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Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO and International Organization of Masters, Mates, and Pilots, AFL-CIO and Cross-Link, Inc., d/b/a Westar Marine Services. Case 20-CD-718-1

November 28, 2003

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS
SCHAUMBER AND WALSH

The charge in this Section 10(k) proceeding was filed on July 3, 2002, by the International Organization of Masters, Mates, and Pilots, AFL-CIO (MMP), alleging that the Respondent, Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO (Local 3), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Cross-Link, Inc., d/b/a Westar Marine Services (Westar or Employer) to assign certain work to employees it represents rather than to employees represented by MMP.¹ The hearing was held on various dates between September 3, 2002, and March 27, 2003, before Hearing Officer Jonathan J. Seagle and Hearing Officer Richard J. McPalmer.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officers' rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer is a California corporation with an office and place of business in San Francisco, California, where it is in the business of providing tugboat, crew boat, and barge services in San Francisco Bay. The parties do not dispute, 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 3 and MMP are labor

¹ Local 3's alleged conduct was also the subject of a Sec. 8(b)(4)(ii)(B) proceeding (Case 20-CC-3381-2). At the commencement of the hearing in the present matter, the record in Case 20-CC-3381-2 was received into evidence. In *Operating Engineers Local 3 (Westar Marine Services)*, 340 NLRB No. 127 (2003), issued this day, the Board found that Local 3 violated Sec. 8(b)(4)(ii)(B) of the Act by threatening to cause a work stoppage on the bridge project described infra, with an object of forcing or requiring the general contractor to cease doing business with Westar.

organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

In December 2000, Westar began providing tugboat and crew boat services as a subcontractor on the seismic retrofit of the Richmond-San Rafael Bridge in San Francisco Bay (bridge project). These services consist primarily of moving barges and personnel to and around the construction site. Westar employees who are performing the tugboat and crew boat work are represented by MMP.

The general contractor for the bridge project is Tutor-Saliba/Koch/Tidewater Joint Venture (Joint Venture). In the spring of 2001, the Joint Venture began utilizing its own tugboats and crew boats to perform some of the work that had been performed by Westar. Consequently, the number of Westar vessels used on the bridge project decreased. The work on the vessels operated by the Joint Venture is performed by employees represented by Local 3.

The bridge project expanded in the spring of 2002,² and the number of Westar vessels on the project increased. In April, Local 3 District Representative Roger Wilson contacted Westar and asserted that the work Westar was performing on the bridge project belonged to Local 3, and that Westar was required to pay State prevailing wage rates for the work. Throughout the next several months, Local 3 continued to claim the work and attempted to persuade Westar to sign an agreement assigning marine transportation work on construction projects to employees represented by Local 3.

On July 2 or 3, Wilson and Robert Clark, who is Local 3 director of contracts and industry relations, met with Westar Port Captain Bill Sherfy and Westar Vice President David Morrow. At the meeting, Local 3 reiterated its claim for the work, and presented a proposed agreement covering prevailing wage rates for marine transportation services on construction projects. Sherfy testified that he asked Wilson what was going to happen since Westar was not able to sign the agreement, and Wilson told him that there was going to be a "storm on Monday." Sherfy then asked Wilson, "Are you going to shut down Tutor, are you going to shut down Agra?"³ Wilson allegedly replied, "[W]e're going to start with Tutor, there's going to be a storm on Monday." Wilson denied making the statements attributed to him by Sherfy.

Sherfy testified that after the meeting he called Mike Green, the marine superintendent for the joint venture,

² All dates hereafter are in 2002 unless otherwise indicated.

³ Agra is a subcontractor on the project for which Westar provides crew boat services.

and repeated Wilson's remarks. Sherfy also told Green that Sherfy believed that Local 3 was going to try to shut down the job on Monday.

MMP filed charges with the Board on July 3, alleging that Local 3 unlawfully threatened to shut down the bridge project unless Westar assigned the tugboat and crew boat work to employees who are represented by Local 3.

B. Work in Dispute

The disputed work involves work performed on construction work boats or vessels used as work boats by Westar at the Richmond-San Rafael Bridge Seismic Retrofit Project, including, but not limited to: moving barges; moving materials by barge; and transporting employees and other personnel to locations on the bridge project.⁴

C. Contentions of the Parties

MMP contends that Wilson threatened to shut down the bridge project to force Westar to assign the disputed work to employees who are represented by Local 3 in violation of Section 8(b)(4)(D) of the Act. Local 3 denies that its representatives have made unlawful threats concerning the bridge project and contends that it has pursued its jurisdictional claims through lawful means. In support of its contention that the Section 10(k) notice of hearing should be quashed, Local 3 asserts that the parties have a written jurisdictional agreement resolving this dispute.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute under Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) that the parties have not agreed on a method for the voluntary adjustment of the dispute.

The parties here do not dispute that there are competing claims for the work. Employees represented by MMP continue to perform the marine transportation work for Westar, and Local 3 has continuously asserted its claim to the work since the spring of 2002.

We also find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred based on Sherfy's testimony. Thus, Sherfy testified that when he asked if Wilson was planning to "shut down" Tutor, the

general contractor, Wilson replied, "[W]e're going to start with Tutor, there's going to be a storm on Monday." Although Wilson denied that he made these statements, this conflict in the testimony does not prevent us from proceeding under Section 10(k) because we are not charged here with finding that a violation did in fact occur, but only that reasonable cause exists for finding such a violation. See *Bricklayers Local 15 (Fusco Corp.)*, 278 NLRB 967, 968 (1986).

Finally, we find no merit in Local 3's contention that the notice of 10(k) hearing should be quashed because it has entered into a voluntary jurisdictional settlement agreement with MMP. Although the record contains evidence of settlement negotiations between Local 3 and MMP over the assignment of the disputed work, it is not clear that the two unions had actually reached an agreement. Further, even assuming that MMP and Local 3 had entered into a voluntary settlement agreement, such an agreement does not constitute a method for a voluntary adjustment of the dispute under Section 10(k) because there is no evidence that Westar was a party to that agreement. See, e.g., *Laborers Local 113 (Michels Pipeline Construction)*, 338 NLRB No. 51, slip op. at 4 (2002); *Electronic & Space Technicians Local 1553 (Hughes Aircraft)*, 313 NLRB 800, 804 (1994) (Board will not defer to voluntary method of resolving dispute where employer has not agreed to be bound by such method).

We thus 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 making the determination of this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence that either MMP or Local 3 has been certified to represent employees who are performing the disputed work. However, Westar has voluntarily recognized MMP as the collective-bargaining representa-

⁴ Local 3 contends that the description of the work in dispute set forth in the notice of hearing is overbroad, and we find merit in that contention. Accordingly, we have narrowed the description to accurately reflect the work that is subject to competing claims. See *Machinists District 15 (Hudson General Corp.)*, 326 NLRB 62, 64 (1998) (similarly narrowing the description of the work in dispute).

tive of its employees since 1982, and Westar and MMP have been parties to a series of collective-bargaining agreements since that time. The scope of the work covered by the agreement in effect at the time of the hearing⁵ was “all tows originating and terminating in San Francisco Bay which have no intermediary port stops.” Westar has not been a signatory to any collective bargaining with Local 3. Thus, because Westar is a signatory only to a contract with the MMP, this factor favors an award of the work to employees represented by MMP. See generally, *Electrical Workers Local 134 (Pepper Construction Co.)*, 339 NLRB No. 22, slip op. at 3 (2003).⁶

2. Employer preference and past practice

Richard Smith, general manager for Westar, testified that Westar has assigned tugboat and crew boat work exclusively to employees represented by MMP, and that

⁵ The record indicates that the most recent collective-bargaining agreement between Westar and MMP was entered into on July 1, 1998, and expired on June 30, 2002. The agreement contained a “roll-over provision” stating that it would be “considered renewed from year to year” unless either party provided at least 60 days notice prior to the expiration date “of a desire to change, modify, or terminate” the contract.

On August 26, 2002, the parties entered into an agreement to extend the contract retroactively from July 1, 2002, until September 30, 2002. The parties subsequently entered into a series of agreements to extend the contract through April 15, 2003.

Local 3 contends that the collective-bargaining agreement between Westar and MMP had expired at the time the charges in this proceeding were filed. Local 3 has offered no evidence, however, that either Westar or MMP had taken any action that would have prevented the collective-bargaining agreement from automatically renewing on July 1, 2002. Indeed, the extension agreements demonstrate that the parties intended to continue their contractual relationship past the June 30 expiration date. Even assuming that the collective-bargaining agreement had expired, the terms and conditions of employment set forth in the agreement were in effect throughout August, at which time the parties executed their first extension agreement. See generally *R.E.C. Corp.*, 296 NLRB 1293 (1989) (terms and conditions of employment in an expired contract continue until the parties conclude a new agreement or good-faith bargaining leads to impasse).

⁶ Member Walsh disagrees and concludes that the factor of collective-bargaining agreements does not favor an award of the disputed work to either group of employees. Even assuming *arguendo* that the Westar—MMP collective-bargaining agreement was in effect at all material times, the contract does not “specifically cover” the work in dispute within the meaning of Member Walsh’s dissent in *Iron Workers Local 1 (Goebel Forming, Inc.)*, 340 NLRB No. 136 (2003). See also *Pepper Construction*, *supra* at fn. 7 (personal footnote of Member Walsh). The “scope” clause quoted above is described in the contract as a “scope of agreement” provision, i.e., the clause defines the geographic scope of the contract’s coverage. This clause does not specify the work that is to be assigned to bargaining unit employees. Indeed, in its brief to the Board, MMP argues only that its contract with Westar “cover[s] the terms and conditions of employment of the Employer’s employees”; MMP does not argue that the contract specifically covers the work in dispute.

the company prefers to assign the disputed work to those employees. Accordingly, the factor of employer preference and past practice favors an award of the work to employees represented by MMP.

3. Area practice

The record demonstrates that employees represented by both Unions have performed tugboat and crew boat work for various employers in the San Francisco Bay area. MMP has performed work on several bridge construction projects in the San Francisco Bay since 1998, including projects on the San Mateo, Benicia, and Bay Bridges. Local 3 Representative Roger Wilson testified that in addition to the work being performed by its members on the bridge project, employees represented by Local 3 have performed similar work on the Carquinez and Bay Bridges.

Based on these facts, we find that the factor of area practice does not favor awarding the work to employees represented by either Union.

4. Relative skills and training

The types of vessels utilized by Westar on the bridge project have crews consisting of a captain and deckhand. Because of the size of the vessels used or the number of passengers they carry, the captain of these vessels must be licensed by the Coast Guard. Deckhands are apparently not licensed.

The record indicates that employees represented by both MMP and Local 3 hold Coast Guard licenses. It also indicates that employees represented by MMP who are employed by Westar have participated in safety training programs. However, the record contains almost no evidence regarding the specific duties or skills required of deckhands. Thus, we find that this factor does not favor awarding the work to either group of employees.

5. Economy and efficiency of operations

Because the parties have not adduced any relevant evidence regarding this factor, we cannot find that this factor favors either group of employees.

CONCLUSIONS

After considering all the relevant factors, we conclude that employees represented by MMP are entitled to perform the work in dispute. We reach this conclusion relying on Westar’s preference and past practice, and the collective-bargaining agreement between MMP and Westar.⁷ In making this determination, we are awarding the work to employees represented by MMP, not to that

⁷ Consistent with his position in fn. 6, *supra*, Member Walsh relies only on the factors of employer preference and past practice.

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.

1. Employees of Westar Marine Services represented by the International Organization of Masters, Mates, and Pilots, AFL-CIO are entitled to perform work on construction boats or vessels used as work boats by Westar at the Richmond-San Rafael Bridge Seismic Retrofit Project, including, but not limited to, moving barges, moving materials by barge, and transporting employees and other personnel to locations on the bridge project.

2. Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Westar to assign the disputed work to employees represented by it.

3. Within 14 days from this date, Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO, shall notify the Regional Director for Region 20 in writing whether it will refrain from forcing Westar, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C. November 28, 2003

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD