

Tile, Marble, Terrazzo Finishers and Shopworkers, Local 47-T and Grazzini Brothers & Company and General Laborers Union, Local 317, Party-in-Interest, and Bricklayers and Allied Craftsmen, Local 19 of Wisconsin, Party-in-Interest.
Case 18-CD-324

October 31, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

Upon a charge filed by Grazzini Brothers & Company (the Employer) on September 3, 1993, and duly served on Tile, Marble, Terrazzo Finishers and Shopworkers, Local 47-T (the Respondent), the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on October 1, 1993, against the Respondent alleging that it had violated Section 8(b)(4)(ii)(D) of the National Labor Relations Act.

The complaint alleges that since February 12, 1991, the Respondent has demanded that the Employer assign the ceramic tile finishing work at the St. Croix Meadows Racetrack to employees who are represented by the Respondent. The complaint charges that the Respondent violated the Act by continuing to pursue an action with the Wisconsin Employment Relations Commission (WERC) with an object of forcing and requiring the Employer to assign the work in dispute to employees represented by the Respondent. The work in dispute had previously been awarded to employees represented by the General Laborers Union, Local 317, and the Bricklayers and Allied Craftsmen, Local 19 of Wisconsin, in an earlier 10(k) proceeding before the Board.¹ The Respondent filed an answer admitting in part, and denying in part, the complaint allegations, denying the commission of any unfair labor practices, and asserting that the Respondent's collective-bargaining agreement with the Employer provides a separate and independent basis for contract enforcement.²

Thereafter, on November 22, 1993, the General Counsel, by counsel, filed with the Board in Washington, D.C., a motion to strike part of the Respondent's answer and a Motion for Summary Judgment. The General Counsel submits that all evidentiary issues have either been litigated in the underlying 10(k) pro-

ceeding, have been admitted by the Respondent, or have been established by undisputed evidence, and that because there is no genuine issue of any material fact, summary judgment should be granted.

On November 24, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On December 8, 1993, the Respondent filed a memorandum of law, with exhibits attached, in opposition to the General Counsel's Motion for Summary Judgment.

For the reasons discussed below, we agree that no genuine issue of material fact exists and that it is appropriate to grant the General Counsel's Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Charging Party, a Minnesota corporation, with its office and place of business in Minneapolis, Minnesota, has been a contractor in the construction industry, performing commercial and industrial construction. During the calendar year ending December 31, 1992, the Employer performed services valued in excess of \$50,000 in States other than the State of Minnesota. We find that the Charging Party is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*⁴

The Employer is a tile, marble, and terrazzo contractor. In December 1990, the Employer was awarded a contract to install and finish ceramic tile at the St. Croix Meadows Greyhound Racing Track. The Employer originally planned to complete the project using one tile setter and one tile finisher from its regular crew in Minnesota; the tile setter and finisher were represented by the Bricklayers Local 19. The Employer subsequently increased the size of its crew to one apprentice and five journeymen tile setters, two finisher bricklayers, and two laborers. The laborers were represented by Laborers Local 317.

The Employer and the Respondent were parties to a collective-bargaining agreement through at least May

¹ *Laborers Local 317 (Grazzini Bros.)*, 307 NLRB 1290 (1992).

² The Respondent also contends that the General Laborers and the Bricklayers should be dismissed as parties to this proceeding because they are not parties to the collective-bargaining agreement at issue in the WERC proceeding. The Respondent has not shown that the participation of the Bricklayers and the General Laborers in this proceeding is prejudicial or detrimental to the Respondent. Further, the Bricklayers and General Laborers were parties to the earlier 10(k) case, which is relevant to this proceeding. For these reasons we will not dismiss them as parties to this proceeding.

³ Thus, we do not find it necessary to rule on the General Counsel's motion to strike part of the Respondent's answer.

⁴ The recited facts are based on exhibits attached to the Motion for Summary Judgment, including the Decision and Determination of Dispute in *Grazzini Bros.*, supra, and on the Respondent's admissions either in its answer or its response and attached exhibit (omitted from publication).

31, 1990; the Employer and the Respondent disagree about whether they were bound by that agreement past May 31, 1990. The Respondent, contending that the Employer was still bound by the collective-bargaining agreement, claimed the tile finishing work on the St. Croix Racetrack project. However, when the Employer suggested the possibility of using employees represented by the Respondent on the project, the Bricklayers and the Laborers demanded the finishing work and threatened to picket the jobsite if employees represented by the Respondent were used on the project.

On February 12, 1991, the Respondent filed a grievance with the Employer, asserting that the Employer's use of Bricklayers and Laborers on the project violated the alleged collective-bargaining agreement between the Employer and the Respondent. On February 26, 1991, based on the Bricklayers' and Laborers' threats to picket, the Employer filed a charge with the Board to initiate a 10(k) proceeding. Subsequently, on March 14, 1991, the Respondent filed a complaint with WERC seeking to compel the Employer to submit to arbitration to resolve the Respondent's claim that the Employer's assignment of the tile finishing work to employees represented by the Bricklayers and Laborers violated its alleged collective-bargaining agreement with the Employer.

At the 10(k) proceeding, the Respondent contended that no reasonable cause existed for finding a jurisdictional dispute because the threats to picket resulted from collusion among the Employer, the Bricklayers and the Laborers to obtain a 10(k) determination. The Board found no merit in the Respondent's contention because the Respondent did not present any evidence to show collusion, but instead relied solely on supposition. *Laborers Local 317 (Grazzini Bros.)*, 307 NLRB at 1290 fn. 5. Thus, the Board found reasonable cause to believe that the Act had been violated and, after considering the relevant factors, awarded the work in dispute to the Bricklayers and the Laborers; the Board relied on employer preference, area practice, and economy and efficiency. *Id.* at 1294.

Approximately 9 months after the Board issued its Decision and Determination of Dispute, WERC sent a letter to the Respondent's counsel inquiring as to the status of the Respondent's state proceeding against the Employer. The Respondent replied that it wanted to pursue the WERC proceeding and requested that a scheduling order issue. WERC subsequently issued a notice of hearing on complaint in the action. The Employer then filed its charge in the instant proceeding, alleging that the Respondent's continued pursuit of the WERC action violates Section 8(b)(4)(D) of the Act.

B. Analysis and Conclusions

1. Genuine issue of material fact

Summary judgment in an 8(b)(4)(D) proceeding is appropriate only where there is no genuine issue of material fact or where the parties have stipulated the record of the 10(k) hearing as a basis for the Board's determination of the unfair labor practice charge. *Longshoremen ILWU Local 6 (Golden Grain)*, 289 NLRB 1, 2 (1988). A genuine issue of fact exists and a respondent is entitled to a hearing if there are credibility issues to be resolved or if the respondent denies the existence of an element of the 8(b)(4)(D) violation, either directly or by raising an affirmative defense. The respondent is not required to proffer new or previously unavailable evidence in order to be entitled to a hearing. *Golden Grain*, supra at 2. See also *Laborers Local 721 (Hawkins & Sons)*, 294 NLRB 166, 167 (1989).

According to its response to the Order to Show Cause and opposition to Motion for Summary Judgment, the Respondent does not disagree with the facts as stated in the General Counsel's brief in support of his motion, and the Respondent does not raise any credibility issues. However, in its answer to the complaint, the Respondent denies that (1) since February 12, 1991, it has demanded that the Employer award the work in dispute to employees represented by it; (2) the WERC action was filed to compel the Employer to arbitrate the Respondent's grievance; (3) the Board has never issued an order determining that the Respondent is the exclusive bargaining agent of the employees performing the work; and (4) continuation of the WERC action violates Section 8(b)(4)(D).

We find that the above-described denials do not raise any genuine issues of material fact. As for the first of these denials, the Respondent admitted in its 10(k) brief, which it incorporates in support of its position in this proceeding, that it sought the work in dispute for employees represented by it. In addition, the Respondent's continued pursuit of the WERC action demonstrates that it is still seeking the work, or compensation for the work, as a consequence of the Employer's assignment of work to employees represented by other unions.⁵ As to the Respondent's denial that the Board has never issued an order determining that the Respondent is the exclusive bargaining agent of the

⁵ As our dissenting colleague notes, the grievance on its face alleges that the contract violations included subcontracting to non-signatory entities and noncompliance with the manning requirements. It is clear from the facts discussed above, however, that the Respondent claimed the work that was assigned by the Employer to the Bricklayers and the Laborers. Further, the Respondent itself, in its response to the Order to Show Cause and opposition to the Motion for Summary Judgment, described the grievance as a "contractual assignment of work grievance."

employees performing the work in dispute, we point out that the Board found in the underlying 10(k) proceeding that “[t]here is no evidence that the Board has certified any of the three Unions as the exclusive collective-bargaining representative of the Employer’s employees.” *Grazzini Bros.*, 307 NLRB at 1291. While the Respondent is not required to proffer new or previously unavailable evidence to show that a genuine issue of material fact exists, the Respondent has not proffered any evidence, either at the 10(k) proceeding, or during the present proceeding, to show that the above finding is incorrect. With respect to the Respondent’s denial that the WERC action was filed to compel the Employer to arbitrate the Respondent’s grievance and that the Respondent’s continuation of the WERC action violates the Act, the denials of these two assertions do not raise genuine issues of material fact. The grievance and the WERC complaint speak for themselves, and the issue of whether continuation of the WERC action violates the Act calls for a legal conclusion—it does not raise an issue of fact requiring a hearing.

Finally, in support of its contention that genuine issues of material fact exist, the Respondent’s Response states that it disagrees with the “findings” made at the earlier 10(k) proceeding. Although the Respondent does not detail or enumerate the 10(k) findings with which it disagrees, the issues raised by the Respondent’s assertions in its 10(k) brief essentially are: (1) whether the Employer colluded with the Bricklayers and the General Laborers to initiate the 10(k) proceeding; and (2) whether, at the time that the Employer awarded the work, the Respondent had a current collective-bargaining agreement with the Employer.

As discussed earlier, the Board rejected the collusion argument in the underlying proceeding⁶ because the Respondent did not proffer any evidence to support its allegation. Although the Respondent need not proffer new or previously unavailable evidence in order to show that a genuine issue of material fact exists entitling it to a hearing before an administrative law judge, the Respondent cannot make assertions without any evidence. Mere supposition was not sufficient at the 10(k) proceeding, and reassertion of mere supposition is not sufficient in this proceeding to establish that a genuine issue of material fact exists.

The second contention advanced by the Respondent in its 10(k) brief is that the Respondent had a current collective-bargaining agreement with the Employer at the time that the Employer assigned the work in dispute. The Board, however, came to a contrary conclusion in the earlier 10(k) proceeding, holding that there was no firm basis for finding that a collective-bargaining agreement existed between the Respondent and the Employer. *Grazzini Bros.*, 307 NLRB at 1292. We

find that holding dispositive of the Respondent’s contention. The existence of a collective-bargaining agreement is one of many factors that the Board weighs when awarding work in a 10(k) proceeding. It is well settled that a party to a Board 10(k) proceeding cannot relitigate the Board’s work assignment in a subsequent 8(b)(4)(D) case. *Longshoremen ILA Local 1566 (Holt Cargo)*, 311 NLRB No. 166, slip op. at 2 (Aug. 9, 1993) (not published in Board volumes). It logically follows that a party cannot relitigate the various factors, including the existence or nonexistence, of a collective-bargaining agreement, that the Board considers in making its 10(k) determination.⁷ Therefore, we reject the Respondent’s attempt to relitigate the issue of whether it had a collective-bargaining agreement with the Employer.

In any event, the question of whether or not there was a current collective-bargaining agreement between the Respondent and the Employer does not raise a genuine issue of material fact that would prevent us from granting summary judgment. To establish that a genuine issue of material fact exists, the Respondent must either raise a credibility issue or must deny the existence of an element of the 8(b)(4)(D) violation.⁸ The Respondent’s contention regarding a collective-bargaining agreement neither rests on a credibility determination nor negates the existence of an element of an 8(b)(4)(D) violation; thus the argument does not raise a genuine issue of material fact.

For all the reasons discussed above, we conclude that there are no genuine issues of material fact and that, if the General Counsel’s legal principles are correct, summary judgment is appropriate in this case.

2. Application of legal principles

The issue in this case is whether the Respondent violated Section 8(b)(4)(D) of the Act by maintaining its WERC action seeking to force the Employer to arbitrate the Respondent’s grievance after the Board issued its 10(k) award assigning the work in dispute to employees represented by the Bricklayers and the General Laborers rather than to employees represented by the Respondent. The Board has held that, even if a union has an arguably meritorious contractual claim to the work in dispute, it violates the Act if it continues to pursue the contractual claim after the Board issues a 10(k) award allowing the work to be assigned to em-

⁷ This is consistent with the Board’s holding that it will not permit the relitigation of threshold or preliminary matters not necessary to prove an 8(b)(4)(D) violation. *Golden Grain*, 289 NLRB at 2 fn. 4.

⁸ Sec. 8(b)(4)(D) states that it is an unfair labor practice for a union to engage in or coerce another to engage in a strike or to threaten, coerce, or restrain an employer where the object is to force or require an employer to assign particular work to certain employees unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for the employees performing the work.

⁶ See *Grazzini Bros.*, 307 NLRB at 1290 fn. 5.

ployees represented by a different union. *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273 (1992); *Iron Workers Local 433 (Swinerton Co.)*, 308 NLRB 756 (1992); *Roofers Local 30 (Gundle Construction)*, 307 NLRB 1429 (1992), *enfd.* 1 F.3d 1419 (3d Cir. 1993); *Laborers Local 261 (Skinner, Inc.)*, 292 NLRB 1035 (1989); *Longshoremen ILWU Local 13 (Sea-Land)*, 290 NLRB 616 (1988), *enfd.* 884 F.2d 1407, 1413–1414 (D.C. Cir. 1989); and *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, 271 NLRB 759 (1984), *enfd.* sub nom. *Longshoremen ILWU (Weyerhaeuser Co.) v. Pacific Maritime Assn.*, 773 F.2d 1012 (9th Cir. 1985), *cert. denied* 476 U.S. 1158 (1986). The purpose of prohibiting pursuit of such claims after a 10(k) award is to prevent the undermining of the 10(k) award. Section 10(k) was included in the Act “to provide a final resolution to the dispute over which group of employees are entitled to the work at issue.” *Roofers Local 30 (Gundle Construction)*, *supra* at 1430. The Respondent argues that “the employer can have assigned the work according to [Sec.] 10(k) standards and yet at the same time can have obligated itself by collective bargaining agreement to the assignment of the work to Respondent, thereby assuming a contractual obligation, the breach of which entitles Respondent to contractual remedies.” This affirmative defense has no merit because it is directly contrary to Board law as described above.⁹ We find that the Respondent’s continued pur-

⁹The Respondent cites *Hutter Construction Co. v. Operating Engineers Local 139*, 862 F.2d 641 (7th Cir. 1988), and *Carpenters Local 33 (AGC of Massachusetts)*, 289 NLRB 1482 (1988), to support its proposition that a labor organization can lawfully pursue its contractual remedies even when there was a 10(k) proceeding and award. The cases cited by the Respondent are inapposite. Each involved a dispute over the employer’s subcontracting work in violation of a lawful union signatory subcontracting clause of a collective-bargaining agreement. The Board has held that a union does not violate the Act by pursuing contractual remedies for an employer’s breach of a union signatory subcontracting clause when there have been no coercive actions such as picketing and when no action has been taken or threatened against the employer of the employees to whom the work was awarded, because such an action is not necessarily inconsistent with a work award to the subcontractor’s employees. For example, a union may pursue a grievance against employer A if employer A subcontracts work to employer B in violation of a collective-bargaining agreement between employer A and the union, even if, in a 10(k) proceeding, the Board awarded the work in dispute to a union representing Employer B’s employees. In that situation, the union’s grievance would not be inconsistent with the Board’s 10(k) award. *Carpenters Local 33*, 289 NLRB at 1484. The instant case is distinguishable from the subcontracting cases because Grazzini itself is the employer of the employees to whom the work was awarded. *Accord, Gundle Construction*, 307 NLRB at 1430 *fn.* 4.

The Respondent’s reliance on *Longshoremen ILWU Local 7 (Georgia-Pacific Corp.)*, 291 NLRB 89 (1988) (*Georgia-Pacific II*), is also misplaced. The Board held in *Georgia-Pacific II* that grievances filed by a union *before* the Board issues a 10(k) determination do not violate Sec. 8(b)(4)(D), but that grievances filed after the 10(k) determination do violate the Act. The Board has since found that a union’s failure to withdraw a pending grievance or state court action to pursue a grievance after a 10(k) award has issued also vio-

suit of the state WERC action violates Section 8(b)(4)(ii)(D) because it seeks to undermine the Board’s earlier 10(k) award and to coerce the Employer into paying damages to the Respondent even though the Employer assigned the work consistent with the Board’s 10(k) award.

CONCLUSIONS OF LAW

1. Grazzini Brothers & Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) and Section 8(b)(4) of the Act.

2. Respondent Tile, Marble, Terrazzo Finishers and Shopworkers Local 47-T is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining and refusing to withdraw its complaint pending before the Wisconsin Employment Relations Commission in Case 1 No. 45488 Ce-2115 for the purpose of forcing the Employer to arbitrate the consequences of the Employer’s assignment of the work in dispute to employees not represented by the Respondent, with an object of forcing or requiring the Employer to assign contrary to the Board’s Decision and Determination of Dispute in 307 NLRB 1290 (1992) the work of installing and finishing the tiles at the St. Croix racetrack, the Respondent has violated Section 8(b)(4)(ii)(D) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. In particular, we shall order the Respondent to withdraw its action pending before the Wisconsin Employment Relations Commission in Case 1 No. 45488 Ce-2115.

ORDER

The National Labor Relations Board orders that the Respondent Tile, Marble Terrazzo Finishers and Shopworkers, Local 47-T, Milwaukee, Wisconsin, its officers, agents, and representatives, shall

1. Cease and desist from maintaining an action before the Wisconsin Employment Relations Commission docketed as Case 1 No. 45488 Ce-2115 seeking to arbitrate the consequences of the Grazzini Brother & Company’s assignment of work to employees not rep-

lates the Act. See *Gundle Construction*, 307 NLRB at 1430–1431. For the reasons stated in the majority opinion in *Gundle*, we reject our dissenting colleague’s position that the Respondent can lawfully continue to pursue an arbitration award which would be contrary to an outstanding 10(k) determination, if its grievances are limited to work subject to, but performed prior to issuance of the determination.

resented by the Respondent, with an object of forcing or requiring the Employer to assign contrary to the Board's Decision and Determination of Dispute in 307 NLRB 1290 (1992) the work of installing and finishing the tiles at the St. Croix Meadows Greyhound Racing Track.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw its complaint in Case 1 No. 45488 Ce-2115 from the consideration of the Wisconsin Employment Relations Commission.

(b) Post at its business office, union hall, or any places where it customarily posts notices to its members, copies of the attached notice marked "Appendix A."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent Local's authorized representative, shall be posted by the Respondent Local immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Local to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and mail sufficient copies of the notice to the Regional Director for Region 18 for posting by Grazzini Brothers & Company, where notices to their employees are usually posted, if the Employer is willing.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Local has taken to comply.

MEMBER DEVANEY, dissenting.

Contrary to my colleagues, I would find that the Union's continued pursuit of its action to compel arbitration of its grievance concerning the Employer's assignment of the disputed work, after the Board issued its 10(k) determination awarding the work to employees represented by other unions, did not violate Section 8(b)(4)(D).¹ Thus, the General Counsel has adduced no evidence that the Union's grievance seeks compensation for any work performed after the issuance of the Board's 10(k) determination on July 15, 1992, and I note that my colleagues do not argue to the contrary. I note further that the grievance itself asserts only that the Employer violated the parties' collective-bargaining agreement by subcontracting to nonsignatory entities

¹⁰If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹*Laborers Local 317 (Grazzini Bros.)*, 307 NLRB 1290 (1992). I note that I was not on the panel that decided the underlying 10(k) case.

and by failing to comply with manning requirements.² Further, the complaint filed by the Union with the Wisconsin Employment Relations Commission (WERC) seeks only that the Employer be compelled to arbitrate the grievance and to supply requested information asserted to be relevant to the processing of that grievance. I also note that the project itself commenced on February 19, 1991; although it apparently was still in progress in April 1991 when the hearing in the 10(k) case was held, there is no evidence that any of the disputed work was performed after July 15, 1992.

Consistent with my dissenting position in *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273, 276 (1992), and *Roofers Local 30 (Gundle Construction)*, 307 NLRB 1429, 1432 (1992), *enfd.* 1 F.3d 1419 (3d Cir. 1993), I would find that the Union's continued pursuit, after a 10(k) determination has issued, of grievances with respect to work performed *prior* to the issuance of the determination, does not violate Section 8(b)(4)(D). As there is no evidence in this case that the Union's grievance, or its action before WERC seeking to compel arbitration of the grievance, concerns work performed after the Board issued its 10(k) determination on July 15, 1992, I would dismiss the complaint.

²I agree with my colleagues that the Union's grievance may be viewed as protesting the Employer's assignment of the disputed work.

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain the action docketed before the Wisconsin Employment Relations Commission in Case 1 No. 45488 Ce-2115 with an object of forcing or requiring Grazzini Brothers & Company to assign, contrary to the Board's Decision and Determination of Dispute in 307 NLRB 1290 (1992), the work, described below, to employees represented by Tile, Marble Terrazzo Finishers and Shopworkers, Local 47-T rather than to employees represented by the General Laborers Local 317 or the Bricklayers Local 19. The work in question consists of installing and finishing the tiles at the St. Croix Meadows Greyhound Racing Track.

WE WILL withdraw our complaint in Case 1 No. 45488 Ce-2115 currently pending before the Wisconsin Employment Relations Commission.

TILE, MARBLE TERRAZZO FINISHERS
AND SHOPWORKERS, LOCAL 47-T