

Laborers' International Union of North America, Local No. 435 and Spiniello Construction Company, Inc. and International Brotherhood of Teamsters, Local Union No. 398. Case 3-CD-626

June 16, 1997

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The charge in this Section 10(k) proceeding was filed on July 10, 1996, by Spiniello Construction Co., Inc. (Employer), alleging that the Respondent, Laborers' International Union of North America, Local No. 435 (Laborers), 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 International Brotherhood of Teamsters, Local Union No. 398 (Teamsters). The hearing was held on August 14, 1996,¹ before Hearing Officer Doren G. Goldstone. Thereafter, the Employer and Teamsters filed briefs.

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 is a New Jersey corporation engaged in construction and refurbishing work of water pipes. The Employer annually purchases and receives materials valued in excess of \$50,000 directly from suppliers located outside the State of New York. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that Laborers and Teamsters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The current dispute involves the Employer's contract with the city of Rochester, New York, to clean and re-line water pipes. Since January 1993, the Employer has had five projects in Rochester, New York, involving the same work. The most recent project began in the winter of 1996.

¹ Teamsters appeared at the hearing and objected to the hearing going forward. After entering into a stipulation concerning jurisdiction, and presenting its statement and exhibits concerning a dispute resolution process set forth in a May 14, 1970 memorandum of understanding, the Teamsters' representatives left the hearing and did not return. The hearing continued, with representatives of Spiniello and Laborers participating.

The Employer and Laborers currently are parties to a collective-bargaining agreement effective from June 1, 1996, through May 31, 1998.² The Employer has also observed the terms of an expired Teamsters' collective-bargaining agreement which was effective from May 1, 1989, through April 30, 1992, with modifications as requested and communicated by the Teamsters. Neither the Laborers nor the Teamsters have been certified as the collective-bargaining representative of the Employer's employees.

The Employer's Rochester projects have historically utilized tractor-trailer, six-wheel dump trucks, flatbeds, utility trucks, and pickup trucks. The Employer typically utilizes a composite crew generally consisting of employees represented by Laborers and Teamsters. Employees represented by the Teamsters have tended to do more driving of the heavy vehicles, such as the tractor-trailers and the six-wheel dump trucks. Employees represented by the Laborers are primarily engaged in cleaning and lining pipes, digging trenches, and working with asphalt. Nevertheless, during the course of their job duties, the latter employees also drive most of the trucks present on the Employer's project sites. The Employer makes the determination as to who will drive which vehicle based on work efficiency. The Employer has generally assigned employees represented by the Laborers the duties of driving various smaller trucks, such as dump trucks, flatbeds, and utility trucks, to transport tools and materials to the numerous project sites.

Historically, the Employer has employed at least one or two Teamsters drivers per job site and on one occasion it utilized three Teamsters drivers.

In the spring of 1996 the Teamsters demanded that the Employer employ three Teamsters-represented truck drivers rather than the two then at the Employer's Rochester project site. The Employer refused that request. Thereafter, the Teamsters filed a grievance claiming that a third Teamsters-represented driver should be employed by the Employer.

On June 27, 1996, counsel for the Employer informed the Laborers that the Employer was considering laying off one or more of the employees represented by the Laborers in order to accommodate a competing claim made by the Teamsters for the work in dispute. Laborers' Business Manager Brown responded that, "[T]here was no way I was going to let a Teamster replace a Laborer and that I was going to take some kind of job action."

B. Work in Dispute

The disputed work involves the driving of dump trucks, flatbeds, utility trucks, and pickup trucks to and from, and on, the Employer's project sites while it

² The Employer has apparently not executed this agreement but concedes that it is bound to the agreement.

cleans and relines water mains and lines pursuant to its contract with the City of Rochester, New York.

C. Contentions of the Parties

The Employer asserts that there is a reasonable cause to believe that the Respondent has violated Section 8(b)(4)(D) and that the dispute is properly before the Board for determination. The Employer contends that the disputed work should be assigned to employees represented by the Laborers. The Employer maintains that in the past it has assigned the disputed work to employees represented by the Laborers. The Employer also argues that it is more efficient and economical for Laborers-represented employees to be assigned the disputed work. According to the Employer, dump trucks, pickup trucks, flatbed trucks, and utility trucks on the jobsite are usually driven for a very small portion of the day, consisting at most of an hour or two. The remainder of the time these vehicles sit idle either on or off the jobsite, while the Laborers-represented employees assigned to these vehicles perform regular laborer work. The Employer argues that, if a Teamsters-represented employee were used to replace a Laborers-represented employee, the Employer would have to lay off the latter and hire the former for a few minutes of work. Specifically, the Employer's field superintendent testified that, because of a lack of useful work, the two Teamsters-represented employees who have been employed on the project have often slept or read newspapers while on the job. Finally, the Employer contends that assignment of the disputed work is consistent with the parties' collective-bargaining agreements. Although the Employer concedes that the Teamsters' contract explicitly covers all truck driving, it argues that, until now, the Teamsters Union has never claimed that employees it represents were exclusively entitled to the disputed work.

Laborers Local 435 did not submit a brief in this case. The Laborers, however, at the hearing contended that the work in dispute should be awarded to Laborers-represented employees, asserting that the Employer has traditionally assigned the work to employees it represents.

Initially, Teamsters Local 398 argues that this dispute should be resolved pursuant to a dispute resolution process set forth in a May 14, 1970 memorandum of understanding between the International Unions.³ Teamsters Local 398 also argues that its contract explicitly covers all truck driving work and that the Laborers' agreement did not. Further, Teamsters Local 398 submits that Teamsters-represented employees have the skills to perform the disputed work. Team-

sters Local 398 also states that the Employer, on a preceding job, employed a third Teamsters driver without going out of business. Finally, Teamsters Local 398 argues that the award of the disputed work should be nonexclusive.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute under Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) that the parties have not agreed on a method for the voluntary adjustment of the dispute.

Initially, we find that there are competing claims for the disputed work. The Teamsters demanded the work both in the form of conversations between Teamsters Representative Lippa and Employer Field Superintendent Lesandri as well as by the filing of the grievance. The Laborers also claimed the work, inasmuch as Business Manager Brown informed the Employer's counsel that he would do whatever was necessary to prevent a Teamsters-represented employee from replacing a Laborers-represented employee. Finally, the Employer and Laborers stipulated at the hearing that both the Teamsters and Laborers claimed the work in dispute.

There is also reasonable cause to believe that Section 8(b)(4)(D) has been violated. Specifically, Laborers Business Manager Brown responded to the Employer that, "[T]here is no way I was going to let a Teamster replace a Laborer and that I was going to take some kind of job action." Moreover, the Employer and the Laborers stipulated at the hearing that there was reasonable cause that Section 8(b)(4)(D) had been violated. Accordingly, we find reasonable cause to believe that Section 8(b)(4)(D) has been violated.

The Employer and the Laborers stipulated at the hearing that there was no agreed-upon method for voluntary adjustment of the work in dispute. Teamsters Local 398 claims that this dispute should be resolved pursuant to a dispute resolution process set forth in a May 14, 1970 memorandum of understanding between the International Unions. However, as noted above, the 1970 memo is not properly part of the record. We have affirmed the hearing officer's rejection of the Teamsters' evidence in this regard. Accordingly, the record contains no evidence supporting the Teamsters' position that there is an agreed upon method for resolving this dispute.

Moreover, assuming arguendo, as contended by the Teamsters, that there is a mechanism for dispute resolution agreed to by the Unions, it has not been shown that the Employer is contractually bound to abide by this method of dispute resolution. Therefore, we find that no method of voluntary adjustment binding on all

³ The hearing officer rejected the Teamsters' exhibit containing the purported memorandum of understanding. In so doing, the hearing officer relied on the lack of authentication and a lack of evidence that this agreement remained in effect.

parties exists. The dispute is thus properly before the Board for resolution.⁴

Having found that there is 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, we conclude 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.

1. Certification and collective-bargaining agreements

There is no evidence that either Union has been certified to represent employees performing the disputed work. Both Unions assert, however, that their collective-bargaining agreements entitle them to the disputed work.

The Employer has had local area collective-bargaining agreements with both the Teamsters and the Laborers. Article 7 of the Teamsters contract grants the Teamsters recognition for all "Truck Drivers," and article 3 requires that all work traditionally within the Teamsters' jurisdiction be performed by Teamsters-represented employees. The Laborers agreement describes work that it covers and sets forth job classifications but makes no specific reference to truck driving. However, as the record reflects, and as the Teamsters Union notes in its brief, employees represented by both the Laborers and Teamsters have performed various kinds of driving work, to varying extents, under their union contracts.

Based on the evidence presented, we find that this factor does not favor awarding the work in dispute to either group of employees.

2. Employer preference

The Employer prefers to use employees represented by the Laborers, rather than Teamsters-represented employees, to perform the work in dispute. Therefore, this

⁴In agreeing that a dispute within the meaning of Sec. 10(k) is properly before the Board, Member Fox notes that the contention of Teamsters Local 398 regarding a 1970 dispute resolution mechanism for unions is the sole argument made in opposition to a finding that the dispute is properly before the Board for resolution.

factor favors the award of the disputed work to employees represented by the Laborers.

3. Employer past practice

The Employer since 1984 has been signatory to agreements with the Laborers and has assigned to employees represented by this Union most of the work of driving dump trucks, flatbeds, utility trucks, and pickup trucks. The Teamsters presented no evidence that employees it represents have typically performed most of the work in dispute. Thus, the factor of Employer past practice favors the award of the disputed work to employees represented by the Laborers.

4. Area practice

The Laborers presented testimony that one of the Employer's principal competitors, Mainline, assigns only one member of the Teamsters to its jobsites and that employees represented by the Laborers drive the types of trucks in dispute. The record shows that other contractors use a composite crew of Teamsters and Laborers represented employees to perform driving work. Based on the evidence presented, we find that the factor of area practice is inconclusive and does not favor an award of the disputed work to either group of employees.

5. Relative skills

Employees represented by the Teamsters and by the Laborers are both experienced and qualified to perform the disputed work. We find that this factor does not favor an award of the disputed work to either group of employees.

6. Economy and efficiency of operations and job impact

The Employer testified that it is more efficient to assign the disputed work to employees represented by the Laborers. According to the Employer, dump trucks, pickup trucks, flatbed trucks, and utility trucks on the jobsite are usually driven for a very small portion of the day, consisting at the most of perhaps one hour or two. The remainder of the time these vehicles sit idle either on or off the jobsite. If an additional teamster were to be hired, the Employer would lay off a laborer and hire the Teamsters-represented employee for a few minutes' work.

Based on the evidence presented, we find that the factor of economy and efficiency of operations favors an award of the disputed work to employees represented by the Laborers.⁵

⁵Teamsters Local 398 also contends that the factor of "awards by private bodies" favors awarding the work in dispute to employees it represents. However, there is no evidence in the record supporting Local 398's argument in this regard.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Laborers are entitled to perform the disputed work. We reach this conclusion by relying on the factors of Employer preference, past practice and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Local 435, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding. We note that this conclusion does not affect the Employer's use of a composite crew of Teamsters-represented and Laborers-represented employees.⁶

⁶We do not view the work in dispute as encompassing that work traditionally done by Teamsters-represented employees. Thus, our award does not intrude on the work traditionally done by Teamsters-

DETERMINATION OF DISPUTE

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

Employees of Spiniello Construction Company, Inc., represented by Laborers' International Union of North America, Local No. 435 are entitled to perform the work of driving dump trucks, flatbed trucks, utility trucks and pickup trucks to and from, and on, the Employer's project sites while it cleans and relines water mains and pipes in and about the vicinity of the City of Rochester, New York.

represented employees and specifically does not award all driving work to Laborers-represented employees. Our award is limited to the additional work sought by the Teamsters in this case, (i.e., hire of a third Teamsters-represented employee to perform driving of smaller trucks).