

Iron Workers Local Union No. 350 and Cornell & Company, Inc. and Perini Corporation and South Jersey District Council of Carpenters and its Local 623. Case 4-CD-625

23 August 1984

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The charge in this Section 10(k) proceeding was filed 27 February 1984 by Perini Corporation (Perini), alleging that the Respondent (the Iron Workers) had violated Section 8(b)(4)(D) of the National Labor Relations Act by threatening to engage in a work stoppage with an object of forcing Cornell & Company (Cornell) to assign certain work to employees it represents rather than to employees represented by the Carpenters. The hearing was held 11 April 1984 before Hearing Officer Steven M. Plon.

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.¹ On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated, and we find, that Perini, a Massachusetts corporation, is engaged in the construction business in Atlantic City, New Jersey. During the 12-month period preceding the hearing, Perini purchased materials valued in excess of \$50,000 directly from points outside the State.

The parties also stipulated, and we find, that Cornell, a New Jersey corporation, is engaged in the steel erection and construction business out of its New Jersey facility. During the 12-month period preceding the hearing, the Employer purchased goods valued in excess of \$50,000 directly from points outside the State. Accordingly, we find that Perini and Cornell are each engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties further stipulated, and we find, that the Iron Workers and the Carpenters are

¹ We deny Perini's motion to reopen hearing and to consolidate. In its motion, Perini contends that the hearing should be reopened to allow consolidation of this case with an 8(b)(4)(D) charge it filed on 12 April 1984 against the Carpenters, alleging that the Carpenters threatened a work stoppage unless the work in dispute was reassigned to them. According to Perini, it became aware of this threat in the course of the hearing in the instant case. As Perini acknowledges, however, no complaint has issued in that proceeding. Under the circumstances we see no reason to delay the instant case while the General Counsel is reviewing the new charge. We therefore deny Perini's motion.

labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Perini is the construction manager for the Sands Hotel and Casino project in Atlantic City. As construction manager, Perini oversees all the work at the construction site. Perini has no employees and does no construction work. Rather, it subcontracts all construction work. Perini subcontracted the work in dispute, the installation and erection of the "Dryvit" Systems prefabricated panels, to the Jersey Panel Corporation (Jersey Panel). Jersey Panel then subcontracted the disputed work to Cornell. Cornell is a member of the Iron Workers District Council (Philadelphia and Vicinity) Employers Association which had a collective-bargaining agreement with the Iron Workers effective 1 July 1981 to 30 June 1984. Section 22 of the collective-bargaining agreement gives the Iron Workers jurisdiction over the erection of all precast concrete structures, although it does not refer specifically to Dryvit Systems. Cornell employs only members of the Iron Workers to do this type of work. Cornell does not employ any members of the Carpenters, nor is it a party to any agreement with the Carpenters. The work in dispute, which began in December 1983 and was completed in March 1984, was done by Cornell solely with employees who were members of the Iron Workers.

Perini is a member of the Building Contractors Association of New Jersey (the BCANJ). The BCANJ is a party to a collective-bargaining agreement with the Carpenters. Article XIII of the agreement covers work jurisdiction. It states that the Carpenters District Council claims jurisdiction over the "installation and erection of the Drivit [sic] and similar systems." On 21 December 1983 the Carpenters demanded, by telegram to Perini, that the work be assigned to it. On 26 January 1984 the Carpenters filed for arbitration with the American Arbitration Association requesting that Perini make whole the union members who allegedly should have been assigned the work in dispute. Perini's position is that it is not a party to this collective-bargaining agreement. On both 10 August 1979 and 14 October 1981 Perini informed the BCANJ that it had no authority to enter into any contracts on Perini's behalf. No arbitration of the Carpenters' grievance had been scheduled as of the hearing.

After the Carpenters demanded that the work be assigned to them, Frank Gross, the director of labor relations for Perini, contacted Thomas F.

Kepner, the business manager of the Iron Workers. Kepner stated that if the work was to be assigned to members of the Carpenters he would have all the members of the Iron Workers walk off every Perini construction site in the Atlantic City area. Perini is currently managing at least one other construction site in Atlantic City which is using members of the Iron Workers.

B. Work in Dispute

The work in dispute here involves the installation and erection of large prefabricated panels to the top floor of the 240-foot-tall Sands Hotel and Casino in Atlantic City. These panels measure as large as 40 feet by 11 feet and weigh over 2000 pounds. They are commonly referred to as the "Dryvit" System because of their exterior coating with a patented surface material called Dryvit. The panels are delivered from the factory to the construction site via truck and subsequently are hoisted by a 225-ton crawler crane to a height of approximately 240 feet up the hotel building. The actual installation and erection of the Dryvit System entails the welding of steel braces onto the building's steel shell, the loading of the panels onto a crane and unloading of the same on the hotel's top floor, and the welding of the panels onto the steel braces attached to the building's shell.

C. Contentions of the Parties

Perini and Cornell contend that Cornell properly assigned the disputed work to members of the Iron Workers, based, inter alia, on Cornell's past practice, relative skills and safety, economy and efficiency of operations, and Cornell's preference. Thus, they agree that this assignment of the work is in accordance with Cornell's established practice, and that the ironworkers have been assigned to this type of work in the great majority of instances. Secondly, they contend that the work involved is quite dangerous and the ironworkers have greater skill and experience in performing this work. Tasks involved in completing the work include "walking the iron" unprotected 240 feet in the air. Moreover, the installation work at this jobsite is much more difficult than the normal installation of prefabricated panels because of the height of the structure and because the work is in an already completed building that is being used by the public. Next, they argue that the assignment of the work to members of the Iron Workers is more efficient, because the ironworkers are also assigned to the erection and subsequent disassembling of the crane necessary to haul the panels to the top of the hotel. By contrast, assignment of the work to members of the Carpenters would force Cornell to use two sep-

arate crews. Perini also asks for an areawide decision, arguing that the dispute is a recurring one and that the Carpenters has a propensity to engage in 8(b)(4)(D) conduct in an effort to obtain the work in dispute.

At the hearing the Carpenters asserted that it has no interest in the work at issue, and that it has effectively disclaimed it. In addition, the Carpenters moved to quash the notice of hearing on the grounds that the proceeding was a sham and moot because the threat to strike was made by the Union whose members had already been assigned the work and because the work had been completed. Following presentation of the arguments, and the hearing officer's refusal to quash the notice of hearing, the Carpenters removed itself from the proceeding, and refused to participate further.

D. Applicability of the Statute

Before the Board proceeds 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 there is no agreed-upon method for the voluntary adjustment of the dispute.

As noted above, the Iron Workers threatened Perini that, if the work were assigned to members of the Carpenters, the Iron Workers would strike every Perini construction site in the Atlantic City area. There is no evidence in the record that the strike threat was anything but genuine. Under settled Board policy, reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred exists if a labor organization which represents employees who are assigned the disputed work puts improper pressure on an employer to continue such assignment.² Based on the foregoing, and the record as a whole, we find that there is reasonable cause to believe that an object of the Iron Workers' action in threatening to strike Perini was to force Cornell to continue to assign the disputed work to employees represented by the Iron Workers and that a violation of Section 8(b)(4)(D) has occurred.

Further, we find that the completion of the work does not render the dispute moot, because the record here contains evidence of a similar dispute in the past and nothing to indicate that such disputes will not occur in the future.³ Additionally, it

² See, e.g., *Machinists District Lodge 27 (Joseph E. Seagram & Sons)*, 198 NLRB 407, 408 (1972); *Laborers Local 1184 (H. M. Robertson Pipeline Constructors)*, 192 NLRB 1078, 1079 (1971).

³ *Sheet Metal Workers Local 541 (Kingery Construction Co.)*, 172 NLRB 1046, 1049 (1968), and cases cited therein at fn. 9.

is clear that the Carpenters has not effectively disclaimed the work, for its pursuance of the grievance for breach of contract against Perini for failing to give the work to members of the Carpenters is inconsistent with the putative disclaimer.⁴

Finally, the parties stipulated and we find that there is no agreed-upon method for voluntary adjustment of the work in dispute. Accordingly, the matter is properly before the Board for determination under Section 10(k) of the Act.⁵

E. Merits of the Dispute

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to various factors.

1. Certifications and collective-bargaining agreements

The parties stipulated that neither labor organization has been certified as the collective-bargaining representative for a unit of either of the Employer's employees. As noted previously, section 22 of Cornell's agreement with the Iron Workers gives the Iron Workers work jurisdiction over the erection of all precast concrete structures. The Carpenters' contractual claim to the work is presently being arbitrated. Perini claims that its membership in the BCANJ does not reflect the granting of authority to the BCANJ to enter into binding collective-bargaining negotiations, and that therefore it is not bound by the Carpenters' agreement, which states that the Carpenters District Council claims jurisdiction over the "installation and erection of the Drivit [sic] and similar systems."

Because there are conflicting collective-bargaining agreements, both of which suggest that installation and erection of Dryvit Systems is within the work jurisdiction of the respective Unions, we find that this factor does not favor an award to employees represented by either Union.

2. Company past practice

Cornell has performed approximately 10 subcontracting jobs in the Atlantic City area involving the installation of prefabricated panels, and the record reveals that, with one exception, the Employer always has assigned such work to employees represented by the Iron Workers.⁶ Record testimony

⁴ See *Electrical Workers IBEW Local 486 (New England Power Service Co.)*, 219 NLRB 692, 693 (1975).

⁵ In view of our decision herein, the motion to quash the notice of hearing, referred to the Board by the hearing officer, is hereby denied.

⁶ In that one exception, the Employer commenced the job with employees represented by the Carpenters, under the supervision of employees represented by the Iron Workers. According to the testimony of an employer official, the Employer was forced to employ carpenters on this one occasion, but was unable to complete the job, partly because of the

also reveals that only employees represented by the Iron Workers have been utilized for installation and erection of the Dryvit System on the Sands Hotel and Casino project in dispute. Accordingly, we find that the predominant past practice of Cornell favors an award of the work to employees represented by the Iron Workers.

3. Safety and relative skills

According to the record, the "connectors" on the Sands Hotel and Casino project are those employees who are required to work off a beam at the top of the building in order to receive and direct the prefabricated panels from the cranes. The record indicates that the crane used on the Sands Hotel and Casino project is unusual and requires the use of more complex than normal hand signals to the crane operator by the connectors. Comprehension of the requisite signals is a matter generally acquired through on-the-job experience, rather than through special training. According to the record testimony, employees represented by the Iron Workers would be familiar with the signals, whereas employees represented by the Carpenters would not. Additionally, because of the height at which the installation and erection of the prefabricated panels is performed, and because a number of the employees work off unprotected beams 240 feet in the air, the work involved is dangerous and requires laborers skilled in the task. The difficulty of performing the work in dispute is exacerbated both by the height of the structure being refurbished, as well as the fact that the work is performed on a completed building in constant use by the public. Therefore, the safety of the public walking beneath the construction areas is an additional consideration. The safety of the "connectors" on the narrow iron beams is compromised further by powerful ocean winds and, on this particular job, icy winter conditions. According to the record, the employees represented by the Iron Workers have much greater experience in the skills required and will agree to "walk on iron" (i.e., work on unprotected beams at great heights), whereas the employees represented by the Carpenters are unwilling to perform such work without the erection of protective scaffolding. We therefore find that safety and relative skills favor an award of the work to employees represented by the Iron Workers.

excessive costs resulting from the use of employees represented by the Carpenters.

4. Economy and efficiency of operation

As noted above, employment of employees represented by the Carpenters for the work in dispute would require the erection of scaffolding, because employees represented by the Carpenters have in the past refused to work off unprotected beams of great heights. According to the record, the cost of erecting protective scaffolding on this job would be uneconomical. Moreover, assignment of the work in dispute to employees represented by the Carpenters would force the Employer to employ two separate crews: one for the installation and erection of the prefabricated panels, the other for the assembling/disassembling of the crane. Therefore, the factors of economy and efficiency favor an award of the work to employees represented by the Iron Workers.

5. Company preference

Cornell has assigned the disputed work to employees represented by the Iron Workers and has expressed its preference that the disputed work be performed by them. Cornell's present assignment and preference therefore favor an award to employees represented by the Iron Workers.

Scope of the Award

As noted, Perini is requesting a broad work award by the Board on behalf of the employees represented by the Iron Workers, contending that such an award is necessary in order to avoid future disruptions at its construction sites. While the work in dispute has been a source of controversy in the Atlantic City area on one prior occasion, and while it is possible that similar disputes may occur in the future, on the record before us we are nevertheless

unable to conclude that the dispute here is a regularly recurring one in the geographic area and, more particularly, that the labor organization involved here—the Iron Workers—has a propensity to engage in prohibited 8(b)(4)(D) conduct on an areawide scope for this particular work.⁷ Therefore, our determination in this case shall be restricted to the particular work and parties giving rise to this proceeding.

Conclusions

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by the Iron Workers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of past practice, safety and relative skills, economy and efficiency of operation, and Cornell's preference. In making this determination, we are awarding the work in question to employees who are represented by the Iron Workers, 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

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

Employees of Cornell & Company, Inc., who are represented by Iron Workers Local Union No. 350, are entitled to perform the installation and erection of Dryvit Systems for Cornell & Company, Inc., at the Sands Hotel and Casino construction site in Atlantic City, New Jersey.

⁷ *Iron Workers Local 3 (Spancrete Northeast)*, 243 NLRB 467, 470 (1979).