

Local No. 46, Metallic Lathers Union and Reinforcing Iron Workers of New York City and Vicinity and A.F.C. Enterprises, Inc. and District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 2-CD-867

February 9, 1995

DECISION AND ORDER QUASHING NOTICE OF HEARING

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The charge in this Section 10(k) proceeding was filed on September 24, 1993, by A.F.C. Enterprises, Inc. (A.F.C.), alleging that the Respondent, Local No. 46, Metallic Lathers Union and Reinforcing Iron Workers of New York City and Vicinity (Lathers), 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 the District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters). The hearing was held on January 26 before Hearing Officers Esther Morales and Mary Mooney, and before Mary Mooney on February 4 and March 25 and 28, 1994, in New York City. 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 officers' rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

A.F.C. is a New York corporation engaged in the operation of a highway construction and building renovation business. Annually, the Employer derives gross revenues in excess of \$500,000 and purchases and receives goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of New York. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties stipulated, and we find, that the Lathers and the Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts in Dispute

The Employer was a member of the General Contractors Association of New York, Inc., which had a series of collective-bargaining agreements with the Lathers. The last agreement to which the Employer ac-

knowledges that it was a party expired by its terms on June 30, 1993. That collective-bargaining agreement was extended by a memorandum of agreement for the term from July 1, 1993, to June 30, 1996. However, by letter dated June 16, 1992, the Employer had withdrawn the Association's authority to bargain on its behalf. The Employer also had sent a followup letter to the Association, dated January 26, 1993, advising the Association not to include A.F.C. in any collective-bargaining negotiations. By letter dated April 30, 1993, the Employer had notified the Lathers of "its proposed intent to terminate or modify the existing terms of its collective-bargaining agreement." The letter had advised further that the Employer would "not be utilizing the General Contractors Association of New York, Inc., to serve as its collective bargaining representative." That letter was received by the Lathers on May 5, 1993.

The Employer is a current member of the Association of Wall, Ceiling & Carpentry Industries of New York, Inc., and has been a party to a series of collective-bargaining agreements with the Carpenters. The Employer is signatory to the current agreement that is effective by its terms from July 1, 1993, until June 30, 1996.

In January 1991, A.F.C. began the renovation and construction work on the North Building of Hunter College. During the entire period of the work, the North Building was utilized by day and evening students and faculty. Specifically, A.F.C.'s contract with the New York State Dormitory Authority involved the demolition and reconstruction of the fourth and fifth floors of the North Building for the purpose of constructing a music and theater department (including TV studios, a recital hall-theater, music practice rooms, and offices) and further involved the renovation and reconstruction of the eighth and ninth floors for the purpose of constructing scientific laboratories and offices.

In August 1992, following the initial demolition of the existing walls and ceilings, and the removal of debris, A.F.C. assigned the black iron ceiling suspension work to the Lathers. The work was performed on a sporadic basis, ending a few days after it began, and resuming again for a few days in September 1992. The work was again suspended until February 6, 1993, but was thereafter performed continuously until April 1993. During the periods when the black iron work was not being performed, the Lathers were laid off. The Lathers were never assigned any work other than black iron ceiling suspension work.

A.F.C. began utilizing Carpenters at the site continuously from early 1991, assigning to them all other types of work from their trade including drywall, sheetrock, and woodwork.

On September 1, 1993, the Employer recalled the Lathers to work. The Employer's construction supervisor, Alan Charlip, informed the Lathers' foreman, Joseph Scanlon, that the Employer no longer had a contract with the Lathers. Charlip advised Scanlon that the employees would not receive benefits under the Association contract but would be paid the prevailing wage. Although Scanlon was not sure what the term "prevailing wage" meant, he told Charlip that the offer was unacceptable and that he needed to consult with the Lathers. Following that consultation, Scanlon informed Charlip that the Lathers would not work for the Employer unless the Employer applied the current 1993-1996 Association contract to them. Charlip then offered to sign a site specific agreement for the Hunter College job. Scanlon refused, and walked off the jobsite. Charlip then assigned the disputed work to the Carpenters.

A.F.C.'s general superintendent, John Mikuszewski, asserts that the Employer never intended to assign the work to the Lathers, but felt compelled to do so after repeated threats by the Lathers' business agent, Robert Ledwith, to disrupt the job. Mikuszewski testified that prior to recalling the Lathers in September 1993, he had arranged with Ledwith for the Employer to honor a site specific agreement and pay the Lathers' benefits according to the terms of the current General Contractor's Association agreement. When the employees arrived at the site to work, Ledwith insisted that the Employer become a signatory to the current 1993-1996 agreement. The Employer refused and assigned the work to the Carpenters.

Ledwith disputes Mikuszewski's recollection of the events. Ledwith asserts that when he called the Employer to find out its intent with respect to an agreement, Mikuszewski stated "my actions will speak for themselves."

On September 20, 1993, and for several days thereafter, members of the Lathers picketed the entrance to the jobsite. The legend on the picket signs read:

On Strike
A.F.C./Catapano
No Dispute With Any
Other Employer
Local #46
Metallic Lathers Union
and Reinforced Ironworkers

The picket line was honored by several trades and the progress of the work slowed.

B. The Work in Dispute

The work in dispute involves the installation of a black iron ceiling suspension system on several floors of A.F.C.'s jobsite at Hunter College (695 Park Ave-

nue, New York, New York). The work consists of drilling anchors into the ceiling, hanging a pencil rod, and attaching it to a channel clip. The channel clip is then attached to a black iron rod that stretches laterally across the ceiling.

C. Contentions of the Parties

A.F.C. contends that the work in dispute should be assigned to the Carpenters based on the Employer's preference; efficiency and economy of operations; and its collective-bargaining relationship with the Carpenters. Further, although there have been prior disputes between the parties involving this type of work, there have been no decisions, arbitration awards, or agreements in which all parties have agreed to be bound. A.F.C. asserts there has been no binding award assigning the disputed work to either the Carpenters or the Lathers.

The Carpenters Union contends that the Board should give paramount consideration to the Employer's assignment of the work based on the Employer's preference for the carpenters' skills; productivity; and economy and efficiency. The Carpenters assert that the Employer's assignment of the work in dispute to its members allows for greater flexibility of operations. The Carpenters argue, contrary to the assertions by the Lathers, that the 1979 Inter-Union Agreement and Hearing Panel Decision of the New York Plan between the Lathers and the Carpenters should be disregarded because the Employer was not a party to and did not agree to be bound by that agreement. Further, the Carpenters assert that that agreement is no longer determinative of the issues raised here because there have been several mergers among the various unions since 1979 and current industry practice has changed dramatically. Finally, the Carpenters contend that the Lathers violated the Act by picketing the jobsite to compel the Employer to assign the disputed work to the Lathers rather than to the Carpenters.

The Lathers contend that there is no reasonable cause to believe that it violated Section 8(b)(4)(D) because the purpose of its picketing was not to compel an assignment of work but to protest A.F.C.'s failure to recognize its continuing contractual obligations with Local 46. Further, the Lathers move to quash the notice of hearing because there is a voluntary method of adjustment that is binding on all parties. As part of that contention, it asserts that the Employer did not timely withdraw from multiemployer bargaining and is therefore bound to the renewed 1993-1996 agreement between the Lathers and the General Contractors Association of New York. Assuming, arguendo, that this case is a jurisdictional dispute, properly before the Board, the Lathers assert that the following Section 10(k) factors favor assigning the work in dispute to employees it represents: the collective-bargaining

agreements; the Employer's initial assignment of the work; the Employer's practice; area practice; the various jurisdictional dispute decisions and awards; apprenticeship programs; efficiency and economy of operations; and the balancing of equities.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a 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. On the record before us, we are unable to reach such a conclusion in this case.

We have long held that a dispute within the meaning of Section 8(b)(4)(D) requires a choice between two competing groups.¹ In this regard the Board has stated:²

There must, in short, be either an attempt to take a work assignment away from another group, or to obtain the assignment rather than have it given to the other group.

. . . .

A demand for recognition as bargaining representative for employees doing a particular job, or in a particular department, does not to the slightest degree connote a demand for the assignment of work to particular employees rather than to others.

The Employer here was, until June 30, 1993, a party to a collective-bargaining agreement with Lathers Local 46. It is undisputed that the contract was in effect and honored by A.F.C. when it commenced construction work at the Hunter College jobsite. It is also undisputed that, prior to June 1993, when the contract was in effect, the Employer assigned the installation of the black iron suspended ceiling systems to journey-men Lathers represented by Local 46. Further, in September 1993, the Employer initially sought to assign

¹ *Commercial Workers Local 1222 (FedMart Stores)*, 262 NLRB 817 (1982); *Teamsters Local 222 (Jelco, Inc.)*, 206 NLRB 809 (1973).

² *FedMart Stores*, supra, citing *Communications Workers (Mountain States Telephone)*, 118 NLRB 1104, 1107-1108 (1957).

the work to a lather. Only when a dispute arose as to the terms and conditions under which the work was to be performed did the Employer reassign the work to the employees represented by the Carpenters. At that point, Local 46 picketed. Because the Employer had indicated that it was willing to assign the work to employees represented by the Lathers, the Lathers' dispute with the Employer was not over the assignment of the work. Rather, it is clear that the dispute was over the terms and conditions under which the Lathers would perform the work. Thus, Local 46 picketed the Employer's jobsite to protest the Employer's failure to reach an agreement with the Lathers Union regarding the terms and conditions under which the Lathers-represented employees would continue to work after the contract expired. Therefore, we find that the Lathers did not picket for an objective, proscribed by Section 8(b)(4)(D). Rather, the Lathers sought an agreement regarding the terms under which Lathers-represented employees would work. Accordingly, we conclude that no jurisdictional dispute exists within the meaning of Sections 8(b)(4)(D) and 10(k) of the Act. We shall therefore quash the notice of hearing.

ORDER

The notice of hearing is quashed.

CHAIRMAN GOULD, dissenting.

I disagree with my colleagues' determination that the notice of hearing should be quashed on the basis that the Lathers' picketing activity was in furtherance of a recognition or representational objective, and that therefore no jurisdictional dispute exists. The Board has held that "[o]ne proscribed object is sufficient to bring a union's conduct within the ambit of Section 8(b)(4)(D)."¹ In my opinion, there is reasonable cause to believe that at least one object of the Lathers' conduct was to force the Employer to assign the work in dispute to the employees it represents which is clearly a violation of Section 8(b)(4)(D).

¹ *Cement Masons Local 577 (Rocky Mountain Prestress)*, 233 NLRB 923, 924 (1977); *Plumbers Local 195 (Warren Petroleum Co.)*, 260 NLRB 1149, 1150 (1982); and *Millwrights Local 1026 (Intercounty Construction)*, 266 NLRB 1049, 1052 (1983).