

Pointers, Cleaners & Caulkers Local Union No. 66, of the International Union of Bricklayers and Allied Craftsmen, AFL-CIO¹ and Richardson & Lucas, Inc. and Local 522, Lumber Drivers, Warehousemen & Handlers, International Brotherhood of Teamsters, AFL-CIO.² Case 2-CD-812

November 8, 1991

DECISION AND DETERMINATION OF
DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

The charge in this Section 10(k) proceeding was filed on June 19, 1991, by the Employer, Richardson & Lucas, Inc., alleging that the Respondent, Pointers, Cleaners & Caulkers Local Union No. 66, of the International Union of Bricklayers and Allied Craftsmen, AFL-CIO (Local 66), 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 Local 522, Lumber Drivers, Warehousemen & Handlers, International Brotherhood of Teamsters, AFL-CIO (Local 522). The hearing was held on July 23, 1991, before Hearing Officer Esther Morales-Cruz.

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 New York corporation with a facility at 705 Greenwich Street, New York, New York, is engaged in the restoration of building exteriors. Annually, the Employer derives gross revenues in excess of \$1 million and purchases and receives materials and supplies valued in excess of \$50,000 directly from suppliers located outside the State of New York. The Employer and Local 66 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 Local 66 is a labor organization within the meaning of Section 2(5) of the Act. The record further reveals, and we find, that Local 522 is a labor organization within the meaning of Section 2(5) of the Act.³

¹The name of the Respondent is corrected in accordance with counsel for Local 66's amendment at the hearing.

²The name of Local 522 has been changed to reflect the new official name of the International Union.

³Local 522 was not present at the hearing, and Local 66 would not stipulate that Local 522 was a labor organization within the meaning of Sec. 2(5) of the Act. However, we find that Local 522

II. THE DISPUTE

A. Background and Facts of Dispute

Fred Ilchert, the Employer's president, testified that the Employer has had a series of collective-bargaining agreements with Local 522 for over 30 years to do its roofing work. Currently, about 40 Local 522 members are working for the Employer. In March 1990, the Employer began restoration of a building located at 740 Park Avenue, New York, New York. The work was still in progress at the time of the hearing. Ilchert testified that this was a big job, that Local 522 was able to do roof work and brickwork, but that he began hiring employees represented by Local 66 to do stone work. The Employer signed an agreement with Local 66 covering masonry work.

Local 66 set the limestone panels on the facade of the building and, where necessary, repaired the backup brickwork behind the limestone. Local 522 did roof work on the main roof and the terraces which, because of upper floor setbacks, also constituted the roof of part of the level beneath each of the terraces. Local 522 also did roof-related brickwork on the main roof and exterior parapets of the terraces, removed a strip of limestone from the inside of each terrace, and inspected and repaired the flashing as needed. In May or June 1991,⁴ when it was time to replace with brick the area adjacent to the flashing where the limestone had been removed, Local 66 claimed that brickwork.

Ilchert testified that in late May John Keppel, business manager of Local 66, said he wanted to claim the brickwork below the limestone and below the terrace deck. Ilchert stated that he told Keppel "no way" because it was a Local 522 job. Ilchert also testified that on June 5 or 6 Local 66 struck the building and, on the same day, filed a grievance with respect to the Employer's assignment of the inside terrace brickwork to Local 522. Ilchert further testified that on June 18 he asked if there were any way to get the pickets off the building and Keppel said "no [sic] unless he got the brickwork below the limestone."

is a labor organization within the meaning of the Act on the basis of the Employer's testimony concerning its 30-year collective-bargaining relationship with Local 522 as reflected in the copy of the collective-bargaining agreement between Local 522 and the Employer which was admitted into evidence at the hearing, and the terms and provisions of that agreement. *Operating Engineers Local 825 (Patoch Construction Co.)*, 255 NLRB 255 fn. 2 (1981). Furthermore, the status of Local 522 as a labor organization is not a prerequisite to a finding that a jurisdictional dispute exists, as it has been repeatedly held that Secs. 8(b)(4)(D) and 10(k) apply to disputes between rival groups of employees and not only between rival unions. The existence and validity of the collective-bargaining agreement between Local 522 and the Employer is only one factor to be considered by the Board in determining a jurisdictional dispute. *Essex County Building Trades Council*, 243 NLRB 249 fn. 2 (1979).

⁴All dates are in 1991 unless otherwise noted.

Eric Schnellbacher, the Employer's construction manager, testified that when Local 522 started the disputed brickwork on June 6 Local 66 collectively walked off the job.

B. *Work in Dispute*

The disputed work involves brickwork along the inside of the terraces located on the building at 740 Park Avenue, New York, New York.

C. *Contentions of the Parties*

The Employer contends that Local 66 violated Section 8(b)(4)(D) of the Act. The Employer further contends that the disputed work should be awarded to employees represented by Local 522 on the basis of employer preference and past practice, economy and efficiency of operation, and specialized skills.

Local 66 contends that this is not a traditional jurisdictional dispute, but rather is a dispute involving subcontracting of work, safety, improper termination, and a lockout. Local 66 argues that Local 522 has not claimed the work in dispute, that the work was not being done by Local 522 but rather by a subcontractor, and that there is no reasonable cause to believe that Local 66 violated Section 8(b)(4)(D) of the Act. Local 66 contends that the work was reassigned away from Local 66. Further, Local 66 contends that it has the necessary skills, that it has a collective-bargaining agreement that provides for jurisdiction over the work, that company and industry practice is to have Local 66 do the work, and that there are awards under the Building Trades and Employers Association that indicate Local 66 should do this kind of work.

Local 522 did not participate in this hearing and did not present evidence concerning its position.

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 established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that a union has threatened to or has used proscribed means to force an employer to assign work to one group of employees rather than to another.

As discussed above, Ilchert testified that in May John Keppel, business manager of Local 66,⁵ stated that he wanted the brickwork below the limestone and below the terrace deck. Ilchert replied "no way," because that was Local 522 work. Shortly thereafter, on about June 5 or 6, Local 66 struck and, on the same day, filed a grievance over the Employer's assignment of the brickwork. Ilchert further testified that on June

18 when he asked if there were any way to get the pickets off the building Keppel replied, "no [sic] unless he got the brickwork below the limestone."

Eric Schnellbacher, the Employer's construction manager, testified that when Local 522 began the disputed brickwork on June 6 Local 66 collectively walked off the job.

We find that Keppel's statements to Ilchert constituted a demand for work that Local 522 was performing. Consequently, we conclude that there are active competing claims to disputed work between rival groups of employees.⁶

In light of Ilchert's and Schnellbacher's testimony, we also find reasonable cause to believe that Local 66 violated Section 8(b)(4)(D). The record reveals 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.

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 the dispute.

⁶We find without merit Local 66's contention that Local 522's nonparticipation in the 10(k) hearing warrants a finding that Local 522 does not claim the work in dispute. The record evidence establishes that employees represented by Local 522 are performing the work in question. There is no evidence that Local 522 has disciplined employees for continuing to perform the work or that Local 522 has objected to or disclaimed the assignment of this work. This indicates that Local 522 continues to claim the work. See *Teamsters Local 50 (Schnabel Foundation)*, 295 NLRB 68 (1989). Similarly, Local 66's argument that the Employer has subcontracted the work does not warrant a different result. The evidence presented by the Employer establishes that the Employer employs employees represented by Local 522 to perform the disputed work. Thus, even assuming arguendo that the fact that the disputed work was subcontracted would affect the outcome, it is well established that a conflict in testimony does not prevent the Board from proceeding under Sec. 10(k), for in this type of proceeding the Board is not charged with finding that a violation did in fact occur, but only that reasonable cause exists for finding such a violation. See *Electrical Workers IBEW Local 400 (E. T. Electrical)*, 285 NLRB 1149 (1987).

Finally, we reject Local 66's argument that it did not violate Sec. 8(b)(4)(D) because its object in picketing was to protest safety and the termination of Local 66-represented employees. Even if Local 66 were able to substantiate this claim, this would only establish that one object of the picketing was lawful. The issue at this stage is whether reasonable cause exists to believe that an object of the picketing was to force or require the Employer to assign the work to individuals represented by Local 66. *Electrical Workers IBEW Local 701 (University of Chicago)*, 255 NLRB 1157, 1161 (1981).

⁵Ilchert mistakenly testified that Keppel was president of Local 66. The record shows that Keppel was in fact the business manager for Local 66.

1. Certifications and collective-bargaining agreements

There is no evidence that either Union was ever certified by the Board to represent the employees of the Employer. Both Local 522 and Local 66 arguably have collective-bargaining agreements which cover the work. This factor does not favor awarding the work in dispute to either group of employees.

2. Company preference and past practice

The Employer has used Local 522 to do this type of work for 32–33 years and prefers to continue to use Local 522 for its roof-related brickwork. The Employer must give a 10-year guarantee on its roofing and argues that the proper installation of the brick adjacent to the flashing is an important factor in its roofing. Although Local 66 has done masonry work for the Employer at this and other sites, the Employer contends it has never used Local 66 to do this specific type of work. This factor favors awarding the work in dispute to employees represented by Local 522.

3. Area and industry practice

Although Local 66 has introduced evidence of area and industry practice regarding limestone and backup brickwork, there is no evidence in the record pertaining to area and industry practice specifically regarding roof-related brickwork. This factor does not favor awarding the work in dispute to either group of employees.

4. Relative skills

The Employer attests to the skill of employees represented by Local 522 in performing this type of work and contends that roof-related brickwork is a very technical specialized skill. Local 66 presented evidence that it provides extensive training in various phases of brickwork, and there was testimony that employees represented by Local 66 have performed this specific type of work for other employers and also that this type of brickwork does not require skills different from those required for other brickwork. This factor does not favor awarding the work in dispute to either group of employees.

5. Economy and efficiency of operations

The Employer states that it is more economical and efficient to use Local 522 for the roof-related brickwork. The Employer argues that assignment to Local 66 of this integral part of Local 522's roof repair work would entail taking Local 66 employees from their stone-setting work and bringing them to the terraces where Local 522 employees were already stationed, so that Local 66 could perform a small part of a job which Local 522 had almost finished. The Employer contends that this would result in an unnecessary delay

in the project's schedule, enforced idleness for several Local 522 members and the needless and wasteful 'fragmentation of the Employer's operations.' This factor favors awarding the work in dispute to employees represented by Local 522.

6. Joint Board determinations

Local 66 offered a determination of the Building Trades and Employers Association regarding masonry work. Neither the Employer nor Local 522 took part in the hearing that led to that determination, and the determination is not binding on them. Moreover, the determination does not address roof-related brickwork. This factor does not favor awarding the disputed work to either group of employees.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Local 522, Lumber Drivers, Warehousemen & Handlers, International Brotherhood of Teamsters, AFL–CIO are entitled to perform the work in dispute. We reach this conclusion relying on employer preference and past practice and on economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by Local 522, Lumber Drivers, Warehousemen & Handlers, International Brotherhood of Teamsters, AFL–CIO, 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.

1. Employees of Richardson & Lucas, Inc. represented by Local 522, Lumber Drivers, Warehousemen & Handlers, International Brotherhood of Teamsters, AFL–CIO are entitled to perform roof-related brickwork on the inside of terraces at the jobsite located at 740 Park Avenue, New York, New York.

2. Pointers, Cleaners & Caulkers Local Union No. 66, of the International Union of Bricklayers and Allied Craftsmen, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Richardson & Lucas, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Pointers, Cleaners & Caulkers Local Union No. 66, of the International Union of Bricklayers and Allied Craftsmen, AFL–CIO shall notify the Regional Director for Region 2 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.