

International Brotherhood of Electrical Workers, Local Union No. 702, AFL-CIO and F. W. Electric, Inc. and Laborers International Union of North America, AFL-CIO, Local 227. Case 14-CD-1026

May 30, 2002

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND BARTLETT

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). The charge in this Section 10(k) proceeding was filed on October 4, 2001,¹ by F.W. Electric, Inc. (the Employer) alleging that the Respondent, International Brotherhood of Electrical Workers, Local Union No. 702, AFL-CIO (IBEW Local 702), violated Section 8(b)(4)(D) of the 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 Laborers International Union of North America, AFL-CIO, Local 227 (Laborers Local 227). The hearing was held on October 30, before Hearing Officer AnnG K. Wright.

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 parties stipulated that the Employer is an Illinois corporation engaged in the business of providing commercial electrical services as an electrical contractor in the construction industry. During the 12-month period preceding the hearing, the Employer purchased and received goods valued in excess of \$50,000 at its facility located in Benton, Illinois, directly from points located outside the State of Illinois. The parties further 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 IBEW Local 702 and Laborers Local 227 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 is engaged in commercial electrical work within the construction industry. E.T. Simonds, the

general contractor, subcontracted the work of installing traffic signals at Reed Station Road and Highway 13 in Carbondale, Illinois, to the Employer. E.T. Simonds is signatory to a collective-bargaining agreement with Laborers Local 227. The Employer is signatory to a collective-bargaining agreement with IBEW Local 702 and assigned the installation of the traffic signals to its employees who are represented by IBEW Local 702.

Laborers Local 227 filed a grievance against E.T. Simonds, asserting a violation of the subcontracting clause of the Simonds-Laborers' collective-bargaining agreement by E.T. Simonds' assignment of the disputed work to the Employer. The Employer received a letter dated August 10 from E.T. Simonds, informing the Employer that Laborers Local 227 claimed the installation of traffic signals at the highway construction site being performed by the Employer's employees represented by IBEW Local 702, and that Laborers Local 227 had filed a grievance against E.T. Simonds over the work. The letter further advised that the Employer was obligated to resolve the dispute over the work.

On or about August 20, the Employer's president, Ferrell Winemiller, telephoned John Taylor, Business Manager of Laborers Local 227, to discuss resolution of the dispute. Taylor told Winemiller that Laborers Local 227 claimed the work and that the dispute could be resolved if F.W. Electric became signatory to the Laborers' collective-bargaining agreement. Taylor also told Winemiller that Laborers' Local 227-represented employees had done the work in other areas, and that "he was doing his job and was trying to get it for his members in that area." He said that Local 227 wanted "to get this work drawn back into the [E.T. Simonds contract] . . . or if they were going to . . . give [it] to [F.W. Electric], that it would be done with Laborers." Subsequently, Winemiller informed Gary L. Roan, business manager of IBEW Local 702, about the claim for the work made by Laborers Local 227. By letters dated August 22 and September 20, IBEW Local 702 threatened to strike and/or picket if the disputed work was reassigned to employees represented by Laborers Local 227. On October 4, the Employer filed the instant charge under Section 8(b)(4)(D) of the Act.

B. *Work in Dispute*

The parties stipulated that the disputed work is correctly identified in the notice of hearing as all flagging, concrete pouring, operation of power-concrete saws and hand tampers, and digging with shovels, trowel, or other hand tools necessary for the installation of traffic signals at the highway construction site located at Reed Station Road and Highway 13 in Carbondale, Illinois.

¹ Unless otherwise indicated, all dates are in 2001.

C. Contentions of the Parties²

The Employer and IBEW Local 702 contend that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. The Employer and IBEW Local 702 further contend that no voluntary means exist for adjustment of the jurisdictional dispute and that the work in dispute should be assigned to the employees represented by IBEW Local 702 based on the factors of: the Employer's preference and past practice; the collective-bargaining agreement and relationship between the Employer and IBEW Local 702; area and industry practice; and economy and efficiency of operations. IBEW Local 702 also contends that the work should be assigned to the employees it represents based on relative skills and training.

Laborers Local 227 contends that the work should be assigned to the employees it represents and that the grievance and arbitration procedure in the collective-bargaining agreement between Laborers Local 227 and E.T. Simonds is the proper forum to resolve the dispute over the work assignment. Laborers Local 227 also contends that the arbitrator's decision will bind all the parties.³

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 established that reasonable cause exists to believe that Section 8(b)(4)(D) of the Act has been violated. This requires a finding that there are competing claims to disputed work between rival groups of employees and that there is reasonable cause to believe that a party has used proscribed means to enforce its claim. The Board also must find that no method for voluntary adjustment of the dispute has been agreed upon.

In *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995), the Board held that in the construction industry, a union's effort to enforce a lawful union-signatory subcontracting clause against a general contractor through a grievance, arbitration, or court action does not constitute a claim to the subcontractor for the work. The Board, however, distinguished those cases in which a union does more than peacefully pursue a contractual grievance against a general contractor. The Board found that a true jurisdictional dispute arises when a union, seeking enforcement of a contractual claim, not only pursues its contractual remedies against the employer with which it has an agreement, but also makes a claim for the work directly to the subcontractor that has as-

signed the work. *Id.* at 809. In such circumstances, the Board stated that it would find truly competing claims and that the threat of coercion to enforce a claim by the representative of either group of employees would be sufficient to trigger an 8(b)(4)(D) allegation and consequent 10(k) proceeding. *Id.* See also *Electrical Workers IBEW Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1383 (1998) (citing *Capitol Drilling*, 318 NLRB at 811-812).⁴

The instant case is a true jurisdictional dispute, distinguishable from the facts presented in *Capitol Drilling*. Laborers Local 227 did more than pursue its grievance against General Contractor E.T. Simonds. Laborers Local 227 also made a claim for the work directly to F.W. Electric, the party that had assigned the work. As stated above, the Employer received a letter from E.T. Simonds stating that Laborers Local 227 claimed the work. Subsequently, the Employer telephoned John Taylor, the business manager of Laborers Local 227. Taylor informed the Employer that the Laborers performed the disputed work in other jurisdictions and wanted the disputed work in Southern Illinois for the employees represented by the Laborers. Taylor further indicated that one sure way that the dispute would be resolved was for F.W. Electric to become signatory to the Laborer's agreement. To be sure, this last statement alone may be read simply as explaining how the subcontracting grievance itself could be resolved, since it would bring General Contractor E.T. Simonds into compliance with the subcontracting clause in its agreement with the Laborers. However, in the context of Taylor's other statements to the Employer, we find the evidence is sufficient to establish reasonable cause to believe that Laborers Local 227 made a claim for the disputed work directly to F.W. Electric.

After the Employer informed it of the Laborers' claim, IBEW Local 702 responded by sending two letters to the Employer which claimed the work and threatened actions against the Employer, including "picketing or striking" if the Employer reassigned the disputed work. Accordingly, we find that there is reasonable cause to believe that IBEW Local 702 has used proscribed means to enforce their claim.

Finally, we find that there is no voluntary method of resolving this jurisdictional dispute under Section 10(k) which would be binding on all parties. As stated above,

² Laborers Local 227 did not file a brief.

³ Laborers Local 227 left the hearing after stating its position and presented no evidence.

⁴ Chairman Hurtgen has previously stated his reservations regarding the Board's holding in *Capitol Drilling*. See, e.g., his concurring opinion in *Laborers Local 113 (Super Excavators)*, 327 NLRB 113 (1998). However, inasmuch as the instant case is distinguishable from *Capitol Drilling*, it is unnecessary for him to pass on the Board's holding in *Capitol Drilling*.

Laborers Local 227 is a signatory to a collective-bargaining agreement with E.T. Simonds, the general contractor. Laborers Local 227 pursued its claim under the grievance and arbitration procedure with E.T. Simonds. However, F.W. Electric is deemed to be the employer for purposes of determining the jurisdictional dispute, and F.W. Electric is not a signatory to the Laborers agreement. *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 940 (1989) (the company ultimately controlling and making job assignments is deemed the employer for purposes of a 10(k) proceeding). Nor is IBEW Local 702, the union representing the Employer's employees, bound to the E.T. Simonds-Laborers Local 227 collective-bargaining agreement. Finally, the grievance-arbitration provision of the Laborers Local 227-E.T. Simonds agreement explicitly excludes from its applicability "jurisdictional disputes." Thus, no agreed-upon method for voluntary adjustment of the dispute exists.

We therefore 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 deciding this dispute.

1. Certification and collective-bargaining agreements

Although Laborers Local 227 argues that its collective-bargaining agreement with E.T. Simonds, the general contractor, controls the award of the disputed work, that agreement is not applicable because, as discussed above, the employer for purposes of assigning the work, F.W. Electric, is not a signatory to the Laborers' agreement. F.W. Electric is, however, signatory to a collective-bargaining agreement with IBEW Local 702, which specifically covers the work in dispute. Therefore, we find this factor favors awarding the work in dispute to employees represented by IBEW Local 702. *Electrical Workers IBEW Local 363 (U.S. Information Systems)*, supra. 326 at 1384.

2. Employer preference and current assignment

The Employer assigned the disputed work to employees represented by IBEW Local 702 and prefers that the work in dispute continue to be performed by the IBEW Local 702 represented employees. Accordingly, this factor favors awarding the work in dispute to the employees represented by IBEW Local 702.

3. Area and industry practice

At the hearing, Laborers Local 227 presented no evidence that the disputed work is traditionally performed by Laborers-represented employees in the area and industry. Although IBEW Local 702 also claimed that the disputed work has been performed by the employees it represents at similar projects within the area and throughout the industry, the evidence is limited to Winemiller's testimony as to how F.W. Electric has assigned the work in the past and does not address area or industrywide practice. Accordingly, we find that this factor does not favor an award of the disputed work to employees represented by either union.

4. Employer past practice

At the hearing, Winemiller testified that F.W. Electric's past practice is to assign the type of work in dispute to the members of IBEW Local 702. According to Winemiller, the Employer has employed individuals represented by IBEW Local 702 for the past 27 years and has not employed any employees represented by Laborers Local 227 to perform the disputed work. Accordingly, employer past practice favors an award of the disputed work to employees represented by IBEW Local 702.

5. Relative skills and training

The evidence presented at the hearing demonstrates that the Employer's employees, represented by IBEW Local 702, possess the required skills and training to perform the disputed work and have performed this type of project in the past. Winemiller testified that the Employer is satisfied with the quality of the work performed by its own IBEW-represented employees. No evidence was presented concerning the skills of the employees represented by the Laborers. Accordingly, we find that this factor favors awarding the disputed work to the employees represented by IBEW 702.

6. Economy and efficiency of operations

Winemiller testified that other work at the project, such as the installation of electrical conduit, is performed by employees represented by IBEW Local 702 and is not claimed by Laborers Local 227. According to Winemiller, even if the Laborers perform the disputed work, the Employer would still be obligated to assign the installa-

tion of the conduit to the IBEW -represented employees and the work performed by the employees represented by the Laborers will not account for 8hour workdays for the duration of the project. Based on this undisputed testimony, we find that the factor of economy and efficiency of operations favors an award of the disputed work to the Employer's employees represented by the IBEW Local 702.

Conclusions

After considering all the relevant factors, we conclude that the employees represented by IBEW Local 702 are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and current assignment, employer past practice, relative skills and training, and the economy and efficiency of operations. In making this determination, we are awarding the work to employ-

ees represented by International Brotherhood of Electrical Workers, Local Union No. 702, AFL-CIO, 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 F.W. Electric, Inc., represented by International Brotherhood of Electrical Workers, Local Union No. 702, AFL-CIO, are entitled to perform all the flagging, concrete pouring, operation of power-concrete saws and hand tampers, and digging with shovels, trowel, or other hand tools necessary for the installation of traffic signals at the highway construction site located at Reed Station Road and Highway 13 in Carbondale, Illinois.