

International Association of Bridge, Structural and Ornamental Iron Workers, Local 401, AFL-CIO and William Watts, Inc. and Metropolitan District Council of Philadelphia and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 4-CD-902

May 30, 1995

DECISION AND DETERMINATION OF
DISPUTE

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND TRUESDALE

The charge in this Section 10(k) proceeding was filed November 25, 1994, by the Employer, alleging that the Respondent, International Association of Bridge, Structural and Ornamental Iron Workers, Local 401, AFL-CIO (the Iron Workers), 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 Metropolitan District Council of Philadelphia and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Carpenters). The hearing was held January 17, 1995, before Hearing Officer Allene McNair-Johnson. No briefs were filed by any of the parties.

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 Pennsylvania corporation, is engaged in the exterior restoration and waterproofing of existing buildings at its sole facility located at 240 Gerger Road, Philadelphia, Pennsylvania. During the past year, the Employer purchased and received at its facility goods valued in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania. The parties 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 the Iron Workers and the Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer, a masonry contractor, has successfully bid on successive phases of a project at the Franklin Field Stadium at the University of Pennsylvania. Each phase requires removing wooden bench seating and installing aluminum bench seating in dif-

ferent sections of the stadium. Since September 1992, the Employer has used employees represented by the Carpenters to successfully complete three phases of the removal and replacement of seating at the stadium.

The dispute between the Iron Workers and the Carpenters emerged beginning in October 1993, some time after the completion of the first phase, when the Employer brought employees represented by the Iron Workers on the job to do steel stairs and railing work.¹ Initially this work was subcontracted out, but on November 23, 1993, after discussions with the Iron Workers business agent, Peter McDonough, the Employer signed a contract with the Iron Workers and employed its members directly. McDonough testified that at the time the contract was signed, he informed the Employer that in the future the Iron Workers would make a claim for the installation of the aluminum benches. Subsequently, in both April and August 1994, McDonough sent letters to the Employer claiming the installation of the aluminum bench seating at Franklin Field for the Iron Workers and indicating that failure to reassign the work would cost the Employer money, because the Iron Workers were willing to go to arbitration to collect damages. On November 9, 1994, the Iron Workers filed a grievance with the American Arbitration Association, a copy of which the Employer also received.

In addition, Jerry Watts, secretary/treasurer of the Employer, testified that following a meeting on October 12, 1994, which was unrelated to this dispute but involved the Iron Workers, McDonough threatened to destroy the benches and brackets at the worksite if the work in dispute was not reassigned to them. McDonough denies making the threat. On November 25, 1994, the Employer filed an 8(b)(4)(D) charge against the Iron Workers.

At the hearing, the parties stipulated the following facts: that both Unions were statutory labor organizations; that both the Iron Workers and the Carpenters claim the work; that there is no prior Board Order issued concerning this dispute and no agreed-on method for resolving the dispute; and that there is no certification of the Board determining the bargaining representative for the employees performing the disputed work. The parties did not stipulate that there was reasonable cause to believe that Section 8(b)(4)(D) was violated.

B. *Work in Dispute*

The disputed work involves the repairing of broken brackets and the installation of new aluminum bench seating planks, in the upper and lower east stands at Franklin Field, University of Pennsylvania, by William

¹ While the dispute began during the second or third phase of the project, it is only phase 4, which began January 9, 1995, that is in dispute.

Watts, Inc. At the hearing the parties stipulated to amend the notice of hearing to omit from the description of work in dispute the *removal* of existing bench seating.

C. Contentions of the Parties

The Employer contends that a jurisdictional dispute is properly before the Board and that there is reasonable cause to believe that the Iron Workers violated Section 8(b)(4)(D). The Employer claims that the Iron Workers business agent threatened to break up the Employer's benches and brackets, installed by employees represented by the Carpenters at Franklin Field, if the work was not reassigned to the Iron Workers. Furthermore, the Employer argues that a letter it received indicating that the Iron Workers had filed a grievance with the American Arbitration Association for monetary damages based on the claimed work also constituted a threat to get it to reassign the work. The Employer would like to continue to assign the work to employees represented by the Carpenters, as it has been satisfied with their work and finds it efficient and economical to do so.

The Carpenters Union also contends that the dispute is properly before the Board. The Carpenters argue that the verbal threat by the Iron Workers business agent, as well as the letters from the Iron Workers to the Employer threatening to file for arbitration and the actually filing for arbitration, provide reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. The Carpenters argue that the disputed work must be awarded to the employees that it represents on the basis of employer preference and past practice, economy and efficiency, area practice, and relative skills.

The Iron Workers contend that there is no dispute properly before the Board. They deny that there was any threat made by their business agent to break up the benches following the October 12 meeting with the Employer. They further argue that filing for arbitration to enforce their collective bargaining agreement is not a threat but merely an action taken in accordance with the terms and procedures of that agreement. If the Board, however, does find that a 10(k) proceeding has been triggered, the Iron Workers argue that the work must be assigned to the employees represented by the Iron Workers because they have a valid contract with the Employer that covers the work in question and, they contend, the employees represented by the Carpenters do not. Furthermore, the Iron Workers claim that industry practice, as shown in prior joint Board decisions, favors the Iron Workers, as do efficiency and skill.

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) has been violated, that there are competing claims to the disputed work by rival groups of employees, and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

We find that there is a work dispute properly before the Board. Employer representative, Watts, testified to the verbal threat made by the Iron Workers business agent, McDonough, to break up the newly installed aluminum benches if the Employer did not reassign the work to them. This testimony provides reasonable cause to believe that a party used proscribed means to enforce its claim.² Following our past practice, we find that testimony as to a threat to cause economic harm to an employer on its face is enough to establish a violation.³ Furthermore, as noted above, the parties stipulated that there are competing claims for the disputed work and that there is no agreed-on method for voluntary adjustment of the dispute.

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 this dispute.

²We are aware that McDonough denied making the threat. The Board, however, has held that "in 10(k) proceedings, a conflict in testimony does not prevent the Board from finding 'reasonable cause' and proceeding with a determination of the dispute." *Electrical Workers IBEW Local 103 (Sylvania Lighting)*, 301 NLRB 213, 214 fn. 5 (1991), and cases cited there.

³See *Operating Engineers Local 3 (Levin-Richmond Terminal)*, 299 NLRB 449 (1990). We find no merit in the contention of both the Employer and the Carpenters that the grievance filed by the Iron Workers, or the letters of intention to do so, constitute a threat within the meaning of Sec. 8(b)(4)(D). See *Longshoremen ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 89 (1988), petition for review denied 892 F.2d 130 (D.C. Cir. 1989).

1. Certifications and collective-bargaining agreements

There is no evidence that either the Iron Workers or the Carpenters has been certified as the exclusive collective-bargaining representative of any of the Employer's employees. The Employer was covered at all relevant times by collective bargaining agreements with both Unions.⁴

The Employer signed a contract with the Iron Workers on November 23, 1993, for the period of July 1993 through June 1995. The work jurisdiction language appearing in section 2 of the contract is lengthy and highly specific. It enumerates 21 separate descriptions of work, yet none identify the disputed work of installing aluminum bench seating. Rather, the language relied on by the Iron Workers for its claim to the work appears only as isolated words in the introductory paragraph: "The International Association claims for its membership on all Building, Heavy and Highway projects, the . . . installation of all . . . aluminum . . . seats"

The Carpenters' contract with the Employer, signed March 28, 1993, for the period of May 1, 1991, through April 30, 1994, with an automatic renewal provision, is no more specific. At the time the agreement was signed, however, employees represented by the Carpenters Union were performing the precise work currently in dispute on an earlier phase of the project. There is no indication that the parties modified the GBCA contract to allow the employees represented by the Carpenters to continue to perform this work for the Employer. We find that this factor does not favor an award of the disputed work to either the employees represented by the Iron Workers or those represented by the Carpenters.

2. Employer preference and past practice

The Employer has assigned the work in dispute to employees represented by the Carpenters. While this is the Employer's first job involving bleacher seating, since September 1992, it has awarded previous phases of this project to employees represented by the Carpenters and has been satisfied with their work. Accordingly, we find that this factor favors an award of the disputed work to the employees represented by the Carpenters.

3. Area and industry practice

A business representative for the Carpenters in the Philadelphia region testified that over the past 10 years employees represented by the Carpenters have had ap-

⁴We find no merit in the Iron Workers argument that the lack of a Carpenters representative signature on the Employer's "Me Too" agreement, accepting the terms of the General Building Contractors Association's (GBCA) contract, renders the agreement invalid.

proximately 25 jobs in the Philadelphia area for different employers doing the same work involved here: attaching metal brackets to concrete steps and fastening aluminum bench seating to the brackets.⁵ He also testified that he was unaware of any spectator seating in the Philadelphia area installed by employees represented by the Iron Workers.

Witnesses for the Iron Workers were able to recall a total of three jobs in the Philadelphia area in which employees represented by the Iron Workers installed spectator aluminum seating, one of which involved a composite crew with the Carpenters. While dates for these jobs are not entirely clear from the record, they appear not to be recent.⁶ We find that the factor of area practice favors an award to the employees represented by the Carpenters.

4. Economy and efficiency of operations

The job at the Franklin Field Stadium involves the removal of old seating, repairing broken brackets, and installing new aluminum bench seating. Although he had no basis for comparison, the Iron Workers business agent testified that if given the chance, employees represented by the Iron Workers could perform the installation work in dispute more efficiently than the employees represented by the Carpenters. Jerry Watts for the Employer testified that he found the work of the employees represented by the Carpenters to be efficient and effective and that there had not been any safety problems. There is insufficient record evidence to find that this factor favors an award of the disputed work to either the Iron Workers or the Carpenters.

5. Relative skills

Jerry Watts testified that the disputed work involves prepping, cutting miters, and adjusting wedges. The benches are then screwed and bolted in. Watts testified that he has found the employees represented by the Carpenters to possess the necessary skills for the job. He is not familiar with the ability of employees represented by the Iron Workers to perform the disputed work. The Iron Workers business agent testified that the work in dispute falls under miscellaneous iron assembly, for which employees represented by the Iron Workers have been trained through a general apprenticeship program. He also testified that Iron Workers-represented employees use the same tools as employ-

⁵The Carpenters witness testified that this work of installing spectator seating was done at recreation centers, the Pennsylvania Convention Center, the gymnasium of the Community College of Philadelphia, Veterans Stadium, and the Spectrum.

⁶The Iron Workers also entered into evidence a list of 14 joint Board decisions involving stadium seating where the work was awarded to the Iron Workers. Only one of the disputes, however, is from the Philadelphia area and the most recent case presented is from the late 1970s. We will not find industry practice based on this evidence.

ees represented by the Carpenters to do other types of work. We find that this factor does not favor an award of the disputed work to either the employees represented by the Iron Workers or those represented by the Carpenters.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Carpenters are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's preference and past practice, as well as area practice. In making this determination, we are awarding the work to employees represented by the 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.

1. Employees of William Watts, Inc. represented by the Carpenters are entitled to perform the repairing of broken brackets and the installation of new aluminum bench seating planks at the upper and lower east stands at Franklin Field, University of Pennsylvania in Philadelphia, Pennsylvania.

2. The Iron Workers, Local 401, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force William Watts, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, the Iron Workers, Local 401, AFL-CIO 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 this determination.