

**International Brotherhood of Electrical Workers, Local 98, AFL–CIO and AIMM, Inc. and Metropolitan Regional Council of Philadelphia & Vicinity, United Brotherhood of Carpenters & Joiners of America, AFL–CIO.** Case 4–CD–1017

August 24, 2000

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

The charge in this Section 10(k) proceeding was filed on March 1, 2000,<sup>1</sup> by AIMM, Inc. (the Employer), alleging that the Respondent, International Brotherhood of Electrical Workers, Local 98 (Local 98), 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 United Brotherhood of Carpenters & Joiners of America (the Carpenters). The hearing was held on March 31 before Hearing Officer Henry R. Protas.

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 New Jersey corporation, is engaged in the business of installing commercial furniture, fixtures and equipment; it has an office in Haddon Heights, New Jersey. During the 12-month period leading up to the hearing, the Employer provided services valued in excess of \$50,000 directly to customers located outside the State of New Jersey. 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 Local 98 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 location of the work dispute is the construction site of the Hotel Sofitel in Philadelphia. Higgins Design Group (Higgins), responsible for providing the interior furnishings of the hotel, contracted with the Employer for unloading and installation of the furnishings at the site. The furnishings, referred to generically in this record as "furniture, fixtures, and equipment" or "FF&E," include beds, headboards, armoires, nightstands, lamps, and, most significant in this case, refrigerators and television sets. The Employer assigned the FF&E work to its employees represented by the Carpenters. The Employer began performance of the contract in late January.

On February 22, Karl Disney, the foreman of the Employer's Carpenter employees, and another employee were unloading FF&E from a truck at the hotel's loading dock. Between seven and nine members of Local 98 appeared at the dock and stood in a way that obstructed further unloading and distribution of the FF&E. One of the Local 98 members identified himself as a business agent and told Disney that he knew there were refrigerators on the truck and that Local 98 claimed the work of unloading the refrigerators and distributing them to the hotel rooms. Rather than risk a more serious confrontation, Disney followed the telephoned instructions of his superior to return the refrigerators to Higgins. It is apparent that the rest of the FF&E work was carried out that day without interference from Local 98.

On February 23, Disney was approached at the hotel site by two officials of Local 98. One of them handed Disney a copy of a faxed message sent by the Keating Building Corp., the project's general contractor, to Higgins. The fax stated that, "because Local 98 was threatening a job action, Higgins was not to deliver any refrigerators or televisions to the Sofitel site unless Local 98 members unloaded and distributed them." The Local 98 official explained to Disney that "we don't want any more refrigerators or TVs to be delivered unless Electricians handle it."

From February 22 through the March 31 hearing, no more televisions or refrigerators were shipped to the hotel site for unloading, distribution, and installation by the Employer. The hotel project was due to be completed by the end of April.

*B. Work in Dispute*

The disputed work involves the unloading, moving, and installation of refrigerators and television sets at the Hotel Sofitel, 17th and Sansom Streets, Philadelphia, Pennsylvania.

*C. Contentions of the Parties*

In its posthearing brief, the Employer contends that the conduct of Local 98's representatives on February 22 and 23 establishes at least reasonable cause to believe that Local 98 has violated Section 8(b)(4)(D) of the Act. The Employer further contends that the Board should award the work to its employees represented by the Carpenters, based on the terms of its current collective-bargaining agreement with the Carpenters; on the Employer's practice and preference; on area and industry practice; on the superior relative skills of its Carpenter employees; and on the economy and efficiency of its assignment to the Carpenter employees. Finally, the Employer requests that the Board issue a broad work award in view of Local 98's conduct.

The Carpenters filed a letter with the Board in lieu of a posthearing brief, expressing agreement with the Employer's position that the work in dispute should continue to be assigned to its members who work for the Em-

<sup>1</sup> All dates hereafter are in 2000.

ployer. Local 98 did not file any posthearing documents with the Board. At the hearing, its position appeared to be that the disputed work should be assigned to its members because installation of both refrigerators and television sets requires plugging electrical cords into wall outlets.

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

Before the Board may proceed with a determination 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 not agreed on a method for the voluntary adjustment of the dispute.

The facts above demonstrate that on February 22, representatives of Local 98 appeared at the loading dock of the Hotel Sofitel site, claimed the work of unloading and distributing refrigerators at the site, and obstructed the work of unloading, distribution and installation of FF&E, including refrigerators, then being performed by the Employer's Carpenter employees. In order to avoid further confrontation, the Employer ceased unloading the refrigerators. On the following day, a Local 98 official made clear—based on the content of the Keating/Higgins fax and on his own statement to Foreman Disney—that Local 98 claimed the work of unloading, moving, and installing televisions and refrigerators then being performed by the Employer's Carpenter employees, and that it was prepared to engage in a job action of some kind in order to acquire it.

Local 98's conduct in both of these incidents appeared to be threatening and coercive and designed to force an assignment of the work in dispute to its members. Accordingly, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. Further, the parties stipulated, and we find, that Local 98 and the Carpenters both claim the work in dispute,<sup>2</sup> 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 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).

<sup>2</sup> Member Brame notes that Local 98's "disclaimer" letter was not submitted into evidence at the hearing and, in any event, does not effectively disclaim the disputed work.

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

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

The parties stipulated that the Employer is not failing to conform to a Board order or certification determining the bargaining representative for the employees performing the work in dispute. The parties further stipulated that the Employer has no collective-bargaining agreement with Local 98. Finally, the parties stipulated that there is a current collective-bargaining agreement between the Employer and the Carpenters, and that the terms of this agreement cover the work in dispute in this case. Accordingly, this factor favors an award of the disputed work to employees represented by the Carpenters.

#### 2. Employer preference and past practice

The Employer's clear preference is for its employees represented by the Carpenters to perform the work. The evidence establishes that this preference is consistent with the Employer's past practice: in the 3 years prior to the hearing, the Employer has performed the disputed work using its Carpenter employees at nine hotel construction sites in the Philadelphia area, and also at a tenth location where refrigerators, but not television sets, were involved. Accordingly, this factor favors an award of the disputed work to employees represented by the Carpenters.

#### 3. Area and industry practice

The Employer contends that the past-practice evidence above also represents the industry practice in the Philadelphia area. We find this evidence insufficient to support any affirmative finding regarding this factor. Therefore, this factor does not favor an award of the disputed work to either of the competing employee groups.

#### 4. Relative skills

The Employer contends that its Carpenter employees have far more experience than employees represented by Local 98 in unloading and distributing refrigerators and televisions, and in plugging them into wall outlets, and that this establishes their superior relative skills in performing the disputed work. On this record, we infer that the performance of the work in dispute requires no special skills. Accordingly, this factor does not favor an award of the work to either employee group.

#### 5. Economy and efficiency of operations

As currently assigned, the Carpenter employees perform the disputed work as part of their broader assignment to unload, distribute and install FF&E. The Employer has no control over the loading of the trucks which transport the FF&E to the Hotel Sofitel site. Thus, it is an invariable fact that in each truckload refrigerators and television sets are intermixed with other FF&E—apparently loaded in a manner consistent with the destination of each set of room furnishings within the hotel. Therefore, if Local 98 employees

were awarded the work in dispute, two employee crews working simultaneously would be required: a Local 98 crew to perform the disputed work, and a Carpenter crew to unload, distribute, and install the remainder of the FF&E. Therefore, this factor favors an award of the work to employees 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 terms of the collective-bargaining agreement between the Employer and the Carpenters, the Employer's preference and past practice, and the economy and efficiency of the Employer's operation resulting from its current assignment of the work to its Carpenter employees.

In making this determination, we are awarding the work to employees represented by the Carpenters, not to that Union or its members.

#### Scope of the Award

The Employer requests that the Board issue a broad, areawide work award applicable to all future FF&E installation work it may perform.<sup>3</sup> In support of a broad award, the Employer asserts that prior allegations that Local 98 violated Section 8(b)(4)(D) have been found meritorious with regard to other employers and unions and different disputed work, and thus demonstrate, in the Employer's view, a relevant pattern of illegal conduct.

There is a two-part legal standard for the issuance of a broad award concerning disputed work in Section 10(k) proceedings. First, there must be evidence that the disputed work has been a continuing source of controversy in the relevant geographic area and that similar disputes are likely to recur. Second, there must be evidence that

<sup>3</sup> As a matter of clarification, we note that the Employer actually requests a broad "order" against Local 98. However, the Board does not issue remedial orders pursuant to 10(k) proceedings. See Sec. 10(k); compare Sec. 10(b) and (c). Accordingly, we have interpreted this request to mean a broad *award* concerning the disputed work.

the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the work at issue. See, e.g., *Electrical Workers Local 3 (U.S. Information Systems)*, 324 NLRB 604, 607 (1997). In the instant case, the Employer has provided no evidence that the work in dispute has been the source of previous controversies, and no evidence that this dispute is likely to recur. Further, there is no evidence that Local 98 has sought previously to acquire work similar to the work in dispute or evidence of a proclivity to engage in unlawful conduct in order to do so. Finally, the Employer's request for an award covering *all* FF&E installation work exceeds the defined work in dispute, and therefore is overbroad.

In light of the above, we find that a broad work award is inappropriate in this case. Accordingly, our determination and award 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 AIMM, Inc., represented by Metropolitan Regional Council of Philadelphia & Vicinity, United Brotherhood of Carpenters & Joiners of America, AFL-CIO are entitled to perform the work of unloading, moving and installation of refrigerators and television sets at the Hotel Sofitel, 17th and Sansom Streets, Philadelphia, Pennsylvania.

2. International Brotherhood of Electrical Workers, Local 98, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force AIMM, Inc., to assign the disputed work to employees represented by it.

3. Within 10 days from this date, International Brotherhood of Electrical Workers, Local 98, AFL-CIO, shall notify the Regional Director for Region 4 in writing whether it will refrain from forcing AIMM, Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.