

Local No. 5, International Union of Elevator Constructors and Stuart-Dean Co., Inc., Pennsylvania Division and Montgomery Elevator Company and Service Employees International Union, Local 36, AFL-CIO

Local No. 5, International Union of Elevator Constructors and National Elevator Industry, Inc. and Stuart-Dean Co., Inc., Pennsylvania Division and Service Employees International Union, Local 36, AFL-CIO. Cases 4-CD-834 and 4-CD-843

April 23, 1993

DECISION AND DETERMINATION OF
DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

The charges in this Section 10(k) proceeding were filed May 1, 1992, by Stuart-Dean Co., Inc., Pennsylvania Division (Stuart-Dean), and July 23, 1992, by National Elevator Industry, Inc. (NEII), alleging that the Respondent, Local No. 5, International Union of Elevator Constructors (Local 5), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Stuart-Dean and Montgomery Elevator Company (Montgomery) to assign certain work to employees it represents rather than to employees represented by Service Employees International Union, Local 36, AFL-CIO (Local 36). The hearing was held August 3 and 24 and October 2, 14, and 22, 1992, before Hearing Officer Joseph M. Cionzynski.

The National 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

Stuart-Dean Co., Inc., Pennsylvania Division is a division of Stuart-Dean Co., Inc., a New York corporation, engaged in the business of refinishing, polishing, and maintaining metal and marble, with its principal place of business located at Philadelphia, Pennsylvania, where during the 12 months preceding the hearing it purchased goods and supplies valued in excess of \$50,000 from suppliers located outside of Pennsylvania.

Montgomery Elevator Company is a Delaware corporation engaged in the manufacture, installation, and repair of elevators and escalators, with corporate headquarters in Moline, Illinois, and a local office in King of Prussia, Pennsylvania. Montgomery has at all relevant times had a contract to install and repair elevators and escalators at the Philadelphia International

Airport, the only facility involved herein. During the 12 months preceding the hearing, Montgomery purchased equipment and supplies valued in excess of \$50,000 directly from suppliers located outside of Pennsylvania for use at the Philadelphia Airport job-site.

The parties stipulate, and we find, that Stuart-Dean and Montgomery are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 5 and Local 36 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*¹

Montgomery has been a party to a multiemployer nationwide contract negotiated between NEII² and the IUEC for several decades. Its employees employed in the Philadelphia area are represented by Local 5.

In late 1991, Montgomery secured a contract to perform a complete modernization of 34 elevators and escalators at the Philadelphia Airport. Montgomery employed its employees to perform the work involving mechanical repairs and replacement of the equipment and subcontracted the scratch removal and metal refinishing work to Stuart-Dean, which specializes in refinishing and polishing of metal and marble. Stuart-Dean employs approximately 11 Local 36-represented employees.

In late 1991, Local 5-represented employees commenced construction and repair work at the airport. On April 20, 1992,³ Stuart-Dean employees began performing the scratch removal and metal refinishing work.

On April 27, about 10 a.m., Local 5 Assistant Business Agent James Martin advised Lloyd Ivie, Montgomery's project manager, that Local 5 employees should be doing the work performed by Stuart-Dean employees. Martin demanded that Montgomery at least

¹ We find no merit to Local 5's request that the Board adopt the findings of the U.S. District Court for the Eastern District of Pennsylvania, which denied the Regional Director's 10(l) petition in the instant dispute. Congress has entrusted the Board in the first instance with the function of determining whether to proceed with a determination of dispute pursuant to Sec. 10(k) and a decision by a district court on an injunction petition is in no way binding on the Board. *Southern California Pipe Trades Council No. 16 (Kimstock Div.)*, 198 NLRB 1240, 1242 (1972). Thus, even when a court denies a 10(l) injunction which the Board has sought on the basis of an 8(b)(4)(D) charge, the Board is still free to conduct statutorily authorized procedures which flow from that charge. *Hoerber v. Roofers Local 30*, 939 F.2d 118, 123 fn. 7 (3d Cir. 1991). See also *Coronet Foods v. NLRB*, 981 F.2d 1284 (D.C. Cir. 1993) (determinations in court decision denying 10(j) injunction not binding on Board in subsequent related unfair labor practice proceeding).

² NEII is a membership corporation which represents employer members in collective bargaining and negotiates contracts with the International Union of Elevator Constructors (IUEC) on a nationwide basis.

³ All subsequent dates refer to 1992.

assign Local 5 members as “standbys” while the work was being done. Ivie refused.

At lunchtime that day, Local 5-represented employees, who were performing mechanical work on an elevator, locked the wooden barricade surrounding the elevator. Martin was present at the time. About 12:30 p.m., Stuart-Dean employee Kevin Kelly, who was represented by Local 36, returned from lunch to continue his metal refinishing work on the cab interior of an elevator. He discovered that the barricade had been padlocked and that the equipment and materials he had left inside the elevator had been placed outside of the barrier unprotected. Martin and the two Local 5-represented employees who had been performing the mechanical work were standing nearby.

Kelly testified that he asked Martin why he had been locked out and Martin replied that Kelly was doing Local 5 work and that Kelly should speak to Ivie about the situation. When Ivie was summoned, Martin reiterated his claim that Kelly was doing Local 5 work. There is no evidence that the barricade had been padlocked during lunch hour on previous days. Martin claims that the Local 5 employees locked the barricade for safety reasons and denies telling Kelly that he was doing Local 5 work in response to his question as to why the barricade was locked.

Shortly thereafter, James Basile, Stuart-Dean’s sales representative, arrived at the jobsite, having been called by Kelly. Martin stated to Basile that the work in dispute was within Local 5’s jurisdiction. Basile then contacted Local 5 Business Manager William Fagan.

According to Basile, Fagan stated that day that he believed Local 5 had a collective-bargaining agreement with Stuart-Dean and warned that if Stuart-Dean did not use Local 5-represented employees, Local 5 would picket the jobsite. When Basile pointed out to Fagan that Local 5-represented employees were not trained to do the work, Fagan insisted that Stuart-Dean would have to train them.

Meanwhile, Ivie contacted Montgomery Elevator Assistant Vice President Rod Grant and told him that Martin had said the Company could either hire Local 5-represented employees to watch the work being performed by Stuart-Dean, or stop the job. Grant telephoned Fagan to set up a meeting to resolve the matter.

Grant met with Fagan and Martin the next morning. Fagan showed Grant what purported to be a collective-bargaining agreement between Local 5 and Stuart-Dean. According to Grant, Fagan said he would picket the jobsite and other jobsites, if Montgomery continued to use Stuart-Dean to perform the work. Grant related the threat to Basile. On April 29, Grant advised the chief executive officer of Stuart-Dean Co., Inc. of the threat and stated that Stuart-Dean Co., Inc. would have

to resolve its dispute with Local 5 and in the meantime would be barred from continuing its work at the airport. Grant stated that he took that action because he did not want any picketing or work stoppage at the jobsite. Fagan denies making any threat to picket but testified that when Grant asked him if Local 5 would strike, he responded, “[T]hat’s a possibility.”

On May 5, 1992, Local 5 filed grievances against Stuart-Dean and Montgomery alleging that Montgomery was violating its Standard Agreement by subcontracting the disputed work to Stuart-Dean, and that Stuart-Dean was not employing Local 5 members in accordance with its Standard Agreement.

B. Work in Dispute

The disputed work involves the metal refinishing and scratch removal work on elevators and escalators for Stuart-Dean Co., Inc., Pennsylvania Division, at the Philadelphia International Airport, Philadelphia, Pennsylvania.

C. Contentions of the Parties

Stuart-Dean, Montgomery, and NEII contend that Local 5 locked out Stuart-Dean employee Kevin Kelly, who is represented by Local 36, and threatened to picket the jobsite with the object of coercing the reassignment of the work to employees represented by Local 5. They contend that Local 36 should be awarded the work on the basis of area and industry practice, employer preference, relative training and skills, and economy and efficiency of operations.

Local 5 contends that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the notice of hearing should be quashed. Local 5 contends that it never locked out any Local 36 members from working at the jobsite and denies threatening to picket the jobsite to obtain the work. If the notice of hearing is not quashed, Local 5 contends that the work should be awarded to the employees it represents based on the applicable collective-bargaining agreements, industry and area practice, economy and efficiency of operations, and relative skills.

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 voluntary resolution of the dispute. NEII, Montgomery, and Stuart-Dean have stipulated and Local 5 does not dispute in its brief to the Board that there is no agreed-upon method for voluntary adjustment of the dispute.

Local 5 contends that the lockout was for safety reasons. Kelly testified, however, that when he asked why he was locked out, Martin replied that Stuart-Dean was

doing Local 5 work and did not mention any safety concerns. Further, only 2 hours prior to the lockout, Martin confronted Ivie to demand that Local 5-represented employees be assigned the work. We find that there is reasonable cause to believe that Local 5 locked out Stuart-Dean employee Kelly with an unlawful object of obtaining the disputed work for the employees it represents.

We also find reasonable cause to believe that Local 5 Representative Fagan threatened Basile and Grant that Local 5 would picket the jobsite unless they began employing Local 5-represented workers.⁴

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.

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.

1. Certifications and collective-bargaining agreements

There are no relevant Board certifications.

Stuart-Dean argues that its contract with Local 36 covers the disputed work. Local 5 claims that it has a contract with Stuart-Dean that covers the work.⁵ Stuart-Dean argues that the contract with Local 5 covered only employees of a now-defunct division and has

⁴Martin denied telling Kelly that he was doing Local 5 work. Martin and Fagan denied making any threats. It is well settled that a conflict in testimony does not prevent the Board from proceeding under Sec. 10(k) because 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 a violation. See, e.g., *Electrical Workers IBEW Local 400 (E. T. Electrical)*, 285 NLRB 1149 (1987). Further, Fagan admits stating to Grant that a strike was a possibility if Local 5-represented employees were not employed to perform the disputed work.

⁵Alternatively, Local 5 contends that Montgomery is the primary employer and is bound by the IUEC's Standard Agreement. We reject Local 5's argument that Montgomery controlled the disputed work and find instead that subcontractor Stuart-Dean exercised control over assignment of the work to its employees and did not surrender to Montgomery its right to choose its employees. See *Operating Engineers Local 139 (McWad, Inc.)*, 262 NLRB 1300, 1301-1302 (1982).

never been applied to the employing entity involved in this dispute.

We find that neither contract clearly covers the disputed work. We therefore find that this factor does not favor the assignment of the disputed work to either party.

2. Company preference and past practice

Stuart-Dean has assigned the disputed work to Local 36-represented employees and is satisfied with their work. Additionally, Stuart-Dean has used Local 36-represented employees to perform similar work at various jobsites in the area. Stuart-Dean prefers to continue assigning this work to employees represented by Local 36.

We find the factor of employer preference and past practice favors assigning the disputed work to employees represented by the Local 36.

3. Area practice

The weight of the evidence indicates that elevator construction firms routinely subcontract scratch removal and refinishing work to specialty contractors such as Stuart-Dean and that Stuart-Dean and its primary competitors in the area employ Local 36-represented employees exclusively to perform the type of work in dispute. Although there was testimony by Local 5 witnesses indicating that a few Local 5-represented employees performed such work on occasion for other employers, most of that work was either incidental to the installation of new equipment, involved work performed in the shop, or did not involve the same equipment used in the job in dispute. Accordingly, the factor of area practice favors assigning the work in dispute to employees represented by Local 36.

4. Relative skills

The evidence indicates that Local 36-represented employees possess skills, training, and experience in performing the disputed work that are greater than those possessed by Local 5-represented employees. Stuart-Dean's Local 36-represented employees spent from 3 to 5 years in training to progress from a helper to a journeyman in metal refinishing work. Stuart-Dean employees were trained in the use of machines and chemicals and Stuart-Dean has issued safety manuals to its employees governing the use of its equipment. Local 5-represented employees, by contrast, were largely unfamiliar with the chemicals used by Stuart-Dean employees to perform refinishing work. The improper use of the equipment and chemicals could cause costly damage to the metal and also cause personal injury to individuals.

Although Local 5 claims that employees it represents were skilled in performing the work in dispute, Fagan admitted that as few as 12 out of 875 are "com-

petent” to perform metal refinishing and scratch removal. Accordingly, we find that this factor favors an assignment of the disputed work to employees represented by Local 36.

5. Economy and efficiency of operations

We find that training would generally be required for Local 5-represented employees to perform the disputed work, whereas all of Stuart-Dean’s Local 36-represented employees are trained in the work. Accordingly, because the time required to perform the job would be less if Local 36-represented employees were assigned the work, we find that this factor favors assigning the disputed work to employees represented by Local 36.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Service Employees International Union Local 36, AFL–CIO are entitled to perform the work in the dispute. We reach this conclusion relying on employer preference and past practice, area practice, relative skills, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by Service Employees International Union Local 36, AFL–CIO, not to that Union or its members.

Scope of the award

Stuart-Dean contends that the scope of the award should include all metal refinishing and restoration work performed by it. Generally, in order to support a broad, areawide award, there must be evidence that

the disputed work has been a continuing source of controversy in the relevant geographic area, that similar disputes are likely to recur, and that the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work. *Electrical Workers IBEW Local 104 (Standard Sign)*, 248 NLRB 1144, 1148 (1980). We do not find that the record supports awarding a broad order. Accordingly, our 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 Stuart-Dean Co., Inc., Pennsylvania Division, represented by Service Employees International Union, Local 36, AFL–CIO, are entitled to perform metal refinishing and scratch removal work on elevators and escalators for Stuart-Dean Co., Inc., Pennsylvania Division, at the Philadelphia International Airport, Philadelphia, Pennsylvania.

2. Local No. 5, International Union of Elevator Constructors is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Stuart-Dean Co., Inc., Pennsylvania Division, or Montgomery Elevator Company to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Local No. 5, International Union of Elevator Constructors shall notify the Regional Director for Region 4 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 the determination.