

**Local No. 81 Plumbers & Pipefitters and John's Service & Sales, Inc. and Sheet Metal Workers International Association Local No. 1.** Case 33-CD-390

October 29, 1998

DECISION AND DETERMINATION OF DISPUTE  
BY MEMBERS FOX, LIEBMAN, AND BRAME

The charge in this Section 10(k) proceeding was filed on September 4, 1996 by John's Service & Sales, Inc. (the Employer), alleging that the Respondent, Local No. 81 Plumbers & Pipefitters (Local 81 or Plumbers), 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 Sheet Metal Workers International Association Local No. 1 (Local 1 or Sheet Metal Workers). The hearing was held on October 2, 1996, before Hearing Officer Lawrence J. Suhorsky. Thereafter, the Employer and Plumbers 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 officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer is an Illinois corporation engaged in the sale, installation, service and repair of appliances, heating systems, and air conditioning systems, at its facility in Oglesby, Illinois. During the 1995-1996 calendar year its revenues exceeded \$500,000, and it purchased and received at its Illinois facility goods and materials valued in excess of \$50,000 directly from points outside the State of Illinois. 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 Plumbers, Local 81 and Sheet Metal Workers, Local 1 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

*A. Background and Facts of Dispute*

The Employer is party to collective-bargaining agreements with the Plumbers, Sheet Metal Workers, and the International Brotherhood of Electrical Workers, and it currently employs approximately 10 individuals who are represented by these labor organizations.<sup>1</sup> Since commencing business in 1962, owner John E. Senica and his son John S. Senica (John S.), both members of Local 81, have performed residential service work on heating and air conditioning systems. The Employer has variously assigned employees represented by Local 81 and Local 1

<sup>1</sup> IBEW is not a party to this proceeding and does not claim the disputed work for employees it represents.

to perform residential service work, depending on daily demands from customers. Likewise, its after-hours on call schedule lists employees who are represented by both unions to be contacted for customer emergencies, although typically John E. Senica and John S. answer emergency calls because the employees do not wear pagers and are often difficult to reach.<sup>2</sup>

In October 1994, the Employer decided to hire an individual primarily to handle the residential service calls during normal business hours. When neither Local 81 nor Local 1 could supply an applicant, the Employer placed an advertisement in the local newspaper and hired Ralph Gibson, who had responded to the ad. Gibson was not a union member. In late 1995 the Employer, with Gibson's acquiescence, discussed with Local 81 Gibson's becoming a member of that union and enrolling Gibson in the apprenticeship program to be offered in fall 1996.<sup>3</sup> Gibson, however, quit his employment on July 12.<sup>4</sup> Shortly thereafter, David Hallowell, Business Agent of Local 1, contacted the Employer and claimed the residential service work for employees represented by his union. On August 1, Local 1 filed a grievance against the Employer, seeking wages and benefit fund contributions under its collective-bargaining agreement with the Employer for the work performed by Gibson. By letter dated August 23, the Plumbers claimed the work in question and threatened to "undertake any and all economic action, including striking and picketing, which may be necessary to redress the situation."

*B. Work in Dispute*

The disputed work involves the servicing and repair of residential heating and air conditioning systems for the Employer's customers in the Oglesby, Illinois area.

*C. Contentions of the Parties*

The Employer contends that employees represented by Local 81 should be awarded the residential service work inasmuch as Plumbers have done the work since the inception of the business and since Local 81 has a residential training school. The Employer further contends that Local 81's collective-bargaining agreement is more favorable for economic reasons. Although Local 1's collective-bargaining agreement contains an addendum that provides lower wages for residential work than for commercial work performed by employees it represents, the Employer contends that Hallowell stated that there were no signatories to it in the geographic region and that applying it would "upset a lot of people."

<sup>2</sup> When John E. Senica became ill at an unspecified time prior to the Sec. 10(k) hearing, John S. assumed primary responsibility for handling after-hours calls.

<sup>3</sup> Hereafter, all dates refer to 1996.

<sup>4</sup> Gibson had quit once before but had been rehired. Although he did not testify in this proceeding, there is some indication that Gibson changed his mind about joining the Plumbers and wanted to become a member of the Sheet Metal Workers.

Local 81 contends that employees it represents should perform the work. It asserts that its collective-bargaining agreement addresses the work in dispute more specifically than Local 1's collective-bargaining agreement, and that Local 1's disinclination to apply the residential addendum to its collective-bargaining agreement adversely affects the Employer's economy and efficiency of operations. Further, Local 81 points out that beginning with John E. Senica and John S., plumbers historically have performed this work for the Employer. Finally, Local 81 argues that its establishment of a new program to provide specialized training in heating and air-conditioning service work will allow the Employer to train current employees and provide a source of new employees to perform the disputed work.

Although Local 1 did not file a brief, testimony and documentary evidence presented at the hearing indicate that its position is that employees it represents should be awarded the disputed work because the work is within the jurisdictional provisions of Local 1's collective-bargaining agreement. Further, John V. Senica and Randy Senica, who both are represented by Local 1, have performed this work in the past for the Employer, and a number of businesses in the area use sheet metal workers to perform the same or similar work.

#### *D. Applicability of the Statute*

Before the National Labor Relations Board may proceed with a determination of the 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 the parties have not agreed on a method for the voluntary settlement of their dispute.

As noted above, Local 1 filed a grievance asserting that the Employer violated the terms of the collective-bargaining agreement by assigning the performance of residential service work to nonmember Ralph Gibson, and seeking wages and payments for that work in accordance with the collective-bargaining agreement. Subsequently, at the hearing, Business Agent Hallowell claimed the work for Local 1. Soon after Local 1's filing of the grievance, Local 81 threatened the Employer with strikes, picketing, and other, unspecified action it deemed "necessary" if the residential service work was assigned to anyone other than an employee represented by the Plumbers.

The parties stipulated at the hearing that there is no agreed upon method of resolving this dispute that is binding on all parties, and the record supports the fact that none exists. Although the collective-bargaining agreement between Local 1 and the Employer provides for submission of jurisdictional disputes to the Impartial Jurisdictional Disputes Board for the Construction Industry, it specifically states that IJDB decisions are not binding if the other labor organization involved does not also have a collective-bargaining agreement that provides for

submission of such disputes to IJDB. The Local 81 collective-bargaining agreement does not provide for settlement of jurisdictional disputes by the IJDB.

On the basis of the foregoing, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed 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.

##### 1. Certifications and collective-bargaining agreements

No party claims that there are certifications that cover the disputed work. Appendix A of the 1994-1996 collective-bargaining agreement to which Local 81 and the Employer are parties<sup>5</sup> describes the work which falls within that Union's jurisdiction, in pertinent part, as:

22. The setting, erecting, and piping of instruments, measuring devices, thermostatic controls, gauge boards, and other controls used in connection with power, heating, refrigerating, air conditioning, manufacturing, mining, and industrial work; . . . .

33. All piping, setting and hanging of all units and fixtures for air conditioning, cooling, heating, roof cooling, refrigerating, ice making, humidifying, dehumidifying, dehydrating, by any method, and the charging and testing, servicing [sic] of all work after completion. .

48. The operation, maintenance, repairing, servicing and dismantling of all work installed by Journeymen members of the [Plumbers].<sup>6</sup>

The collective-bargaining agreement to which the Employer and Local 1 are parties, titled Standard Form of Union Agreement, states in article I that it covers the rates of pay and conditions of employment of all employees engaged in:

<sup>5</sup> The agreement, between the Union and Illinois Valley Contractors Association, gives as effective dates August 1, 1994 through May 31, 1996; however, it contains a year-to-year automatic renewal clause. We note that no party disputes the applicability or validity of the agreement, and therefore we assume that it remained in effect at the time of the events herein.

<sup>6</sup> Plumbers Business Manager Tom Gross also testified that paragraphs 23 (hot water heaters, etc.), 27 (oil heaters and coolers), and 28 (erection of cooling units, pumps, etc.) are applicable as well.

(a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous and nonferrous metal work and all other materials used in lieu thereof and of all air-veyor systems and air handling systems regardless of material used including the setting of all equipment . . . .

The Residential Addendum to the Sheet Metal Workers Standard Form Agreement states in Section I that it:

covers the rates of pay, rules and working conditions of all employees of the employer engaged in the fabrication, erection, installation, repairing, replacing and servicing of all residential heating and air conditioning systems and the architectural sheet metal work on such residences.

The cited provisions of both Unions' collective-bargaining agreements and their addenda arguably encompass the work in dispute. However, John S. and Randy Senica testified that Local 1 pointedly discouraged use of its Residential Addendum. Additionally, Hollowell testified that no employers in the Union's geographic jurisdiction signed or applied it, and the August 1 grievance filed by Local 1 seeks wage rates specified in the wage addendum to the Standard Form Agreement, not those specified in the Residential Addendum. Thus, Local 1 did not seek application of the contractual language in its contract that came closest to covering the residential service work in dispute. Under the circumstances, where Local 1 is refusing to apply to the Employer's residential work the terms of an addendum which was negotiated specifically to cover residential work, we cannot say that the provisions of the standard form agreement, which Local 1 was seeking to apply, pertain as clearly and specifically to the disputed work as those of the Local 81 collective-bargaining agreement. Accordingly, we conclude that this factor favors an award of the work to employees represented by Local 81.

## 2. Employer preference and past practice

At the commencement of its business the Employer "assigned" residential service work to plumbers, i.e., John E. Senica initially performed such work and trained his son John S. to perform that work. In the three intervening decades, however, employees represented by Local 1 as well as those represented by Local 81 have been assigned residential service calls. In 1995, the Employer hired Gibson, who took over 95 percent of the residential service calls. Gibson was not represented by either union, but the Employer planned for him to attend residential service classes sponsored by Local 81. Although the Employer's "on-call" sheets for after-hour emergencies list employees who are represented by both unions, John S. testified that his father and he responded to most of those calls because the employees do not wear pagers.

John S. further testified that although the Employer still wanted to hire a full-time plumber to replace Gibson, he rejected a recent offer from Local 81 to supply an employee because he did not want to exacerbate the jurisdictional dispute. The Employer's preference is based in part on the fact that the residential service training offered by Local 81 will increase the number of qualified persons available for hire.

The Employer's past practice regarding the assignment of residential service work is a mixed one that essentially does not favor either Union. The Employer's preference, however, supports awarding the disputed work to employees represented by Local 81.

## 3. Area and industry practice

Local 1 submitted 11 letters into evidence from employers who use employees represented by Sheet Metal Workers to perform HVAC work and residential service work. Local 81 Business Manager Gross named approximately seven area employers that use Plumbers-represented employees to perform residential service work. Witnesses for both Unions testified that employees in their trade commonly perform residential service work on heating and air-conditioning systems. Accordingly, this factor does not favor employees represented by either Union.

## 4. Relative skills

Residential service work typically involves the repair and replacement of gas valves, furnace ignitors, and thermostat systems. The tools commonly needed to perform the work include wrenches, screwdrivers, tube cutters, and soldering irons. The Employer supplies the tools to its employees, although the Local 1 agreement provides that sheet metal workers supply their own tools. Hollowell testified that Local 1 periodically conducts training in residential service work. Gross testified that Local 81 and other Plumbers locals in the region received a grant to conduct a residential service school that was to begin training courses in the fall. As employees represented by both unions carry the tools required to perform residential service work and both offer some training, this factor does not favor employees represented by either Union.

## 5. Economy and efficiency of operations

The Employer intends to hire an individual to respond to the bulk of its residential service calls during normal business hours. As noted above, the Employer points out that the residential service training school offered by Local 81 will enhance the number of qualified applicants available for hire to perform the disputed work.<sup>7</sup> However, inasmuch as Local 1 offers similar training from

<sup>7</sup> The Employer and Local 81 also point out that the hourly wage specified in the Plumbers agreement is significantly lower than in the Sheet Metal Workers agreement, an economic factor that the Board customarily does not consider in determining jurisdictional disputes.

time to time, it likewise could fulfill the Employer's manpower needs. Accordingly, this factor does not favor employees represented by either Union.

6. Joint Board determinations

As noted above, Local 1 filed a grievance over the assignment of the disputed work which was under consideration by the IJDB. As also noted above, however, the Local 1 contract acknowledged that an IJDB award would not be binding if the other union involved in the dispute did not also have a contract providing for submission of disputes to the IJDB, and Local 81 was not party to such a contract. Furthermore, the IJDB had not notified any party in writing of its determination as of the time of the hearing in this case. We assign no weight to this factor in this case both because there is no actual written award, and because of the lack of binding effect of any award the IJDB might issue.<sup>8</sup>

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<sup>8</sup> *Asbestos Workers Local 41 (Close Insulation Co.)*, 251 NLRB 1458, 1460 (1980).

## CONCLUSIONS

After considering all the relevant factors, we conclude that employees represented by Local 81 are entitled to perform the work in dispute. We reach this conclusion relying on Employer preference and the collective-bargaining agreement between Local 81 and the Employer. In making this determination, we are awarding the work to employees represented by Local 81, 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:

Employees of John's Service & Sales, Inc., Oglesby, Illinois, represented by Local Union No. 81, Plumbers and Pipefitters are entitled to perform the servicing and repair of residential heating and air conditioning systems, for the Employer.