

International Union of Bricklayers and Allied Craftworkers, Bricklayers Local No. 20, AFL-CIO and Altounian Builders, Inc. and Chicago and Northeast District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, Carpenters Local No. 250. Case 13-CD-637-1

April 30, 2003

DECISION AND ORDER QUASHING
NOTICE OF HEARING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. The charge was filed on February 28, 2002, by Altounian Builders (the Employer). The charge alleges that the Respondent, International Union of Bricklayers and Allied Craftworkers, Bricklayers Local 20, AFL-CIO (Bricklayers), violated Section 8(b)(4)(D) by engaging in proscribed activity with the object of forcing the Employer to assign certain work to the employees it represents rather than to those represented by Chicago and Northeast District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, Carpenters Local 250 (Carpenters). The hearing was held on March 21, 2002, before Hearing Officer David Huffman-Gottschling.

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

FINDINGS OF FACT

I. JURISDICTION

The Employer is an Illinois corporation engaged in general contracting construction work. It annually purchases and receives goods and materials valued in excess of \$50,000 directly from suppliers located 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 the Bricklayers 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

Both the Bricklayers and the Carpenters have collective-bargaining agreements with the Employer. In February 2002, the Employer began the installation of pre-

cast, aerated autoclave concrete (PAAC) on its Allendale School project site in Lake Villa, Illinois. As it had on two previous projects, the Employer assigned the PAAC work to employees represented by the Carpenters. Shortly thereafter, the Bricklayers' business manager, Joe Gagliardo, contacted the Employer's vice president, Todd Altounian, and asked him to reconsider using employees represented by the Carpenters for the job because such work fell under the Bricklayers' jurisdiction. Altounian conceded that PAAC work could fall under the Bricklayers' jurisdiction, but stated that he felt that employees represented by the Carpenters were better suited to perform the work. Gagliardo again asked Altounian to reconsider, but the parties did not discuss what steps the Bricklayers would take if the work was not reassigned. Later in the conversation, Altounian asked Gagliardo if the Bricklayers could provide sufficient manpower to perform the work if it was reassigned, and Gagliardo responded that he would need some time prior to starting the job to procure sufficient workers as the Bricklayers were currently at full employment. Shortly after the conversation ended, the Bricklayers faxed information to Altounian on the Bricklayers' proficiency in PAAC projects.

The following day, Gagliardo called Altounian and asked if he had reviewed the information faxed the previous day. Altounian replied that he had, but felt that the employees represented by the Carpenters were doing a fine job and that the Employer intended to allow them to continue with the work. Gagliardo then stated that he would submit the dispute to the joint arbitration board, which is the authority specified in the parties' contract to resolve such disputes, and seek lost wage and benefit damages. Altounian testified that he then asked Gagliardo if "you demand that I stop work and you close my job down" and Gagliardo replied, "yes." Altounian subsequently testified that, in his mind, he equated pursuit of a grievance with shutting down the job. He explained that this was because of his earlier conversation with Gagliardo about reassigning the work, and the possible delays of the project while the Bricklayers found a sufficient number of qualified employees. Altounian further testified, on cross-examination, that he later became aware that the Bricklayers sought primarily an award of damages and conceded that the words "shut my job down" were his own and not those of Gagliardo.¹

After the meetings, the Bricklayers sent the Employer a letter stating that it intended to file a grievance over the disputed work but would not picket the Employer's job

¹ On cross-examination, Altounian used the words "shut down," rather than the words "close down."

to obtain the work. The Bricklayers did not picket or engage in other proscribed conduct, but did subsequently file a grievance, which resulted in an award of monetary damages. Employees represented by the Carpenters continued to perform the PAAC work, which was scheduled to be completed in April of 2002.

B. *The Work in Dispute*

The parties stipulated that the disputed work involves the installation of PAAC at the Employer's Allendale School project.

C. *Contentions of the Parties*

The Bricklayers contends that the Board should quash the notice of hearing because there is no reasonable cause to believe that the conversation between its representative and Altounian constituted a violation of Section 8(b)(4)(D). The Bricklayers further argues that Altounian mistakenly equated its seeking to enforce the contract through the grievance procedure with a threat to shut the job down. The Bricklayers asserts that the only action it took to acquire the disputed work was to file and pursue a grievance. It argues that, if the Board reaches the merits of the case, the Board should assign the disputed work to the employees it represents based on the terms of their collective-bargaining agreement with the Employer, industry practice, and the relative skills of the employees it represents.

The Carpenters and the Employer contend that the Bricklayers' threat to file a grievance and shut down the Employer's job constitute sufficient evidence of a violation of Section 8(b)(4)(D) to warrant a decision on the merits. On the merits, the Carpenters and the Employer argue that the work should be awarded to the employees represented by the Carpenters based on the Employer's preference and past practice, industry practice, and economy and efficiency.

D. *Applicability of the Statute*

In resolving disputes under Section 10(k) of the Act, the Board must, as an initial matter, determine whether there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. This requires a finding that a party has used proscribed means, such as coercion, threats, or picketing, to force an employer to assign work to one group of employees rather than another. On the record before us, we are unable to make such a finding.

The only action taken by the Bricklayers in furtherance of its claim to the work in dispute was to file a grievance under its collective-bargaining agreement with the Employer. Contrary to the Carpenters' contention, however, the mere filing of an arguably meritorious grievance is not unlawful coercion within the meaning of Section

8(b)(4)(D). See *Teamsters Local 222 (Geneva Rock Products)*, 322 NLRB 810, 810-811 (1996). See also *Iron Workers Local 401 (William Watts, Inc.)*, 317 NLRB 671, 672 fn. 3 (1995) (neither union's letters to employer threatening to file grievance nor filing of grievance itself constituted unlawful threat under Sec. 8(b)(4)(D)). Thus, the Bricklayers' statements of its intention to file a grievance and its filing and pursuit of that grievance do not establish reasonable cause to believe that Section 8(b)(4)(D) has been violated.

The only other record evidence cited by the Carpenters in support of its "reasonable cause" argument is Todd Altounian's testimony that Business Manager Gagliardo answered in the affirmative when Altounian asked if the Bricklayers intended that its grievance close down the Allendale School project. We find this evidence insufficient to satisfy the "reasonable cause" standard.

Altounian's testimony must be viewed in its entirety. Altounian initially testified that he asked Gagliardo whether "you demand that I stop work and you close my job down" and Gagliardo answered in the affirmative. Altounian, however, later testified that he equated pursuit of a grievance with shutting down the job because of his earlier conversation with Gagliardo about the possibility of reassigning the work and the delays to the project while the Bricklayers found a sufficient number of qualified employees. Significantly, he also conceded that the words "shut down my job" were his and that he was not certain whether Gagliardo made a threat or he assumed it.

Altounian's subjective interpretation of this conversation cannot determine whether Gagliardo threatened proscribed activity. Rather, the Board must look to the "specific language used and surrounding conduct and events." *Teamsters Local 82 (Champion Exposition)*, 292 NLRB 794, 795 (1989) (citing *Carpenters District Council (Apollo Dry Wall)*, 211 NLRB 291 fn. 1 (1974)). Here, it is undisputed that Gagliardo himself never threatened that the Bricklayers would shut down the Employer's job. Indeed, Altounian conceded that these words were his own and acknowledged that his inference of a threat might well have been a leap. Altounian's equivocal testimony about Gagliardo's response does not provide a sufficient basis to attribute an actual threat to the Bricklayers, in the absence of any other evidence even hinting that the Bricklayers intended to use proscribed means to enforce a claim to the work. The only subsequent action taken by the Bricklayers to pursue its claim was the filing of a grievance.² Consequently, we

² The grievance resulted in an arbitration award in favor of the Bricklayers. The Carpenters seek to reopen the record to introduce evidence that, following the close of the Sec. 10(k) hearing, the Brick-

find that Altounian's testimony, viewed in context, does not establish reasonable cause to believe that a violation of the Act occurred. See, e.g., *Teamsters Local 82*, 292 NLRB at 795 (ambiguous testimony by employer's witness insufficient to establish reasonable cause); *Sheet Metal Workers Local 38 (Corbesco)*, 295 NLRB 1069, 1070–71 (1989) (statements by union business agent too vague and insubstantial to establish reasonable cause).

Our dissenting colleague argues that Altounian "sought a confirmation of the fact that a Bricklayers victory on the grievance would result in a shut down of the job" and that "Gagliardo gave that confirmation." The "shut down" as the dissent explains, is one that might result if the Bricklayers prevailed and needed time in which to find and refer the necessary Bricklayers employees to take over the work. He then concludes that "the shut down of a job caused by union action, is proscribed by Section 8(b)(4)(D)." Surely, the kind of "union action" at issue here—needing time to find employees—is not the kind of threat, restraint, or coercion proscribed by the Act. That prevailing on the grievance might, as a practical matter, entail a temporary cessation of work, does not mean that a "shut down" was the object of the union's grievance. Our colleague cites no supporting authority, and we know of nothing on point.

Under these circumstances, we find that there is no reasonable cause to believe Section 8(b)(4)(D) has been violated. Therefore, we find that we are without authority to determine the merits of this dispute. Accordingly, we shall quash the notice of hearing.

ORDER

The notice of hearing is quashed.

CHAIRMAN BATTISTA, dissenting.

Contrary to my colleagues, I would not quash the notice of hearing, and I would reach the merits of the 10(k) dispute.

layers demanded that the Employer comply with its arbitration award and, in response, the Carpenters notified the Employer that, if the work were reassigned, it would take necessary action, including picketing, to preserve the work. The Carpenters contends that this threat establishes reasonable cause. We reject this argument. Sec. 10(k) provides that "[w]henver it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of Sec. 8(b), the Board is empowered and directed to hear and determine the dispute." No charge has been filed against the Carpenters, a party who is not charged with violating the Act. Cf. *Laborers (Vernon Construction)*, 298 NLRB 797, 798 fn. 4 (1990) (unfair labor practice charges filed against Carpenters—which merely filed grievance—and Laborers—which threatened to strike if work was reassigned; Board held that had notice of hearing issued only against Carpenters, Board would have quashed the notice). Accordingly, we deny the Carpenters' motion. Because we have denied the Carpenters' motion, we find it unnecessary to rule on the motion filed by the Bricklayers to strike the Carpenters' motion to reopen the record and supporting argument.

In order to reach a determination on the merits of a jurisdictional dispute issue, the Board need not determine that a violation of Section 8(b)(4)(D) of the Act in fact occurred, but only that there is reasonable cause to believe that the charged party has violated the Act. In the instant case, I believe that the evidence shows that there is such reasonable cause.

The Employer's vice president, Todd Altounian, testified that he asked the Bricklayers if its grievance was intended to shut down the Allendale School jobsite, and the Bricklayers' representative replied with an unequivocal "yes." This conversation must be understood in the context of an earlier conversation. In that earlier conversation, Gagliardo told Altounian that, if the Bricklayers prevailed in their grievance, the Bricklayers would need an indefinite period of time in which to find and refer the necessary Bricklayers employees. Accordingly, there would be an indefinite period in which no work was performed, and the Employer's project would be shut down. Thus, Altounian's subsequent question sought a confirmation of the fact that a Bricklayers victory on the grievance would result in a shut down of the job. Gagliardo gave that confirmation.

Clearly, the shutdown of a job, caused by union action, is proscribed by Section 8(b)(4)(D). At the very least, the argument in favor of an 8(b)(4)(D) violation in the instant case is not unreasonable. Thus I would not quash the 10(k) notice.

Unlike my colleagues, I would not characterize the delay in operations, affirmed by the Bricklayers, as a "temporary cessation of work." An indefinite period of cessation is not a temporary period of cessation. As stated above, the Bricklayers Union was currently at full employment and did not, or could not, quantify the amount of time it would need to acquire the necessary labor to complete the project. In essence, then, the Employer's operations would cease for an amount of time to be determined exclusively by the Bricklayers.

My colleagues say that Altounian acknowledged that he only inferred a threat from his conversation with Gagliardo. However, this case does not turn on whether there was a threat, inferred or otherwise. Rather, it turns on the fact that a shut down of the job was said to be the consequence of the Union's action. And, that action was not the grievance filing itself, but rather the fact that a Bricklayers victor on the grievance, coupled with a Bricklayers inability to produce employees, would result in a shut down of the job. Surely, the shutdown of a job, whether threatened or not, is a serious economic blow to an employer. And yet, that was the very prospect faced by Altounian. In these circumstances, Altounian could

reasonably perceive a shutdown as a real prospect of economic loss.

I agree with my colleagues that the filing of a grievance, or the threat to do so, is not proscribed by Section 8(b)(4)(D). However, where, as here, success on the grievance will result in a shutdown of the job, and the union confirms that this is so, there is at least an arguable basis for finding an 8(b)(4)(D) threat and at this juncture of the proceeding that is our only mandate.

Finally, I am not basing my view on Altounian's subjective understanding of Gagliardo's affirmative response to Altounian's question. Rather, I am evaluating

the reasonable understanding of the two conversations between the two men. Accordingly, I would find that there is reasonable cause to believe that the Act has been violated.

On the merits of the work dispute, after considering all the relevant factors, I would award the work to employees represented by the Carpenters based on the factors of employer preference and assignment, employer past practice and economy and efficiency of operations. *Carpenters Local 210 (Turner Construction Co.)*, 327 NLRB 1 (1998).