Local Union No. 71 International Brotherhood of Electrical Workers *and* Capital Electric Line Builders, Inc. and R.B. Jergens Contractors *and* Local Union No. 534, Laborers International Union of North America *and* Laborers District Council of Ohio, Laborers International Union of North America[1] Case 9–CD–499

April 16, 2010

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Capital Electric Line Builders, Inc. (Capital Electric) and R.B. Jergens Contractors (Jergens) (collectively, the Employers) filed a charge on September 17, 2009, alleging that Local Union No. 71, International Brotherhood of Electrical Workers (Electrical Workers) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employers to assign certain work to employees represented by Electrical Workers rather than to employees represented by Local Union No. 534, Laborers International Union of North America (Laborers). The hearing was held on December 10, 2009, before Hearing Officer Aranzazu Lattanzio. At the hearing, Laborers moved to quash the notice of hearing.[2] Thereafter, the Employers, Electrical Workers, and Laborers filed posthearing briefs, and the Employers filed a memorandum in opposition to Laborers' motion to quash.

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.

[1] Laborers District Council of Ohio is listed on the Notice of Hearing and joined Local Union No. 534 on its brief. The notice of hearing also lists both Jergens and Capital Electric as the Employers in this case. However, it is not disputed that the subcontractor, Capital Electric, hired and assigned the work to the employees performing the work in dispute.

[2] We find no merit to the Employers' contention that Laborers did not raise its motion to quash until after the hearing concluded. The record shows that Laborers' moved to quash prior to the close of the hearing and that the hearing officer deferred the issue to the Board.

I. JURISDICTION

The parties stipulated that Capital Electric is engaged in the business of providing electrical installation services from its Dayton, Ohio facility. During the 12-month period prior to the hearing, Capital Electric, during the course and conduct of its business, derived gross revenues in excess of $1 million and purchased and received, at its Dayton, Ohio facility, goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Ohio. The parties further stipulated that Jergens is engaged in the business of providing highway construction services from its Vandalia, Ohio facility. During the 12-month period prior to the hearing, Jergens, during the course and conduct of its business, derived gross revenues in excess of $1 million and purchased and received at its Vandalia, Ohio facility goods and materials valued in excess of $50,000 directly from suppliers outside the State of Ohio. The parties further stipulated, and we find, that the Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that Laborers and Electrical Workers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

Jergens is a general contractor engaged in highway construction in Ohio, Indiana and Michigan. Jergens is bound to a collective-bargaining agreement between Laborers and the Ohio Contractors Association (Heavy-Highway Agreement), effective from May 1, 2007, to April 30, 2010. That agreement, among other things, covers "Highway Construction" work, including "highway lighting" and "signal lighting." The Heavy-Highway Agreement also contains a provision, titled "Subcontractors," which provides that "all subcontractors shall be subject to the terms and provisions of this Agreement. Any Contractor who sublets any of his work must sublet the same subject to this Agreement."

Throughout its business history, Jergens has primarily subcontracted its electrical work on highway projects to Capital Electric. Those subcontracts typically covered the installation of traffic signals, lighting, street lighting, highway lighting, intelligent traffic systems and overhead and underground voltage distribution.

Capital Electric and Electrical Workers are parties to a collective-bargaining agreement for outside electrical work (Outside Agreement). That agreement, effective from December 31, 2007, to January 3, 2010, covers the "installation and maintenance of highway and street lighting, highway and street sign lighting, electric message boards and traffic control systems, camera systems,

traffic signal work, substation and line construction, including overhead and underground projects, . . . [including] the operation of all tools and equipment necessary for the installation of the above projects." Capital Electric does not have a collective-bargaining agreement with Laborers.

In late July or early August 2009,[3] Jergens subcontracted with Capital Electric for the installation of highway signalized traffic control systems at the Ohio Department of Transportation Project 090248, involving intersection improvements on State Route 747 in Butler County Ohio (Route 747 project). Capital Electric assigned the subcontracted work to its employees, who are represented by Electrical Workers.

On August 3, Laborers filed a grievance against Jergens, claiming that Jergens' subcontract with Capital Electric violated the subcontracting provision of the Heavy-Highway Agreement. On about August 19, in response to the grievance, Jergens' vice president, Vic Roberts, sent Laborers a letter stating that "[e]lectric work is not covered under [the Heavy-Highway Agreement]," and that Jergens "is entitled to make work assignments to any specialty subcontractor with Collective Bargaining Agreements in place." Roberts testified that Laborers' field representative, Eddie Deaton, then called him to explain that although Laborers had not claimed the signal installation work in the past, "times are . . . lean and we're going after the work."

Also on about August 19, Laborers' president and field representative, Jerry Bowling, visited the Route 747 jobsite and spoke with two Capital Electric employees, Jerry Campbell and Chris Snodderly. Campbell testified that Bowling informed the employees that he was the president and field representative for Laborers, and told them they were performing Laborers' work. Campbell further testified that Bowling told the employees they had two options: they could allow employees represented by Laborers to perform the work, or they could sign a contract with Laborers that authorized a 3-percent dues deduction from their pay.[4] Bowling then provided Campbell with his business card, and shortly thereafter left the jobsite.[5]

Later that day, Campbell informed Electrical Workers Business Manager Patrick Grice about the incident. Grice then sent a letter, dated August 21, to Capital Electric concerning the possible reassignment of work to employees who are not members of Electrical Workers. The letter stated that the Outside Agreement requires that Electrical Workers "be the sole and exclusive source of referral of applicants for employment," and that "any breach or violation of the collective-bargaining agreement will result in grievances being filed against Capitol [sic] Electric Line Builders. In addition, Picket Lines, Strike activity and the filing of Charges with the National Labor Relations Board will be levied against Capitol [sic] Electric Line Builders Company."

B. Work in Dispute

The work in dispute involves the installation of highway signalized traffic control systems, including conduit, loop detectors, signal poles, and foundations in which to set signal poles, at the Ohio Department of Transportation Project 090248.

C. Contentions of the Parties

Laborers argues that the notice of hearing should be quashed, contending that it has not claimed the disputed work. Laborers argues that it is only pursuing a grievance under the Heavy-Highway Agreement. Laborers further contends that Bowling's visit to the Route 747 project jobsite did not entail a claim for the disputed work, but only involved an attempt to secure dues checkoff cards from the employees working there.[6]

The Employers and Electrical Workers contend that there are competing claims for the work in dispute, and that the dispute is properly before the Board for determination. They contend that Laborers pressed its claim for the work through its grievance, in the telephone discussions between officials of Laborers and Jergens, and in Bowling's conversation with Capital Electric's employees at the Route 747 jobsite. In addition, the Employers contend that Laborers' refusal to disclaim the work at the hearing further demonstrates Laborers' intent to claim the work in dispute. The Employers and Electrical Workers additionally contend that Grice's August 21 letter to Capital Electric, threatening "Picket Lines" and "Strike Activity" if the work were reassigned, demonstrates that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.

On the merits, the Employers and Electrical Workers assert that the work in dispute should be awarded to employees represented by Electrical Workers based on the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations.

[3] Unless otherwise specified, all dates hereafter are in 2009.

[4] Snodderly did not testify at the hearing.

[5] Bowling testified that his visit to the jobsite was routine and, at the time, he did not know about Capital Electric's contractual relationship with Electrical Workers. Bowling testified that he introduced himself to the workers, stated that Laborers had a contract with Jergens and, after hearing Campbell state that there would be no Laborers on the job, left the jobsite.

[6] Laborers does not set forth any contentions regarding the merits of the dispute.

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;[7] (2) a party has used proscribed means to enforce its claim to the work in dispute;[8] and (3) the parties have not agreed to a method for the voluntary adjustment of the dispute.[9] 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 in dispute. Electrical Workers has at all times claimed the work in dispute for the employees it represents, and these employees have been performing the work. Further, Grice's August 21 letter to Capital Electric specifically claimed the work in dispute for employees represented by Electrical Workers.

We also find reasonable cause to believe that Laborers claimed the work in dispute for the employees it represents. As set forth above, Campbell testified that Bowling informed the Capital Electric employees that they were performing Laborers' work.[10] Contrary to Laborers' contention, evidence of a claim conveyed directly to an employer's employees is sufficient to establish reasonable cause to believe that there is a competing claim for the disputed work. See *Bricklayers (Cretex Construction Services, Inc.)*, 343 NLRB 1030, 1031–1032 (2004). Moreover, Laborers' claim for the work is further evinced by Bowling's testimony, wherein he summarized Laborers' position by stating, "[w]hose work is it? It's both of ours." Therefore, we find that the record evidence establishes reasonable cause to believe that there are completing claims for the work in dispute.[11]

2. Use of proscribed means

As discussed above, Grice stated in his August 21 letter to Capital Electric that he considered reassignment of the electrical work to employees other than those represented by Electrical Workers to be a violation of the collective-bargaining agreement, and that said violation would result in Electrical Workers engaging in "Picket Lines" and "Strike activity." On this basis, we find reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Bricklayers (Cretex Construction Services, Inc.)*, supra, 343 NLRB at 1032.

3. No voluntary method for adjustment of dispute

The parties have stipulated, and we find, that there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound.

Based on the foregoing, we find reasonable cause to believe that there are competing claims for the work in dispute, that a violation of Section 8(b)(4)(D) has occurred, and that no voluntary method exists for adjustment of the dispute.[12] We thus find that the dispute is properly before the Board for determination, and accordingly deny Laborers' motion 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 ex-

[7] *Carpenters Local 275 (Lymo Construction Co.),* 334 NLRB 422, 423 (2001).

[8] See, e.g., *Electrical Workers Local 3 (Slattery Skanska, Inc.),* 342 NLRB 173, 184 (2004).

[9] *Operating Engineers Local 150 (R & D Thiel),* 345 NLRB 1137, 1138–1139 (2005).

[10] Laborers argues that Campbell's testimony conflicts with the testimony of its representative, Bowling, who stated that he was merely attempting to obtain the employees' signatures on authorization cards. However, "[i]n 10(k) proceedings, a conflict in testimony does not prevent the Board from finding evidence of reasonable cause and proceeding with a determination of the dispute." *Sheet Metal Workers Local 107 (Lathrop Co.)*, 276 NLRB 1200, 1202 fn. 3 (1985).

[11] Because we find that the testimony described above establishes reasonable cause to believe that Laborers claimed the work in dispute, we find it unnecessary to address the Employers' contention that Laborers' failure to disclaim the work at the hearing also is indicative of a competing claim for the work. We also find it unnecessary to address whether evidence presented by Employers and Electrical Workers concerning Laborers' attempts to secure work being performed by Electrical Workers on other projects further demonstrates that Laborers claims the work in dispute. In finding reasonable cause to believe that the Laborers claimed the work in dispute, we do not rely on the Laborers' grievance claiming that Jergens' subcontracting of the work to Capital Electric violated the subcontracting provision of the Heavy-Highway Agreement. See *Laborers (Capitol Drilling)*, 318 NLRB 809, 810 (1995) (grievance to enforce an arguably meritorious claim against general contractor that work has been subcontracted in breach of contract with general contractor does not constitute a claim for the work to the subcontractor). In this case, the Laborers made a claim for the work directly to Capital Electric by conveying its claim to Capital Electric's employees. Cf. *Electrical Workers Local 71 (Thompson Electric)*, 354 NLRB No. 46, slip op. at 3–4 (2009) (union's assertion that it did not claim work because it merely filed grievances against general contractor rejected because union also made claim for work directly to subcontractor).

[12] In addition, we reject Laborers' argument that the notice of hearing should be quashed because the work in dispute has now been completed. "[T]he mere fact that disputed work has been completed does not render a jurisdictional dispute moot where nothing indicates that similar disputes are unlikely to recur." See *Millwright Local 1906 (Chicago Steel)*, 310 NLRB 646, 648 fn. 8 (1993), quoting *Operating Engineers Local 150 (Martin Cement)*, 284 NLRB 858, 860 fn. 4 (1987).

perience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certifications and collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute. However, the Outside Agreement, to which Capital Electric and Electrical Workers are bound, covers the installation and maintenance of highway and street lighting and traffic signal work, i.e., work similar to that in dispute in this case. Although the Heavy-Highway Agreement between Jergens and Laborers also references highway lighting and signal lighting work, Capital Electric is not a signatory to that agreement, and there is no evidence that Jergens has authority to assign or control Capital Electric employees in their performance of electrical work once it awards a subcontract. See generally *Plasterers Local 502 (PBM Concrete)*, 328 NLRB 641, 644 (1999). Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Electrical Workers.

2. Employer preference and past practice

Capital Electric District Manager Jim Woeste testified that, since he was hired in 2003, Capital Electric has always assigned its electric signal work to employees represented by Electrical Workers. In addition, Woeste testified that Capital Electric prefers to assign its work to employees represented by Electrical Workers. Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Electrical Workers.

3. Area and industry practice

Grice testified that employees represented by Electrical Workers have been assigned work of the kind in dispute (i.e., installation of highway signalized traffic control systems) for many years throughout the State of Ohio, and he is not aware of any traffic signalization work performed by employees represented by Laborers. Jergens Vice President Vic Roberts testified that Jergens has always contracted work similar to the kind in dispute to Capital Electric or to other subcontractors that use employees represented by Electrical Workers.

The record presents conflicting evidence as to whether there is an area practice of using employees represented by Laborers to perform work of the kind in dispute. On the one hand, Laborers' representative, Bowling, testified that employees represented by Laborers have performed traffic signal installation work throughout Ohio for many years. However, as discussed above, Roberts testified that Laborers' representative, Eddie Deaton, said in a telephone conversation that Laborers had not claimed signal installation work in the past, but that "times are . . . lean and we're going after the work."

Based on the above evidence, we find that this factor favors an award of the work in dispute to employees represented by Electrical Workers.

4. Relative skills

Grice, Campbell, and Woeste testified about the skills and training required of members of Electrical Workers to reach the level of journeyman traffic signal technician. Woeste testified that journeyman status requires completion of a 6000-hour apprenticeship program that includes on-the-job training, classroom work, and testing. Campbell testified that journeyman traffic signal technicians receive training in electrical theory, mathematics, and the National Electrical Code. Grice testified that Electrical Workers' apprenticeship training standards require apprentices to master the rules and regulations for traffic signal technicians. Grice added that Electrical Workers requires its apprentices to be paired in two-man crews with journeyman electricians during their apprenticeship period.

Bowling testified that some members of Laborers received training in traffic signal technician work. He did not, however, provide details on the extent of that training. Significantly, though, Bowling testified that while Laborers' members are able to perform some of the tasks involved in work of the kind in dispute, such as pouring concrete, they generally do not perform the electrical portions of that work. Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Electrical Workers

5. Economy and efficiency of operations

The Employers and Electrical Workers argue that this factor favors an award to the employees that Electrical Workers represents. In support, they rely on Woeste's testimony that employees represented by Electrical Workers perform all of the tasks involved in signal installation and are more qualified to perform that work than are Laborers' members. In addition, they rely on Roberts' testimony that using employees represented by Laborers would increase Capital Electric's costs because he did not believe that these employees could perform the work adequately. Neither of these witnesses, however, provided specific details as to how efficiencies would be achieved by performing the work with employees represented by Electrical Workers.[13]

[13] In addition, on brief, the Employers contend that subcontractors utilizing employees represented by Electrical Workers generally submit the lowest bids for subcontracting jobs. However, there is no record

We find that the record does not contain sufficient evidence to find that the factor of economy and efficiency of operations favors one group of employees over the other.

Conclusion

After considering all the relevant factors, we conclude that employees represented by Electrical Workers 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, area and industry practice, and relative skills. In making this determination we are awarding the disputed work to employees represented by Electrical Workers, not to that labor organization or its members.

F. Scope of the Award

The Employers request a broad areawide award covering the work in dispute. The Board customarily does not grant a broad areawide award in cases where the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See, e.g., *Laborers Local 243 (A. Amorello & Sons)*, 314 NLRB 501, 503 (1994). Accordingly, we shall limit the present determination to the particular controversy that gave rise to the proceeding.

evidence supporting this claim, and thus there is no explanation as to whether the purported cost differential would be due to efficiencies based on greater employee skills, or due to nonrelevant factors such as wage differentials.

DETERMINATION OF DISPUTE

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

Employees of Capital Electric Line Builders Inc., represented by Local Union No. 71, International Brotherhood of Electrical Workers are entitled to perform the installation of highway signalized traffic control systems, including conduit, loop detectors, signal poles and foundations in which to set signal poles, at the Ohio Department of Transportation Project 090248.

Dated, Washington, D.C. April 16, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD