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Chicago Regional Council of Carpenters, Local 1 *and* Brewer Concrete Construction, Inc. and Laborers Local No. 6. Case 13–CD–745

June 30, 2006

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Brewer Concrete Construction, Inc. (Brewer Concrete) filed a charge on February 21, 2006,[1] alleging that Respondent Chicago Regional Council of Carpenters, Local 1 (the Carpenters) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing Brewer Concrete to assign certain work to employees it represents rather than to employees represented by Laborers Local No. 6 (the Laborers). The hearing was held on March 13 before Hearing Officer Joyce A. Hofstra. Thereafter, Brewer Concrete, the Laborers, and the Carpenters each filed a posthearing brief.

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

Brewer Concrete, an Illinois corporation, is engaged in the business of concrete construction. During the calendar year ending December 31, 2005, a representative period, Brewer Concrete purchased and received goods, products, and materials at its Chicago, Illinois facility valued in excess of $50,000 directly from points located outside of the State of Illinois. The parties stipulate, and we find, that Brewer Concrete is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Carpenters and Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Brewer Concrete is a subcontractor on the Access Living Headquarters project at 115 West Chicago Avenue in Chicago, Illinois. Machoota Construction is the general contractor on the project. On January 16, Brewer Concrete assigned to its employees represented by the Laborers the following work under its subcontract with Machoota: fabricating, erecting, placing, stripping, shoring, re-shoring, cleaning and oiling, dismantling and stockpiling all wall forms, gang forms, deck forms and flying forms; loading and unloading all forms; setting all bulkheads, beam sides, beam bottoms and beam pockets, the framing of doorways, window openings, chamfer and all layout work in conjunction with the above; hoisting, framing, pouring, setting and other work pertaining to tilt-up walls and panels; footings; cement finishing; operating all boom trucks, laser guided grader boxes, skid steers, uniloaders and all their attachments. Brewer Concrete had seven Laborers-represented employees working on the project, and has employed this group of employees since March 2004.

On January 31, Brewer Concrete President Scott Brewer and Carpenters Business Agent Anthony Guida set up a meeting to discuss signing a contract. Brewer and Guida met on February 2, at which time Guida asserted that the work on the Access Living Headquarters project being performed by employees represented by the Laborers was "Carpenters work." Brewer informed Guida of Brewer Concrete's existing collective-bargaining agreement with the Laborers that covered the Access Living Headquarters project. Guida continued to insist that the Carpenters do the work. According to Brewer, Guida ultimately threatened to "shut down the job" and "go after the General Contractor." Guida denied making the threats. Brewer Concrete and the Carpenters had no further contact after this meeting.

B. Work in Dispute

The Board's notice of hearing states, and the parties stipulate, that the work in dispute is "the fabricating, erecting, placement, stripping, shoring, re-shoring, cleaning and oiling, dismantling and stockpiling of all wall forms (Symons, Simplex, plywood, aluminum, Styrofoam, Peri Systems, etc.), gang forms, deck forms and flying forms; the loading and unloading of all forms; the setting of all bulkheads, beam sides, beam bottoms and beam pockets, the framing of doorways, window openings, chamfer and all layout work in conjunction with the above; the hoisting, framing, pouring, setting and other work pertaining to tilt-up walls and panels; footings; cement finishing, by trowel or machine; the operation of all boom trucks, laser guided grader boxes, skid steers, uniloaders and all their attachments on the Access Living Headquarters Project performed by Brewer Concrete Construction, Inc., at its jobsite located at 115 W. Chicago in Chicago, Illinois."

[1] Unless otherwise stated, all dates are in 2006.

C. Contentions of the Parties

The Laborers contend that all the prerequisites for 10(k) jurisdiction have been satisfied: the Carpenters threatened to shut down the job and "go after" the General Contractor unless Brewer Concrete employed Carpenters to perform the work in dispute; the Laborers and the Carpenters stipulated that they both claim the work in dispute; and the Laborers and the Carpenters stipulated that there is no agreed-upon method for voluntary adjustment of the work in dispute that would bind all parties. As to the merits of the dispute, the Laborers contend that the work in dispute should be assigned to employees represented by the Laborers, based on the collective-bargaining agreement between Brewer Concrete and the Laborers, employer assignment, employer preference, employer past practice, area practice, relative skills, economy and efficiency of operations, and job loss.

The Carpenters contend that the prerequisites of 10(k) jurisdiction have not been satisfied. The Carpenters argue that they have not made a competing claim for the work because the February 2 meeting between Brewer Concrete President Scott Brewer and Carpenters Business Agent Anthony Guida centered on the Carpenters' obtaining a contract with Brewer Concrete. The Carpenters also argue that there is no reasonable cause to believe that they violated Section 8(b)(4)(D). In support of this argument, the Carpenters cite the conflicting testimony over whether Guida actually threatened to shut down the job as well as the lack of contact between Guida and Brewer Concrete after the meeting on February 2 and before the charge was filed on February 21. The Carpenters do not take a position on the proper assignment of the work in dispute.

Brewer Concrete contends that the factors utilized by the Board in resolving jurisdictional disputes favor an award of the work in dispute to employees represented by the Laborers.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work among rival groups of employees and that a party has used proscribed means to enforce its claim to the work in dispute. See *Operating Engineers Local 150* (*R&D Thiel*), 345 NLRB No. 94, slip op. at 3 (2005) (citing *Electrical Workers Local 3* (*Slattery Skanska, Inc.*), 342 NLRB 173, 173 (2004)). Additionally, the Board will not proceed under Section 10(k) if there is an agreed-upon method for voluntary adjustment of the dispute. Id.

1. Competing claims to work in dispute

The Carpenters argue that they have not made a competing claim for the work because the February 2 meeting between Brewer and Guida centered on the Carpenters' obtaining a contract with Brewer Concrete. However, Guida asserted a claim to the work on the Access Living Headquarters project when he told Brewer that it was "Carpenters work." As to the Laborers, the Board has long held that a group of employees performing work is evidence of their claim to that work. See *Longshoremen Local 14* (*Sierra Pacific Industries*), 314 NLRB 834, 836 (1994), supplemented by 318 NLRB 462 (1995), enfd. 85 F.3d 646 (D.C. Cir. 1996). In any event, the unions stipulated at the hearing that they both claim the work in dispute. Accordingly, the existence of competing claims has been established.

2. Use of proscribed means

Brewer testified that at his February 2 meeting with Guida, Guida threatened to shut down the job and go after the general contractor. Contrary to the Carpenters' contention, this threat is sufficient to constitute a violation of Section 8(b)(4)(D) even if it is not followed by other action. See *Plumbers Local 562* (*Grossman Contracting*), 329 NLRB 516, 520 (1999). Moreover, the fact that Guida denies making the threat is no defense.[2] Accordingly, there is reasonable cause to believe that the Carpenters used proscribed means to enforce its claim to the work in dispute.

3. No voluntary method for adjustment of dispute

All parties stipulated that there is no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k), and we so find. Accordingly, the prerequisites for 10(k) jurisdiction have been established, and the dispute is properly before the Board for determination.

E. Merits of the Dispute

The grant of authority in Section 10(k) for the Board to "hear and determine" jurisdictional disputes requires the Board to make an affirmative award of the disputed work to one of the groups of employees involved in the dispute. *NLRB v. Radio & Television Broadcast Eng. Union Local 1212* (*Columbia Broadcasting*), 364 U.S. 573, 579 (1961). While the Act does not set out the standards the Board is to apply in making this determination, the

[2] The Board need not resolve conflicting versions of events in order to proceed to a determination of the dispute because the Board need only find reasonable cause to believe that the respondent union violated the statute. See *R&D Thiel*, supra, slip op. at 4 fn. 9.

Supreme Court has explained that "[e]xperience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board." Id. at 583. Consistent with the Court's opinion, the Board announced in *Machinists Lodge 1743* (*J.A. Jones Construction*), 135 NLRB 1402, 1410–1411 (1962), that in making the determination that the Supreme Court found was required by Section 10(k), the Board would consider "all relevant factors," and that its determination in a jurisdictional dispute would be an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. See generally *R&D Thiel*, supra, slip op. at 4.

We have considered the following relevant factors, and, for the reasons set forth below, conclude that Brewer Concrete's Laborers-represented employees are entitled to perform the work in dispute.

1. Certifications and collective-bargaining agreements

The parties have stipulated that there are no Board certifications concerning the employees involved in the dispute. Accordingly, that factor does not favor awarding the disputed work to employees represented by either Union. See *R&D Thiel*, supra, slip op. at 4; *Slattery Skanska*, supra at 176.

Brewer Concrete and the Laborers have a collective-bargaining agreement. The work jurisdiction provision of that agreement incorporates by reference the concrete agreement between the Concrete Contractors Association of Chicago and the Laborers. The work in dispute clearly falls within the scope of the work covered by the concrete agreement.[3] Thus, the work in dispute falls within the work jurisdiction provision of the collective-bargaining agreement between Brewer Concrete and the Laborers. Moreover, pursuant to the work jurisdiction provision of the collective-bargaining agreement, Brewer Concrete must assign to Laborers-represented employees all covered work, which would include the work in dispute. The work jurisdiction provision also prohibits Brewer Concrete from subcontracting covered work to any entity not a signatory to and covered by the collective-bargaining agreement. In contrast, Brewer Concrete does not have a collective-bargaining agreement with the Carpenters. Accordingly, the factor of collective-bargaining agreements favors awarding the work in dispute to employees represented by the Laborers.

[3] For example, art. XV, par. 7 of the concrete agreement states, "Laborers shall erect all wall forms (Symon, Simplex, Plywood, Aluminum, Stryofoam, Peri Systems, etc.). Laborers shall remove, dismantle and clean all forms. Laborers shall erect and dismantle all gang forms."

2. Employer preference, current assignment, and past practice

Brewer Concrete, in accordance with its preference, and consistent with its practice since its inception, has assigned the work in dispute to employees represented by the Laborers. Therefore, Brewer Concrete's preference, current assignment, and past practice favor awarding the work in dispute to employees represented by the Laborers.

3. Industry and area practice

The parties presented no evidence with respect to industry practice. There is evidence, however, that similarly-sized concrete contractors in the relevant geographic area have traditionally used Laborers-represented employees to perform the work in dispute. Thus, the factor of area practice favors awarding the work in dispute to employees represented by the Laborers.

4. Relative skills

The employees represented by the Laborers who are currently performing the work in dispute received their training from Brewer. Some of these same employees also received training at the Chicagoland Laborers' Training and Apprentice Center. The Carpenters-represented employees received their training, which included concrete form work, through a 4-year apprenticeship program. Because employees represented by either Union have the necessary skills and training to perform the work in dispute, we find that the factor of relative skills does not favor awarding the work in dispute to employees represented by either Union. *R&D Thiel*, supra, slip op. at 5 (citing *Laborers Local 113* (*Joseph Lorenz, Inc.*), 303 NLRB 379, 380 (1991)).

5. Economy and efficiency of operations

Brewer Concrete does not employ employees represented by the Carpenters. Brewer Concrete asserts that it is more economical and efficient for it to continue to use employees represented by the Laborers because they perform every task in the concrete construction process with the exception of the ironwork. In contrast, Carpenters-represented employees would not perform all the tasks in the process. For example, they would not carry all the lumber, strip the holes, perform digging or water pumping, or set up scaffolding. In other words, the Carpenters would sit idly by while these tasks were performed by other employees. Consequently, Brewer Concrete would face additional costs if it hired employees represented by the Carpenters to perform the work in dispute while also retaining employees represented by the Laborers. Accordingly, this factor supports awarding

the work in dispute to employees represented by the Laborers.

6. Job Loss

The Board will consider job loss when making an award of the work in dispute. See, e.g., *Iron Workers Local 40* (*Unique Rigging*), 317 NLRB 231, 233 (1995). As stated above, Brewer Concrete does not employ employees represented by the Carpenters, but it does employ seven employees represented by the Laborers, who are currently performing the work in dispute. According to Brewer, awarding the work in dispute to employees represented by the Carpenters "would put some of [his] men out of a job." We therefore find that the factor of job loss favors awarding the work in dispute to employees represented by the Laborers.

Conclusion

After considering the foregoing factors, we conclude that employees represented by the Laborers are entitled to continue performing the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference, employer past practice, area practice, economy and efficiency of operations, and job loss. In making this determination, we emphasize that we are awarding the work to employees represented by the Laborers, not to that labor organization or its members.

DETERMINATION OF DISPUTE

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

1. Employees of Brewer Concrete represented by Laborers Local No. 6 are entitled to fabricate, erect, place, strip, shore, re-shore, clean and oil, dismantle and stockpile all wall forms (Symons, Simplex, plywood, aluminum, Styrofoam, Peri Systems, etc.), gang forms, deck forms and flying forms; load and unload all forms; set all bulkheads, beam sides, beam bottoms and beam pockets; frame doorways, window openings, chamfer and all layout work in conjunction with the above; hoist, frame, pour, set and other work pertaining to tilt-up walls and panels; footings; cement finishing, by trowel or machine; operate all boom trucks, laser guided grader boxes, skid steers, uniloaders and all their attachments on the Access Living Headquarters Project at 115 W. Chicago in Chicago, Illinois.

2. Chicago Regional Council of Carpenters, Local 1 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Brewer Concrete to assign the disputed work to employees represented by it.

3. Within 14 days from this date, Chicago Regional Council of Carpenters, Local 1 shall notify the Regional Director for Region 13 in writing whether it will refrain from forcing Brewer Concrete, 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. June 30, 2006

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD