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Chicago and Northeast Illinois District Council of Carpenters and Prate Installations, Inc. and United Union of Roofers, Waterproofers, and Allied Workers, Local 11. Case 13-CD-664

March 31, 2004

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

This is a work jurisdiction dispute proceeding under Section 10(k) of the Act. The charge was filed on September 24, 2002,¹ by Prate Installations, Inc. (Prate or the Employer), alleging that the Respondent, Chicago and Northeast Illinois District Council of Carpenters (Carpenters) 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 the United Union of Roofers, Waterproofers and Allied Workers, Local 11 (Roofers). The hearing was held on October 17 and 18 before Hearing Officer Christopher Lee and on November 6, 7, and 18 through 22, before Hearing Officer William M. Belkov.

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, whose principal place of business is Wauconda, Illinois, is engaged in the installation of roofing, exterior sheet metal, building insulation, siding, and gutters. The parties stipulate, 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 Carpenters and Roofers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Since the early 1980s, the Employer has been signatory to consent agreements with the Carpenters and Roofers. For most of this time, the Employer assigned all types of roofing work, including new installation,

tear-off and reroofing² of asphalt shingles, cedar, and slate on steep slope roofs, and all work on flat roofs to employees represented by the Roofers. The Employer's Carpenter-represented employees were primarily employed on new residential construction installing asphalt shingles and cedar shakes on steeply sloped roofs. However, occasionally the Employer used composite crews of Roofers and Carpenters represented employees to perform the shingling and tear-off work at various sites throughout Illinois and southern Wisconsin.

In 2000, the Carpenters' Trust Funds conducted an audit of the Employer's records regarding the Employer's contractual payment of contributions to the Trust Funds for each Carpenter-represented employee. A controversy arose between the parties regarding the accuracy of the audit and the amount owed by the Employer. On October 19, 2001, the Trust Funds sued the Employer in Federal district court claiming a delinquency of \$2.5 million. While the suit was pending, in March 2002, the Carpenters struck the Employer and picketed all of its jobsites. The strike lasted for 4 months and resulted in the Employer's losing a significant amount of business and laying off approximately 50 percent of its employees. In July, the Employer filed a countersuit against the Trust Funds and a suit against the Carpenters. As a result, the Trust Funds and the Employer entered into settlement negotiations, during which the Trust Funds demanded that the Employer assign all shingling and tear-off work exclusively to the Carpenters. The Employer refused, but ultimately, as a part of the settlement agreement, agreed to assign its tear-off work exclusively to the Carpenters. On July 15, the Court approved the parties' settlement agreement, and the strike and picketing by the Carpenters ceased immediately.

Soon after the strike and picketing ceased, the Employer's employees began to complain of harassment by Carpenters' representatives who showed up at its various jobsites. The harassment assertedly included verbal abuse, false and derogatory statements about the Employer, and statements to the effect that the Carpenters were going to put the Employer out of business. Employees represented by the Roofers were singled out and confronted by the Carpenters' representative who demanded that they stop their work and show their union identification.

On August 8, the Employer's owner, Michael Prate, met with Carpenters' President Earl Oliver, who claimed

¹ Except where specifically indicated, all dates refer to 2002.

² "Tear-off work" is defined as the removal of existing roofing materials down to the roofing decking and the application of new roofing materials on any roofing surface. "Re-roofing work" is described as the application of a new roof over an existing roof. According to the Roofers, neither work is limited to steep-sloped roofs.

the work in dispute as the exclusive jurisdiction of the Carpenters and told Prate that the Employer was not to deal with the Roofers.³ Oliver also accused the Employer of cheating and not abiding by the terms of the settlement agreement.

On September 17, the Carpenters filed an unfair labor practice charge against the Employer that alleged a refusal to supply information—the names of seven employees who were working at one of the Employer’s jobsites on August 30—in violation of Section 8(a)(5). On September 24, the Carpenters went on strike and began picketing six to eight of the Employer’s different jobsites each day. The picketing ceased after 2 days when the Employer filed the instant 8(b)(4)(D) charge.

Subsequently, in a meeting on October 9, Carpenters’ President Oliver again claimed the disputed work and accused Employer owner Prate of violating the settlement agreement by assigning employees represented by the Roofers to do shingling work, thus implicitly contending that the Carpenters had exclusive jurisdiction over the work in dispute.

B. Work in Dispute

As described in the notice of hearing, the work in dispute is shingling work—the installing of underlayment, shingles, and ice and watershields—at eight specified new construction sites:

Lakemoor Farms at Route 12 and Route 120, Lakemoor, Illinois; The Lindens at Route 88 and Orchard Road, Algonquin, Illinois; Algonquin Lakes at Route 62 and Sand Bloom, Algonquin, Illinois; Natures Pointe at Waterford and Caredon, Aurora, Illinois; Pheasant Ridge at Drauden Road and Theodore, Joliet, Illinois; Ashcroft at Route 25 and Plainfield Road, Oswego, Illinois; Windsor Pointe at Route 56 and Galena Road, Sugar Grove, Illinois; and Farmington Lakes at Route 30 and Route 34, Oswego, Illinois.

C. Contentions of the Parties

The Employer and the Roofers contend that there is reasonable cause to believe that the Carpenters violated Section 8(b)(4)(D) of the Act and that there is no agreed-on voluntary method of resolution to which all parties to this dispute are bound. They contend that the Board must therefore make a determination of the merits of the dispute. Both the Employer and the Roofers contend that the disputed work should be awarded to employees represented by the Roofers, based on the Employer’s collective-bargaining agreement with the Roofers, the Employer’s preference, area practice, economy and effi-

ciency of operations, and skills and training. The Employer further contends that the Carpenters’ persistent efforts to have the disputed work assigned exclusively to the Carpenters, suggest that disputes are likely to reoccur wherever the Employer works. Therefore, the Employer contends that a broad award is warranted.

The Carpenters contends that the dispute involves a work preservation issue and does not fall within the scope of Section 10(k) of the Act. It also argues that the Trust Fund litigation and strike were merely to collect the Employer’s delinquent fund contributions. The Carpenters further contends that the 2-day strike in September was a lawful unfair labor practice strike because the Employer refused to identify the employees who were performing shingling and tear-off work at a jobsite in Wauconda, Illinois. This work, the Carpenters claims, falls within its exclusive jurisdiction.

Finally, the Carpenters asserts that the work in dispute should be awarded to employees it represents based on industry practice; the Employer’s past practice; safety, skill, and efficiency; and its collective-bargaining agreement, which contains a description of shingling work.

D. Applicability of the Statute

Before the Board can 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) the parties have not agreed on a method for the voluntary adjustment of the dispute.

We find that there are competing claims for the work. The parties stipulated that both the Carpenters and Roofers have claimed the work in dispute, and the record shows that they both continue to do so.⁴

We reject the Carpenters’ contention that this is a work preservation dispute that does not fall within the scope of Section 10(k) of the Act. It is well established that for such a work preservation defense to prevail, the Carpenters must show that the employees it represents have previously performed the work in dispute *and* that it is not attempting to expand its work jurisdiction. *Stage Employees IATSE Local 39 (Shepard Exposition Service)*, 337 NLRB 721, 723 (2002). The Carpenters have failed to make the latter showing. The record reveals that Roofers-represented employees have performed the work in dispute, i.e., the installation of shingles, underlayment,

³ As noted below, the work in dispute is shingling work at eight sites.

⁴ We do not rely on the testimony regarding the settlement negotiations to prove that the Carpenters claimed the disputed work, nor do we rely on the settlement agreement in finding reasonable cause to believe that the Carpenters violated Sec. 8(b)(4)(D). We therefore find it unnecessary to reach the merits of the Carpenters’ motion to strike the testimony regarding the settlement negotiations.

and ice and water shields. The record also establishes that Carpenters-represented employees have performed at least that part of the disputed work consisting of the installation of asphalt shingles and cedar shakes. Although the record does not specifically address whether the Employer has likewise assigned underlayment and ice and water shield work to Carpenters-represented employees, no one contends that it has not. Instead, the more general testimony is that the Employer has variously assigned shingling work to crews of Roofers-represented employees, to crews of Carpenters-represented employees, and to composite crews. Thus, even assuming that Carpenters-represented employees have performed all aspects of the work in dispute, they have never performed it exclusively. The dispute arose when the Carpenters claimed *all* of the disputed work, including that previously performed by employees represented by the Roofers. As such, the Carpenters' objective here was not that of work *preservation*, but of work *acquisition*. *Stage Employees IATSE Local 39 (Shepard Exposition Service)*, supra, at 723.

We also find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. Thus, the record establishes that the Carpenters, after filing an unfair labor practice charge, engaged in a 2-day strike with picketing against the Employer at six to eight different jobsites each day where the Employer's Roofers-represented employees were primarily performing the work in dispute.

The Carpenters asserts that the picketing of the jobsites, as the Carpenters' picket signs indicated, was because of the Employer's alleged unfair labor practice. But even assuming that the picketing had a lawful objective, it is well settled that a union may violate Section 8(b)(4)(D) if one object of the conduct is prohibited. *Electrical Workers Local 134 (Pepper Construction)*, 339 NLRB No. 22, slip op. at 3 (2003). We find that an object of the Carpenters' picketing was to obtain exclusively the disputed work that was being performed by employees represented by the Roofers. Thus, the picketing took place precisely at those jobsites at which the Employer was employing Roofers-represented employees. Moreover, Michael Prate testified that on August 8, Carpenters' President Oliver made another demand for the work in dispute and demanded that Prate not deal with the Roofers. Prate also testified that on October 9, Oliver claimed that the Employer's use of Roofers-represented employees to perform the work in dispute violated the settlement agreement. On both occasions, Oliver asserted, either explicitly or implicitly, that the Carpenters had exclusive jurisdiction over the disputed work. These demands and assertions, coming so close in

time to the September picketing, further indicate that the picketing had a jurisdictional object.

Finally, as stipulated by the parties, no method for the voluntary adjustment of the dispute has been agreed on. Accordingly, we find that the dispute is properly before the Board for determination.⁵

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

The parties stipulated that there are no Board orders or certifications determining the collective-bargaining representative of the employees performing the work in dispute. The Employer has been signatory for approximately 20 years to consent agreements with the Roofers and Carpenters. The only roofing work covered by the Carpenters' agreement refers to the installation of new shingles and related tasks. The Roofers' agreement covers a greater number of roofing services, including the work in dispute. However, because there is some overlap of the identified shingling tasks, including at least part of the work in dispute, this factor does not favor either group of employees.

2. Employer assignment and preference

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

3. Employer past practice

Until recently, the Employer's historic practice has been to sometimes use composite crews of Carpenters and Roofers and other times to use crews of either Roofers or Carpenters to perform the disputed work. We find that this factor does not favor an award to either group of employees.

⁵ We therefore deny the Carpenters' motion to quash the notice of hearing.

4. Area and industry practice

The record evidence does not indicate the area and industry practice of assigning work similar to that in dispute. Accordingly, we find that this factor does not favor an award to either group of employees.

5. Relative skills and training

Both unions offer training programs applying to the skills necessary to perform the disputed work. The record shows that the Roofers' apprenticeship training program is a 4-year program that covers all aspects of roofing including shingling and the various roofing products, materials, and systems. The Carpenters' program, however, only provides brief training on how to shingle asphalt and cedar shakes and shingles. Accordingly, this factor favors awarding the work in dispute to employees represented by the Roofers.

6. Economy and efficiency of operations

The Employer and the Roofers also assert that using Roofers to perform the disputed work is more economical and efficient than using Carpenters because the Roofers alone can do the entire job from start to finish.⁶ Further, the Employer and the Roofers contend that because roofers can perform all aspects of roofing services, they are less affected by rain and bad weather when working on combination roofs. The Employer further asserts that being able to assign the work in dispute to roofers has a positive effect on both its work scheduling and project costs because the Roofers have a larger pool of qualified roofers to draw from and it is easier to obtain highly qualified roofers immediately from the Roofers. In contrast, the Carpenters have a limited number of carpenters who can perform shingling work and they are not always readily available. Also, the Carpenters' apprenticeship program requires apprentices to attend during the workday, which interferes with work scheduling and production. By contrast, the Roofers-represented employees attend their apprenticeship training on the weekends and at night, and thus do not have to miss work in order to attend training classes. We find that this factor favors awarding the disputed work to the employees represented by the Roofers.

CONCLUSIONS

After considering all the relevant factors, we conclude that employees represented by the Roofers are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's preference, economy and effi-

⁶ The Employer and Roofers also argue that in some situations even with a composite crew, the carpenters would be idle while the roofers performed certain roofing tasks, particularly on combination flat and steeply sloping roofs.

ciency of operations, and skills and training. In making this determination, we are awarding the work to employees represented by the Roofers, not to that Union or its members.⁷

Scope of the Award

The Employer has requested that the Board issue a broad award that encompasses the geographical areas in which the Employer performs roofing services. We find no merit in that request.

Normally, 10(k) awards are limited to the jobsites 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 dispute. *Id.* See also *Electrical Workers Local 98 (Swartley Bros. Engineers)*, 337 NLRB 1270, 1272-1273 fn. 7 (2002); *Operating Engineers Local 150 (Foley Construction)*, 316 NLRB 360, 363 (1995). Here, while the dispute covered six to eight of the Employer's jobsites, it is the first substantiated controversy arising over the disputed work. Thus, the record does not indicate that the disputed work has been a continuous source of controversy and will continue to be so. Nor is there evidence that the Carpenters Union is likely to engage in unlawful conduct at future job sites in pursuit of work similar to that in dispute. Accordingly, the award is limited to the at the jobsites that gave rise to this proceeding.

DETERMINATION OF DISPUTE

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

1. Employees of Prate Installations, Inc. represented by United Union of Roofers, Waterproofers, and Allied Workers, Local 11 are entitled to perform shingling work—the installing of underlayment, shingles, and ice and watershields—at new construction sites located at: Lakemoor Farms at Route 12 and Route 120, Lakemoor, Illinois; The Lindens at Route 88 and Orchard Road, Algonquin, Illinois; Algonquin Lakes at Route 62 and Sand Bloom, Algonquin, Illinois; Natures Pointe at Waterford and Caredon, Aurora, Illinois; Pheasant Ridge at Drauden Road and Theodore, Joliet, Illinois; Ashcroft at

⁷ This award does not affect the reroofing and tear-off work, which the Employer has traditionally performed at times with composite crews and is not in dispute. Nor is it intended to take away the tear-off work that the Employer has agreed to assign exclusively to the Carpenters pursuant to the Employer's and Trust Funds' settlement agreement.

Route 25 and Plainfield Road, Oswego, Illinois; Windsor Pointe at Route 56 and Galena Road, Sugar Grove, Illinois; and Farmington Lakes at Route 30 and Route 34, Oswego, Illinois.

2. Chicago and Northeast Illinois District Council of Carpenters is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Prate Installations, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, Chicago and Northeast Illinois District Council of Carpenters shall notify the Regional Director for Region 13 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.

Dated, Washington, D.C. March 31, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD