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International Union of Operating Engineers, Local 150, AFL-CIO and International Brotherhood of Teamsters, Local 703 and Moore Landscapes, Inc. and Laborers' International Union of North America, Local No. 4 and United Union of Roofers, Waterproofers and Allied Workers, Local No. 11. Cases 13-CD-800 and 13-CD-801

September 30, 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. Moore Landscapes, Inc. (the Employer) filed charges on June 25, 2009,¹ alleging that the International Brotherhood of Teamsters, Local 703 (Teamsters) and the International Union of Operating Engineers, Local 150 (Operating Engineers) violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by the Teamsters and Operating Engineers rather than to employees represented by the United Union of Roofers, Waterproofers and Allied Workers, Local No. 11 (Roofers).² The hearing was held from July 14 to 16, before Hearing Officer Adriana Lipczynski. Thereafter, the Teamsters and Operating Engineers, jointly, the Employer, and Roofers filed posthearing briefs.

The National Labor Relations Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, we make the following findings.³

¹ All dates hereafter are 2009, unless otherwise indicated.

² Prior to the hearing, the Laborers International Union of North America, Local 4, named as a party here, disclaimed interest in the disputed work and did not participate in the hearing.

³ 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*

I. JURISDICTION

The parties stipulated that the Employer is an Illinois corporation engaged in commercial landscape construction and maintenance, and that, during the past calendar year, the Employer purchased and received goods and materials valued in excess of \$50,000 indirectly from points located outside the State of Illinois. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties further stipulated, and we find, that Teamsters, Operating Engineers, and Roofers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer has been engaged in commercial landscape construction and maintenance in the Greater Chicago area since 1948. In 2004, the Board certified Teamsters and Operating Engineers as the joint representatives of the Employer's landscape construction employees, including lead plantsmen, plantsmen, landscape helper, and installers. As a member of the Illinois and Indiana Landscape Contractors Bargaining Association (ILCBA), the Employer is signatory to the Plantsmen agreement⁴ with both unions and the Operators agreement⁵ with Operating Engineers. The Employer has never had a collective-bargaining relationship with Roofers.

The Employer has a subcontracting agreement with general contractor Walsh Construction Company (Walsh) to perform all landscaping work at the Roosevelt Collection, a new, multiuse development consisting of both residential and commercial space. The landscaping work in the subcontract includes the installation of two green roof systems: a "green grid" system consisting of preplanted trays of plant material that are arranged in a grid pattern on the rooftop, and a "build-up" system consisting of multiple layers or components that are installed

Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed sub nom. *NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc.*, __U.S.L.W.__ (U.S. September 29, 2009) (No. 09-377).

⁴ The Plantsmen agreement covers employees in the following classifications: plantsmen, lead plantsmen, equipment mechanics, shop helpers, truckdrivers, landscape helpers, water truck operators and installers. The Plantsmen agreement's scope of work includes "all work historically performed in the landscape construction industry at or on construction sites[.]" The Employer has approximately 25 employees covered by the Plantsmen agreement.

⁵ The Operators agreement applies to employees working as landscape equipment operators. The Operators agreement's scope of work includes the operation of equipment "on all commercial landscape construction projects." The Employer has approximately six employees covered by the Operators agreement.

on top of each other to form a rooftop garden.⁶ The build-up system layers typically include: (1) the roof deck, (2) the roofing membrane, (3) a root barrier, (4) optional insulation, (5) an optional moisture mat, (6) a drainage mat, (7) filter fabric, (8) growing media, and (9) plants.

The Employer has historically performed green rooftop projects using its employees represented by Teamsters and Operating Engineers. Consistent with this practice, the Employer assigned the green roof installation work, as well as all other landscaping work under the Roosevelt Collection subcontract, to these employees.

On April 6, the Employer commenced work on the Roosevelt Collection project. Two days later, Roofers requested a meeting of the Joint Conference Board (JCB) of the Chicago and Cook County Building and Construction Trades Council (CBTC) to resolve an alleged jurisdictional dispute with respect to the performance of the green roofing work at the Roosevelt Collection jobsite. Roofers and Operating Engineers are members of the CBTC.

The initially scheduled JCB hearing was postponed. Thereafter, as a result of a meeting attended by Roofers, Operating Engineers, the Employer, and Teamsters, the Employer employed two employees represented by Roofers to complete certain work under the subcontract for a couple of days. In agreeing to use the two employees, the Employer expressly stated that it was not admitting that Roofers has a valid jurisdictional claim to the disputed work or that the Employer did not have a preference for employees represented by Teamsters and Operating Engineers. Notwithstanding this and other attempts to settle the dispute, a JCB arbitration hearing on Roofers' work claim was held on June 5. Although both Operating Engineers and the Employer received notice of the hearing, only Operating Engineers participated. On June 6, the JCB arbitrator issued a decision awarding to Roofers the installation of several components of the green roofing system at the Roosevelt Collection jobsite. In an appeal to the National Plan Administrator, Operating Engineers argued that the JCB did not have jurisdiction to render an award because Teamsters and the Employer were not bound. The appeal was denied on grounds that Operating Engineers failed to raise this before the arbitrator.

On June 15, general contractor Walsh notified the Employer that if it did not comply with the terms of its subcontract and perform the work in accordance with the project schedule using "the appropriate union labor,"

⁶ All parties agree that the "green grid" and "build-up" roof systems are considered "vegetative roofs," one of several types of green roofing projects.

Walsh would exercise the failure of performance clause in the subcontract. The Employer responded by June 18 letter to Walsh, with copies to Teamsters and Operating Engineers, stating that it was caught in the unions' jurisdictional dispute, was not bound by the JCB's arbitration award, and was exploring ways to complete the work. On June 23, the Employer received a letter from Teamsters and Operating Engineers threatening that they would use "any and all means, including picketing" if the Employer reassigned any of the disputed work.

B. Work in Dispute

The work in dispute includes green roof work to be performed by the Employer at the Roosevelt Collection jobsite at 949 South Wells Street, Chicago, Illinois, specifically including the placement of preplanted trays in the green-grid roof system and the installation of all layers in the built-up roof system above the roof membrane through the partial placement of growing media.

C. Contentions of the Parties

Teamsters, Operating Engineers, and the Employer contend that there are competing claims for the work in dispute, that there is reasonable cause to believe that Teamsters and Operating Engineers violated Section 8(b)(4)(D) by their threats to picket, that no voluntary method for dispute resolution exists, and that the disputed work should be awarded to employees represented by Teamsters and Operating Engineers based on the factors of Board certification and collective-bargaining agreements, employer preference and past practice, area and industry practice, economy and efficiency of operations, relative skills, and gain or loss of employment.

Roofers moves to quash the notice of hearing on grounds that there are no competing claims to the work in dispute, the threat to picket by Teamsters and Operating Engineers was a noncoercive sham, and, if a genuine jurisdictional dispute exists, the JCB grievance and arbitration proceeding was a voluntary means for resolving the dispute. In the event that the Board does exercise its jurisdiction under Section 10(k) of the Act, Roofers contends that the Board should award the work in dispute to employees represented by Roofers based on the factors of relative skills, economy and efficiency, area practice, and prior jurisdictional dispute determinations.

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) has been violated. This standard requires finding that there is reasonable cause to believe that: (1) there are competing claims for the disputed work among rival groups of employees; (2) a party has used proscribed means to enforce

its claim to the work in dispute; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.⁷ On this record, we find that this standard has been met.

1. Competing claims for work

We find that there are competing claims for the work. Teamsters and Operating Engineers explicitly claimed the work in dispute for the employees they represent by their joint letter to the Employer on June 23. Employees represented by Teamsters and Operating Engineers have also been performing the work. Roofers has made a competing claim by virtue of its efforts to secure an award of the disputed work through the JCB grievance and arbitration proceedings.⁸ The Employer received notice of both the JCB arbitration hearing and the subsequent award. Furthermore, Roofers pursued its claim to the disputed work in the meeting with the Employer and other parties that resulted in the temporary employment of two employees represented by Roofers at the Roosevelt Collection jobsite.

2. Use of proscribed means

Teamsters and Operating Engineers' June 23 joint letter to the Employer, threatening it with picketing if it reassigned any of the disputed work, constitutes a threat to take proscribed coercive action in furtherance of a claim to the work in dispute. Although Roofers urges the Board to find that this threat was a sham, there is no evidence that the threat was not made seriously or that Teamsters and Operating Engineers colluded with the Employer in this matter.⁹ Furthermore, the Board has rejected the argument that a strike threat was a sham simply because it would have violated a no-strike clause.¹⁰

3. No voluntary method for adjustment of dispute

Roofers alternatively urges the Board to quash the notice of hearing because it submits that the parties are bound to a voluntary method of adjustment, namely, the JCB standard agreement. It is settled that the Board will not hear a dispute when all of the parties are bound to an

alternative method of adjustment.¹¹ In order to determine if the parties are bound, the Board carefully scrutinizes the agreements at issue.¹² A union is bound to the JCB standard agreement if it is a member of the Chicago and Cook County Building and Construction Trades Council (CBTC). An employer is bound to the JCB standard agreement if it is a member of the Construction Employer's Association (CEA). Teamsters is not a member of the CBTC, and the Employer is not a member of the CEA. Nor is the Employer a signatory to a collective-bargaining agreement containing language that adopts or incorporates the JCB standard agreement. The JCB standard agreement also provides that a party can be bound to an arbitration decision by being present at the hearing. However, neither the Employer nor Teamsters attended the arbitration hearing. Accordingly, neither the Employer nor Teamsters are bound to the method of adjustment set forth in the JCB standard agreement.

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 agreed-upon method for voluntary adjustment of the dispute. We accordingly find that the dispute is properly before the Board for determination and deny Roofers' motion to quash the notice of the 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, 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, 1410-1411 (1962).

Based on the following factors, which we find are relevant to determining this dispute, we conclude that the Employer's employees represented by Teamsters and Operating Engineers are entitled to perform the work in dispute.

1. Certifications and collective-bargaining agreements

The Board has certified the Teamsters and Operating Engineers jointly as the sole representative of the Employer's employees in classifications performing the

⁷ See, e.g., *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004).

⁸ *Elevator Constructors Local 2 (Kone, Inc.)*, 349 NLRB 1207, 1209 (2007).

⁹ *Lancaster Typographical Union 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. [Citation omitted.]").

¹⁰ See *Electrical Workers Local 3 (Unitec Elevator Co.)*, 352 NLRB 1047, 1049 (2008).

¹¹ *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1140 (2005).

¹² See, e.g., *Laborers Local 6 (Anderson Interiors, Inc.)*, 353 NLRB No. 62, slip op. at 3 (2008); *Elevator Constructors Local 2 (Kone, Inc.)*, supra at 1209-1210.

work in dispute. In addition, the Plantsmen agreement and Operators agreement, to which the Employer is bound through its membership in the ILCBA, at least generally cover the work in dispute as well as all employees represented by the job classifications. In contrast, the Employer has never had a collective-bargaining relationship with Roofers. Accordingly, we find that the factor of Board certification and collective-bargaining agreements favors awarding the disputed work to employees represented by Teamsters and Operating Engineers.

2. Employer preference and past practice

The record shows that the Employer has assigned the work in dispute to its employees represented by Teamsters and Operating Engineers and prefers that they continue to perform it. Further, the Employer has historically assigned similar work to employees represented by Teamsters and Operating Engineers. The Employer did employ two employees represented by Roofers to complete certain work under the Roosevelt Site subcontract. However, that limited work was only for a couple of days, and, in agreeing to hire the two Roofers employees, the Employer expressly stated that it was not admitting that Roofers had a valid jurisdictional claim to the disputed work or that it did not have a preference for employees represented by Teamsters and Operating Engineers. Accordingly, we find that the factor of employer preference and past practice favors an award of the work in dispute to employees represented by Teamsters and Operating Engineers.

3. Area and industry practice

The Employer presented extensive evidence that the area and industry practice of landscape constructor contractors is to assign the disputed work to employees represented by Teamsters and Operating Engineers. The evidence shows that employees represented by Teamsters and Operating Engineers have worked on over one hundred similar projects in the area since 2002. Roofers also presented evidence of green roof projects completed by employees represented by Roofers. Although Roofers claims that roofing contractors have been installing garden or green rooftop systems longer than landscape contractors, its evidence did not specify whether the work done by the roofing contractors was actually performed by employees represented by Roofers, or that the work performed was actually of the same type as the work in dispute here, i.e., vegetative roofs. Thus, this factor weighs in favor of awarding the work in dispute to the employees represented by Teamsters and Operating Engineers.

4. Relative skills

The Employer, Teamsters, and Operating Engineers provided evidence that employees represented by Teamsters and Operating Engineers receive on-the-job and formal class training, attend training courses conducted by OSHA and the manufacturer of the systems to be installed, participate in daily prejob conferences at the Roosevelt Collection site, and have performed the disputed work in the past. Noting that work on rooftops is highly dangerous, Roofers testified that its members go through an intensive 5-year apprenticeship program to perform work on roofs, including the installation of roof systems that will be used for rooftop gardens. On this record, we find that employees represented by each of the three unions have the skills and training necessary to perform the work in question. This factor, therefore, does not favor an award of the disputed work to either group of employees.

5. Economy and efficiency of operations

Employees represented by Teamsters and Operating Engineers have the skills and experience required to perform all aspects of the work under the Roosevelt Collection subcontract, including work that Roofers do not claim. Furthermore, these employees already comprise the Employer's established crew and operate within the flexibility afforded by the Plantsmen and Operators agreements to perform a variety of assigned tasks. In contrast, employees represented by Roofers could only perform discrete and limited portions of the rooftop installation work in the subcontract. We therefore find that the factor of economy and efficiency of operations favors an award of the work in dispute to employees represented by Teamsters and Operating Engineers.

6. Gain or loss of employment

Employees represented by Teamsters and Operating Engineers are currently performing the work in dispute (notwithstanding the temporary assignment of some of the work to two Roofers). The reassignment of the disputed work to employees represented by Roofers would potentially result in the loss of employment for approximately five or six of the Employer's employees represented by Teamsters and Operating Engineers. Conversely, an award of the disputed work to employees represented by Teamsters and Operating Engineers would cause no discernible loss to Roofers because they are not currently employed by the Employer. We find that this factor favors an award to employees represented by Teamsters and Operating Engineers.

7. Prior jurisdictional dispute determinations

Roofers contends that prior jurisdictional dispute determinations indicate that an award of the work in the instant case should be made to employees it represents. Roofers points out that it has been awarded the installation of preplanted roof trays in the past, and that an arbitrator has awarded the work in dispute at the Roosevelt Collection jobsite to Roofers. However, these determinations did not involve the Employer and Teamsters. Thus, we find that the evidence in support of this factor does not favor an award of the disputed work to either group of employees.¹³

Conclusion

After considering all of the relevant factors, we conclude that employees represented by Teamsters and Operating Engineers are entitled to perform the work in dispute. We reach this conclusion by relying on the factors of Board certification and collective-bargaining agreements, employer preference and past practice, area and industry practice, economy and efficiency of opera-

¹³ See, e.g., *Ceramic Tile Layers & Terrazzo Workers Union Local 67 (Fisher & Reid Tile Co.)*, 318 NLRB 569, 572 (1995).

tions, and gain or loss of employment. In making this determination, we are awarding the work to employees represented by Teamsters and Operating Engineers, and not to those unions or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board has made the following Determination of Dispute.

Employees of Moore Landscapes, Inc., represented by International Brotherhood of Teamsters, Local 703, and International Union of Operating Engineers, Local 150, are entitled to perform all of the work in dispute at the Roosevelt Collection jobsite in Chicago, Illinois.

Dated, Washington, D.C. September 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD