

Southwest Regional Council of Carpenters and Associated General Contractors of Southern Nevada and International Union of Painters and Allied Trades, Local Union 159. Case 28–CD–257

May 19, 2003

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND ACOSTA

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). The charge was filed on August 26, 2002, by Associated General Contractors of Southern Nevada, and alleges that Southwest Regional Council of Carpenters (Carpenters) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing Benly, Inc. (the Employer) to assign certain work to employees it represents rather than to employees represented by International Union of Painters and Allied Trades Local Union 159 (Painters). The hearing was held on September 19, 2002, before Hearing Officer Barbara Beaubrun.

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 engaged in the business of installing architectural-grade millwork. During the 12-month period preceding the hearing, the Employer purchased and received goods valued in excess of \$50,000 directly from points located outside Nevada. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that Carpenters and Painters are labor organizations within the meaning of Section 2(5) of the Act.¹

II. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employer has separate collective-bargaining agreements with Carpenters and Painters. The work in dispute is the preparation of wood and fiberglass reinforced gypsum (GRG) products for painting, frequently described as "touchup" or "preparation" at the

Mandalay Bay Convention Center in Las Vegas, Nevada.

The Employer initially hired only employees represented by Carpenters to do the installation work, including touchup and preparation. It later hired employees represented by Painters to do faux finishing work on the GRG products. However, at one point, the Employer also hired Painters to perform touchup and preparation work, and thus, had a composite crew doing that work.

On July 22, 2002, Painters sent a letter to the Employer claiming not only the right to perform the faux finishing work, but also the exclusive right to perform all touchup and preparation work. On July 25, 2002, Carpenters sent a letter to the Employer claiming that the employees it represents should be assigned to perform all of the disputed work. Specifically, the letter stated that, if the Employer did not continue to assign all the touchup and preparation work to employees represented by Carpenters it would take "appropriate action to protect" its jurisdiction and that it would "behoove" the Employer to inform Painters that the work had been assigned to Carpenters-represented employees.

On about August 12, 2002, the Employer's representative, Emanuel Grimaldo, received a telephone call from a Carpenters representative informing him that Carpenters was very unhappy that Painters was performing touchup and preparation work and that he expected all of that work to be assigned to Carpenters by the end of the week. Carpenters' representative further stated that if Carpenters' demands were not met, it would take whatever actions it needed to ensure that its work was protected. A few days later, the Employer assigned all of the touchup and preparation work to employees represented by Carpenters and laid off the employees represented by Painters.

On August 21, 2002, Painters filed a grievance claiming that the layoff of the employees it represented and the assignment of touchup and preparation work to Carpenters-represented employees violated the collective-bargaining agreement, which culminated in a decision and order by the Joint Trade Board of the Painters and Decorators Joint Committee, Inc. The Joint Committee found that the Employer had violated its collective-bargaining agreement with Painters by assigning the touchup and preparation work to Carpenters. Having learned of Painters' grievance, Carpenters sent a letter to the Employer on August 23, 2002, stating: "Please be advised that if you attempt to reassign the work, we will picket the job site to stop its reassignment and to get it back if the reassignment goes through."

¹ Painters did not participate in the hearing. Evidence as to, among other facts, Painters' labor organization status was adduced from the testimony of the Employer's witnesses.

B. Work in Dispute

The disputed work consists of the assignment of the touch up and preparation of glass-reinforced gypsum (GRG) and wood products at the Mandalay Bay Convention Center in Las Vegas, Nevada.

C. Contentions of the Parties

The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. It argues that the disputed work should be awarded to employees represented by Carpenters on the basis of collective-bargaining agreements, employer preference and current practice, employer past practice, area and industry practice, and economy and efficiency of operations.

Carpenters did not submit a brief in this case. At the hearing, Carpenters contended that the work in dispute should be awarded to employees it represents based on area and industry practice.

Although Painters was not represented at the hearing, its letter of July 22, 2002, and its later grievance contend that the disputed work should be awarded to employees it represents on the basis of its collective-bargaining agreement with the Employer.

D. Applicability of the Statute

Before the Board may proceed with the determination of a dispute 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. This requires a finding that: (1) there are competing claims to the disputed work between rival group of employees, and (2) a labor organization has used proscribed means to enforce its claim to the work in dispute. The Board must also find that the parties have not agreed on a method for the voluntary adjustment of the dispute.²

Here, the record shows that there is no agreed on method for voluntary adjustment of the dispute. We further find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. The record shows that both Unions claim the work in dispute. Specifically, Painters, in its July 22, 2002 letter, and later in the August 21, 2002 grievance, claimed the work in dispute, as did Carpenters in its July 25, 2002 letter to the Employer.

Further, we find that Carpenters used proscribed means to further its claim. Specifically, Carpenters on August 23, 2002, stated:

² *Teamsters Local 259 (Globe Newspaper Co.)*, 327 NLRB 619, 622 (1999); *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 114 (1998); *Laborers' District Council of West Virginia (Michel, Inc.)*, 325 NLRB 1058, 1059 (1998).

We have been informed that the Painters have filed a grievance effectively demanding that you reassign the finishing work located at the Mandalay Bay Convention Center from employees represented by this Union to employees represented by the Painters. Please be advised that if you attempt to reassign the work we will picket the job site to stop its reassignment and to get it back if the reassignment goes through.

It is well settled that the threat to cause a work stoppage or engage in other economic reprisals to support a claim for disputed work provides reasonable cause to believe that Section 8(b)(4)(D) has been violated. See, e.g., *Operating Engineers Local 150 (Diamond Coring Co.)*, 331 NLRB 1055 (2000); *Teamsters Local 179 (USF Holland, Inc.)*, 334 NLRB 362, 363 (2001).

Accordingly, we find that this 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).

The following factors are relevant in deciding this dispute.

1. Certification and collective-bargaining agreements

Neither Painters nor Carpenters have been certified to represent any of the Employer's employees. The record does establish, however, that each union has a collective-bargaining agreement with the Employer. There is no evidence that either Painters' agreement or Carpenters' specifically refers to the disputed work.

Accordingly, we find that the factors of certification and collective-bargaining agreements do not favor awarding the disputed work to either group of employees.

2. Employer preference and current assignment

The Employer assigned the disputed work to employees represented by Carpenters. However, at one point, it also hired employees represented by Painters and assigned some of the disputed work to them as a composite crew. Later, it reassigned the disputed work to employees represented by Carpenters. The Employer contends that it continues to prefer that the disputed work be assigned to Carpenters-represented employees.

Accordingly, these factors favor awarding the disputed work to employees represented by Carpenters.

3. Employer past practice

The Employer's predominant past practice has been to assign touchup and preparation work to Carpenters-represented employees. According to one Carpenters' witness, the only deviation from this practice occurred 2 years ago when the Employer was involved in the construction of the Mandalay Bay Hotel & Casino. That witness testified that the Employer had hired employees represented by Painters to perform a substantial amount of the faux finishing work, and during periods when there was a "lull or slow down in the amount of faux finishing," those painters were assigned to perform some light touch up work only. Painters presented no evidence that employees it represents have typically performed the work in dispute for the Employer. Thus, the factor of Employer past practice favors the award of the disputed work to employees represented by Carpenters.

4. Area practice

Carpenters presented evidence that Las Vegas area companies assign the disputed work to employees represented by Carpenters. Specifically, three witnesses testified that they had extensive experience in performing and supervising the type of work in dispute and that the disputed work is predominantly assigned to employees represented by Carpenters. Carpenters also introduced letters from several companies in the Las Vegas area that perform the same type of work as the Employer, stating that touchup and preparation work is commonly assigned to employees represented by Carpenters.

There is no evidence that employees whom Painters represent perform the type of disputed work at other area companies.

Accordingly, this factor favors an award of the work in dispute to employees represented by Carpenters.

5. Relative skills

The record evidence fails to establish that specific skills are needed to perform the disputed work. Accordingly, this factor does not favor employees represented by either union.

6. Economy and efficiency of operations

The Employer's project manager testified that using employees represented by Carpenters to perform the disputed work improves the economy and efficiency of operations because they can be cross-utilized to perform all the tasks which must be performed in installing the products. Specifically, when a particular task is not

necessary at the moment, Carpenters-represented employees can be quickly reassigned to perform the task the Employer needs at that time. In contrast, the witness testified, that the employees represented by Painters have historically been used for only one task—faux finishing (or, if light touch up and preparation is included, at most two tasks). Thus, the Employer contends that, if the disputed work was assigned only to Painters-represented employees, not only would the painters frequently be idle, when not performing the faux finish work, but the Employer would frequently need to hire additional employees represented by Carpenters to perform various tasks that Painters-represented employees are unable or unauthorized to perform.

Accordingly, we find that this factor favors awarding the disputed work to employees represented by Carpenters.

7. Job loss

Painters contended in its grievance that, by assigning the work to employees represented by Carpenters, 53 painters were laid off.

Assignment of the disputed work to Painters would have a direct adverse impact upon the employment status of employees represented by Carpenters since the latter group of employees are now doing the work and would have to be laid off. The record evidence does not reflect the exact amount of job loss. Accordingly, we find that this factor does not favor either group of employees.

8. Arbitration awards

As indicated above, Painters obtained a Joint Committee decision holding that the Employer had violated the collective-bargaining agreement with it regarding the disputed work. However, Carpenters did not participate in that Joint Committee hearing, nor did it agree to be bound by the Joint Committee's decision. Furthermore, there is no evidence that the Joint Committee considered the factors on which the Board relies when it resolves jurisdictional disputes. See, e.g., *Bachman Co.*, 337 NLRB 421 (2002); *Electrical Workers Local 104 (Standard Sign & Signal Co.)*, 248 NLRB 1144 (1980); *Automotive Trades District Lodge 190 (Sea-Land Service)*, 322 NLRB 830, 832 (1997).

Accordingly, we find that the arbitration award does not favor employees represented by either Union.

Conclusion

After considering all the relevant factors, we conclude that employees represented by Carpenters are entitled to perform the work in dispute. We reach this conclusion based on the factors of employer preference,

employer past practice, area practice, and economy and efficiency of operation.

In making this determination, we are awarding the work to employees represented by Carpenters, not to that union or its members. This 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 Benly, Inc., who are represented by Southwest Regional Council of Carpenters (Carpenters) are entitled to the work at the Mandalay Bay Convention Center, Las Vegas, Nevada, of the touchup and preparation of glass-reinforced gypsum (GRG) and wood product work.