United Association of Journeymen and Apprentices of the Plumbing, Pipefitting, Air Conditioning, and Refrigeration Industry of the United States and Canada, Local Union 123 *and* Florida Maintenance and Construction, Inc. Case 12–CD–322

October 11, 2002

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

This is a work jurisdiction dispute proceeding under Section 10(k) of the Act. The charge was filed on December 20, 2001, by Florida Maintenance and Construction (FMC or the Employer), and alleges that the Respondent, United Association of Journeyman and Apprentices of the Plumbing, Pipefitting, Air Conditioning, and Refrigeration Industry of the United States and Canada, Local Union 123 (Pipefitters), 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 Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local No. 397, AFL–CIO (Ironworkers), and Millwrights and Machinery Erectors Local Union 1000, United Brotherhood of Carpenters and Joiners of America (Millwrights). The hearing was held on February 19, 2002, before Hearing Officer Chris Zerby.

The National Labor Relations 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 Florida corporation, is engaged in the construction business. The parties stipulated that within the 12 months preceding the hearing, which is a representative period, the Employer purchased and received goods valued in excess of $50,000 from points located outside the State of Florida. We accordingly find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find, based upon the stipulation of the parties, that the Pipefitters, the Ironworkers, and the Millwrights 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 involved in the maintenance and repair of equipment used in phosphate and chemical plants. The Employer uses a core crew of 24 employees, most of whom are members of the Ironworkers and Millwrights unions. It employs additional employees, referred by these unions, when needed.

In about May 2001, the Employer executed a contract to perform miscellaneous steel repair and other duties on the Payne Creek Power Plant project (Payne Creek). Some of the Employer's work on the Payne Creek project included removing and replacing sections of piping, repairing leaks, relocating pipe supports, and working on pipe hangers. The Employer assigned this work to its crews consisting of employees represented by the Millwrights, Ironworkers, or both. The Employer has collective-bargaining agreements with the Ironworkers and the Millwrights.

The Employer estimates that around 20 percent of the work it performed at the Payne Creek site work, as well as at its other sites, was work that traditionally would be claimed by the Pipefitters. The Employer does not have a collective-bargaining agreement with the Pipefitters, nor is there record evidence that it has ever employed Pipefitters-represented employees.

In the summer of 2001, Stan McIntosh, assistant business manager for the Pipefitters, learned that the Employer was performing piping work at the Payne Creek site. McIntosh contacted Edward Dees, president of the Building Trades Council and business agent for the Ironworkers, to arrange a meeting with Employer's president, Michael G. Feduccia. McIntosh told Dees that he wanted the Employer to sign a collective-bargaining agreement with the Pipefitters.

McIntosh, Dees, and Feduccia met at a restaurant. McIntosh told Feduccia that employees represented by the Pipefitters should be performing all of the Employer's piping work. McIntosh gave Feduccia a Pipefitters contract to examine and asked Feduccia to sign it. McIntosh and Feduccia discussed whether the Employer intended to increase piping work and, if so, McIntosh stated that the Employer would need to hire a superintendent. McIntosh volunteered to send employees to the Employer to apply for the superintendent position.

Later, McIntosh called Feduccia to find out why none of six referred superintendent applicants had been hired. According to McIntosh, Feduccia stated that the Employer would not consider signing a Pipefitter contract until January 2002. McIntosh responded that he had learned that the Employer was performing more piping work and that he was going to picket wherever the Employer had ongoing jobs.

Around September 17, 2001, the Pipefitters began picketing the Employer at Payne Creek. The picketing lasted for 2 to 3 weeks. McIntosh testified that the purpose of the picketing was to get the Employer to sign a

contract with the Pipefitters. In early November 2001, the Pipefitters purportedly disclaimed the work.[1]

In mid-December 2001, McIntosh went to Payne Creek with Pipefitters member, Cliff Mays, and Assistant Business Manager Mike Comber. According to McIntosh, the parties went to the site to investigate a grievance that had been filed against another subcontractor. Comber testified that he only went along for the ride.

While at Payne Creek, Comber testified that he observed an employee wearing a welding mask while working on a pipe hanger. Comber approached the employee and asked him if he was an Ironworker. The employee responded that he was. Comber informed the employee that he was performing work that belonged to the Pipefitters. Comber further stated that Pipefitters do not take work from Ironworkers. Comber then went to the car to obtain a camera.

Comber testified that he went to get a camera so that he could take a picture of the Ironworker who was performing pipefitting work. Michael D. Feduccia, an Ironworker member (and the Employer president's son) approached Comber. According to Comber, Feduccia told him that cameras were not allowed on the job. Comber held out his hand and said he had a camera. Comber then told Feduccia that if he wanted a war they would give it to him. According to Comber, he meant that the Pipefitters would file a grievance under article 20 of the AFL–CIO constitution.[2]

According to Feduccia, (who testified that he was wearing a hardhat labeled with the Employer's name, and standing near a generator stenciled FMC), he informed Comber that cameras were not allowed on the job. Comber responded by saying, "Come on you punk, take the camera. I'm tired of this shit. You guys are doing our work and Ed Dees is a f—ing liar." Comber then told Feduccia that "f [the Ironworkers] wanted a f—ing war," he would bring them a war. After Feduccia told him to bring it on, Comber stepped closer and stated he would break Feduccia's jaw.

B. Work in Dispute

As described in the notice of hearing, the work in dispute concerns the assignment of the following work tasks:

> The installation of a testing system for piping process involved in the eventual operation of the new power generating facility under construction at the Payne Creek Power Plant, including installing metal, plastic and copper pipes up to 300' in length, through which water, oils and compressed air will travel; and
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> The installation as part of an ongoing system at Cargill Fertilizer, of replacement pipes and processed piping running from the pumps to various vessels or tanks, including welding metal pipe up to 24" in diameter and up to 300' in length.

C. Contentions of the Parties

The Pipefitters Union argues that the notice of a 10(k) hearing should be quashed because there are no competing claims for the disputed work. Rather, the Pipefitters asserts that it filed two disclaimers to the disputed work, the first after the picketing in September and, again, during the instant 10(k) hearing.[3] The Pipefitters also argues that neither the Millwrights nor Ironworkers has claimed the work, but merely complied with the Employer's requests to provide it with employees under the terms of its respective collective-bargaining agreement.

The Pipefitters Union further contends that there is no reasonable cause to believe that it violated Section 8(b)(4)(D). It contends that Comber's alleged threats were not directed at the Employer. Specifically, it contends that Comber's statement "if you want a war, we'll give you a war" is too ambiguous to constitute a threat. Further, it argues that Combers explained that the "war" he had in mind was an article XX proceeding against the Ironworkers.

Finally, the Pipefitters argues that, in the event that the Board determines that a work jurisdiction dispute is properly before it, the Board should limit the scope of its order to the Payne Creek project. It argues that the alleged threat was isolated, there is no evidence that such an unusual incident would likely recur, and that its alleged actions were not in defiance of a Board order.

The Employer contends that there is reasonable cause to believe that the Pipefitters violated Section 8(b)(4)(D) of the Act. It argues that the Pipefitters have engaged in both picketing and threats with the object of forcing it to alter its job assignment patterns and award the disputed work to Pipefitters-represented employees.

Specifically, the Employer contends that Pipefitters Business Agent McIntosh requested that the Employer sign a collective-bargaining agreement with the Pipefitters. When the Employer declined to sign the contract, McIntosh threatened to picket, and the Pipefitters

[1] An earlier 8(b)(4)(D) charge was dismissed at this point.

[2] Comber states he did not know Feduccia was employed by the Employer and that he did not lose his temper or make physical threats.

[3] The record contains no evidence as to the latter purported disclaimer. Although the record contains a purported disclaimer that the Pipefitters would engage in prohibited conduct regarding the work in dispute, the Pipefitters did not thereby disclaim interest in that work.

thereafter picketed the Employer at two jobsites and its central office in the fall 2001.

Following the filing of the earlier unfair labor practices charges, the Pipefitters purportedly disclaimed interest in any work of the Employer. The Employer argues, however, that there is reasonable cause to believe that the disclaimer was hollow, as demonstrated by the subsequent visit by McIntosh and Comber to the Payne Creek site to check on the status of the Employer's work assignments and to reaffirm the Pipefitters' claim to the work in dispute.

Finally, the Employer contends that when Comber was told by Michael D. Feduccia, an Ironworkers member (and employer president's son), that cameras were not allowed on the site, Comber became enraged and told Feduccia that he would bring on a f—ing war. Thus, the Employer argues that the Pipefitters' picketing and subsequent threat to require the Employer to enter into a collective-bargaining agreement constituted reasonable cause to believe that Section 8(b)(4)(D) had been violated.

On the merits of the jurisdictional dispute, the Employer contends that the disputed work should be awarded to its current employees, represented by the Ironworkers and Millwrights**,** on the basis of employer preference, historical practice, and economy and efficiency of operation. On this last point, the Employer argues that its efficiency would be undercut if it was required to dismantle its core composite crew—which performs work across craft lines—and replace it with intermittent work by Pipefitters-represented employees. The Employer further argues that because the parties' dispute is likely to recur, it is appropriate for the Board to issue a broad award in this proceeding.

Although the Ironworkers and Millwrights did not file posthearing briefs, they took the position at the 10(k) hearing that each union has a collective-bargaining agreement with the Employer and that each will perform the work that is assigned it by the Employer.

D. Applicability of the Statute

It is well settled that the issue in a 10(k) proceeding is whether there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. It requires a finding that there are competing claims to the disputed work between rival groups of employees, reasonable cause to believe that a party has used proscribed means to enforce its claim to the work in dispute, and that no method for the voluntary adjustment of the dispute has been agreed on.[4] We find that these jurisdictional prerequisites have been met.

Regarding competing claims, employees represented by the Ironworkers and Millwrights are performing the current work. Performance of the work constitutes their claim for it. See generally *Operating Engineers Local 926 (Georgia World Congress Center),* 254 NLRB 994, 996 (1981). Further, the Ironworkers and Millwrights have indicated that they will continue to refer employees they represent to the Employer to perform work assigned by the Employer.

As to the Pipefitters, it claimed interest in the disputed work in September 2001 by informing the Employer that employees it represents should perform all of its piping work. While the Pipefitters purportedly disclaimed interest in the work in November, in December Assistant Business Manager Comber renewed the Pipefitters' claim to the work by telling the Employer's Ironworker employee that he was doing Pipefitters work and that the Ironworkers "were taking their f—ing work and that he would bring a f—ing war." Accordingly, we find that there are competing claims for work in dispute.

Regarding whether there is reasonable cause to believe that there was 8(b)(4)(D) conduct, there is evidence—through the testimony of Feduccia—that Pipefitters business representative Comber threatened to engage in proscribed activity within the meaning of Section 8(b)(4)(D) in an effort to require the Employer to reassign the disputed work to Pipefitters-represented employees.[5] Although there is conflicting evidence, disputing Feduccia's account, the Board is not required in a 10(k) proceeding to resolve conflicting testimony or find that Section 8(b)(4)(D) has, in fact, been violated. It need only find reasonable cause. See, e.g., *Electrical Workers (Comm-Tract Corp.),* 289 NLRB 281, 282 (1988); *Laborers Local 334 (Dynamic Construction Co.),* 236 NLRB 1131, 1132 (1978). Here we find that this standard has been met.

Finally, as stipulated to by the parties, no method for the voluntary adjustment of the dispute has been agreed on.

We thus find reasonable cause to believe Section 8(b)(4)(D) of the Act has been violated, and that the dispute is properly before the Board to determination. We accordingly deny the Pipefitters' request to quash the notice of hearing.

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[4] E.g., *Carpenters Local 275 (Lymo Construction Co.),* 334 NLRB 422, 423 (2001).

[5] See, e.g., *Information Systems,* 326 NLRB 1382, 1383 (1998), where the Board found that the statement, "I'm going to throw them off the fourth floor balcony above the atrium" constituted a threat of prohibited activity.

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, 1410–1411 (1962).

The following factors are relevant in deciding this dispute.

1. Certification and collective-bargaining agreements

As stipulated by the parties, there is no order or certification of the Board determining the bargaining representative of the employees performing the disputed work. Accordingly, this factor does not militate either way.

As set forth above, the Employer is party to separate collective-bargaining agreements with the Ironworkers and Millwrights. The agreements permit the use of composite crews. The Employer testified that these agreements cover the work in dispute, and there is no record evidence disputing this claim. The Pipefitters Union, conversely, does not have a contract with the Employer. Accordingly, we find that this factor favors awarding the work in dispute to the employees represented by the Ironworkers and Millwrights.

2. Employer assignment and preference

The Employer currently assigns the disputed work to its core employees represented by the Ironworkers and Millwrights, and prefers that the work in dispute continue to be performed by them. This factor accordingly favors awarding the work in dispute to employees represented by the Ironworkers and Millwrights.

3. Past practice

The Employer's historic practice is to use a composite crew of Millwright and Ironworker represented employees to perform similar work on other projects. This factor factors awarding the disputed work to employees represented by the Millwrights and Ironworkers.

4. Area and industry practice

The record evidence is insufficient as to the area and industry practice of assigning work similar to that here in dispute. Accordingly, we find that these factors do not favor an award to any of the groups of employees.

5. Relative skill

The record shows that employees represented by the Ironworkers, Millwrights, and Pipefitters have the requisite skills and training to perform the work in dispute. This factor, therefore, does not favor an award to any group of employees.

6. Economy and efficiency of operations

The Employer uses a core crew of 24 employees consisting primarily of Millwright and Ironworker-represented employees. It contends that it took 2-1/2 to 3 ears to develop this core group of employees. The Employer argues that it would be inefficient and uneconomical if it were required to assign the work in dispute to Pipefitters-represented employees because: it might have to put the current employees on stand-by status or pay them for standing around; and it would risk losing some of its core group of employees. The Employer further contends that, as a small employer, it cannot afford jurisdictional segregation of each work assignment along traditional craft lines. It asserts that it would be inefficient to dismantle the current composite crew and replace it with intermittent work by Pipefitters-represented employees.

We find that this factor favors awarding the disputed work to employees represented by the Ironworkers and Millwrights.

Conclusions

After considering all of the relevant factors, we conclude that employees represented by the Ironworkers and Millwrights are entitled to perform the work in dispute. We reach this conclusion based on the factors of collective bargaining agreements, employer preference and current assignment, past practice, and economy and efficiency of operations. In making this determination, we are awarding the disputed work to employees represented by International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local No. 397, AFL–CIO (Ironworkers) and Millwrights and Machinery Erectors Local Union 1000, United Brotherhood of Carpenters and Joiners of America (Millwrights), not to those unions or its members.

Scope of Award

The Employer has requested that the Board issue a broad award assigning the disputed work to employees represented by the Ironworkers and Millwrights. Normally, 10(k) awards are limited to the jobsite where the unlawful 8(b)(4)(D) conduct occurred or was threatened. *Electrical Workers Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1385 (1998). There are two prerequisites for a broader award: (1) evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur; and (2) evidence demonstrating the offending union's proclivity to engage in further unlawful conduct in order to obtain work similar to that in dis-

pute. See *Laborers District Council (Paschen Contractors)*, 270 NLRB 327, 330 (1984), and *Electrical Workers Local 104 (Standard Sign & Signal Co.)*, 248 NLRB 1144, 1147–1148 (1980). Here, the dispute at the Payne Creek site is the first substantiated controversy arising over the disputed work. And while a previous 8(b)(4)(D) charge was filed against the Pipefitters as to this same site, that charge was dismissed. Finally, the record does not establish that the Pipefitters Union is likely to engage in unlawful conduct at future job sites in pursuit of work similar to that here in dispute. Accordingly, the award is limited to the controversy at the jobsite that gave rise to this proceeding.

DETERMINATION OF DISPUTE

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

1. Employees of Florida Maintenance & Construction, Inc. who are represented by International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local No. 397, AFL–CIO, and Millwrights and Machinery Erectors Local Union 1000, United Brotherhood of Carpenters and Joiners of America are entitled to perform the following work

> The installation of a testing system for piping process involved in the eventual operation of the new power generating facility under construction at the Payne Creek Power Plant, including installing metal, plastic and copper pipes up to 300' in length, through which water, oils and compressed air will travel; and
>
> The installation as part of an ongoing system at Cargill Fertilizer, of replacement pipes and processed piping running from the pumps to various vessels or tanks, including welding metal pipe up to 24" in diameter and up to 300' in length.

2. The United Association of Journeyman and Apprentices of the Plumbing, Pipefitting, Air Conditioning, and Refrigeration Industry of the United States and Canada, Local Union 123, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Florida Maintenance and Construction, Inc., to assign the disputed work to employees represented by it.

3. Within 14 days from this date, the United Association of Journeyman and Apprentices of the Plumbing, Pipefitting, Air Conditioning, and Refrigeration Industry of the United States and Canada, Local Union 123, shall notify the Regional Director for Region 12, in writing, whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.