

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25**

Seafarers International Union Atlantic,)	
Gulf, Lakes & Inland Waters District,)	
NMU, AFL-CIO,)	
)	
Charged Party,)	
)	
and)	Case No. 25-CD-301
)	
Luedtke Engineering Company,)	
)	
Charging Party,)	
)	
and)	
)	
International Union of Operating Engineers,)	
Local 150, AFL-CIO,)	
)	
Party-in-Interest.)	

LOCAL 150's POST-HEARING BRIEF

STATEMENT OF CASE

On December 17, 2009, Luedtke Engineering Company (“Luedtke” or the “Employer”), filed a charge with the National Labor Relations Board, Region 25 (the “Board”), alleging that (Board Ex. 1(a)):

Luedtke Engineering Company (“LECO”) has been awarded a contract by the Chicago District-U.S. Army Corps of Engineers, 111 North Canal Street, Suite 600 Chicago, Illinois 60606-7206 valued at \$765,290 for maintenance dredging of 120,000 cubic yards of sand and material in the Burns Ditch Watershed located at the outer harbor area., Portage, IN. a/k/a Burns Small Boat Harbor, Portage, Indiana.

The job started on or about 11/1/09 and has been underway continuously weather permitting 24 hours a day, days a week in 12 hour shifts.

The Charging Party has assigned employees represented by the Seafarers Int’l Union to perform the work.

The disputed assignment involves the use of a hydraulic picker. The hydraulic picker is a Grove RT 420, 20 ton capacity owned by Luedtke and it is placed on a 40' X 60' barge.

This assignment has been made to the Charging Party's existing workforce and to members of the SIU (Charged Party). The SIU contract references land equipment engaged in assisting hydraulic dredges. Since this equipment is part of the process of sucking up sand and materials which in turn are deposited on shore, the contract description seems apt.

There is also exists[sic] a contract with the IUOE, Local 150 called the Great Lakes Floating Agreement (GLFA) in place and signed between the Charging Party and Local 150, IUOE. The IUOE has filed grievances protesting the above work assignment and demanded that another additional IOUE[sic] member/operator be placed on the hydraulic picker.

The SIU has been informed of IOUE[sic] claims and has stated that if the contractor removes any of its members, the SIU will enforce its contract, file a grievance, seek expedited arbitration and other action it deems appropriate. The employer does not have any need for additional operators for its hydraulic picker.

This is not a dispute of the employer's making as the work at issue is being performed by Charging Party employees personnel who have performed it before, and are skilled in its operation.

The work at issue is the operation of Grove RT 420, 20 ton capacity (a/k/a hydraulic picker by employees represented by the SIU at the Burns Ditch Jobsite, Portage IN.

On January 26, 2010, Region 25 conducted a hearing pursuant to Section 10(k) of the Act, 29 U.S.C. § 160(k), into the dispute concerning Luedtke's assignment of the following work (Board Ex. 1(d)):

The operation of a hydraulic picker utilized on the Burns Ditch jobsite in Portage, Indiana by Luedtke Engineering Company.

The International Union of Operating Engineers, Local 150, AFL-CIO ("Local 150"), now files this brief in support of its position that the Board should quash the Notice of Hearing, and dismiss the Charge.

STATEMENT OF FACTS

Local 150 is a labor organization as that term is defined in Section 2(5) of the Act (Board Ex. 2).¹ Local 150 represents heavy equipment operators throughout northern Illinois, northwestern Indiana, and eastern Iowa.

WORK IN QUESTION

There is no work in dispute. The Notice of Hearing issued by the Region on December 31, 2009, described the disputed work as: “The operation of a hydraulic picker utilized on the Burns Ditch jobsite in Portage, Indiana by Luedtke Engineering Company.” (Board Ex. 1(d)). On January 25, 2010, counsel for Local 150 affirmatively disclaimed any interest in that work (Board Ex. 3; Tr. 9). Significantly, at no time during the hearing did the SIU ever affirmatively claim any portion of the work described in the Notice of Hearing (see infra at 3). Thus, there is no dispute between the Unions regarding the work in question.

ARGUMENT

I. THE BOARD SHOULD QUASH THE NOTICE OF HEARING.

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for the work in question; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and, (3) the parties have not agreed on a method for the voluntary adjustment of the dispute. Super Excavators, 327 NLRB No. 31 (1998). None of the elements are satisfied in this case.

¹ Local 150 did not sign the stipulation entered into evidence as Board Ex. 2, but does not dispute the contention that it is a labor organization within the meaning of 29 U.S.C. § 152(5).

A. There Are No Competing Claims for Any Work.

A jurisdictional dispute “is a dispute between two or more groups of employees over which are entitled to do certain work for an employer.” NLRB v. Radio and Television Broadcasters, 364 U.S. 573, 579 (1961). Congress enacted Sections 8(b)(4)(D) and 10(k) of the Act “to protect employers from being ‘the helpless victims of quarrels that do not concern them at all.’” Id. at 580. The Board has held “that a jurisdictional dispute no longer exists when one of the competing unions effectively renounces its claim to the work.” Emery Air Freight Corp., 332 NLRB 1140, 1142 (2000), *citing* Dyad Construction, 252 NLRB 48 (1980). Notably, a union can disclaim an interest in disputed work even after the close of a hearing. See Emery Air Freight Corp., 332 NLRB at 1142 (Board gave effect to a post-hearing disclaimer letter).

Local 150 has “made a material disclaimer, thereby eliminating the existence of disputed work.” Emery Air Freight Corp., 332 NLRB at 1142. A jurisdictional dispute ceases to exist when one union “does not seek to do” the work of another union. Shurtleff & Andrews Constructors, 249 NLRB 176, n. 2 (1980). Importantly, “once competing claims between the employee groups have been resolved, no jurisdictional dispute exists, even if the employer protests the particular resolution.” Id., *citing* International Longshoremen’s & Warehousemen’s Union v. NLRB, 781 F.2d 919, 923 (D.C. Cir. 1986).

Furthermore, the SIU made no affirmative claim for the work in dispute as stated in the Notice of Hearing. As stated by its counsel at the hearing conducted January 26, 2010, “the Union [SIU] has no witnesses or evidence to present” (Tr. 100-101). In his opening statement, counsel for the SIU stated only that “hydraulic dredging at Burns Harbor was assigned to the SIU” (Tr. 18), as doing was “all hydraulic dredging” “since 1991” (Tr. 19). As the Employer witnesses explained, however (characterized by SIU counsel as a “very good job” describing the

work (Tr. 19)), operation of the hydraulic dredge is “very different” from the operation of the hydraulic picker (Tr. 40). As Employer President Kurt Luedtke put it (id.):

...a hydraulic dredge again is a pump creating a vacuum, creating energy, that discharges the sand off the stern of the dredge. A hydraulic picker is more of a crane with a hydraulic system driven by a diesel engine that runs a hydraulic—an enclosed hydraulic system with oil, so even though that name “hydraulic” is in both of them, they are very different meanings there.

Nowhere in this record does the SIU claim “operation of a hydraulic picker.” The Board should quash the Notice of Hearing since there are no competing claims for the work in question.

B. There Is No Reasonable Cause to Believe that Section 8(b)(4)(D) Has Been Violated.

There is no allegation, and no evidence in the record, that Local 150 made any unlawful threat against the Employer. At the hearing, the Employer attempted to establish that the SIU made an unlawful threat to strike Luedtke. The Employer has not established reasonable cause to believe that either Local 150 or the SIU violated Section 8(b)(4)(D).

1. The Employer Did Not Present Credible Evidence that the SIU Made an Unlawful Threat to Picket.

The unfair labor practice charge filed against the SIU provided, in part: “The SIU...has stated that if the contractor removes any of its members, the SIU will enforce its contract, file a grievance, seek expedited arbitration, and other action it deems appropriate” (Board Ex. 1(a)). Despite the allegations in the Charge, there is no evidence in the record that the SIU struck or picketed any Luedtke jobsites. Thus, there is no record evidence that either Local 150 or the SIU engaged in any unlawful conduct.

The Employer’s sole allegation regarding an unlawful threat to strike came in its purported “stipulation” (Board Ex. 2). There, the attorneys for the Employer and the SIU ostensibly agreed that (Board Ex. 2, “Stipulation” at 2, ¶ 9):

There is a reasonable cause to believe that on about December 16, 2009, SIU used means proscribed under Section 8(b)(4)(D) of the Act when its Vice President Thomas Orzechowski, Jr., informed Luedtke's President Kurt Luedtke that if the work in dispute identified in Paragraph 5 above was reassigned to Local 150, then SIU would weigh all of its legal options, which could include shutting down the workplace by means of a strike.

The "Stipulation" accepted by the Hearing Officer is not a stipulation establishing as uncontested a fact in dispute because it was not signed by Local 150 (Board Ex. 2 at 2; Tr. 8-9). "It is, of course, generally true that a stipulation is an agreement between the parties, and that there *must* be *mutual assent* by the parties." U.S. v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1290 (7th Cir. 1974) (emphasis added). "...They call this a 'stipulation,' which it isn't. A stipulation is an agreement of the parties, but all we have here is a unilateral description of one side's position." Bullard v. Burlington Northern Santa Fe Ry. Co., 535 F.3d 759, 762 (7th Cir. 2008); see also St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289-90 (1938); In re Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992). Absent agreement by all the parties, Board Exhibit 2 is simply a unilateral statement of position by two of the parties to the proceeding.

Luedtke has failed to present any evidence the SIU has threatened to picket Luedtke to force them to change any work assignments. Under Section 8(b)(4), it is a proscribed means of enforcing a claim to disputed work for a union "(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment...to perform any services." To determine a violation, the Board will not consider the subjective interpretation of the parties, but rather will look to the specific language used and surrounding conduct and events. See Teamsters Local 82 (Champion Exposition), 292 NLRB No. 83 (1989).

In this case, the SIU has not threatened to strike or picket Luedtke over this dispute. As alleged by the Employer, the SIU did not violate Section 8(b)(4)(D). Rather, the SIU lists several lawful courses of action in the event Luedtke removes its members from the job (“enforce its contract, file a grievance, seek expedited arbitration and other action it deems appropriate.”). Even the phrase “other action it deems appropriate” is not specific and does not establish reasonable cause. The Board has consistently found this type of language not sufficient to establish reasonable cause. In Champion Exposition, the Board found no reasonable cause where the language used “did not explicitly refer to any specific conduct by the local.” 292 NLRB No. 83 at 2; Sheet Metal Workers Local 38 (Corbesco), 295 NLRB No. 121 (1989) (“I’ll just take whatever steps I have to necessary to get this work for my members” is too vague and insubstantial to establish reasonable cause.”); Operating Engineers Local 106 (E. C. Ernst), 137 NLRB 1746, 1749-1752 (1962) (absent further evidence, the ambiguous phrase “try it and see” does not establish reasonable cause). While the SIU’s statement indicates it may take some action, it does not indicate that it was communicating a threat of illegal conduct. See Corbesco, 295 NLRB No. 121 at 3.

Nor does the alleged “stipulation,” even if taken as a statement attributable to the SIU, amount to a threat to strike or picket within the meaning of Section 8(b)(4)(D). It states only that an SIU “Vice President” (there is no evidence that this person is an agent within the meaning of Section 2(13) who could speak for the SIU or even exists) told Luedtke President Kurt Luedtke that if the work in dispute was reassigned to Local 150, then the SIU would “weigh all of its legal options, which could include shutting down the workplace by means of a strike.” (Board Ex. 2 at 2, ¶ 9). This statement on its face is not a threat to strike, but a threat simply to consider a strike. And like the statement alleged in the Luedtke charge, it asserts on its face to take only lawful action. A violation of 8(b)(4)(D) by definition is an unlawful act. No reasonable person

would construe a wishy-washy comment that a union would “weigh all of its legal options” as an unlawful strike threat, and neither should the Board.²

If the SIU in fact threatened Kurt Luedtke, he would be expected to have testified as such. Impeachment by omission is “a well-established, if slightly uncommon, subcategory of impeachment by contradiction.” Moylan v. Meadow Club, Inc., 979 F.2d 1246, 1249 (7th Cir. 1992). The theory of impeachment by omission is that “if [a] former statement fails to mention a material circumstance presently testified to, which it would have been natural to mention in the prior statement, the prior statement is sufficiently inconsistent” to be admitted to impeach the present testimony. Id. (citations omitted). A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. U. S. v. Standard Oil Co., 316 F.2d 884 (7th Cir. 1963) (citations omitted). Based on established Board precedent, the language used by the SIU does not establish reasonable cause; there, this Charge must be dismissed.

2. The SIU’s Alleged Threat to Strike Was a Sham.

The Board will not find reasonable cause to believe that Section 8(b)(4)(D) has been violated upon a showing that the “threat was a sham or the product of collusion.” Superior Construction Co., 340 NLRB No. 150, fn. 4 (2003), *quoting* C.J.S. Lancaster, 325 NLRB 449, 450-451 (1998). The SIU’s “threat” was a sham—the product of collusion between the Employer and the SIU. As pointed out supra, the alleged threat was carefully couched to avoid damage liability under 29 U.S.C. § 187. It came on the eve of hearing (Tr. 8-9), only after Local 150 pointed out that the lawful conduct alleged in the Charge could not suffice to involve the Board’s jurisdiction.

² The careful phraseology used by Luedtke and the SIU also highlights the collusive nature of the Charge discussed infra. Section 303, 29 U.S.C. § 187, creates a damage action for “Whoever shall have been impaired in his business or property by reason” of a violation of 8(b)(4). Obviously, if the SIU were foolish enough to concede a violation of the Act, either Luedtke, or even Local 150 or any of its members, could sue the SIU for damages.

The SIU's "threat" and Luedtke's subsequent filing of the unfair labor practice charge were orchestrated. Consequently, the SIU's alleged threat cannot constitute an unlawful Section 8(b)(4)(D) threat, as a matter of law. Superior Construction Co., 340 NLRB No. 150, fn. 4. There is no reasonable cause to believe that either Local 150 or the SIU violated Section 8(b)(4)(D). Therefore, the Board should dismiss the pending unfair labor practice charge and quash the Notice of Hearing.

C. The Dispute Can Be Voluntarily Adjusted.

Even assuming there are competing claims for the work and there is reasonable cause to believe Section 8(b)(4)(D) has been violated, the Board should still quash the Notice of Hearing because the dispute is subject to voluntary adjustment. Section 10(k) provides (29 U.S.C. § 160(k)) [emphasis supplied]:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of [Section 8(b)(4)(D)], the Board is empowered and directed to hear and determine the dispute out of which the unfair labor practice shall have arisen unless [the parties have voluntarily adjusted the dispute]. . . upon such voluntary adjustment of the dispute, such charge shall be dismissed.

The Supreme Court has observed that Section 10(k) "offers strong inducements to quarreling unions to settle their differences by directing dismissal of unfair labor practices upon voluntary adjustment of jurisdictional disputes." Radio and Television Broadcasters, 364 U.S. at 576.

The Employer offered and the Hearing Officer accepted without objection from the SIU an arbitration award dated June 28, 2007, between the SIU and IUOE over work performed by Luedtke Engineering Co. (Employer Ex. 7; Tr. 14-15). There, Luedtke apparently assigned dredging work including "hydraulic dredge operators, hydraulic dredge engineers/deckhands, and rangemen to the SIU-represented employees" (Employer Ex. 7 at 2-3). Counsel for the Employer described the award as one "wherein the Seafarers prevailed." (Tr. 15).

There is no evidence in the record that Luedtke and the SIU obtained anything less than complete satisfaction from that Article XX proceeding. Hence, there is no reason to believe another charge before an AFL-CIO arbitrator over the hydraulic picker would not likewise resolve the dispute. Consequently, the Board should dismiss the pending unfair labor practice charges and quash the Notice of Hearing.

II. THE EMPLOYER IS NOT ENTITLED TO A BROAD AWARD.

Even if the Board awards the disputed work to the SIU, it should not issue a broad award. In awarding disputed work pursuant to § 10(k), the Board will limit its award to the particular jobsite at issue. International Union of Operating Engineers, Local 318 (Foeste Masonry, Inc.), 322 NLRB 709 (1996). Indeed, for an Employer to obtain a broad award it must meet a high burden and establish that the disputed work has been a continuing source of controversy in the relevant geographic area, that similar disputes are likely to recur, and that the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work. United Assoc. of Journeymen and Apprentices of the Plumbing and Pipe Fitting Indus. of the U.S. and Canada, (C&R Heating & Service Co., Inc.), 328 NLRB No. 176, 162 LRRM. 1300 (1999). Here, the Employer failed to meet its high evidentiary burden.

Even assuming there was a dispute, the dispute was not a continuing source of controversy in the area. Employer President Kurt Luedtke testified that the Employer only began operating the crane in dispute in 2009. A dispute over work related to hydraulic dredging was resolved to the Employer's satisfaction in 2007 (Employer Ex. 7; Tr. 14-15). Evidence offered and accepted by the Hearing Officer (Employer Ex. 20) related to the projected jobs not yet started in 2010, all of which were in Michigan outside Local 150's jurisdiction (Tr. 71-72).

The Employer readily concedes that the project at which the disputed work occurred is over (Tr. 73). Luedtke does not anticipate encountering Local 150 on any of its 2010 projects

(Tr. 71-73). As the Hearing Officer observed, “The issue that has been set for hearing is the hydraulic picker used at Burns Ditch in Portage, Indiana (Tr. 73). That was the work described in the Notice of Hearing issued December 31, 2009 (Board Ex. 1(d)), and disclaimed by Local 150 on January 25, 2010 (Board Ex. 3). To expand the determination beyond that Notice deprived Local 150 of an opportunity to defend itself and would violate its rights to due process. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 316 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”). Due process requires more than mere notice; rather, “meaningful notice” is required “before a hearing will comport to the requirements of due process.” Rice v. Apfel, 1999 WL 33597094 at *3-4 (N.D. Fla. 1999), quoting, Harris v. Callahan, 11 F. Supp. 2d 880, 884 (E.D. Tex. 1998) (notice must contain an explanation of the issues to be covered at hearing). This is so because purpose of the notice of hearing is to allow the plaintiff to adequately prepare to litigate the issues presented there. Venko v. Schweiker, 551 F. Supp. 698, 703 (D.N.H. 1982). On these facts, and applicable law, a broad award is not warranted.

CONCLUSION

For all the above-stated reasons, Local 150 respectfully requests the Board to quash the Notice of Hearing. If the Board awards the work to the SIU, Local 150 respectfully requests that the Board refrain from entering a broad award.

Respectfully Submitted,

s/Dale D. Pierson
One of the Attorneys for Local 150

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that he electronically filed the foregoing *Post-Hearing Brief* with National Labor Relations Board, and further certifies that he caused a copy to be served via electronic and regular mail upon:

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