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Seafarers International Union, Atlantic, Gulf, Lakes & Inland Waters District NMU, AFL-CIO and Luedtke Engineering Company and International Union of Operating Engineers, Local 150.
Case 25-CD-301

July 14, 2010

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN LIEBMAN AND MEMBERS
SCHAUMBER AND BECKER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Luedtke Engineering Company (the Employer) filed a charge on December 21, 2009, alleging that the Seafarers International Union, Atlantic, Gulf, Lakes & Inland Waters District/NMU, AFL-CIO (SIU) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer not to reassign certain work from employees represented by the SIU to employees represented by Local 150, International Union of Operating Engineers (Local 150). The hearing was held January 26, 2010, before Hearing Officer Derek A. Johnson. Thereafter, the Employer, the SIU, and Local 150 filed posthearing briefs.

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.

I. JURISDICTION

The Employer, a Michigan corporation, with a headquarters in Frankfort, Michigan, and a jobsite at Burns Ditch in Portage, Indiana, has been engaged in maritime construction and related services. During the fiscal year ending December 31, 2009, the Employer performed maritime construction services valued in excess of \$1 million in states other than the State of Michigan.

The Employer and the SIU stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Employer and the SIU stipulated, and we find, that the SIU and Local 150 are labor organizations within the meaning of Section 2(5) of the Act.¹

¹ Local 150 did not appear at the hearing and therefore did not join in the stipulations. Its posthearing brief does not dispute the jurisdictional facts.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer has been a marine dredging contractor since 1950. It performs both hydraulic and mechanical dredging. In September 2009, the Army Corps of Engineers contracted with the Employer to hydraulically dredge sediment in the Burns Ditch (waterway) in Lake Michigan to deepen the Small Burns Boat Harbor at Portage, Indiana. The work was performed from late October until December 21, 2009.

Four pieces of equipment were used for the harbor dredging. The actual dredging was performed by a hydraulic dredge, essentially a floating vacuum cleaner, which sucked up the sand from the harbor bottom and pumped it through pipes to the shoreline of the lake. The three other pieces of equipment assisting the hydraulic dredge were a work boat, a tugboat, and a dredge tender (barge). The hydraulic picker at the center of this dispute was welded to the dredge tender during the project.

The hydraulic picker is like a crane with a boom that extends by means of a hydraulic system driven by a diesel engine. During 3-day mobilization and demobilization periods at the beginning and end of operations at Burns Ditch, the picker was used frequently during the daylight hours to assemble/disassemble the pipeline and to set up/break down the dredge. During the 7-week period of continuous hydraulic dredging, the picker was not used every day. When it was used, it would be for only 1–2 hours per day to assist in moving the pipeline, anchors, and dredge. The two hydraulic dredge operators, as well as the field superintendent and foreman, operated the picker as needed, in addition to performing their regular duties.

The Employer assigned all the work involved in the Burns Ditch hydraulic dredging project, including the work in dispute, to employees represented by the SIU. The Employer has assigned all work associated with hydraulic dredging since 1991 to SIU-represented employees, pursuant to its collective-bargaining agreement with the SIU.

Local 150 and the Employer are parties to the Great Lakes Floating Agreement (GLFA).² When the Employer performs mechanical dredging, as opposed to hydraulic dredging, it assigns a composite crew of mechanical dredge operators represented by Operating Engineers and tug men and deckhands represented by SIU.³

² The GLFA is an agreement with the International Union of 10 signatory local unions within their respective territorial jurisdictions.

³ In mechanical dredging, a crane with a clamshell bucket is used to scoop material from the bottom of the lake and place it in a scow that is transported by tugboat to wherever it is to be unloaded.

The GLFA's scope of the work provision was expanded in 1996 to cover hydraulic dredging, and hydraulic dredging job classifications were included. After the Burns Ditch project began, Local 150 filed two grievances in November 2009 challenging the Employer's assignment of the disputed work to the SIU. The first grievance claimed that the hydraulic picker was work covered under the GLFA. The second alleged that the Employer failed to conduct a pre-job conference.

At the Section 10(k) hearing, the Employer and the SIU stipulated, among other things, that:

There is 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 ... 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.

Local 150, although notified of the hearing, did not participate. In a January 25 letter from its counsel to Region 25, Local 150 stated it disclaimed any interest in the disputed work.

B. Work in Dispute

The notice of hearing described the work in dispute as "the operation of a hydraulic picker utilized on the Burns Ditch jobsite in Portage, Indiana by Luedtke Engineering Company."

C. Contentions of the Parties

The Employer and the SIU contend that this Section 10(k) dispute is properly before the Board for determination and that the merits of the dispute favor awarding the disputed work to the employees represented by the SIU. The Employer and the SIU cite the collective-bargaining agreements, employer preference and past practice, relative skills and training, and economy and efficiency of operations.

Local 150 argues that the notice of hearing should be quashed. Local 150 contends that there are not competing claims for the work in dispute because it affirmatively disclaimed the work and, at the hearing, the SIU never affirmatively claimed the work. Local 150 further contends the evidence does not establish that the SIU made an unlawful threat against the Employer. First, the stipulation by the Employer and the SIU does not establish as an uncontested fact that there was a "threat" because the stipulation was not signed by Local 150. Second, the "wishy-washy" stipulation states only that the SIU will "weigh its legal options" and does not say the SIU will strike, but simply that it will consider a strike.

Third, the stipulation was the product of last-minute collusion between the Employer and the SIU to invoke the Board's jurisdiction, but was carefully couched in language to avoid subjecting the SIU to damage liability under Section 303 of the Act. Finally, Local 150 contends that any dispute over operation of the picker can be voluntarily adjusted under article XX of the AFL-CIO constitution, as in the article XX arbitration award in evidence where the SIU prevailed over Local 150 in a previous dispute about another of the Employer's hydraulic dredging projects.

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is 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 there are competing claims to the disputed work among rival groups of employees and that a party has used proscribed means to enforce its claim to the work in dispute. Additionally, the Board will not proceed under Section 10(k) if there is an agreed-upon method for voluntary adjustment of the dispute.⁴ For the reasons stated below, we find that these requirements have been met.

1. Competing claims for work

We find that there are competing claims for the work in dispute. The Employer and the SIU stipulated that there were competing claims. Further, the operation of the hydraulic picker by employees represented by the SIU constitutes a claim to that work. *Operating Engineers Local 513 (Thomas Industrial Coatings)*, 345 NLRB 990, 992 fn. 6 (2005) ("performance of work by a group of employees is evidence of a claim for the work by those employees, even absent a specific claim"). The two grievances filed by Local 150 because the Employer failed to assign an employee represented by Local 150 to operate the picker also constitute a claim for the work in dispute. *Plumbers District Council 16 (L & M Plumbing)*, 301 NLRB 1203, 1204 (1991) (union's grievance alleging employer violated agreement by subcontracting work to employees not represented by union was, in effect, a demand for the work).

We find that Local 150's disclaimer of interest in the work was ineffective. The letter from Local 150's counsel purportedly disclaiming interest in the work was received the day before the hearing, and about 1 month after the work was completed. "Although it is well settled that an effective renunciation of work in dispute re-

⁴ See, e.g., *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004).

solves a jurisdictional dispute, the Board will refuse to give effect to ‘hollow disclaimers’ interposed for the purpose of avoiding an authoritative decision on the merits.” *Laborers Local 81 (Kenny Construction Co.)*, 338 NLRB 977, 978 (2003). See also *Southwest Regional Council of Carpenters (Standard Drywall)*, 346 NLRB 478, 480–481 (2006) (finding purported disclaimer made shortly before hearing and after majority of work completed was ineffective).⁵

2. Use of proscribed means

The Employer and the SIU stipulated that there is reasonable cause to believe that the SIU threatened to use proscribed conduct. While Local 150 did not agree to that stipulation, the stipulation constitutes record evidence that the SIU vice president told the Employer’s president that it might strike if the work was reassigned. Local 150 did not offer any evidence to the contrary. We find the stipulation sufficient to establish that such a statement was made.

We further find no merit in Local 150’s arguments that such a statement fails to prove reasonable cause to believe that SIU threatened resort to proscribed means in support of its claim to the work in dispute. In *Lancaster Typographical Union No. 70 (C.J.S. Lancaster)*, 325 NLRB 449, 450–451 (1998), the Board rejected arguments similar to those advanced by Local 150 here. In that case, the respondent union told the employer that if the work was given to the other union, it would “take such action as necessary including but not limited to refusing to perform certain tasks. . . .” *Id.* at 449–450. The competing union contended that the respondent’s threat was “vague,” not “genuine,” and “was deliberately crafted in equivocal language to invoke the Board’s jurisdiction while at the same time avoiding the need ‘to actually place its entire membership [sic] jobs on the line.’” *Id.* at 450. The Board found “nothing vague” about the respondent’s threat, which, “while not using the word “strike,” clearly constitute[ed] a threat to refuse to perform services, conduct specifically proscribed by Section 8(b)(4)(D).” *Id.* at 450–451. See also *Operating*

Engineers Local 2 (PVO International), 209 NLRB 673, 674–675 (1974) (finding reasonable cause based, in part, on letter from respondent’s attorney stating respondent “contemplated taking action, including picketing and cessation of work”) (emphasis added).

Teamsters Local 82 (Champion Exposition), 292 NLRB 794 (1989), *Sheet Metal Workers Local 38 (Corbesco)*, 295 NLRB 1069 (1989), and *Operating Engineers Local 106 (E. C. Ernst)*, 137 NLRB 1746 (1962), all cited by Local 150, are distinguishable. In those cases, the Board found that allegedly threatening language was too vague or ambiguous to establish reasonable cause because it did not explicitly refer to specific unlawful conduct. Unlike those cases, the stipulation here explicitly states that the SIU contemplated striking if the work was reassigned.

Further, even though the stipulation mentions weighing only “legal options,” the option of striking remains a threat to use proscribed means. Thus, the Board has found that a union’s stated intent “to exercise any and all legal means . . . including, if necessary, picketing, concerted and protected job slowdown, and striking” was a threat to engage in unlawful conduct notwithstanding the union’s “characterization of its threat as involving ‘legal means.’” E.g., *Laborers Local 860 (Anthony Allega Cement Contractor)*, 336 NLRB 358, 361 (2001).

Finally, we reject Local 150’s contention that the stipulation was the product of collusion between the Employer and the SIU to bring the dispute before the Board. “In the absence of affirmative evidence that a threat to take proscribed action was a sham or the product of collusion, the Board will find reasonable cause to believe that the statute has been violated.” *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1140 (2005). Local 150 failed to present any affirmative evidence in support of its claims of sham and collusion.

3. No voluntary method for adjustment of dispute

The Employer and the SIU stipulated that there is no agreed-upon method for voluntary adjustment of the dispute. Local 150 contends that the current work dispute can be resolved through AFL–CIO article XX arbitration, as was a different dispute between Local 150 and the SIU over work performed by the Employer in 2007. There is no evidence, however, that the Employer is bound by the article XX procedure. For an agreement to constitute an agreed-upon method for voluntary adjustment, all parties to the dispute must be bound to that agreement. We find, therefore, that there is no agreed-upon method for voluntary adjustment of the dispute.

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 vio-

⁵ Local 150 argues that the Board has given effect to even a posthearing disclaimer, citing *Teamsters Local 295 (Emery Worldwide)*, 332 NLRB 1140, 1142 (2000). *Emery* is distinguishable, however. There, mutual posthearing disclaimers from the competing unions completely resolved the jurisdictional dispute. Additionally, the union that had filed grievances claiming the work withdrew its demand for arbitration of the matter. In contrast, there is no evidence that Local 150 has withdrawn its grievances. The pending grievances are a continuing claim to the work by Local 150 and render its disclaimer ineffective. See *Plumbers District Council 16 (L & M Plumbing)*, supra at 1204 (finding continued pursuit of grievance inconsistent with asserted disclaimer of interest in disputed work).

lated, and that there is no agreed-upon method for the voluntary adjustment of the dispute. We thus find that the dispute is properly before the Board for determination, and, accordingly, we deny Local 150's 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 IBEW 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 (1962).

The following factors are relevant in making the determination of this dispute.⁶

Certifications and collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute. However, since 1991, the recognition clauses in the successive SIU contracts to which the Employer was bound have covered the operation of "land equipment engaged in assisting hydraulic dredges."

In 1996, the GLFA added language recognizing classifications performing "hydraulic dredging (including pipe assembly and/or disassembly for marine dredging)." The Employer contends, however, that the disputed work is not covered by the GLFA. The Employer introduced evidence that in 1996, after the new language was added, the International Union agreed with the Employer to delete "all clauses that have traditionally been in the SIU agreement" and to delete the hydraulic dredging classifications. The terms of the current GLFA provide that the hydraulic dredging classifications are covered by that agreement only if the employees are not already represented by another union. Accordingly, we find that the factor of collective-bargaining agreements favors awarding the disputed work to the SIU-represented employees.

2. Employer preference and past practice

The Employer's president testified that the Employer has assigned SIU-represented employees to perform the disputed work associated with hydraulic dredging since 1991. Consistent with this past practice, the Employer assigned the disputed work at the Burns Ditch jobsite to SIU-represented employees and prefers to assign the disputed work to those employees. Accordingly, we find

that the factors of employer preference and past practice favor assigning the work to employees represented by the SIU.

3. Relative skills and training

The Employer's president and field superintendent testified that SIU-represented employees have the requisite skills and training to perform the work in dispute. The president testified that SIU-represented employees are more skilled than the Local 150-represented employees because they have more experience and training in operating equipment on water. Local 150 presented no evidence regarding this factor. Accordingly, we find that this factor favors an award of the work to SIU-represented employees.

4. Economy and efficiency of operations

The disputed work is only a part of the hydraulic dredging operation. The SIU-represented employees perform all aspects of the hydraulic dredging. Local 150 does not claim any of the work associated with the hydraulic dredging, except for the operation of the picker. Thus, at least during the 7-week stage of continuous dredging operations, a Local 150-represented employee would operate the picker on the barge only intermittently and for short periods of time. Any such Local 150-represented employee would be idle most of the time. The SIU-represented employees can operate the picker for the brief periods when it is needed as well as perform their regular duties related to the hydraulic dredging operation. Local 150 presented no evidence regarding this factor. Accordingly, we find that this factor favors awarding the disputed work to the employees represented by the SIU.

Conclusion

After considering all the relevant factors, we conclude that employees represented by the Seafarers International Union, Atlantic, Gulf, Lakes & Inland Waters District/NMU, AFL-CIO 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 award the work to employees represented by the SIU, not to that labor organization or to its members.

Scope of Award

The Employer seeks a broad award, arguing that its work is performed on all of the Great Lakes. It expects that operation of the hydraulic picker will continue to be a source of controversy with the other Operating Engi-

⁶ Local 150 presented no evidence and took no position on these factors.

neers" local unions that enforce the GLFA within their respective territorial jurisdictions on the Great Lakes.

The Board has customarily declined to grant an areawide award in cases such as this in which the *charged party* represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. E.g., *Elevator Constructors, Local 2 (Kone, Inc.)*, 349 NLRB at 1211–1212. Accordingly, in the circumstances of this case we find no warrant for granting a broad award. Therefore, the present determination is limited to the particular controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

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

Employees of Luedtke Engineering Company represented by the Seafarers International Union Atlantic, Gulf, Lakes & Inland Waters District/ NMU, AFL–CIO

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

Dated, Washington, D.C. July 14, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD