

Plumbers, Steamfitters & Refrigeration Fitters, Local Union No. 393, United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Therma Corporation and Northern California District Council of Laborers; Laborers International Union of North America, Local 270. Case 32-CD-126

July 15, 1991

DECISION AND DETERMINATION OF
DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed December 5, 1990, by the Therma Corp. (Therma or the Employer) alleging that the Respondent, Plumbers, Steamfitters & Refrigeration Fitters, Local Union No. 393 (Plumbers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Laborers International Union of North America, Local 270 (Laborers). The hearing was held on January 17, February 7, and March 6, 1991, before Hearing Officer Cynthia Rence. Thereafter, all parties filed briefs in support of their positions.

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 Employer, a California corporation, is engaged in mechanical contracting with offices located in San Jose, California. During the past calendar year, Therma purchased and received goods valued in excess of \$50,000 directly from customers located outside the State of California. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Plumbers and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

On June 15, 1990,¹ Turner Construction Company (Turner) subcontracted the plumbing and air-conditioning work on its Ford Aerospace Building No. 38 project (the project) to Therma. Since October, Therma

has performed plumbing and air-conditioning work at the project, including digging, backfilling, and tamping of plumbing trenches. Therma has employed varying numbers of plumbers and tradesmen at the project, and these employees are represented by Plumbers. The current contract between Therma and Plumbers is effective July 1, 1983, to June 30, 1995.

Therma has had a contract with Plumbers for about 20 years, and during that time period Therma has used tradesmen from Plumbers to dig, backfill, and tamp plumbing trenches on its jobsites. As specified in the collective-bargaining agreement with Plumbers, Therma uses tradesmen to do other tasks assisting the journeymen plumbers when they are not digging, backfilling, or tamping pipe trenches. Therma employs several tradesmen who move between jobsites on an as-needed basis, and who will at times work at more than one jobsite during a day.

Therma has never employed workers from Laborers District Council or Laborers Local 270 to dig, backfill, and tamp plumbing trenches. In the past, on other jobsites and on the project involved in this dispute, Therma has sometimes subcontracted with companies using employees represented by Operating Engineers Local Union No. 3 of the International Union of Operating Engineers to perform the more substantial digging and backfilling jobs, where heavy equipment is required.

The contract between Therma and Plumbers is a Master Labor Agreement between Plumbers and the Santa Clara Valley Contractors Association, of which Therma is a member. About 30 contractors in that association currently employ tradesmen, and contractors in the association do use tradesmen to dig, backfill, and tamp plumbing trenches. These tasks have been among the tasks performed by tradesmen represented by Plumbers for at least 18 years.

On or about October 29, tradesmen and John Romero, the Therma plumbing foreman on the project, were digging plumbing trenches on a section in the middle of the building where two main sewer lines come together. The digging was done using handtools, i.e., compressors, jackhammers, and shovels. After the tradesmen assisted Romero in placing the pipe in the trenches, they then assisted him with backfilling and tamping the trenches. The backfilling and tamping was done using shovels, wheelbarrows, and a tamper called a "whacker." While the backfilling and tamping was being done on this section of the project, a business representative from Laborers visited the project and asked Romero if he was a laborer. When Romero responded that he was a plumber, the business representative said the tamper and shovel were his tools and Romero could not touch them, and that he would file a grievance if Romero continued working. The business representative, who was later identified to Romero

¹ All dates refer to 1990 unless otherwise indicated.

as Ray Turrey, also claimed the work on the project and said that if plumbers did not stop doing the digging and backfilling, “he was going to take action against Therma, through [Turner] to get him removed from the job.” Further, at a building trades council executive board meeting in October, a man introduced by the executive secretary as Laborers President and delegate Bob Hill, told Plumbers, “If you guys don’t stop doing our work at the [project], we are going to picket.”

Therma continued to assign the backfilling and tamping with shovels and whackers on the project to Therma employees represented by Plumbers. On November 2, Laborers filed a grievance under the Laborers District Council Master Agreement, claiming work being done on the project by plumbers. The Laborers’ grievance was filed against both Therma and Turner.

After learning of the Laborers’ claim, Plumbers notified Therma by letter dated November 28, that if “as a result of the claim to this work by Laborers . . . our members lose this work, it is our intention to picket to compel this work to be assigned” to employees represented by the Plumbers; the letter also asserted that “the work of digging, backfilling and tamping of pipe trenches for the work allied to and in conjunction with the piping systems installed at this project” is assigned to employees represented by the Plumbers under its labor contract with Therma. Therma continued to use tradesmen to assist their plumbing foreman on the project in digging, backfilling, and tamping; the Plumbers did not picket.

On February 6, 1991, Laborers withdrew the grievance filed against Therma, but continued to seek backpay from Turner under the Laborers District Council Master Agreement for work done by Plumbers-represented employees. On February 6, 1991, an arbitrator ruled that Turner violated subcontracting provisions in the Master Agreement with the District Council by using a subcontractor that did not use laborers to perform the work in question, but the arbitrator did not prospectively award the disputed work to employees represented by the Laborers.

Therma is bound to the District Council Master Agreement on the project through its subcontracting agreement with Turner. Both the Master Agreement and the subcontracting agreement contain provisions for voluntary dispute resolution. There is no provision in Therma’s agreement with Plumbers, however, binding Therma to a voluntary dispute resolution procedure for jurisdictional claims arising from a dispute with a local union of a competing international union.

B. Work in Dispute

The notice of 10(k) hearing describes the work in dispute as the backfilling and tamping of trenches. Plumbers and Therma assert that the digging of trench-

es is also in dispute, as claimed by Plumbers in the above-referenced letter of November 28. Prior to the end of the hearing, Therma moved to expand the description of the work to include digging, and Laborers objected, arguing that the notice of hearing did not include digging. Deferring the motion to the Board, the hearing officer, over the Laborers’ objection, took evidence bearing on digging and offered Laborers an opportunity to move for a continuance.

We have decided to grant Therma’s motion to expand the description of the disputed work to include digging with hand tools, as described below. In granting the motion, we reject the Laborers’ contention that the issue of digging was not litigated. We note that the hearing officer agreed to hear testimony relating to digging early in the hearing on February 7 and offered Laborers a continuance if needed, and that, in fact, the hearing was continued from February 7 to March 6. Further, we find that the Plumbers’ November 28 letter claims the digging work, thereby placing it in dispute. The record reflects that digging plumbing trenches is a substantial and integral part of the pipelaying work performed by plumbers on the project,² and as noted earlier, that digging was accomplished by the plumbers with compressors, jackhammers, and shovels. Hence, we find that the issue of digging was in dispute and that Laborers was afforded adequate notice of the dispute.

Accordingly, we find that the disputed work involves the digging of plumbing trenches using such handtools as compressors, jackhammers, and shovels, the backfilling of plumbing trenches after pipe has been laid, and compacting the dirt placed in the trenches by use of a tamper or shovel, at Therma’s jobsite at the Ford Aerospace Building No. 38 on Fabian Way in Palo Alto, California.

C. Contentions of the Parties

As an initial matter, Laborers has moved to quash the 10(k) notice of hearing on the ground that the dispute is not properly before the Board.³ In support of this motion, Laborers contends that this is not a jurisdictional dispute but rather a separate and distinct contract action that involves only it and Turner Construction Company; that it has engaged in no conduct which would constitute an impermissible claim to the work in question; that the grievance filed by the Laborers was amended and withdrawn as to Therma Corporation; and that all parties are bound to a plan for voluntary settlement. Relying on *Operating Engineers Local 139 (Allied Construction)*, 293 NLRB 604 (1989), Laborers

²In this connection, we reject the Laborers’ contention that Therma and the Plumbers are seeking to “capture more work to which the [Plumbers are] not entitled.”

³The hearing officer has referred to the Board another, earlier Laborers’ motion to quash that was made at the end of the hearing when it disclaimed the work in dispute.

asserts that Plumbers and Laborers, by virtue of their respective International affiliations, are both affiliated with the AFL–CIO Building & Construction Trades Department, and are thereby bound to an agreed-on method of dispute resolution of jurisdictional disputes in the construction industry.

Therma and Plumbers contend that this is a traditional jurisdictional dispute and that reasonable cause exists to find that Section 8(b)(4)(D) has been violated. They argue that Laborers, after learning of the work assignment, made threats through a business agent to a business agent of Plumbers, and that Laborers thereafter filed a grievance against both Turner and Therma, to which Plumbers responded with a threat to picket if the assignment of the work were changed. Therma and Plumbers further contend that Laborers' decision to drop Therma from the grievance and disclaim the work was merely a tactical decision and that, in fact, through the arbitration proceeding, Laborers continues to claim the work by demanding payment for the work in question. Both also claim that no agreed-on method exists for the voluntary resolution of the dispute between the parties.

As to the merits of the dispute, Therma and Plumbers contend that the disputed work should be awarded to employees represented by Plumbers on the basis of employer preference, collective-bargaining agreements, economy and efficiency of operations, safety, area practice, and relative skills and training. Laborers contends that the factors of collective-bargaining agreements and efficiency and economy support an award of the disputed work to employees it represents.

D. Applicability of the Statute

Before the National Labor Relations Board may proceed with a determination of the dispute pursuant to Section 10(k), it must be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary settlement of their dispute.

As noted above, Laborers, inter alia, threatened to file a grievance if the employees represented by the Plumbers did not stop doing work which they were doing, and subsequently the Laborers filed such a grievance. In addition, after learning that the Laborers was making a claim to the work, Plumbers sent a letter to Therma threatening to picket if the work were withdrawn from its employees. Laborers contends there are no competing claims, however, because its grievance does not constitute a claim for the work.⁴ We reject

⁴ At the 10(k) hearing, the Laborers asserted that it disclaimed the work in issue, citing the withdrawal of its grievance against Therma. In view of its overall conduct and its retention of the grievance against Turner, we find its "disclaimer" to be a hollow gesture. See *Electrical Workers IBEW Local 202 (W. B. Skinner, Inc.)*, 271 NLRB 171, 172–173 (1984). Chairman Stephens agrees that the Laborers purported disclaimer was ineffective in view of its

this contention.⁵ Contrary to the claim of Laborers, we find that *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990), in which the Board reaffirmed that a union's pre-10(k) grievance constitutes an active claim for the work in dispute, is directly on point with the instant case.⁶

We reject the Laborers' assertion that there is an agreement binding all parties to a voluntary method for resolving jurisdictional disputes. Laborers alludes to a method of resolution that purportedly is binding on all affiliate AFL–CIO Building & Construction Trades unions, but provides no documentation to support the existence, viability, or coverage of this asserted method of resolution.⁷ The contracts in evidence show that Turner's collective-bargaining agreement with Laborers provides a jurisdictional dispute mechanism and that Therma is bound to that agreement by virtue of its subcontract with Turner. However, Plumbers is not a signatory to either agreement, and the collective-bargaining agreement between Therma and Plumbers does not provide for the submission of non-Plumbers jurisdictional disputes to private dispute resolution. Since the Act requires that *all* parties must be bound, we find that no such agreement exists.

Based on our findings above, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-on 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.⁸

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).

earlier threat to picket and the fact that at the time of the hearing, there remained disputed work to be done.

⁵ We also reject Laborers' contention that the Plumbers' threat to picket was a sham. The evidence is insufficient to support that contention.

⁶ Chairman Stephens adheres to his dissent in *Slattery*, but finds the instant case distinguishable because the Laborers' conduct was not limited purely to pursuit of contractual remedies, but also included a threat to picket if it did not obtain the disputed work. In this connection, he deems it immaterial that the threat was made to a business representative of Plumbers rather than to a representative of Therma or Turner. The threat indicated that Laborers at one time publicly threatened taking coercive action within the meaning of Sec. 8(b)(4)(D) to obtain the work in dispute. That fact suffices to establish a basis for finding that a competing claim for the work was made by Laborers.

⁷ See, e.g., *Operating Engineers Local 3 (Hawaiian Dredging)*, 297 NLRB 953 (1990).

⁸ In view of our findings, we deny the Laborers' motion to quash the notice of 10(k) hearing.

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

1. Certifications and collective-bargaining agreements

No party claims there are certifications applicable to the work in dispute. The type of work in dispute is encompassed by the 1989–1993 Laborers’ Master Agreement between Associated General Contractors of California, Inc., of which Turner is a member, and the Northern California District Council of Laborers. It is also encompassed by the 1983–1995 Master Labor Agreement between Plumbers Local 393 and the Santa Clara Valley Contractors Association, of which Therma is a member. However, Therma, as the subcontractor that assigned the disputed work, is the employer for purposes of determining an award in this case.⁹ Because Plumbers has a collective-bargaining agreement with Therma covering the disputed work, and because Laborers does not have such a contract with Therma,¹⁰ we find that this factor favors an award of the disputed work to employees represented by Plumbers.

2. The Employer’s preference and past practice

Therma assigned the disputed work to Plumbers-represented employees and has invariably used such employees for two decades to perform such work. Accordingly, these factors favor an award to employees represented by Plumbers.

3. Area practice

The only evidence of area practice was given by Lloyd Williams, business representative for Plumbers, who testified that it was the practice of employers in the area to use plumbers tradesmen to dig, backfill, tamp, and do other tradesmen work. This evidence favors an award to employees represented by Plumbers.

4. Relative skills, safety, and economy and efficiency of operations

Therma president, Joseph Parisi, testified that the plumbers have the skill necessary to perform the work in a safe and efficient fashion. Plumbers Foreman John

Romero testified that plumbing tradesmen are skilled at filling trenches to specification to support pipe grade. Parisi further testified that employer efficiency is achieved because the employees represented by Plumbers can work with pipe, deliver pipe, and can be given various productive assignments when they are not performing digging, backfilling, and tamping. The Laborers presented no evidence concerning skills, but no one has established that the laborers cannot perform the disputed work. Although the skills of the laborers and plumbers tradesmen may be equal insofar as digging and backfilling trenches, the Employer is able to continuously work the plumbing tradesmen, without intermittent layoffs. This adds substantially to the Employer’s efficiency and economy. Although the laborers point out that their wage rate is lower and that they can be assigned to work periods of as little as 4 hours, we find that the factors of efficiency and economy favor awarding the disputed work to employees represented by Plumbers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Plumbers are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreements, employer preference, employer and area practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Plumbers Local 393, not to that Union or its members. 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.

Employees represented by Plumbers, Steamfitters & Refrigeration Fitters, Local Union No. 393 are entitled to perform the digging of plumbing trenches using handtools, such as compressors, jackhammers, and shovels, the backfilling of plumbing trenches after pipe has been laid, and compacting the dirt placed in the trenches by use of a tamper or shovel at the Therma jobsite at the Ford Aerospace Building No. 38, Fabian Way, Palo Alto, California.

⁹ See *Laborers Local 223 (Anastasi Bros.)*, 272 NLRB 860, 862 (1984).

¹⁰ The record shows that Therma entered into a collective-bargaining agreement with Laborers for a particular short-term project which has since ended.