Laborers International Union of North America, Local No. 1184 *and* Ames Construction, Inc. *and* Teamsters, Chauffeurs, Warehousemen, Industrial and International Brotherhood of Teamsters. Case 21–CD–674

November 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 (the Act). Ames Construction, Inc. (Ames) filed a charge on March 24, 2009, alleging that Laborers International Union of North America, Local No. 1184 (Laborers), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing Ames to assign certain work to employees represented by Laborers rather than to employees represented by Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters (Teamsters). The hearing was held on May 13, 2009, before Hearing Officer Stephanie Cahn. Thereafter, Ames, Laborers, and Teamsters each filed a posthearing brief.

The National Labor Relations Board[1] affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, we make the following findings.

I. JURISDICTION

Ames is engaged in the business of highway, heavy, and industrial construction in the Midwest and Southwest, including California. The parties stipulated, and we find, that Ames is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers and Teamsters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

In 2006, Ames expanded its business from the Midwest and other parts of the Southwest to include California, after securing a construction project in San Bernardino County, referred to as El Cajon. In March 2007, prior to the commencement of this project, Ames signed a Short Form Agreement with Teamsters, which incorporated by reference the Teamsters Southern California Construction Master Labor Agreement. This Master Labor Agreement was effective, by its terms, from July 1, 2006 through June 30, 2009. At El Cajon, Ames assigned Teamsters-represented employees to perform truck driving work, including the operation of water trucks, belly dump trucks, and other construction vehicles. El Cajon began around June 2007 and ended sometime in early summer 2008.

In June 2007, around the same time El Cajon began, Ames secured a second California project in Imperial County, referred to as All American. Ames' work at this project, which involved dirt removal in the construction of a ten-mile concrete lining, also required water and belly dump trucks. In June 2007, Ames signed a Short Form Agreement with Laborers, which incorporated by reference the Laborers Southern California Master Labor Agreement. This Master Labor Agreement was effective, by its terms, from July 1, 2006 through June 30, 2009. Prior to the commencement of All American, Teamsters Business Agent Michael Kling asked Ames Regional Construction Manager Terry Brennan whether the Teamsters contract "was good in that area." Teamsters did not ultimately claim any truck driving work at All American because the few trucks used at the project were not owned by Ames, but instead by independent owner operators. All American ended in December 2008.

The disputed work in this case is truck driving at Ames' third California project, referred to as Drop 2, also located in Imperial County. Ames' work at this project, which involves earth moving and pipeline installation in the construction of a reservoir, began in late January to early February 2009 and is expected to conclude in the middle of February 2010. Ames employs 70 to 75 employees at Drop 2, 50 to 55 of whom operate water trucks, belly dump trucks, and cement mixers. Before beginning this project, Ames met with Laborers and

[1] 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 *Narricot Industries, L.P. v. NLRB*,___F.3d___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted ___S.Ct.___, 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

Teamsters to discuss the assignment of truck driving work. Ultimately, Ames selected Laborers to perform the disputed work because Laborers claimed jurisdiction over the work, Ames already had a contract with Laborers, and Drop 2 was across the street from All American, where, according to Ames, Laborers had already performed truck driving work.

Following Ames' assignment of the disputed work to Laborers, Teamsters filed a grievance against Ames on February 19, 2009, alleging that this assignment violated the terms of the Teamsters Master Labor Agreement. On February 25, 2009, Laborers sent Ames a letter claiming the disputed work under its collective-bargaining agreement with Ames. Laborers further stated that if Ames reassigned the work to any other employee group, it would "take all economic action necessary to preserve our work, including but not limited to picketing and work stoppages on the Project." Ames continues to assign the disputed work to employees represented by Laborers.

B. Work in Dispute

The parties stipulated that the work in dispute is all truck driving, "including, but not limited to the operation of belly trucks and water trucks at the Drop 2 Storage Reservoir, Canal and Structures Project, located along Interstate Highway 8 in Imperial County, California."

C. Contentions of the Parties

Teamsters argues that this case involves a work preservation claim on behalf of Teamsters-represented employees, not a jurisdictional dispute covered by Section 10(k) of the Act. It contends that Ames created this dispute by assigning truck driving work at Drop 2 to Laborers-represented employees in violation of Teamsters' collective-bargaining agreement with Ames. Therefore, according to Teamsters, Ames is not an innocent employer entitled to relief under Section 10(k). In the event the Board finds that there is a valid jurisdictional dispute, Teamsters alternatively contends that the Board should award the work to Teamsters-represented employees on the basis of collective-bargaining agreements, employer past practice, industry practice, and relative skills and training.

Ames and Laborers contend that a bona fide jurisdictional dispute is properly before the Board for resolution. They argue that the Board should award the work to Laborers-represented employees on the basis of collective-bargaining agreements, employer preference and past practice, relative skills and training, and economy and efficiency of operations. Ames separately argues that area and industry practice favors an award to Laborers-represented employees.

D. Applicability of the Statute

Before the Board may proceed with determining a Section 10(k) dispute, there must be reasonable cause to believe that Section 8(b)(4)(D) has been violated. See, e.g., *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004). 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; a party has used proscribed means to enforce its claim to the work in dispute; and the parties have not agreed on a method for the voluntary adjustment of the dispute. Id. On this record, we find that this standard has been met.

The parties stipulated that Laborers and Teamsters assert competing claims to the work in dispute and that there is no agreed upon method for voluntary adjustment of the dispute. Further, we find that there is reasonable cause to believe that Laborers used proscribed means to enforce its claim to the work in dispute when it threatened to picket and engage in a work stoppage if Ames reassigned the disputed work to employees represented by Teamsters. It is well established that threats of picketing and work stoppage constitute proscribed means. *Laborers Local 731 (Tully Construction Co.)*, 352 NLRB 107, 109 (2008); *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1032 (2004).

We reject Teamsters' argument that this case presents a dispute between Ames and Teamsters over the preservation of bargaining unit work, which is not within the scope of Section 10(k) of the Act. The Board has held that "if a dispute is fundamentally over the preservation, for one group of employees, of work they have historically performed, it is not a jurisdictional dispute." *Machinists District 190 Local 1414 (SSA Terminal, LLC)*, 344 NLRB 1018, 1020 (2005), affd. 253 Fed. Appx. 625 (9th Cir. 2007). The Board has explained that performance of work on "a few isolated occasions" is insufficient to establish a work preservation claim. *Teamsters Local 107 (Reber-Friel Co.)*, 336 NLRB 518, 521 (2001).[2] Here, the record shows that Teamsters-represented employees performed truck driving work for Ames at a single California project (El Cajon) lasting about a year. This limited history, with an employer who had only

[2] Compare *Seafarers (Recon Refractory & Construction*), 339 NLRB 825, 828 (2003), petition for review denied 424 F.3d 980 (9th Cir. 2005) (a "true work preservation dispute" existed where an employer assigned disputed work exclusively performed by one employee group, for a decade, to another employee group that had not previously performed the work); *Teamsters Local 578 (USCP-Wesco*), 280 NLRB 818, 821-22 (1986), affd. 827 F.2d 581 (9th Cir. 1987) (employees' performance of disputed work for approximately 20 years established a "true work preservation" claim).

recently begun work in California, is insufficient to establish a work preservation claim.

Based on the foregoing, we find reasonable cause to believe that there are competing claims to the disputed work, a violation of Section 8(b)(4)(D) has occurred, and no voluntary method exists for the adjustment of the dispute. Accordingly, we find that this 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 (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 Ames is not failing to conform to an order or Board certification determining the bargaining representative for the employees performing the disputed work. Both unions, however, assert that their collective-bargaining agreements with Ames entitle them to the disputed work.

As indicated above, Ames is subject to short form agreements with Laborers and Teamsters.[3] Both agreements contain broad jurisdictional clauses that do not describe the type of work covered under the agreements. Each agreement incorporates, by reference, a master labor agreement. Both master labor agreements cover Imperial County, California, the site of Drop 2. Additionally, each master labor agreement describes the type of work Ames performs at Drop 2, i.e., excavation of earth and pipe line work in the construction of a reservoir.

The Teamsters Master Labor Agreement sets forth wage scale job classifications that reference the disputed work, including "water truck," "dump truck," and "driver of vehicle or combination of vehicles." The Laborers Master Labor Agreement does not include similar classifications; however, an addendum to that agreement, signed in June 2007, states that Ames employs personnel "which the Employer has previously designated as the craft of . . . Teamster." In the addendum, the parties agree to extend the scope of the Laborers Master Labor Agreement to cover these employees. This addendum, however, does not reference truck driving. Nevertheless, employees represented by both unions have performed truck driving work under their respective contracts. See *Laborers Local 435 (Spiniello Construction Co.)*, 323 NLRB 994, 996 (1997).

Considering all the circumstances, we find that the factor of collective-bargaining agreements does not favor awarding the work in dispute to either group of employees.

2. Employer preference, current assignment, and past practice

Ames currently assigns the work in dispute to Laborers-represented employees and prefers to continue this current assignment. The record shows that Ames did assign truck driving work to Teamsters-represented employees at El Cajon. We find, however, that this single assignment of truck driving work by Ames, at a time when it had only recently begun work in California, is insufficient to establish a controlling past practice that outweighs Ames' current assignment and, in particular, its preference for Laborers. See *Operating Engineers Local 825 (Structure Tone, Inc.)*, 352 NLRB 635, 638 (2008) (single instance of a union's performance of disputed work insufficient to establish controlling employer past practice); *Chicago Regional Council of Carpenters*, 354 NLRB No. 73, slip op. at 6 (2009) (it is "well-settled precedent" that the factor of employer preference is "entitled to substantial weight."). Therefore, the factors of current assignment and employer preference favor an award of the work in dispute to employees represented by Laborers.

3. Area and industry practice

Teamsters asserts that Ames, based on its experience in the Midwest, understands that industry practice is to assign truck driving work to Teamsters-represented employees. However, Ames Regional Construction Manager Brennan testified that while the practice in Minnesota is to assign truck driving work to Teamsters-represented employees, in California, it is unclear to him if a particular union has exclusive jurisdiction over truck driving. Teamsters also contends that Ames' assignment of truck driving work to employees it represents, at El Cajon, shows industry practice in California. This lone assignment by a single employer, however, is insufficient to establish area practice, much less industry-wide prac-

[3] Ames introduced extra-contractual evidence to argue that its Short-Form Agreement with Teamsters was a project specific agreement that only applied to El Cajon. Ames asserts that this alleged factor favors awarding the disputed work to Laborers-represented employees, under its agreement with Ames, because the Teamsters agreement did not apply to Drop 2. As discussed below, we have concluded, even without regard to this evidence, that employees represented by Laborers are entitled to perform the work in dispute. In view of this disposition, we find it unnecessary to pass on the admissibility or weight of this evidence.

tice. There is no other evidence of area or industry practice. Accordingly, we find that this factor does not favor an award of the work in dispute to employees represented by either Laborers or Teamsters.

4. Relative skills and training

It is undisputed that employees must have a Class A license to drive any of the trucks at issue here. Laborers Regional Manager Michael Dea testified that Laborers-represented employees currently performing truck driving work at Drop 2 have these licenses. Teamsters Agent Kling testified that its members can receive Class A licensing through the Teamsters' dedicated truck driving school. Teamsters asserts that this training facility makes its members more qualified than Laborers-represented employees to drive trucks at Drop 2. However, Dea testified that, since at least 2006, Laborers has expanded its training school to include instruction in truck driving. On this record, we find that employees represented by each union possess the relative skills and training necessary to perform the work in dispute. This factor therefore does not favor an award of the work in dispute to either group of employees.

5. Economy and efficiency of operations

Brennan, a construction manager at Ames for 10 years, testified that it is more efficient to have employees represented by Laborers perform disputed work. He explained that during "periodic" truck breakdowns or if Ames does not need all of its trucks on a particular work day, Laborers-represented employees can perform additional "labor" work. To this end, Dea testified that Laborers receive training in various crafts, unlike Teamsters members, who, according to Kling, only receive training in truck driving and HAZMAT procedures. Furthermore, although Kling contended that if a truck breaks down, Teamsters-represented employees could perform additional work under a "working Teamster classification," these employees would merely "assist others." Laborers-represented employees, when not performing disputed work, are thus better equipped to perform additional work at Drop 2 than Teamsters-represented employees. Accordingly, the factor of economy and efficiency of operations favors an award of the work in dispute to employees represented by Laborers. See, e.g., *Operating Engineers Local 825 (Walters & Lambert)*, 309 NLRB 142, 145 (1992) (factor of economy and efficiency of operations favored laborers over operating engineers where evidence showed that, when not performing disputed work, laborers possessed knowledge and skills necessary to perform additional craft work).

Conclusion

After considering all the relevant factors, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, employer current assignment, and economy and efficiency of operations. In making this determination, we are awarding the disputed work to employees represented by Laborers, not to that labor organization or its members.

DETERMINATION OF DISPUTE

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

Employees of Ames Construction, Inc., represented by Laborers International Union of North America, Local No. 1184, are entitled to perform all truck driving work, including, but not limited to, the operation of belly trucks and water trucks at the Drop 2 Storage Reservoir, Canal and Structures Project, located along Interstate Highway 8 in Imperial County, California.

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

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD