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**International Brotherhood of Electrical Workers, Local Union No. 42, AFL-CIO and Henkels & McCoy, Inc. and Massachusetts Laborers' District Council of the Laborers' International Union of North America, AFL-CIO.** Case 1-CD-1074

September 23, 2009

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Henkels & McCoy, Inc. (the Employer) filed a charge on April 27, 2009, alleging that the Respondent, International Brotherhood of Electrical Workers, Local Union No. 42, AFL-CIO (IBEW Local 42), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with the object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Massachusetts Laborers' District Council of the Laborers' International Union of North America, AFL-CIO (Laborers). The hearing was held on June 5, 2009, before Hearing Officer Gene Switzer. Thereafter, the Employer, IBEW Local 42, and the Laborers filed posthearing briefs.

The National Labor Relations Board<sup>1</sup> 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 stipulate that the Employer is a Pennsylvania corporation with an office and principal place of business located in Blue Bell, Pennsylvania, and is en-

<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed \_\_\_ U.S.L.W. \_\_\_ (U.S. September 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

gaged in the business of building and construction throughout the United States, including the Commonwealth of Massachusetts and the State of Connecticut. Annually, in the course and conduct of its business operations, the Employer provides services valued in excess of \$50,000 directly to customers located outside the Commonwealth of Massachusetts and the State of Connecticut.

The parties further 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 IBEW Local 42 and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The work in dispute is related to the installation of a fiber optic communication network along Interstate 91 in western Massachusetts. Work on the project started in mid-April 2009 and is expected to conclude sometime in early to mid-December 2009.<sup>2</sup> The general contractor is Adesta, and the Employer is the subcontractor responsible for installing all of the fiber optic cable for the network.

The installation process involves the placing of fiber optic cable into flexible polyethylene tubing (innerduct), which is buried underground using either a dozer plow or a spider plow. In a single operation, the moving plow opens the ground, places six lines of innerduct into the ground, and then covers the lines with plowed-up dirt. An eight or nine person crew is assigned to each plow. One person operates the plow itself and must have a state hoisting license. Another person operates a bulldozer pulling the plow. Other crew members drive a truck pulling a trailer carrying reels of innerduct, and guide the tubing as it feeds into the plow. At times during the plowing process, workers also use drills, jackhammers, or shovels for the removal of rocks and debris. At various intervals, the same crew installs boxes that provide access to the buried innerduct. After the innerduct and boxes are in place, most, if not all, of the plow crew participates in the process of using compressed air machinery to blow the fiber optic cable through the boxes into the innerduct.

The Employer and IBEW Local 42 are parties to the outside teledata agreement, which is a national collective-bargaining agreement with local provisions. The Employer has a core group of employees from various IBEW local unions who travel from job-to-job performing work similar to that which is in dispute. The Employer supplements that core group with employees rep-

<sup>2</sup> All dates hereafter are 2009, unless otherwise stated.

resented by the IBEW local that has jurisdiction over the geographical area where work is being performed. About 20 of 28 employees working for the Employer on the Interstate 91 project are from IBEW Local 42. About 8 to 10 of those employees have the hoisting license required for operation of the plow.

The Employer is also a party, through its membership in the Labor Relations Division of Construction Industries of Massachusetts, Inc., to the Heavy and Highway collective-bargaining agreement with the Laborers. By letter dated February 25, the Laborers requested a prejob conference with the Employer regarding work on the Interstate 91 project. In a March 18 letter, the Laborers stated that a dispute existed regarding the project and that it believed that the Employer had violated the Heavy and Highway agreement by refusing both to participate in a prejob conference and to honor the terms and conditions of the agreement. The letter indicated that the Laborers would request arbitration.

By letter dated March 20, the Employer responded that the work had been assigned to the employees represented by IBEW Local 42 in accordance with the teledata agreement. The Employer also stated that, if the Laborers pursued a grievance, the Employer would request a 10(k) hearing. The Employer sent a copy of this letter to representatives of the International Brotherhood of Electrical Workers and IBEW Local 42.

By letter dated April 15, IBEW Local 42 informed the Employer that “[j]ob actions and picketing by Local Union No. 42, IBEW, will take place if the assignment of all work is not made to the Electrical Workers in your employ.” The Employer’s vice president and director of labor relations, Stephen Freind, testified that he also spoke to IBEW Local 42 Official Milton Moffitt Jr., regarding the Laborers’ claim. Moffitt advised Freind that IBEW Local 42 would do what it had to do to keep the work.

#### *B. The Work in Dispute*

The work in dispute, as set forth in the Board’s notice of hearing, is the work associated with the installation of power and communications innerduct,<sup>3</sup> including fiber optic cable, as part of the intelligent transportation system on a portion of the Interstate 91 Highway in Massachusetts between the Connecticut border and 4 miles south of the Vermont border.

<sup>3</sup> The notice of hearing used the word “conduit” rather than “innerduct”; however, the Employer and IBEW Local 42 stipulated that the word “innerduct” should be used. The Laborers did not join the stipulation or object to it on the record.

#### *C. Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that IBEW Local 42 violated Section 8(b)(4)(D). The Employer and IBEW Local 42 contend that the work in dispute should be assigned to the IBEW Local 42-represented employees on the basis of the teledata agreement, employer’s preference, past practice, area and industry practice, skills and training, and economy and efficiency of operations.

The Laborers requests the Board to quash the notice of hearing, arguing that there is no reasonable cause to believe that IBEW Local 42 violated Section 8(b)(4)(D). It claims that the threat by IBEW Local 42 was a sham, made in collusion with the Employer to bring this dispute before the Board, and that IBEW Local 42 has no intention of engaging in a strike or other coercive action. The Laborers also contends that the Employer should not be allowed to create a jurisdictional dispute simply to avoid wage rate obligations under its contract with the Laborers. Finally, the Laborers argues that, unless the Board declines jurisdiction and quashes the notice of hearing, it runs the risk of effectively preventing the Commonwealth of Massachusetts from establishing the prevailing wage rate for the work in dispute, potentially raising constitutional questions involving the Supremacy Clause of the U.S. Constitution and the Police Power of the Commonwealth of Massachusetts under Article X of the U.S. Constitution.<sup>4</sup> Alternatively, the Laborers argues that if the Board does exercise its jurisdiction under Section 10(k) of the Act, the work in dispute that does not involve the actual operation of the plow or blowing machinery should be assigned to employees represented by the Laborers based on its collective-bargaining agreement with the Employer, on the Employer’s past practice for utility installations other than fiber optic cable, and on area and industry practice.

#### *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

<sup>4</sup> At the hearing, the Laborers introduced a letter from the Massachusetts Executive Office of Labor and Workforce Development, Division of Occupational Safety, dated May 5, 2009, regarding the applicability of the prevailing wage law to the project. The letter states that it covers the wages to be paid for the excavation and backfilling portion of the work. The letter further states that the Laborers provided evidence that its current and past signatory contractors employed laborers to perform work related to that included on the project, including backfill, tamping, and grading related to work, and therefore a worker performing these duties in conjunction with trenching must be paid the Laborers’ rate. The letter also states that the Division has reviewed, inter alia, the outside teledata agreement between the Employer and IBEW Local 42 and concluded that the agreement does not establish the proper wages for the work.

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.<sup>5</sup>

The parties stipulated that there are competing claims to the work in dispute and that there is no agreed-upon method for voluntary adjustment of the dispute. Further, statements in IBEW Local 42's April 15 letter to the Employer and in IBEW Local 42 Official Moffitt's conversation with the Employer's vice president, Friend, constitute threats to take proscribed coercive action in furtherance of a claim to the work in dispute. The Laborers urges the Board to find that such threats were a sham, citing the Employer's forwarding of its March 20 letter to IBEW Local 42. We find, however, that under the Board's governing standard, this evidence is insufficient to conclude that IBEW Local 42 colluded with the Employer in this matter or that the threats were not made seriously.<sup>6</sup>

We also find no merit in the Laborers' argument that the Employer has attempted to create a jurisdictional dispute when the real dispute is a contractual dispute with the Laborers in which the Employer seeks to avoid paying the appropriate wage rates. The dispute in this case is distinguishable from *Recon Refractory & Construction v. NLRB*,<sup>7</sup> cited by the Laborers. In that case the employer assigned work traditionally performed by one employee group under a collective-bargaining agreement to another employee group that had not previously performed or asserted a claim to the work.<sup>8</sup> Thus, the real dispute was a contractual dispute over the preservation of bargaining unit work. Here, we are presented with a traditional 10(k) jurisdictional dispute in which both unions have collective-bargaining agreements with the Employer, each of them claims that its collective-bargaining agreement covers the work in dispute, and the Employer has assigned the work in question to IBEW-represented employees who performed this work in the past.

Finally, as to the Laborers' claim that the Board's exercise of its 10(k) authority risks creating a conflict with the authority of the Commonwealth of Massachusetts to establish prevailing wage rates for the Interstate 91 project, we note that the State statute provides a mechanism for determining and enforcing prevailing wage standards,

not for the resolution of jurisdictional disputes over an employer's work assignment. Our determination of the merits of the dispute decides only which group of employees is entitled to perform the work, not the wages that the Employer must pay them for the work.<sup>9</sup>

Based on the foregoing, we find that there are competing claims for the disputed work, that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that there is no voluntary method for the adjustment of the dispute. We accordingly find that the dispute is properly before the Board for determination, and deny the Laborers' request 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

The parties stipulated that the Employer is not failing to conform to an order or certification of the Board determining the bargaining representative for the employees performing the work in dispute. As stated above, the Employer and IBEW Local 42 are parties to a collective-bargaining agreement known as the outside teledata agreement. In that agreement, the section entitled "Scope" provides, inter alia, that it covers:

low voltage construction, installation, maintenance and removal of teledata facilities (voice, data, and video) including outside plant, telephone, and data wire, interconnect, terminal equipment, central offices, PABX, fiber optic cable and equipment, railroad communications, microwaves, V-SAT, by-pass, CATV, WAN (Wide Area Network), LAN (Local Area Networks) and ISDN (Integrated Systems Network).

Based on this clear and specific language, we find that the work in dispute is covered by the Employer's collective-bargaining agreement with IBEW Local 42. Although the Employer is also bound to the Heavy and Highway agreement with the Laborers, that contract does

<sup>5</sup> The Laborers also requests that the Board stay its ruling in this case because the current Board does not possess a legally constituted quorum and is without authority to issue decisions. For the reasons set forth in fn. 1, supra, we deny the Laborers' request.

<sup>6</sup> *Southwest Regional Council of Carpenters (Standard Drywall)*, 348 NLRB 1250, 1254 (2006); *Operating Engineers Local 3 (Levin-Richmond Terminal)*, 299 NLRB 449, 450-451 (1990).

<sup>7</sup> 424 F.3d 980 (9th Cir. 2005), denying petition for review of Board order quashing notice of hearing in 339 NLRB 825 (2003).

<sup>8</sup> Id. at 990-991.

<sup>9</sup> See, e.g., *Laborers Local 76 (Carlson & Co.)*, 286 NLRB 698, 700 (1987); *Laborers Local 89 (San Diego Zoological Society)*, 198 NLRB 129, 130 (1972).

not specifically mention teledata installation or laying fiber optic cable, nor does it cover all of the work in dispute. The factor of collective-bargaining agreements therefore favors an award of the disputed work to employees represented by IBEW Local 42.<sup>10</sup>

#### 2. Employer preference and past practice

The Employer's preference and consistent past practice is to assign teledata fiber optic installation work of the type that is in dispute to employees represented by the IBEW. Accordingly, we find that this factor favors an award of the work in dispute to employees represented by IBEW Local 42.

#### 3. Area and industry practice

The Employer presented testimony that in the last several years it has worked on several teledata installation projects throughout the country using IBEW-represented employees, and that another contractor, Massachusetts Electric, has performed the same type of work using IBEW-represented employees. The Laborers presented testimony that contractors other than the Employer have used employees represented by the Laborers to perform work associated with the installation of power and communications innerduct (including fiber optic cable), including trenching, backfilling, restoration, and moving and laying the innerduct where the spider plow was unable to go. We find that this factor does not favor an award of the work in dispute to employees represented by either union.

#### 4. Relative skills and training

The IBEW Local 42-represented employees of the Employer have been trained to perform all necessary tasks related to the integrated process of installing innerduct and fiber optic cable using the spider or dozer plow and pneumatic blowing machinery. Only those employees with Massachusetts hoisting licenses can operate the plows, and the Laborers concede that employees it represents would not perform this work. When the Employer introduces a new machine, it has the manufacturer train the employees who will operate the machine, and either the Employer or the manufacturer provides training on the blowing machine. There is evidence that employees represented by the Laborers possess general skills related to the excavation, installation, and burial of conduit for various purposes, but there is no evidence that they have been trained in the operation of unitary plow and blowing processes used by the Employer to perform the teledata installation work in dispute. We therefore find that this factor favors an award of the work to employees represented by IBEW Local 42.

#### 5. Economy and efficiency of operations

The Employer presented testimony that the IBEW Local 42-represented employees are capable of performing everything that is required on the project "from start to finish." The Laborers acknowledge that employees it represents would have to perform some of the disputed work in tandem with a second crew who would perform plow and blower operations. Assignment of a portion of the work in dispute to employees represented by the Laborers would not be as economical and efficient as having the Employer's own employees represented by IBEW Local 42 perform all of the job functions. Accordingly, we find that this factor favors an award of the work in dispute to employees represented by IBEW Local 42.

#### CONCLUSION

After considering all the relevant factors, we conclude that the employees represented by IBEW Local 42 are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, relative skills and training, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by IBEW Local 42, not to that 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.

Employees of Henkels & McCoy, Inc., represented by International Brotherhood of Electrical Workers, Local Union No. 42, AFL-CIO, are entitled to perform the work associated with the installation of power and communication innerduct, including fiber optic cable, as a part of the intelligent transportation system on a portion of the Interstate 91 Highway in Massachusetts between the Connecticut border and 4 miles south of the Vermont border.

Dated, Washington, D.C. September 23, 2009

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Wilma B. Liebman, Chairman

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>10</sup> Accord: *Local 121 (Henkels & McCoy, Inc.)*, 338 NLRB 1, 5 (2002).