

United Brotherhood of Carpenters and Joiners of America, Local Union No. 1207, AFL-CIO (Carlton, Inc.) and Fred F. Holroyd and Campbell Tile Company. Case 9-CD-470

November 23, 1993

DECISION AND DETERMINATION OF
DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed by Fred F. Holroyd, alleging that the Respondent, United Brotherhood of Carpenters and Joiners of America, Local Union No. 1207, AFL-CIO (Carpenters), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Campbell Tile Company (Campbell) to continue assigning certain work to employees it represents rather than to employees represented by International Union of Bricklayers and Allied Craftsmen, Local Union 9, AFL-CIO (Bricklayers). The hearing was held August 20, 1993,¹ before Hearing Officer Linda B. Finch.

The National Labor Relations Board affirms the hearing officer's rulings,² finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Carlton, Inc. (Carlton), a West Virginia corporation, is a general contractor in the building and construction industry. During the 12 months preceding the hearing, a representative period, Carlton purchased goods and materials in excess of \$50,000 from points outside the State of West Virginia which it caused to be shipped into the State of West Virginia.

Campbell, a West Virginia corporation, is a tile specialty operation. During the 12 months preceding the hearing, a representative period, Campbell purchased goods and materials valued in excess of \$50,000 from outside the State of West Virginia which is caused to be shipped into the State of West Virginia.

The parties stipulated, and we find, that Campbell and Carlton are engaged in commerce within the

¹ All dates are in 1993 unless indicated otherwise.

² The hearing officer rejected Bricklayers' Exh. 5 on the grounds that the document, a copy of a letter from the Tile Contractors' Association of America, Inc. to the general president of Carpenters, did not constitute a business record. Bricklayers excepts to the hearing officer's ruling and requests that the record be amended to include the document. We find no merit to Bricklayers' exception. Bricklayers has not established that the document was kept by Bricklayers in the course of regularly conducted business activity. Thus, it does not qualify under the business record exception to the hearsay rule. See Fed.R.Evid. 803(6). Accordingly, we find that the document constitutes inadmissible hearsay and thus affirm the hearing officer's ruling.

meaning of Section 2(6) and (7) of the Act and that Carpenters and Bricklayers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Carlton is signatory to collective-bargaining agreements with Carpenters and Bricklayers respectively. Both agreements cover tilesetting work. Carlton's agreement with Bricklayers prohibits Carlton from subcontracting work covered by the agreement unless the subcontractor agrees in writing to be bound by the terms of the Carlton-Bricklayers' agreement. Carlton's contract with Carpenters also prohibits subcontracting of covered work unless the subcontractor is signatory to an agreement with Carpenters or unless the subcontractor agrees to be bound by the terms of the Carlton-Carpenters' agreement.

In July 1992, the State of West Virginia contracted with Carlton for the construction of the Mount Olive Correction Facility in Fayette County, West Virginia. In March, Carlton and Campbell entered into a subcontracting agreement providing for Campbell to perform tilesetting work at the Mount Olive facility. On June 7, Campbell entered into a collective-bargaining agreement with Carpenters covering, inter alia, tilesetting work performed by Campbell. In early July, Campbell began performing the tilesetting work at Mount Olive using employees represented by Carpenters.

Thereafter, in early July, Bricklayers learned that Carlton had subcontracted the Mount Olive tilesetting work to Campbell. Concerned that Carlton had violated the subcontracting clause of its contract with Bricklayers, Bricklayers' district counsel director, Leroy Hunter, sought a meeting with Carlton officials to resolve the issue. Hunter was unable, however, to arrange a meeting with Carlton officials, and thus Bricklayers filed a grievance against Carlton alleging that Carlton violated the subcontracting clause of its contract with Bricklayers. The grievance was set for arbitration. In addition, Bricklayers' field staff representative, Herbert Smith, contacted Campbell President Elmer Campbell and told him the Mount Olive tilesetting work belonged to employees represented by Bricklayers.³

By letter dated July 13, Carpenters' business representative, Robert Sutphin, informed Elmer Campbell that Carpenters expected Campbell to honor its contract with Carpenters, and that if Campbell did not assign the work accordingly, Carpenters would picket the Mount Olive jobsite.

³ The record does not indicate whether Smith conferred with Campbell before or after Bricklayers filed its grievance against Carlton.

B. Work in Dispute

This disputed work involves the performance of tile-setting work at the Mount Olive Correction Facility in Fayette County, West Virginia.

C. Contentions of the Parties

Campbell and Carlton contend that there is reasonable cause to believe that Carpenters violated Section 8(b)(4)(D) of the Act by threatening to picket, and that the work in dispute should be awarded to employees represented by Carpenters on the basis of collective-bargaining agreements, employer preference and past practice, area and industry practice, and economy and efficiency of operations.

Bricklayers contends that the instant case does not involve a jurisdictional dispute, but rather involves a contractual dispute to be resolved through arbitration of Bricklayers' grievance against Carlton. Alternatively, if the Board finds the instant case constitutes a jurisdictional dispute, Bricklayers contends the work in dispute should be assigned to employees it represents on the basis of collective-bargaining agreements, area and industry practice, relative skills, and economy and efficiency of operations.

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) of the Act has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute. As discussed above, Carpenters' business representative, Sutphin, in essence informed Campbell President Elmer Campbell that Carpenters would picket the Mount Olive jobsite if Campbell reassigned the disputed work to employees represented by Bricklayers. The record reveals no agreed-upon method for voluntary adjustment of the dispute binding on all parties.

In light of the foregoing, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed 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

⁴Member Devaney finds, for the reasons stated in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787, 790 (1990), that Bricklayers' demand for the disputed work, as well as its filing a grievance over this subject, clearly demonstrates that Bricklayers has made a competing claim for the work.

Member Raudabaugh finds that this case is distinguishable from *Laborers Local 731 (Slattery Associates)*, supra. In *Slattery*, the union filed a grievance against the general contractor seeking only monetary damages. Here, Bricklayers has made an explicit claim for the disputed work and does not contend that its grievance against Carlton is limited to monetary damages. Accordingly, without decid-

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. Collective-bargaining agreements

On June 7, Campbell entered into a collective-bargaining agreement with Carpenters covering, inter alia, "All work assignments involved in the preparation, installation, finishing, repair and maintenance of tile, marble, terrazzo and dimensional stone."

Bricklayers' field staff representative, Smith, testified that in 1980 Campbell signed a contract with Bricklayers that renewed from year to year. Elmer Campbell testified that Campbell presently does not have a contract with Bricklayers, but that he could not recall if he had ever executed a contract with Bricklayers. At the hearing, Bricklayers did not offer any exhibit purporting to be a collective-bargaining agreement between Campbell and Bricklayers.⁵

We find that, as Campbell has a collective-bargaining agreement with Carpenters covering the disputed work, and as the preponderance of evidence does not establish the existence of a collective-bargaining agreement between Campbell and Bricklayers covering the disputed work, the factor of collective-bargaining agreements favors an award to employees represented by Carpenters.⁶

ing whether *Slattery* was correctly decided, Member Raudabaugh would find reasonable cause to believe that Bricklayers' conduct constitutes a claim for work in the circumstances of this case.

⁵Bricklayers now moves to amend the record to include a document purporting to be a collective-bargaining agreement between Campbell and Bricklayers. We deny Bricklayers' motion on the grounds that the document has not been authenticated.

⁶Bricklayers also contends that its collective-bargaining agreement with Carlton encompasses the disputed work. Assuming arguendo that the disputed work is encompassed by Bricklayers' agreement with Carlton, this factor would not be relevant to the determination of this dispute. Under these circumstances, the Board has determined that it is the subcontractor's collective-bargaining agreements, and not those of the general contractor, that are relevant. See *Operating Engineers Local 139 (McWad, Inc.)*, 262 NLRB 1300, 1303 fn. 12 (1982). The Board has stated that the "[general contractor's] contractual obligations cannot be conferred upon [the subcontractor], absent record evidence establishing that [the subcontractor] had agreed to be bound by those obligations." *Iron Workers Local 21 (Lueder Construction)*, 233 NLRB 1139, 1140 (1977).

2. Employer preference and past practice

Elmer Campbell testified that he prefers to have the disputed work assigned to employees represented by Carpenters, and that the Carpenters-represented employees currently performing Campbell's tilesetting work at Mount Olive have been performing tilesetting work for Campbell for the past 6 to 10 years. Campbell also testified that he has used employees represented by Bricklayers in the past, but he could not remember the specific years in which he employed Bricklayers-represented employees.

Bricklayers' field representative, Smith, testified that, at various times between 1981 and 1988, Bricklayers-represented employees performed tilesetting work for Campbell. Smith does not claim that Campbell has used Bricklayers-represented employees on a regular basis to perform Campbell's tilesetting work.

We find that the factor of employer preference and past practice favors an award to employees represented by Carpenters.

3. Area and industry practice

Carpenters' business agent, Robert Sutphin, testified that many area contractors have used Carpenters-represented employees to perform their tilesetting work. Bricklayers' representative, Smith, testified that various area contractors have performed tilesetting work using employees represented by Bricklayers, but that not all of the area tilesetting work is performed by Bricklayers-represented employees. The evidence indicates that the practice is mixed among Carpenters-represented employees, Bricklayers-represented employees, and employees not represented by either Carpenters or Bricklayers. We find that the factor of area and industry practice does not favor an award either to employees represented by Carpenters or to employees represented by Bricklayers.

4. Relative skills

Elmer Campbell testified that the Carpenters-represented employees who are currently performing the Mount Olive tilesetting work are skilled employees and are doing quality work. Bricklayers' representative, Smith, testified that employees represented by Bricklayers have been performing tilesetting work for over 43 years. We find that the evidence is inconclusive and therefore the factor of relative skills does not favor an award either to employees represented by Carpenters or to employees represented by Bricklayers.

5. Economy and efficiency of operations

In its brief, Campbell asserts that assignment of the disputed work to employees represented by Bricklayers would require Campbell to use two sets of employees, i.e., Bricklayers-represented employees to set the tile and Carpenters-represented employees to finish the tile,

rather than using one set of employees for both duties. The record does not, however, support this assertion. We find that the evidence is inconclusive and therefore the factor of economy and efficiency of operations does not favor an award either to employees represented by Carpenters or to employees represented by Bricklayers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Carpenters are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements and employer preference and past practice.

In making this determination, we are awarding the work to employees represented by Carpenters, 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 of Campbell Tile Company represented by United Brotherhood of Carpenters and Joiners of America, Local Union No. 1207, AFL-CIO are entitled to perform tilesetting work at the Mount Olive Correction Facility in Fayette County, West Virginia.

CHAIRMAN STEPHENS, dissenting.

In this case Bricklayers at no time engaged in any coercion or threats of coercion. Bricklayers has claimed the work in dispute on the grounds that Carlton's subcontracting the work to Campbell violates the collective-bargaining agreement between Carlton and Bricklayers.¹ Bricklayers has submitted a copy of that agreement. On the basis of that evidence and Bricklayers' contentions, I find that it has at least an arguably meritorious claim that Carlton violated the signatory subcontracting provision of that agreement when it subcontracted the work to Campbell. For the reasons stated in my dissenting opinion in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787, 790-792 (1990), I would find that there are no competing claims for the work, and I would quash the 10(k) notice.

¹ Although the record indicates that Bricklayers' representative, Smith, told Campbell President Elmer Campbell that the Mount Olive tilesetting work belonged to Bricklayers-represented employees, there is no evidence that Smith was seeking anything other than the enforcement of Bricklayers' collective-bargaining agreement with Carlton.