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Laborers International Union of North America, State of Indiana District Council *and* E & B Paving, Inc. *and* Operative Plasterers and Cement Masons International Association, Local Union No. 692 of the Operative Plasterers and Cement Masons International Association *and* Superior Construction Co., Inc. Case 13–CD–688–1

December 15, 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 June 26, 2003, by E & B Paving, Inc. (E & B or the Employer). It alleges that the Respondent, Laborers International Union of North America, State of Indiana District Council (the Laborers) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing E & B to assign certain work to employees represented by the Laborers rather than to employees represented by the Operative Plasterers and Cement Masons International Association and Local Union No. 692 of the Operative Plasterers and Cement Masons International Association (collectively the Plasterers). A hearing was held on August 21, 22, and 26, 2003, before Hearing Officer Neelam Kundra. Thereafter, E & B, the Laborers, and the Plasterers filed briefs in support of their positions. The Plasterers also filed a motion to quash the Section 10(k) notice of hearing and a motion to reopen the record. E & B filed an opposition to the motion to reopen the record, and the Plasterers filed a response.

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 Indiana corporation engaged in the business of paving and that it annually ships goods valued in excess of $50,000 from its facility in Rochester, Indiana, to customers located outside the State of Indiana. The parties also stipulated that Party-In-Interest Superior Construction Co., Inc. (Superior) is an Indiana corporation engaged in the business of construction and that it annually ships goods valued in excess of $50,000 from its facility in Gary, Indiana, to customers located outside the State of Indiana. Accordingly, on the basis of the parties' stipulations, we find that E & B and Superior are engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties also stipulated, and we find, that the Laborers and the Plasterers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts

The current dispute involves cement finishing work on a highway construction project on I-65 in Lake County, Indiana. E & B and Superior entered into a joint venture to perform work on this project. The Joint Venture Agreement provides that the parties will use their own expertise and resources in performing their portions of the contract and that any liability or obligation assumed by the E & B and Superior (Joint Venture) must be done with the approval of both parties. Under the Joint Venture Agreement, E & B is responsible for the concrete paving, while Superior is responsible for bridge work and pavement removal.

E & B, an asphalt and concrete paving contractor, is a member of Indiana Constructors, Inc. (ICI), a construction trade association. ICI has a statewide collective-bargaining agreement with the Laborers that encompasses highway construction work. Pursuant to the ICI agreement, E & B has a longstanding practice throughout Indiana of employing Laborers-represented employees to perform its concrete finishing and form setting work. E & B did not have a collective-bargaining agreement with the Plasterers. It did, however, sign an "Assent of Participation Agreement" with the Plasterers in 1992 in which it agreed to contribute into the Plasterers' health, welfare, and pension funds on behalf of a limited number of employees who had come into E & B's work force when E & B bought the assets of McMahon O'Connor, another concrete paving company.[1]

[1] These employees included five or six workers who were represented by the Plasterers. As these employees retired or quit, E & B replaced them with Laborers-represented employees. Three of the former McMahon O'Connor employees ultimately switched their affiliation to the Laborers.

The only other instance when E & B used Plasterers-represented workers, instead of Laborers-represented workers, to perform concrete finishing work, occurred in 2002 when E & B obtained workers from the Plasterers' hiring hall to perform the final day of three days of concrete finishing work at a Chrysler plant in Kokomo, Indiana, after Chrysler informed E & B that it had to use workers represented by the Plasterers. E & B did not sign a collective-bargaining agreement with the Plasterers, but simply called the Plasterers' hiring hall to obtain the workers.

Superior, a construction contractor, was a party to the Plasterers' Collective Bargaining Agreement for Roads, Bridges, and Airports, which provided that Plasterers-represented employees were to perform concrete paving work. Consistent with this agreement, Superior historically has employed workers represented by the Plasterers to perform its concrete finishing and form setting work.

Superior conducted a prejob conference for the I-65 project with the Plasterers on February 11, 2003.[2] Although Superior stated that E & B might do the cement finishing work on the I-65 project, Superior's prejob conference report provided that all work under the jurisdiction of the Plasterers' agreement and all work traditionally performed by Plasterers-represented employees would be assigned to those employees. The report erroneously listed Superior as the general contractor, and E & B as a subcontractor. It made no mention of the Joint Venture.

E & B had its own prejob conference with the Laborers on April 4. It assigned the concrete finishing and form setting work to employees represented by the Laborers. When the cement finishing work began on the project, E & B's employees represented by the Laborers were doing the work.

The Plasterers took the position that the cement finishing work had been assigned to Plasterers-represented employees pursuant to Superior's prejob conference report. As a member of the AFL–CIO's building trades department, the Plasterers filed a complaint with the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Plan) on April 25 to challenge the change of the original work assignment on the I-65 project. On May 5, the Plan administrator concluded that Superior was acting on behalf of the Joint Venture when it assigned the work to the Plasterers-represented employees in the prejob conference report. He concluded that the use of employees represented by the Laborers constituted a change in the original assignment.

On May 9, E & B filed its Notice of Appeal to Arbitration of the Administrator's Determination of Original Assignment. On May 12, the administrator advised E & B that he could not process its appeal until he received evidence that E & B was complying with the administrator's determination. E & B thereafter reached an agreement with Superior to have Superior's employees represented by the Plasterers perform the concrete finishing and form setting work. Superior's Plasterers-represented employees performed the work for approximately 2 weeks.

[2] All dates hereinafter refer to 2003 unless otherwise indicated.

On May 21, the Plan arbitrator determined that the Joint Venture and E & B were not stipulated to the Plan, and, therefore, he could not reach the merits of the work assignment. E & B then resumed having its Laborers-represented employees perform the work.

Meanwhile, sometime in late April or early May, Laborers' Business Manager Jerry Lee contacted E & B's President Gary Stebbins by phone and told him that the Laborers would strike or picket the jobsite if E & B were to assign the work to employees represented by the Plasterers. Stebbins said that he wanted Lee's position in writing, and shortly thereafter Stebbins received a letter dated May 8 stating: "[I]f there is any attempt by you to give some of our work to the Cement Finishers, we will take all action we can to stop your breach of the Letter Of Assignment up to and including striking and picketing your job."

The Plasterers also commenced litigation in Federal court on June 23, seeking to enjoin the Laborers, E & B, and Superior from taking any action inconsistent with the Plan administrator's May 5 decision. The Plasterers filed a First Amended Complaint on July 24, requesting that the court order E & B and/or the Joint Venture to again go before a Plan arbitrator. On August 8, the Laborers filed a motion to dismiss and supporting memorandum. On August 11, the Joint Venture and E & B each filed a motion to dismiss and supporting memorandum. The Laborers filed a reply brief on August 22, and the Joint Venture and E & B filed a reply brief on August 25. To date, the court has not ruled.

B. Work in Dispute

The work in dispute is the concrete pavement work and related preliminary functions performed on behalf of E & B at the I-65 highway construction project in Lake County, Indiana.

C. Contentions of the Parties

The Plasterers moves to quash the notice of hearing, arguing that there is no reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated and that there is a voluntary method of resolving this dispute to which all parties are bound. It claims that the threat made by the Laborers was a sham intended only as a maneuver to bring this dispute to a Section 10(k) hearing before the Board and that the Laborers never intended to strike. It also asserts that all parties are bound to the Plan[3] and that

[3] The Plasterers makes several arguments in support of its contention that all parties are bound to the Plan. It asserts that the Laborers is bound via its membership in the building and construction trades department. It contends that Superior and E & B are bound by the current Plasterers' Collective Bargaining Agreement for Roads, Bridges, and Airports. Finally, the Plasterers contends that E & B is stipulated to the

the employer in this case is the Joint Venture, not E & B. On the merits, the Plasterers argues that the work should be awarded to employees it represents on the basis of employer preference and area and industry practice.

E & B asserts that this dispute is properly before the Board inasmuch as the conversation between Lee and Stebbins as well as Lee's May 8 letter to Stebbins provide reasonable cause to believe that the Laborers violated Section 8(b)(4)(D) of the Act. E & B also contends that there is no agreed-upon method of resolving this dispute because neither it nor the Joint Venture is stipulated to the Plan. E & B argues that the Assent of Participation Agreement it signed in 1992 did not bind it to a collective-bargaining agreement with the Plasterers. Instead, it contends, the Assent of Participation Agreement required it only to contribute to the Plasterers' health, welfare, and benefit funds. E & B asserts that the work should be awarded to employees represented by the Laborers on the basis of E & B's collective-bargaining relationship with the Laborers, employer preference, expertise of the Laborers, economy and efficiency of operation, skill, and industry and area practice.

The Laborers contends that there is no method for voluntary settlement of the dispute inasmuch as neither E & B nor the Joint Venture is stipulated to the Plan, as the Plan arbitrator has already determined. The Laborers also argues that the work should be assigned to employees represented by the Laborers on the basis of collective-bargaining agreements, employer preference, past practice, area and industry practice, relative skills and training, and economy and efficiency of operations.

D. Applicability of the Statute

Before the Board may proceed with a determination of the 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) of the Act has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

As discussed above, in late April or early May, Laborers' Business Manager Lee contacted E & B's President Stebbins and reminded Stebbins that E & B had assigned the concrete finishing work to employees represented by the Laborers. Lee told Stebbins that the Laborers would strike and/or picket if E & B were to assign the work to employees represented by the Plasterers. In a letter to Stebbins dated May 8, Lee repeated this intention when he wrote: "[W]e will take all action we can to stop your breach of the Letter Of Assignment up to and including striking and picketing your job." Lee's oral statement and the May 8 letter constitute a threat to take proscribed action. Although the Plasterers urges the Board to find that such a threat was a sham, there is insufficient evidence to conclude that these threats were not made seriously or that the Laborers colluded with the Employer in this matter.[4]

The Plasterers also urges the Board to find that the Plan is an agreed-upon method for voluntary adjustment of the dispute. Again, we disagree. Although the Plasterers are bound by the Plan, neither E & B nor the Joint Venture has stipulated to the Plan. The Joint Venture did not sign a formal stipulation, was not a member of an employer association that had stipulated to the Plan, and was not a party to any collective-bargaining agreement providing for the settlement of jurisdictional disputes pursuant to the Plan. Additionally, E & B has not stipulated to the Plan. The plain language of the Plasterers' Assent of Participation Agreement signed by E & B in 1992 demonstrates that E & B's only obligation was to contribute to the Plasterers' health, welfare, and benefit funds.[5] Moreover, the Plan arbitrator determined that neither the Joint Venture nor E & B had stipulated to the Plan.[6] Nor does E & B's collective-bargaining agreement with the Laborers incorporate the Plan. It is well settled

Plan through its agreement with the Laborers and by virtue of its participation in Plan proceedings.

[4] *Lancaster Typographical Union No. 70 (C.J.S. Lancaster)*, 325 NLRB 449, 450–451 (1998) ("It is well established that as long as a Union's statement, on its face, constitutes a threat to take proscribed action, the Board will find reasonable cause to believe that the statute has been violated, in the absence of affirmative evidence that the threat was a sham or was the product of collusion.")

[5] The Assent of Participation Agreement provides:

> The undersigned Employer, employing members of Local 692/Area 438 and other eligible employees, hereby agrees to accept, to be bound by, and to comply with the terms and provisions of the Collective Bargaining Agreement of this Local, requiring contributions to the Indiana State Council of Plasterers and Cement Masons Pension Fund . . . and/or to the Indiana State Council of Plasterers and Cement Masons Health and Welfare Fund. . . .
>
> The obligation hereby undertaken to make Pension and/or Health and Welfare contributions as required by the Collective Bargaining Agreements is not subject to the grievance and arbitration procedure, if any, provided in the Collective Bargaining Agreements.

[6] The Plasterers seeks to reopen the record to admit form letters addressed to "To Whom It May Concern," which were sent to a list of "signatory contractors" that included E & B and which contained notification of new master agreements and wage rates. At the hearing, Ronald Bowser, vice president of the Plasterers, testified that he could produce no master agreement or collective-bargaining agreement (not an assent of participation agreement), containing E & B's signature. Bowser also testified that he could produce no letter specifically addressed to E & B announcing new master agreements or wage rates. The documents the Plasterers would have us reopen the record to receive would not affect this testimony. Accordingly, we deny the motion to reopen the record on the ground that the additional evidence sought to be adduced would not require a different result. See Sec. 102.48(d) of the Board's Rules.

that all parties to the dispute must be bound if an agreement is to constitute "an agreed method of voluntary adjustment." *Plumbers Local 393 (Therma Corp.)*, 303 NLRB 678 (1991). Thus, we find that no such agreement exists here.

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, and we deny the Plasterers' motion to quash the notice of hearing.

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 making the determination of this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute.

As noted above, the Employer, E & B,[7] as a member of ICI, has a statewide collective-bargaining agreement with the Laborers that encompasses highway construction work. The agreement provides that "HIGHWAY CONSTRUCTION shall include construction, modifications, additions or repairs of roads and streets (including roads and streets in housing projects) and construction incidental thereto." The Employer is not, and has never been, a signatory to a Plasterers' collective-bargaining agreement. Accordingly, we find that the factor of collective-bargaining agreements favors an award of the work in dispute to employees represented by the Laborers.

2. Employer preference and past practice

The Employer prefers to assign the work in dispute to employees represented by the Laborers. The Employer has a 25-year practice of assigning similar work to Laborers-represented employees. Therefore, we find that these factors favor awarding the disputed work to employees represented by the Laborers.

3. Area and industry practice

Both the Laborers and the Plasterers testified about sites within northwest Indiana where employees represented by their respective unions performed the disputed work. Thus, we find that this factor does not favor awarding the disputed work to employees represented by either union.

4. Relative skill and experience

The Employer's president testified that the work of both Laborers-represented and Plasterers-represented employees on the project was good and that both groups of employees were qualified to do the work. Accordingly, we find that this factor does not favor awarding the disputed work to either group of employees.

5. Economy and efficiency of operations

The Employer presented testimony that it operates more efficiently and economically if the work in dispute is performed by employees represented by the Laborers. Specifically, it is the Employer's practice to use "key" employees represented by the Laborers who are familiar with the Employer's practices, procedures, and policies. There was also testimony that employees represented by the Laborers perform a wide variety of tasks on the jobsite and that this flexibility helps to maintain work crews. Accordingly, we find that this factor favors awarding the disputed work to employees represented by the Laborers.

Conclusion

After considering all of the relevant factors, we conclude that employees represented by Laborers International Union of North America, State of Indiana District Council are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference, employer past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by the Laborers, not to that Union or its members.

[7] There is no merit in the Plasterers' contention that the Joint Venture is the proper employer, not E & B. Under Board precedent, it is the "company that ultimately controls and makes the job assignment . . . [that] is deemed to be the employer for purpose of a 10(k) proceeding." *Glass Workers (Olympian Precast)*, 333 NLRB 92, 94 fn. 8 (2001). In this case, that company is E & B because, under the terms of the Joint Venture Agreement, E & B is solely responsible for the performance of the concrete paving work on the I-65 project.

DETERMINATION OF DISPUTE

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

Employees of E & B Paving, Inc., represented by Laborers International Union of North America, State of Indiana District Council are entitled to perform the concrete pavement work and related preliminary functions on behalf of E & B Paving, Inc., at the I-65 highway construction project in Lake County, Indiana.

Dated, Washington, D.C., December 15, 2003

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD