firm makes the decision to keep or subcontract the work on an economic basis. The Employer subcontracts about 75 percent of its toilet partition work whereas the other three general contractors subcontract 50 percent of theirs. Employees represented by Carpenters testified to doing toilet partition work in the Denver area as did employees represented by Sheet Metal Workers. Since the Employer has elected to perform the work in dispute itself rather than subcontracting it out, and since it is clear that in such situation it has been the practice of the Employer and other general contractors in the area to assign work similar to that in dispute to employees represented by Carpenters, we find the factor of the Employer's practice and area practice favors an award of the disputed work to employees represented by Carpenters.

5. The Employer's preference

The Employer's project manager testified that, while he had no preference prior to the initial assignment of the work, he preferred to continue to assign the work in dispute to the employees represented by Carpenters since they had become familiar with it and were performing such work in an efficient manner. We therefore find that this factor, although not entitled to controlling weight, tends to favor an award of the work in dispute to employees represented by Carpenters.

6. Interunion agreement

Carpenters and Sheet Metal Workers are affiliated with, respectively, the United Brotherhood of Carpenters and Joiners and the Sheet Metal Workers International Association. In 1929 the two parent organizations entered into an agreement which states, *inter alia*, "toilet partitions [which] shall be done by Sheet Metal Workers." Although Sheet Metal Workers bases its claim to the work in dispute on this interunion agreement, it is not clear that the work in dispute is covered by that agree-

ment. The un rebutted testimony of Carpenters president is that it is not, and, although the record indicates that there are four types of toilet partitions, no evidence was presented as to which, if any, of these types of partitions were the subject of the agreement.

Even if the interunion agreement were not ambiguous, the Board has not assigned significant weight to such agreements where all the parties have not agreed to abide by them.⁵ Although the interunion agreement is mentioned in article 2 of the agreement between Carpenters and the Employer, the stated purpose of that article is to "protect the craft jurisdiction" of Carpenters against other crafts and not to restrict the Employer's assignment of work. Further, neither the Carpenters nor the Employer has agreed to abide by the interunion agreement and Carpenters continues to claim the work in dispute without sanctions from its parent organization for doing so. For all these reasons, we give no significant weight to the interunion agreement.

7. Impartial board determinations

The Sheet Metal Workers submitted into evidence 17 decisions of either the Impartial Jurisdictional Disputes Board or the National Joint Board for the Settlement of Jurisdictional Disputes. On previous occasions, the Board has refused to accord significant weight to such awards when they fail to explicate the factors upon which they are based, as these decisions fail to do.⁶ We therefore accord these decisions no significant weight.

Conclusion

Upon the record as a whole, and after full consideration of all of the relevant factors involved,

⁵ See *Local 361, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Contrete Casting Corp.)*, 209 NLRB 112 (1974).

⁶ See *Operative Plasterers' and Cement Masons' International Association, Local No. 394, AFL-CIO (Warner Masonry, Inc.)*, 220 NLRB 1074, 1075-76 (1975); *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plumbers Local No. 219 (Price Brothers Company)*, 174 NLRB 547, 550 (1969).

we conclude that employees who are represented by Carpenters are entitled to perform the work in dispute. We reach this conclusion based on the collective-bargaining agreement between Carpenters and the Employer, economy and efficiency of operations, Employer and area practice, and the Employer's preference, and the fact that employees represented by Carpenters possess the requisite skills to perform the disputed work. In making this determination, we are awarding the work in dispute to the employees who are represented by the Carpenters, but not to that Union or its members. The present determination is limited to the particular controversy which gives 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. Employees of J. A. Jones Construction Co. who are represented by Carpenters District Council of Denver and Vicinity are entitled to perform the erection and installation of metal toilet partitions at the Employer's construction project, the United Bank Building, a 52-story office building in Denver, Colorado.

2. Sheet Metal Workers' International Association, Local No. 9, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require J. A. Jones Construction Co. 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, Sheet Metal Workers' International Association, Local No. 9, shall notify the Regional Director for Region 27, in writing, whether or not it will refrain from forcing or requiring J. A. Jones Construction Co., 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.