

Local 3, International Brotherhood of Electrical Workers, AFL-CIO and Telecom Plus of Downstate New York, Inc. Case 29-CD-319

31 July 1984

DECISION AND DETERMINATION OF DISPUTE

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

The charge in this Section 10(k) proceeding was filed 23 June 1983 by Telecom Plus of Downstate New York, Inc. (Downstate), alleging that the Respondent, Local 3, International Brotherhood of Electrical Workers, AFL-CIO (Local 3), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Downstate to assign certain work to employees it represents rather than to the unrepresented employees of Telecom Plus Rental Systems, Inc. (Rental). The hearing was held 26 and 30 September and 11 and 12 October 1983 and 9 January and 28 February 1984 before Hearing Officer Lauren Rich.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties were unable to reach a stipulation whether Downstate or Rental are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The record indicates that Downstate and Rental are wholly owned subsidiaries of Telecom Plus International Corporation, Inc., a holding company (Telecom). Telecom is a New York corporation which annually receives goods and services in excess of \$50,000 directly from points outside the State of New York.¹

The record shows that Downstate is a New York corporation with its principal place of business in Long Island City, New York. Downstate is engaged in the sale, installation, and servicing of private telephone systems throughout the New York City metropolitan area and in the course of its business annually receives goods and equipment

valued in excess of \$50,000 directly from points outside the State of New York.²

Rental is a New York corporation with its principal place of business in Rego Park, New York, where it is engaged in the rental, installation, and servicing of private telecommunication systems and related products in New York, New Jersey, and Connecticut.

The record indicates that based on a projection of Rental's operations since February 1983, in the course and conduct of its business, Rental will annually receive at its New York facility equipment and products valued in excess of \$50,000 directly from points outside the State of New York.

We find that Downstate and Rental are employers within the meaning of Section 2(2) of the Act and are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction over them.

The parties stipulated that Local 3, International Brotherhood of Electrical Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

As noted above, Downstate is engaged in the sale, installation, and servicing of private telephone systems. Downstate employs installers (technicians), warehousemen, drivers, and expeditors, all of whom were covered by collective-bargaining agreements with Local 3. Rental has operated since mid-1981 and is engaged in the rental, installation, and servicing of private telephone systems. It employs installers (technicians), none of whom has ever been represented by Local 3 or any other labor organization.

The most recent collective-bargaining agreement between Downstate and Local 3 expired on 9 June 1983.³ On 13 June Downstate's president, Gerald Walsh, and Local 3's business manager, Thomas Van Arsdale, participated in a collective-bargaining session. Walsh testified that Van Arsdale questioned him about Rental and another nonunion Telecom subsidiary, asserting that the work performed by those companies should be performed by Local 3 members. Van Arsdale insisted on speaking to the president of the parent company before continuing negotiations. He asserted that the

¹ See *Electrical Workers IBEW Local 3 (Telecom Equipment Corp.)*, 266 NLRB 714 (1983).

² See *Electrical Workers IBEW Local 3 (Telecom Equipment Corp.)*, 269 NLRB 124 (1984), where the Board found that Downstate is engaged in commerce within the meaning of the Act.

³ All dates are in 1983 unless otherwise stated.

entire issue of nonunion subsidiaries had to be discussed before negotiations could resume.

A meeting was arranged for 14 June with Telecom's president, Thomas Berger. That meeting was abruptly concluded by Van Arsdale when he discovered Telecom's attorney was Robert Lewis. No other meetings were held through 23 June when all of Downstate's Local 3 members commenced a strike. The strike continued at least through the date of the hearing officer's report.

On 5 July a bargaining session was held. Telecom's attorney, Lewis, testified that Van Arsdale announced that the purpose of the meeting was to discuss Local 3's contract with the parent company. In response to Lewis' statement that Local 3 had a contract only with Downstate, Van Arsdale asserted that Local 3 had "worldwide jurisdiction" and asked for an agreement whereby Telecom would give all work performed in the New York area to Local 3. Van Arsdale stated that Rental and other nonunion subsidiaries were depriving Local 3 members of work. The meeting ended without a resolution of the strike.

At another bargaining session on 29 July, Downstate's attorney, Lewis, told Van Arsdale that Local 3 did not have a right to Rental's work. Lewis asked if the strike was in response to Rental's operation. Van Arsdale answered no, but stated that the union was striking to make sure that situations such as that presented by Rental did not recur. Van Arsdale further stated that it was his position that, when a company that had a collective-bargaining agreement with Local 3 opened a new location, the work at that location belonged to Local 3 members. Lewis expressed his disagreement and asked if any other issues were involved in the strike. Van Arsdale replied that all the issues related to similar situations and addressed other nonunion subsidiaries of Telecom. The discussion continued along these lines and ended without the parties reaching agreement about the strike or a successor contract.

B. *Work in Dispute*

The disputed work involves the installation and servicing of private telephone systems rented by Rental. It is currently being performed by six installers (technicians) and apprentices employed by Rental. Prior to the hearing in this case and the strike, Downstate employed approximately 250 installers (technicians), represented by Local 3, who performed the installation and servicing of private telephone systems sold by Downstate.

C. *Contentions of the Parties*

Downstate contends that the statements made by Local 3's agent, Van Arsdale, at the June and July bargaining sessions establish that an object of the strike which commenced on 23 June was to acquire the installation and servicing work performed by Rental's unrepresented employees for Local 3 members. Downstate maintains that the work should remain with Rental's employees.

Local 3 contends that there is no evidence to support a finding that there is reasonable cause to believe that Local 3 has violated Section 8(b)(4)(D) of the Act; that the case is moot because Downstate is defunct;⁴ and that Telecom has so abused Board processes that the complaint should be dismissed. Local 3 has not taken a position with regard to the assignment of the work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a 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 set forth in section A above, Downstate's president, Walsh, testified that Local 3's business agent claimed a right to the work being performed by Rental's nonunion employees and, while denying that the strike was because of Rental, asserted that the strike was to prevent such situations from recurring. We find that this evidence is sufficient for us to conclude that reasonable cause exists to find a violation. Local 3's suggestion that Walsh's testimony is inaccurate or the result of "coaching" does not persuade us to the contrary. In a proceeding under Section 10(k) we are not charged with finding that a violation occurred, but rather with determining that reasonable cause exists for finding such violation.⁵ Without ruling on the credibility of the testimony, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

⁴ Local 3 does not contend that Rental, the entity that performs the work in dispute, is defunct.

⁵ See *Longshoremen ILA Local 1294 (Cibro Petroleum Products)*, 257 NLRB 403 (1981).

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

There are no orders or certifications of the Board awarding jurisdiction of the work in dispute to employees represented by Local 3 or any other labor organization. As noted above, none of the employees of Rental is or has ever been represented by Local 3 or any other labor organization. The expired collective-bargaining agreement between Downstate and Local 3 does not mention Rental or the job duties of Rental's employees. Accordingly, this factor does not favor an award to either group of employees.

2. Employer preference and past practice

Since its formation Rental has regularly assigned the work in dispute to its unrepresented employees. Downstate has not assigned the work in dispute to its employees represented by Local 3.

A representative of Rental testified that it prefers to continue to use its own employees to perform the work in dispute. There is no evidence that Downstate or Telecom controls the assignment of Rental's work. Accordingly this factor favors an award to the employees of Rental.

3. Skills, economy, and efficiency of operations

A representative of Rental testified that there is no difference in the skills required to install and service the rental telephone systems as opposed to

the sold telephone systems. The representative contended, however, that the assignment of work now done by Rental's employees to Local 3 members would result in higher labor costs and inefficiency as far as the assignment of overtime work. We find such evidence insufficient to demonstrate that such an assignment would have an adverse impact on the efficiency or economy of the operations. As the required skills are also the same we find that this factor does not favor an award to either group of employees.

Conclusions

After considering all the relevant factors, we conclude that the unrepresented employees of Rental are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's past practice and preference. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Telecom Plus Rental Systems, Inc. are entitled to perform the installation and servicing of private telephone systems rented by Telecom Plus Rental Systems, Inc.

2. Local 3, International Brotherhood of Electrical Workers, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Telecom Plus of Downstate New York, Inc. or Telecom Plus Rental Systems, Inc. to assign the disputed work to employees represented by Local 3.

3. Within 10 days from this date, Local 3, International Brotherhood of Electrical Workers, AFL-CIO shall notify the Regional Director for Region 29 in writing whether it will refrain from forcing Telecom Plus of Downstate New York, Inc. or Telecom Plus Rental Systems, Inc. by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.