

Pipefitters Local Union No. 562 and Systemaire, Inc. and Sheet Metal Workers, Local Union No. 36, Party in Interest. Case 14-CD-915

May 31, 1996

DECISION AND DETERMINATION OF
DISPUTE

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The charge in this Section 10(k) proceeding was filed on June 1, 1995, by Systemaire, Inc. (Systemaire). The charge alleges that the Respondent, Pipefitters Local Union No. 562 (Pipefitters), violated 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 Sheet Metal Workers, Local Union No. 36 (Sheet Metal Workers). On June 7, 1995, the Regional Director for Region 14 issued a notice of hearing. A hearing was held on June 22, 1995, before Hearing Officer Leonard Perez.

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

Systemaire, a Delaware corporation, is engaged in business as a nonretail mechanical construction contractor with its principal offices and place of business in Earth City, Missouri, and with a jobsite located in St. Louis, Missouri. At its St. Louis jobsite it purchased and received goods and materials valued in excess of \$50,000 for installation at that jobsite and which were shipped from points located outside the State of Missouri.

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 Pipefitters Local Union No. 562 and Sheet Metal Workers Local Union No. 36 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer principally acts as a subcontractor engaged in mechanical contracting in the St. Louis, Missouri metropolitan area. The Employer is party to a contract with each of the competing labor organizations, predicated on a lengthily 8(f) relationship with each. The Employer is a member of, and delegated its bargaining rights to, the Saint Louis Chapter, Sheet

Metal and Air Conditioning Contractors National Association, and its contract with the Sheet Metal Workers results from that membership. The Employer is not a member of the employer association which negotiates the master contract with the Pipefitters, but has signed that contract on a "me-too" basis.

In December 1994, the Employer was awarded a subcontract for the installation of a Re-Verber-Ray heating system,¹ at the U. S. Ice Sports Complex in Chesterfield, Missouri, a suburb of St. Louis. The Re-Verber-Ray system, when completed, will consist of 18 heating units. Each unit will have reflectors and hangers as part of the assembly and installation. The Employer was scheduled to begin the work attendant to the installation of the system in late May 1995.²

In early March 1995,³ the Employer's sheet metal superintendent, Fred Schroeder, a bargaining unit employee and member of the Sheet Metal Workers, phoned Sheet Metal Workers Business Representative John Lorson and told Lorson that a Re-Verber-Ray system had been received at the Employer's shop and was for installation at the Ice Sports Complex. Shortly after their conversation, Lorson went to the Employer's shop, saw the system, and spoke with Schroeder and Sheet Metal Workers Shop Steward Norm Rehling. Lorson told Schroeder and Rehling that the Sheet Metal Workers claimed the installation of the combustion duct, the flue, and reflector shields, and 50 percent of the hangers. In turn, Schroeder told the Employer's operations manager, Kelsie Sams, of the Sheet Metal Workers' claim.

By early May, the Employer was preparing to make assignments of the various work tasks for the installation of the heating system. Operations Manager Sams spoke to Pipefitters Foreman Bill Lahmann, a bargaining unit employee and member of the Pipefitters. Sams asked Lahmann whether the Pipefitters still claimed the work of installing the reflector shields and hangers, and if so, whether the Pipefitters would consider performing the work through a composite crew of Pipefitters and Sheet Metal Workers. In mid-May, Lahmann told Sams that Pipefitters Business Rep-

¹ The notice of hearing described the disputed work tasks as being in connection with the installation of a "Co-Ray-Vac type heating system." Such systems are low-intensity, infrared heating systems with industrial applications in warehouses, sports arenas, and other large, open areas. One such type of system is the Re-Verber-Ray. Co-Ray-Vac, although a trade name, has become synonymous with that type of system, regardless of the manufacturer of the system.

² The work task is the same as that at issue in Case 14-CD-910, which was resolved in *Pipefitters Local 562 (Systemaire, Inc.)*, 320 NLRB 124 (1995). That case involved the same labor organizations as those here, but involved a different jobsite and employer, Charles E. Jarrell Contracting Company, Inc. The hearing in Case 14-CD-910 was part of a consolidated setting with Cases 14-CD-909 and 14-CD-911. The latter case involved Systemaire as the Employer but concerned a different disputed work task from that at issue here.

³ All dates are in 1995 unless otherwise noted.

representative Dick Sullivan said that the Pipefitters continued to claim the work and refused to consider a composite crew to perform the work.

On May 23, Sams received a phone call from Pipefitters Business Manager Jim O'Mara who told Sams that it was O'Mara's understanding that the Sheet Metal Workers were relinquishing their claim to the disputed work. Sams told O'Mara that he was unaware of any such development. On May 24, Sams asked his Sheet Metal Workers superintendent, Schroeder, to find out whether the Sheet Metal Workers were relinquishing their claim to the reflector shields and hangers. On May 25, Schroeder told Sams that Sheet Metal Workers President and Business Manager Ted Zlotopolski said that the Sheet Metal Workers had not relinquished its claim to the disputed work, that Zlotopolski assumed the Employer would make the assignment to the employees represented by the Pipefitters, and that, when the assignment occurred, Zlotopolski would be filing a grievance. Sams then phoned Pipefitters Business Representative O'Mara on May 26 or 27 and informed him of the Sheet Metal Workers' continuing claim for the work. O'Mara reiterated that the Pipefitters were also claiming the work. Sams assigned the work to the Pipefitters, based on his previous assignment of similar work on other jobs to the Pipefitters, what he considered to be the area practice, his review of the contracts with both Unions which convinced him that the Pipefitters' contract was more applicable to the work involved, and his decision that it would be more efficient and cost-effective to have one crew on the job.

By letter dated May 30, Pipefitters Business Representative O'Mara wrote Sams, stating that the installation of Co-Ray-Vac systems had been performed by employees represented by the Pipefitters, that such installations were covered by the Pipefitters' contract with the Employer, and that "if you assign such work to the Sheet Metal Local, we will take whatever action is necessary, including picketing or striking." At the time of the hearing officer's report, there had been no strike or picketing in furtherance of that threatened action.

On June 6, the Sheet Metal Workers filed a grievance alleging "improper assignment of work on Re-Verber-Ray system to pipe fitter." That grievance was pending at the time of the hearing.

Work on the installation of the Re-Verber-Ray heating system at the Ice Sports Complex began on May 25. The Employer assigned some aspects of the installation to each of the Unions. In this regard, the Employer assigned the installation of the fans, louvers, flues, and duct work to employees represented by the Sheet Metal Workers; assigned the installation of the natural gas connections and piping, combustion tubes, hangers, and reflector shields to employees represented

by the Pipefitters; and assigned the setting of roof units to a composite crew of employees represented by the Sheet Metal Workers and Pipefitters. At the site, the Employer has a crew of about four or five employees represented by the Sheet Metal Workers, and a crew of about three employees represented by the Pipefitters, although these crews of employees are not necessarily at the site at the same times. The Employer anticipated completion of the entire installation of the Re-Verber-Ray system by June 23, 1995.

B. *Work in Dispute*

The work in dispute is installation of reflector shields and hangers of a Co-Ray-Vac type heating system at the U. S. Ice Sports Complex in Chesterfield, Missouri.

C. *The Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that the Respondent has violated Section 8(b)(4)(D) by the Pipefitters May 30 letter threatening to strike or picket in the event that the disputed work was assigned to the Sheet Metal Workers, and that the dispute is properly before the Board for determination. The Employer also maintains that the work has been properly assigned to the Pipefitters, and there would be no dispute but for the Sheet Metal Workers' coercive attempt to secure the work through the grievance procedure. The Employer claims that the Sheet Metal Workers have violated Section 8(b)(4)(D) by seeking damages under this award that far exceed the actual damages suffered. This is sufficient reason, according to the Employer, to distinguish those Board cases holding that a broad award should not issue absent evidence of unlawful conduct by the union against which the award will lie. E.g., *Laborers Local 242 (Johnson Gunite)*, 310 NLRB 1335 (1993).

The Pipefitters did not participate in the hearing in its entirety, and left the hearing prior to stating any position.

The Sheet Metal Workers argues that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated as the Pipefitters' threat to strike or picket is hollow and made as part of collusive conduct between the Employer and the Pipefitters solely to obtain a 10(k) determination of the disputed work. The Sheet Metal Workers further contend that its contract with the Employer is applicable to the disputed work, that a greater economy in wage and benefit level is available to the Employer under the terms of its contract as compared to the terms of the Pipefitters' contract, and that the employees it represents possess the skills to perform the work. The Sheet Metal Workers argue that a national practice exists under which the Sheet Metal Workers have been assigned this type of work throughout the country, and that there is an agreement be-

tween the International bodies with which each Union is respectively affiliated under which agreement the disputed work is arguably conceded to the Sheet Metal Workers.

Finally, the Sheet Metal Workers oppose the consideration of any broad award on the grounds that any such award would be repugnant to the purposes and policies of the Act as the Pipefitters are the offending union, that a broad award to the Pipefitters would reward and reinforce their coercive conduct, and that any award must be limited to the dispute as outlined in the notice of hearing. Were the Board to make a broad award in this case, the Sheet Metal Workers assert that such award should be made to the employees it represents as it is the Pipefitters which has demonstrated a proclivity to violate the Act in the face of already having been assigned the work by the Employer. In support of this assertion, the Sheet Metal Workers refer to Cases 14-CD-909, 14-CD-910, and 14-CD-911. (See fn. 2, *supra*.)

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the 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 no agreed-upon method for the voluntary adjustment of the dispute.

By letter dated May 30, 1995, Pipefitters Business Manager O'Mara informed Systemaire Director of Operations Sams that if Sams were to assign the disputed work to the Sheet Metal Workers, the Pipefitters would take whatever action was necessary, including picketing or striking.⁴

Based on the foregoing, we find reasonable cause to believe that the Pipefitters violated Section 8(b)(4)(D), and that, as stipulated by the parties, 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).

⁴We find no evidence to support the allegations made by the Sheet Metal Workers of collusion between the Employer and the Pipefitters.

The following factors are relevant in making the determination of the dispute.

1. Certification and collective-bargaining agreements

There is no evidence that either the Sheet Metal Workers or the Pipefitters has ever been certified as the exclusive collective-bargaining representative of any of the Employer's employees. The Employer, however, is signatory to collective-bargaining agreements with both labor organizations.

The Sheet Metal Workers' most recent collective-bargaining agreement to which Systemaire is signatory contains a jurisdictional clause at article I, section 1(A) that reserves for the Sheet Metal Workers "all sheet metal work used in connection with . . . commercial buildings, including . . . heating, ventilation and air conditioning." The Sheet Metal Workers also relies on a 1956 agreement between the two Unions' Internationals. article I, section 1-(b), of this agreement provides that gas unit heaters "in connection with duct systems, shall be the work of the sheet metal workers." The Sheet Metal Workers assert that the Re-Verber-Ray system is analogous to such a system.

Article 5 of the Pipefitters' most recent collective-bargaining agreement to which Systemaire is signatory covers the scope of work. Section 4 broadly reserves to the Pipefitters all "work . . . relating to new installation, reconditioning, or remodeling of heating, air conditioning . . . and like systems, includ[ing] all phases of the work." Section 7 broadly reserves to the Pipefitters "the fabrication and erection of all pipe-work for all mechanical, residential, commercial, manufacturing, and mining purposes." The Employer also notes that the 1956 agreement between the Unions' Internationals states, at article I, section 1(a), that the Pipefitters are entitled to the work of installing "gas or oil fired unit heaters within a building for heating purposes only and not in connection with a duct system."

Because both the Pipefitters and the Sheet Metal Workers' collective-bargaining agreements reasonably can be read as covering the disputed work, we find that this factor favors neither group of employees.

2. Employer preference

The Employer has stated a preference for having the disputed work awarded to employees represented by the Pipefitters. Accordingly, the factor of employer preference favors an award of the disputed work to employees represented by the Pipefitters.

3. Employer past practice

Operation Manager Sams' undisputed testimony is that the Employer has had a past practice of assigning the disputed work to employees represented by the

Pipefitters. Accordingly, this factor favors an award to employees represented by the Pipefitters.

4. Area practice

The Employer stated that the assignment of the disputed work was based on its knowledge of the practice of other mechanical contractors, especially Jarrell Contracting. Jarrell presented evidence in Case 14-CD-910 that in all 15 prior instances in which it had installed infrared heating systems it had assigned the work to the employees represented by the Pipefitters. Accordingly, this factor favors an award of the work to the employees represented by the Pipefitters.

5. Relative skill

The record shows that both groups of employees possess the necessary skills to perform the work in dispute. Accordingly, this factor does not favor an award of the work to either group of employees.

6. Economy and efficiency of operations

The Employer contends that it is more economical and efficient to assign the disputed work to employees represented by the Pipefitters, because they are already on the job to install the gas pipeline that fuels the burners of the heating system. The Employer further asserts that it is quickest and easiest to install the pipe and the reflectors simultaneously, section by section, as they hang from the same chains. The Employer maintains that if the employees represented by the Sheet Metal Workers were to install the reflectors, they would have idle time waiting for the Pipefitters to assemble the burners and the pipe. Accordingly, we find that the factor of economy and efficiency of operations favors an award of work to the employees represented by the Pipefitters.

Conclusion

After considering all the relevant factors, we conclude that the employees represented by the Pipefitters

are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, past practice, area practice, and economy and efficiency of operations.

Scope of Award

The Employer requests that the Board issue a broad industrywide award on behalf of the Pipefitters in a geographic area equal to the territorial jurisdiction of the two competing labor organizations. The Employer contends that disputes between the Pipefitters and the Sheet Metal Workers over these same issues have arisen in the recent past, as evidenced by the recent Cases 14-CD-909, 14-CD-910, and 14-CD-911, and that they will continue to arise and to multiply in the future. The Employer argues that a broad award is necessary to avoid similar jurisdictional disputes.

The Board customarily declines to grant an areawide award in cases in which the *charged party* represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See *Laborers Local 243 (A. Amorello & Sons)*, 314 NLRB 501, 503 (1994); *Laborers (Paul H. Schendener, Inc.)*, 304 NLRB 623, 625 (1991). Accordingly, we shall limit the present determination to the particular controversy that gave rise to these proceedings.⁵

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Systemaire, Inc. represented by the Pipefitters Local Union No. 562 are entitled to perform the work of installation of reflector shields and hangers of a Co-Ray-Vac type heating system at the U. S. Ice Sports Complex in Chesterfield, Missouri.

⁵With respect to the Employer's allegations of unlawful conduct on the part of the Sheet Metal Workers, we note that there are no charges against the Sheet Metal Workers before us in this case.