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United Brotherhood of Carpenters and Joiners of America, Local Union No. 623 and E.P. Donnelly, Inc. and Sheet Metal Workers' International Association, Local 27, AFL-CIO. Case 4-CD-1178

December 31, 2007

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. E. P. Donnelly, Inc. (the Employer) filed a charge on May 2, 2007,¹ alleging that the Respondent, United Brotherhood of Carpenters and Joiners of America, Local Union No. 623 (Local 623), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to continue to assign certain work to employees it represents rather than to employees represented by Sheet Metal Workers' International Association, Local 27, AFL-CIO (Local 27). Thereafter, Local 27 filed a Motion to Quash Notice of Hearing or Bifurcate Section 10(k) Proceeding. On June 29, the Board denied Local 27's motion without prejudice to Local 27 raising its arguments at the hearing. The hearing was held on July 2, 3, and 5 before Hearing Officer Donna D. Brown. Thereafter, the Employer, Local 623, and Local 27 filed posthearing briefs.²

¹ Unless otherwise indicated, all dates refer to 2007.

² After the briefs had been filed, Local 27 submitted to the Board a letter dated September 6, 2007, attaching transcript pages from a hearing in a civil proceeding in federal district court. The hearing concerned a motion for preliminary injunction brought by Local 27. Local 27 states that it "feel[s] that the Court's comments should be considered by the Board in its determination of this § 10(k) proceeding." Local 27 does not state any other basis for the Board to consider its untimely submission.

Sec. 102.90 of the Board's Rules and Regulations provides that any party to a proceeding under Sec. 10(k) of the Act may file "a brief" with the Board "within 7 days after the close of the hearing." Neither Sec. 102.90 nor any other provision of the Board's Rules provides for any other submission to the Board in a Sec. 10(k) case. In *Reliant Energy*, 339 NLRB 66 (2003), the Board held that parties in unfair labor practice and representation cases may submit post-brief letters, not to exceed 350 words, for the purpose of calling to the Board's attention "pertinent and significant authorities." The Board has never extended *Reliant Energy* to a Sec. 10(k) proceeding. But even assuming the Board were to do so, Local 27's submission would be improper under *Reliant Energy* because the attached transcript pages of a motion hearing do not qualify as "pertinent and significant authorities." As there is no basis in rule or decision to entertain Local 27's September 6 submission, that submission is rejected. Thus, we need not consider

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, a Pennsylvania corporation, is a contractor engaged in the construction industry. During the 12 months preceding the hearing, a representative period, the Employer, at its Jamison, Pennsylvania location, purchased and received goods and services valued in excess of \$50,000 directly from points outside the State of Pennsylvania. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Locals 623 and 27 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer is a contractor in the construction industry, specializing in the installation of prefabricated standing seam metal roofs and related tasks, and performing work (as relevant here) in south and central New Jersey. The Employer is signatory to the Carpenters' International Agreement, which binds the Employer to the Local 623 Agreement while working in Local 623's geographical jurisdiction. As more fully detailed below, both the Carpenters' International Agreement and the Local 623 Agreement assert work jurisdiction over the installation of standing seam roofs. The Employer has had a collective-bargaining relationship with the Carpenters since 1999. It retains a core group of seven or eight Carpenters-represented employees and hires more as needed through the applicable local Carpenters' agreement.

On March 30, the Employer subcontracted with general contractor Sambe Construction Company, Inc. to install prefabricated standing seam metal roofing, soffit, fascia and related trim at the Egg Harbor Township Community Center project in Egg Harbor Township, New Jersey (the disputed work). The Egg Harbor Township Community Center project is covered by a Project Labor Agreement (PLA). The signatories to the PLA are Egg Harbor Township, Sambe, the South Jersey Building and Construction Trades Council, and certain local unions, including Local 27. Local 623 is not a signatory to the PLA. When the Employer entered into the subcontract with Sambe, the Employer signed a Letter of Assent binding it to the terms and conditions of the PLA.

letters submitted in opposition to Local 27's submission by the Employer and Local 623.

Pertinent provisions of the PLA are as follows:

Article 2, Section 4: This Agreement, together with the local Collective Bargaining Agreements appended hereto as Schedule A[,] represents the complete understanding of all signatories and supersedes any national agreement, local agreement or other collective bargaining agreement of any type which would otherwise apply to this Project(s), in whole or in part. Where a subject covered by the provisions, explicit or implicit, of this Agreement is also covered by a Schedule A [collective-bargaining agreement], the provisions of this Agreement shall prevail. . . .

Article 3, Section 1: [W]here there is a conflict, the terms and conditions of this Project Agreement shall supersede and override terms and conditions of any and all other national, area, or local collective bargaining agreements. [¶] It is understood that this is a self-contained, stand alone, Agreement

Article 4, Section 1: The Contractors recognize the signatory Unions as the sole and exclusive bargaining representatives of all craft employees who are performing on-site Project work within the scope of this Agreement

Article 10, Section 2: (A) There shall be a mandatory pre-job markup/assignment meeting prior to the commencement of any work. Attending such meeting shall be designated representatives of the Union signatories to this Agreement, the CM [Construction Manager], and the involved Contractors. . . . (B) All Project construction work assignments shall be made by the Contractor according to the area practice as contained within the jurisdiction of the [South Jersey Building and Construction Trades Council]

In addition, Article 10, Section 3 of the PLA sets forth a procedure for resolving jurisdictional disputes.

One of the “Schedule A” agreements appended to the PLA is a collective-bargaining agreement between Local 27 and Sambe, effective June 1, 2006 until May 31, 2009. As more fully detailed below, the “Scope of Work” provision in the Local 27 Agreement encompasses the disputed work.

The “pre-job markup/assignment meeting” referenced in Article 10, Section 2 of the PLA was held on April 4. At the pre-job meeting, Sambe assigned the disputed work to the Employer. At the same meeting, Local 27 claimed the disputed work. On April 13, the Employer stated that it was assigning the disputed work to employees represented by Local 623. On April 16, Local 27

invoked the PLA’s provisions for the settlement of jurisdictional disputes. A hearing was held before arbitrator Stanley L. Aiges on June 5. On June 15, the arbitrator issued his short-form decision, and on July 2 issued his long-form decision awarding the disputed work to Local 27. The Employer, Sambe, and Local 27 participated in the arbitration, but Local 623 did not.

On April 30, Local 623 informed the Employer that any attempt to assign work within the Carpenters’ jurisdiction to another trade would be “considered a breach of the Collective Bargaining agreement and [would] result in a grievance, picketing or any other means available to preserve this work for the Carpenters.” On May 2, the Employer filed 8(b)(4)(D) charges against both Local 623 and Local 27, alleging that each Union was coercing the Employer to assign the disputed work to employees it represents rather than to employees represented by the other Union. The Board dismissed the Employer’s charge against Local 27. This Section 10(k) proceeding ensued.

B. Work in Dispute

The Notice of Hearing describes the disputed work as “the installation of architectural metal roofing panels and associated flashings and architectural metal siding wall panels for E.P. Donnelly, Inc. at the Egg Harbor Township Community Center in Egg Harbor Township, N.J.” Based on the testimony at the hearing, the Hearing Officer defined the work in dispute as the installation of pre-fabricated standing seam metal roofing, soffit, fascia, and related trim to be performed by the Employer at the Egg Harbor Township Community Center.

C. Contentions of the Parties

The Employer contends that there is reasonable cause to believe that Local 623 violated Section 8(b)(4)(D) because both Local 623 and Local 27 claim the disputed work, and Local 623 threatened to picket if the Employer assigned the work to employees represented by Local 27. The Employer further asserts that there is no agreed-upon voluntary method to adjust the dispute. On the merits of the dispute, the Employer asserts that its collective-bargaining agreement with Local 623, employer preference, past practice, area and industry practice, relative skills and training, and economy and efficiency of operations favor awarding the disputed work to Carpenters-represented employees.

Local 623 agrees that the dispute is properly before the Board under Section 10(k) and, on the merits, cites the same factors as the Employer for asserting that the disputed work should be awarded to employees that it represents. Local 623 also asserts that because Egg Harbor Township is not an employer in the construction in-

dustry, the PLA is an unlawful prehire agreement, and therefore Local 27 violated Section 8(b)(4)(D) by seeking, through arbitration, to enforce its PLA-based claim to the disputed work.

Local 27 contends that the notice of hearing should be quashed because the Board “cannot make an affirmative award of the disputed work.” In support of this contention, Local 27 argues that the Board is precluded from exercising its authority under Section 10(k) with regard to any work that is within the scope of the PLA because the PLA is authorized by a New Jersey statute, N.J. Stat. Ann. §§ 52:38-1 et seq., which (according to Local 27) is not subject to NLRA preemption under the Supreme Court’s decision in *Boston Harbor*.³ Local 27 further contends that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated because Local 27 did not use proscribed means to enforce its claim to the work in dispute, and Local 623 and the Employer colluded in an effort to evade the PLA. Local 27 contends that the notice of hearing should be quashed on the additional ground that the PLA provides an agreed-upon method for voluntarily adjusting the dispute. Local 27 asserts that, should the Board decline to quash the notice of hearing, it should award the disputed work to employees represented by Local 27 based on its “Schedule A” collective-bargaining agreement attached to the PLA and on area and industry practice, relative skills, and economy and efficiency of operations.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, it must be established that (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated; and (3) the parties have no agreed-upon method for voluntary adjustment of the dispute. *Carpenters Local 272 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001). For the reasons stated below, we find that this dispute is properly before the Board for determination under Section 10(k).

At all times, both Local 623 and Local 27 have claimed the disputed work for employees represented by their respective unions. Local 27’s Business Representative, Scott Sheridan, testified that when Sambe announced at the April 4 prejob meeting that the disputed work was being assigned to the Employer (known to employ Carpenters-represented employees), he “raised issue with the assignment.” On April 16, Local 27 expressly claimed the disputed work by invoking the PLA’s grievance/arbitration apparatus for the settlement of ju-

risdictional disputes. On April 30, Local 623 advised the Employer that any attempt to assign work within its jurisdiction to another trade would be “considered a breach of the Collective Bargaining agreement and [would] result in a grievance, picketing or any other means available to preserve this work for the Carpenters.” Accordingly, there is reasonable cause to believe that there are competing claims to the disputed work. See *Bakery Workers Local 205 (Metz Baking Co.)*, 339 NLRB 1095, 1097 (2003).

There is also reasonable cause to believe that Local 623 used proscribed means to enforce its claim. After learning that Local 27 claimed jurisdiction of the disputed work, Local 623 threatened the Employer, in its April 30 letter, with picketing and any other means available should the Employer assign the disputed work to Local 27. It is well established that a picketing threat constitutes proscribed means. See *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1032 (2004); *Laborers Local 1359 (Krall’s Masonry)*, 281 NLRB 1034, 1035 (1986). Although Local 27 contends that the Employer and Local 623 colluded to evade the PLA, it does not claim that Local 623’s picketing threat was a sham. Nor does Local 27 offer any direct evidence that Local 623 did not intend its threat seriously. Absent such evidence, Local 623’s letter, which on its face threatens economic action, supports finding reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Cretex*, 343 NLRB at 1032.⁴

We also find that no agreed-on method exists for voluntarily resolving the dispute. Local 27 urges that the PLA contains such an agreed-upon method, but Local 623 is not a party to the PLA and therefore is not bound to its dispute-resolution procedure. See *Metz Baking*, 339 NLRB at 1097.

Based on these facts, we find reasonable cause to believe that Section 8(b)(4)(D) has been violated, that there are competing claims to the disputed work, and that there is no agreed-upon voluntary method to adjust the dispute. Thus, we find Section 10(k) applicable.

Local 27 further contends, however, that the Board “cannot make an affirmative award of the disputed work” because the PLA is authorized by a New Jersey statute, which is not subject to NLRA preemption. Local 27 thus appears to suggest that a Board award of the work in dispute to employees represented by Local 623 would

³ *Building & Construction Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) (*Boston Harbor*).

⁴ As stated above, Local 623 contends that reasonable cause exists to believe that Local 27 violated Sec. 8(b)(4)(D), and Local 27 opposes that contention. We need not address these arguments. We have found reasonable cause to believe that Local 623 violated Sec. 8(b)(4)(D). That suffices to support our jurisdiction under Sec. 10(k). Moreover, the Employer’s charge against Local 27 was dismissed.

effectively and impermissibly preempt New Jersey law authorizing public entities such as Egg Harbor Township to negotiate project labor agreements. The suggestion is without merit. An award of the disputed work to Local 623 would not prevent Egg Harbor Township from exercising its authority under state law to negotiate and execute project labor agreements, nor would it invalidate the PLA. The Employer would continue to be bound under the terms of the PLA, and the parties to the PLA would retain any rights they may have under state law to bring a suit for damages against the Employer for any breach of the PLA.

But even assuming *arguendo* that our exercise of jurisdiction in this case would put the Board at cross-purposes with the New Jersey statute, it does not follow that the Board is precluded from exercising its statutory authority. It is one thing to urge that, under *Boston Harbor*, the state statute is not subject to preemption; it is quite another to suggest that as a result the Board has no jurisdiction over this dispute arising under Section 10(k). Such a suggestion is contrary to the Constitution's Supremacy Clause.

In sum, 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, 577 (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. Collective-bargaining agreements

The Employer is signatory to the Carpenters' International Agreement, which binds the Employer to the Local 623 Agreement while working in Local 623's jurisdiction. Both the International Agreement and the Local 623 Agreement contain language asserting jurisdiction over the disputed work. The former agreement claims "[a]ll work in connection with the unloading, handling, distribution, and installation by any means of all prefabricated standing seam metal roofing, soffit, fascia, and related trim." The latter claims "erection or application of all . . . standing seam roofs, aluminum siding, siding wallboard, or sheets composed of wood pulp, plastic, plaster, transite or composition materials or any combination of any of the above with any other material in-

cluding combined or faced with metal regardless of the manner attached."

The Employer has no collective-bargaining agreement with Local 27. However, the Employer is signatory to a Letter of Assent that binds it to the PLA; and Local 27's agreement with, *inter alia*, Sambe is appended to the PLA. The latter agreement, in turn, claims for Local 27 "roof curbs . . . fascia, soffits . . . metal roofing and decking and all other architectural sheet metal work" Assuming, without deciding, that the Employer's execution of the Letter of Assent binding it to the PLA also bound it to the appended Local 27 Agreement, we disagree with Local 27's contention that the "supremacy" provisions in Article 3, Section 1 of the PLA cause this factor to favor an award of the disputed work to employees represented by Local 27. Every contract implies an expectation of the parties that its terms will be honored, notwithstanding the existence of any conflicting agreements entered into by any of the parties. Both Local 623 and (arguably) Local 27 have separate binding contracts with the Employer, and the Employer's obligations under one contract cannot be used to void its obligations under the other. Accordingly, the PLA's supremacy provisions do not privilege the Employer to breach its agreement with Local 623, which is not a party to the PLA, nor would a similar provision in the Local 623 contract allow the Employer to breach the Local 27 agreement. Therefore, the factor of collective-bargaining agreements does not favor an award to employees represented by either union. See *Operating Engineers Local 318 (Kenneth E. Foeste Masonry)*, 322 NLRB 709, 712 (1996).

2. Employer preference, current assignment, and past practice

Under the Employer's agreements with the Carpenters dating back to 1999, its past practice has been to assign work of the kind in dispute here to Carpenters-represented employees. Consistent with this practice, the Employer currently assigns the disputed work to those employees, and prefers to continue doing so. Its project manager, Gerry Campi, testified that the Employer has "had a lot of success using the Carpenters. They get the job done on time and as far as the workmanship goes we're very satisfied with it." Although Local 27 urges the Board to accord this factor little weight, Local 27 does not deny that the Employer's preference and past practice is to assign the work in dispute to Carpenters-represented employees. Based on the foregoing, we find that the factors of employer preference, current assignment, and past practice favor awarding the disputed work to employees represented by Local 623.

3. Area and industry practice

In the past several years, the Employer has installed 24 prefabricated standing seam metal roofs in New Jersey with Carpenters-represented employees. In addition, the evidence shows that several other area contractors similarly employ and have employed Carpenters-represented employees to perform this type of work. For example, Patriot Roofing, Inc. did so on 67 projects completed between 2004 and 2007, and it is currently doing so on 10 projects. Bamco, Inc. has done so on 38 completed projects in the last 5 years. La Morte Construction, Inc. did so on 12 projects; Avon Contractors, on 10 projects. J.D. Contractors and Newmet Corporation similarly use Carpenters-represented employees for this type of work. Campi testified that the Employer often bids against contractors who use Carpenters-represented employees to install standing seam metal roofs.

The evidence also shows that employees represented by the Sheet Metal Workers have an extensive history of performing this type of work. George Thomas, vice president of Thomas Company, Inc., testified that between 2002 and 2004, his company completed 28 New Jersey projects of the type at issue with employees represented by Local 27, and that he was currently performing similar work in Atlantic City with Local 27-represented employees. Brian Kiker, president of Kiker Sheet Metal Corporation, testified that his company has had a collective-bargaining relationship with Local 27 since 1953 and has completed 27 projects of this type in New Jersey since 2003. Kiker acknowledged that he competes for these jobs with contractors that employ Carpenters-represented employees. Raymond Sykes, project manager and superintendent of John Sykes Company, testified about Sykes' collective-bargaining relationship with Local 27 dating back to 1901 and about projects successfully completed involving work of the kind at issue here. He further testified that employees represented by the Iron Workers and the Carpenters perform this type of work. Scott Sheridan, Local 27's business representative, acknowledged that employees represented by Iron Workers, Carpenters, and Sheet Metal Workers all perform the type of work at issue.

Because the evidence shows that employees represented by both Carpenters and Sheet Metal Workers perform work of the type in dispute here, we find that the factor of area and industry practice does not favor an award of the disputed work to employees represented by either union.⁵

⁵ Local 27 notes that the arbitration pursuant to the PLA in this case resulted in an award assigning the disputed work to employees represented by Local 27 based exclusively on "[t]he prevailing area practice." The evidence above does not support the arbitrator's conclusion.

4. Relative skills and training

Local 623 presented evidence that Carpenters-represented employees are trained to perform work of the kind in dispute as part of a 4-year apprenticeship program, which includes a required standing seam roofing component. The record further shows that the Employer's Carpenters-represented work force is certified in the installation of the Merchant and Evans' Zip Rib system, which is the specific prefabricated standing seam metal roofing to be installed on the Project. The Employer is also certified by other manufacturers for this type of work.

Local 27 presented evidence of its apprentice training program, wherein apprentices must complete modules related to louvers, metal flashings, metal roofs, and roof systems. Andrew Caccholi, training coordinator for the Local 27 Sheet Metal Workers Education Fund, testified that apprentices receive approximately 1000 hours of combined on-the-job and classroom training in roofing and architectural sheet metal, including installation of prefabricated seamless steel roofing.

George Thomas testified that his company and its Local 27-represented employees were called in to repair poor work done by the Employer and its Carpenters-represented employees on the Sovereign School project. The Employer disputed this contention and made an offer of proof that the project manager for the Sovereign School project would attest to the Employer's satisfactory completion of work on that project. Yan Girylya, vice president and general manager of Sambe, testified that he had experience using employees represented by both unions, and he found both groups of employees "technically proficient" and "acceptable . . . in terms of quality" in installing prefabricated standing seam metal roofing. John Reilly, president of Patriot Roofing, testified that he always uses employees represented by the Carpenters but that employees represented by the Sheet Metal Workers are equally "qualified" to perform the work at issue.

On this record, we find that employees represented by both Local 623 and Local 27 have the skills and training necessary to perform the work in question. Accordingly, the factors of relative skills and training do not favor an award to employees represented by either union.

5. Economy and efficiency of operations

Campi, the Employer's project manager, testified that the installation of standing seam metal roofs sometimes requires the performance of ancillary carpentry work. Thus, the Employer avoids coordination problems and employee down time and thereby gains efficiency by employing Carpenters-represented employees who can

perform this ancillary work in addition to the roof installation. Local 27 notes that its members are skilled in ancillary tasks such as louvers or metal flashing, for which Carpenters-represented employees receive no training. Local 27 contends that these skills make it more efficient to employ its workers. The work in dispute, however, does not include louvers. Campi testified that louvers were not “part of [the] package” on the Project. Giryla confirmed this, adding that roofing bids usually exclude louvers from the scope of the work. Accordingly, we find that the factor of economy and efficiency of operations favors awarding the disputed work to employees represented by Local 623.

6. The arbitrator’s determination

Arbitrator Aiges awarded the work in dispute to employees represented by Local 27. We find, however, that his award is entitled to little weight because he did not consider most of the factors that the Board takes into account in making an award of disputed work under Section 10(k). Rather, he found that under Article 10, Section 2(B) of the PLA, the only applicable consideration was area practice within the jurisdiction of the South Jersey Building and Construction Trades Council. Applying this single factor, the arbitrator’s only option was to find that it favored one union over the other; the alternative, finding that it favored neither union, was unavailable. Thus, the arbitrator found in favor of Local 27, notwithstanding his acknowledgment that the Employer introduced “scores of examples” of standing seam metal roof installations performed by Carpenters-represented employees. We cannot determine how the arbitrator would have ruled on the factor of area practice had the option of “favors neither union” been available. Nor can we evaluate his decision according to our own standards. Thus, we find that the arbitrator’s decision does not favor

awarding the disputed work to either group of employees.

CONCLUSIONS

After considering all the relevant factors, we conclude that employees represented by Local 623 are entitled to continue performing the work in dispute. We reach this conclusion relying on the factors of employer preference, current assignment and past practice, and economy and efficiency of operations. In making this determination, we award the work to employees represented by Local 623, not to that labor organization or to 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.

Employees of E. P. Donnelly, Inc., represented by United Brotherhood of Carpenters and Joiners of America, Local Union No. 623, are entitled to install prefabricated standing seam metal roofing, soffit, fascia and related trim on the Community Center Project in Egg Harbor Township, New Jersey.

Dated, Washington, D.C. December 31, 2007

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD