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**International Brotherhood of Electrical Workers,
Local No. 71 and US Utility Contractor Com-
pany, Inc. and Laborers' International Union of
North America, Local 1216.** Case 8-CD-506

July 30, 2010

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

DECISION AND DETERMINATION OF ISPUTE

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). US Utility Contractor Company, Inc. (the Employer), filed a charge on January 11, 2010, alleging that International Brotherhood of Electrical Workers, Local No. 71 (Electrical Workers) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Electrical Workers rather than to employees represented by Laborers' International Union of North America, Local 1216 (Laborers). The hearing was held on February 8, 2010, before Hearing Officer Gregory M. Gleine. At this hearing, Laborers orally moved to quash the notice of hearing. After the hearing officer referred this motion to the Board for ruling, Laborers filed a memorandum in support of its motion to quash, and the Employer and Electrical Workers each filed a memorandum in opposition to Laborers' motion to quash. The Employer, Electrical Workers, and Laborers also 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 is a Perrysburg, Ohio-based electrical contractor engaged in outdoor electrical work, including the construction and installation of highway and traffic signal lights, highway lighting, and streetscape lighting. The parties stipulated that during the 12-month period prior to January 12, 2010, the Employer purchased goods from outside the State of Ohio valued in excess of \$50,000, and performed services in states other than the State of Ohio valued in excess of \$50,000. The parties further stipulated that the Employer is an employer within the meaning of Section 2(2) of the Act, and we find that it is engaged in commerce within the meaning

of Section 2(6) and (7) of the Act. The parties additionally stipulated, and we find, that Electrical Workers and Laborers are labor organizations within the meaning of 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is a signatory, through the National Electrical Contractors Association (NECA), to a collective-bargaining agreement with Electrical Workers for outside electrical work (Outside Agreement), effective December 31, 2007, to January 3, 2010. That agreement covers the "installation and maintenance of highway and street lighting, highway and street sign lighting, electronic message boards and traffic control systems, camera systems, traffic signal work, substation and line construction including overhead and underground projects."

The Employer does not have a collective-bargaining agreement with Laborers. However, Laborers has a collective-bargaining agreement with the Ohio Contractors Association (OCA), of which Anderzack-Pitzen Construction, Inc. (Anderzack), a general contractor, is a member. That agreement (Heavy Highway Agreement), effective May 1, 2007, to April 30, 2010, covers "Highway Construction" and requires that "all subcontractors shall be subjected to the terms and provisions of this Agreement."

Anderzack is the general contractor on a highway reconstruction project funded by the Ohio Department of Transportation in Bucyrus, Ohio. On August 12, 2009,¹ Anderzack awarded a subcontract to the Employer to perform decorative street lighting and traffic signal installation work on this project. On about October 8, the Employer commenced work on this project using a 3-4 person crew of employees represented by Electrical Workers.

On October 29, Anderzack notified the Employer that Laborers had filed a grievance against Anderzack, alleging that Anderzack's subcontract with the Employer violated the subcontracting provision of the Heavy Highway Agreement.

The Employer's District Manager, Patrick McKeown, testified that, in a telephone call later that day with Laborers' Business Manager Perry Johnson, Johnson stated that Laborers-represented employees do all the traffic signal, street lighting, and highway lighting work throughout the state, except for the "hot hookups." McKeown testified that he then asked Johnson whether

¹ Unless otherwise specified, all dates are in 2009.

the Employer had to use “your people,” and Johnson replied “yes,” adding “[i]t’s their work.”²

In late November, Anderzack notified the Employer that Laborers-represented employees were going to be placed on the Bucyrus Project. Subsequently, on about November 23, Anderzack placed one Laborers-represented employee on the crew together with the Employer’s Electrical Workers-represented employees.

By letter dated November 27, Electrical Workers’ Business Manager Patrick Grice informed the Employer’s President Stan Chlebowski that, under the Employer’s collective-bargaining agreement with Electrical Workers, the Employer was prohibited from using employees other than those represented by Electrical Workers to perform work on the Bucyrus project. The letter stated: “Be advised that should US Utilities continue to violate and/or breach [sic] the [Outside Agreement]; Grievances will be filed against US Utilities Company.” The letter further stated: “In addition, Picket Lines, Strike activity and the filing of charges with the National Labor Relations Board will be levied against US Utilities Company.” Grice concluded by stating that Electrical Workers “will do whatever is necessary to protect the integrity of the [Outside Agreement] and protect IBEW jobs.”

In a letter dated December 2, Anderzack’s General Manager Pam Pitzen notified Chlebowski that the “work required by your firm that is not directly related to electrical hook up, wiring, etc. is being claimed by the Laborers.” Pitzen added that Laborers demanded that two Laborers-represented employees “perform the manual labor (other than electrical) on this project.” Pitzen stated that Anderzack would provide another Laborers-represented employee to assist on the Bucyrus project and that Anderzack would charge the Employer for all hours worked by the Laborers-represented employees.

In December, the Employer utilized a four-employee composite crew on the Bucyrus project, consisting of two employees represented by Electrical Workers and two employees represented by Laborers. The Laborers-represented employees performed the nonelectrical work on the project, which involved digging trenches, piecing together conduit, forming concrete pads, and anchoring bolts. Subsequently, Anderzack billed the Employer for the hours worked by the Laborers-represented employees.

On December 31, Electrical Workers filed a grievance against the Employer alleging, among other things, that

the Employer had failed to use Electrical Workers as the exclusive source of referral of applicants for employment on the project.

On January 4, 2010, Electrical Workers picketed the Bucyrus project site. No work was performed on the jobsite on that day and no further work was performed that week.

B. Work in Dispute

The work in dispute involves trenching, laying of conduit, pulling of wiring, the installation of decorative lighting, and the installation of traffic signals at an Ohio Department of Transportation project located in Bucyrus, Ohio, performed by US Utility Contractor Co., Inc.

C. Contentions of the Parties

Laborers argues that the notice of hearing should be quashed, contending that it has not claimed the disputed work. Relying on *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995) (union’s action through grievance procedure to enforce claim against general contractor does not constitute claim against subcontractor for work in dispute), Laborers argues that it has pursued only a contractual grievance against Anderzack for failing to honor the subcontracting clause in the Heavy Highway Agreement. Laborers also contends that Electrical Workers’ threat was a sham, and was contrived in order to create a jurisdictional dispute and thereby obtain the work assignment preferred by the Employer.³

The Employer and Electrical Workers oppose the motion to quash. They contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, as evidenced by Electrical Workers’ threat to picket and its actual picketing of the jobsite. They further contend that there are competing claims to the disputed work, and therefore the motion to quash should be denied. In particular, they contend that Laborers pressed its claim for the work directly to the Employer when, during the October 29 phone call with Employer District Manager McKeown, Laborers Business Manager Johnson told McKeown that Laborers-represented employees do all the lighting and traffic signal installation work all over the state, and that the work in dispute is “their work.” They further contend that Laborers’ claim for the work is demonstrated by the fact that, for a brief period in November and December, Laborers-represented em-

² Johnson testified that he told McKeown during this conversation that Laborers has a collective-bargaining agreement with Anderzack, but that he rejected a suggestion by McKeown that the Employer employ Laborers-represented employees on the project.

³ In its posthearing brief, Laborers did not set forth any contentions regarding the merits of the dispute. Laborers did, however, introduce some evidence relevant to the merits, and that evidence is considered below.

employees performed the work in a composite crew with the Employer's Electrical Workers-represented employees.⁴

On the merits, the Employer 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.

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;⁵ (2) a party has used proscribed means to enforce its claim to the work in dispute;⁶ 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 the 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 those employees have been performing the work. Further, Electrical Workers Business Manager Grice's November 17 letter to the Employer claimed the work in dispute for employees represented by Electrical Workers.

Laborers contends, however, that it has not claimed the work in dispute, but rather merely filed a grievance against Anderzack for breach of the subcontracting clause in the Heavy Highway Agreement. See *Capitol Drilling*, supra. We disagree. First, its claim is demonstrated by the fact that employees it represents briefly performed the work in a composite crew with employees represented by Electrical Workers.⁸ Further, as stated

⁴ The Employer and Electrical Workers also contend that Laborers made a claim for the work in dispute when it requested that the Employer sign the Heavy Highway Agreement to resolve a grievance filed against another general contractor, Shelly Company, on a project in Lima, Ohio. The Employer further contends that Laborers also claimed the work when, in a meeting held to discuss the grievance concerning the Lima project, the vice president of the Laborers International Union, Ralph Cole, told McKeown that "traffic signal work and street-lighting work belongs to the Laborers", with the exception . . . of any electrical connections, hot connections."

⁵ *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001).

⁶ See, e.g., *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004).

⁷ *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1138-1139 (2005).

⁸ See *Operating Engineers Local 542 (Caldwell Tanks, Inc.)*, 338 NLRB 507, 509 (2002) (observing that the Board has long held that

above, McKeown testified that, in his October 29 phone conversation with Johnson, Johnson replied affirmatively when asked whether the Employer was required to use "your people," adding "[i]t's their work." Although Laborers disputes the validity of this testimony, we find that it is sufficient to establish reasonable cause to believe that Laborers made a claim for the disputed work. See *J.P. Patti Co.*, 332 NLRB 830, 832 (2000).⁹ In view of the evidence that Laborers performed some of the work in dispute and made a claim directly to the Employer for the work, we find the instant case distinguishable from *Capitol Drilling*.

2. Use of proscribed means

We also find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. As set forth above, Electrical Workers stated in its November 27 letter to the Employer that if the Employer assigned the work to employees other than those represented by Electrical Workers, "Picket Lines, Strike activity and the filing of charges with the National Labor Relations Board will be levied against [the Employer]." Additionally, Electrical Workers picketed the jobsite in January 2010.

Laborers argues that Electrical Workers' actions were a sham in order to obtain the work assignment through this 10(k) proceeding. Laborers does not, however, offer any direct evidence demonstrating that Electrical Workers did not intend its threat to be taken seriously. To the contrary, Electrical Workers carried out its threat to picket on January 4, 2010. See *Operating Engineers Local 150 (Royal Components, Inc.)*, 348 NLRB 1369, 1370 (2006) (picketing accompanied by claim for work constitute reasonable cause to believe that a union used proscribed means). We therefore find reasonable cause to believe that Section 8(b)(4)(D) has been violated.

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.

In view of the evidence above, we find reasonable cause to believe that there are competing claims for the

employees' performance of work is evidence of their claim to that work, even absent an explicit claim); *Longshoremen ILWU Local 14 (Sierra Pacific Industries)*, 314 NLRB 834, 836 (1994) (performance of work by a group of employees is evidence of a claim for work by those employees, even in the absence of an explicit claim).

⁹ The Board need not rule on the credibility of testimony in order to proceed to the determination of a 10(k) dispute because the Board need only find reasonable cause to believe that the statute has been violated. *Electrical Workers Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1383 (1998).

We also find it unnecessary to address the Employer's and Electrical Workers' contentions that Laborers made additional claims for the work, as set forth in fn. 4, supra.

work in dispute and that a violation of Section 8(b)(4)(D) has occurred, and that no voluntary method exists for adjustment of the dispute. 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 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, 1410–1411 (1962).

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

1. Certifications and collective-bargaining agreements

There is no evidence of Board certifications concerning the employees involved in this dispute.

The parties stipulated that the Employer and Electrical Workers are bound to the Outside Agreement, which 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.”

In contrast, it is undisputed that the Employer does not have a collective-bargaining agreement with Laborers.¹⁰ Accordingly, we find that the factor of collective-bargaining agreements favors an award of the disputed work to the employees represented by Electrical Workers.

2. Employer preference and past practice

Employer District Manager McKeown testified that the Employer prefers to have the disputed work performed by Electrical Workers-represented employees.

At the hearing, McKeown and Electrical Workers Business Manager Grice testified that the Employer has historically assigned this type of work to its Electrical Workers-represented employees. There is no evidence that, other than during the brief period in November and December, the Employer ever used Laborers-represented

employees to perform work of the kind in dispute. Accordingly, we find this factor favors an award of the disputed work to employees represented by Electrical Workers.

3. Area and industry practice

Grice testified that employees represented by Electrical Workers have performed work of the kind in dispute in Crawford County, Ohio, where Bucyrus is located, and the surrounding areas for at least 30 years. Grice also testified that, throughout Ohio, other electrical contractors have assigned traffic signal and streetscape lighting installation work to employees represented by Electrical Workers. The Employer's foreman, Aaron Grand, testified that he has worked on hundreds of signal installation projects and street lighting projects as an Electrical Workers-represented employee for about 20 years, and that no Laborers-represented employees were involved in those projects.

Laborers also presented testimony relevant to this factor. The vice president of the Laborers' International Union, Ralph Cole, testified that employees represented by his local unions perform highway lighting and traffic signal installation work throughout Ohio, including the wiring except when it is energized.¹¹ In addition, Johnson testified that Laborers-represented employees have performed highway lighting and traffic signal installation “for as long as [he] can remember” within his jurisdiction in the counties of Ashland, Crawford, Knox, Morrow, and Richland, Ohio. Johnson stated that the contractors who use employees represented by Laborers to perform this type of work include “Lake Erie, M.P. Dory, Sandusky Bay, Complete General, Trafftech, Peterson, Bansal, Cornerstone, and Miller Cable.” In view of this evidence, we find that this factor does not favor an award of the work in dispute to either group of employees.

4. Relative skills

Electrical Workers presented testimony that the employees it represents are trained, and have the requisite experience and skills, to perform the disputed work. Electrical Workers Business Manager Grice testified that in order to become a journeyman lineman, an employee represented by Electrical Workers must complete a 7000-hour apprenticeship program consisting of both on-the-

¹⁰ Although Laborers has a collective-bargaining agreement with Anderzack, that agreement is not applicable because the company that ultimately controls the job assignment is deemed to be the employer for purposes of a 10(k) proceeding. *Plasterers Local 502 (PBM Concrete)*, 328 NLRB 641, 644 (1999); *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 940 (1989).

¹¹ At the hearing, Laborers submitted two documents in support of its contention that Laborers-represented employees perform highway and signal lighting installations: a 2006 arbitration decision requiring an employer, Trafftech, Inc., to assign the installation work to employees represented by Laborers Local 860; and the Order of Dismissal from the United States District Court, Northern District of Ohio concerning said arbitration award.

job and classroom training. This program provides training in electrical theory, the requirements of the National Electrical Code, and traffic signal installation. Employer foreman Grand similarly testified that employees represented by Electrical Workers possess the skills required to perform the work in dispute. Employer District Manager McKeown testified that the Electrical Workers-represented employees who perform the work in dispute for the Employer are certified by the International Municipal Signal Association (IMSA). Further, McKeown testified that Laborers officials Johnson and Cole informed him that Laborers-represented employees do not perform work of the kind in dispute when the wiring becomes live.

Cole testified that employees represented by Laborers undergo a 4000-hour apprenticeship program for the classification of general laborer. Although Cole did not testify in detail about the training program, he stated that it has only been in operation for about 3 years, and that it is not specific to electrical work.

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

Employer District Manager McKeown and Employer foreman Grand both testified that it is more efficient for the Employer to perform the work in dispute using Electrical Workers-represented employees. They explained that these employees are able to perform the work interchangeably and in a cohesive fashion. Grand testified, for example, that a ground man, journeyman lineman, or foreman on a crew of employees represented by Electrical Workers can perform the wiring work on the installation projects.

McKeown and Grand also both testified that a composite crew of employees represented by Electrical Workers and Laborers would be less productive, because the latter would have to be taught how to perform some of the tasks involved in the performance of this work. Foreman Grand specifically testified that the two Laborers-represented employees who briefly performed the work in dispute were not familiar with the work, and thus Grand “basically had to walk them through it.”

Finally, as noted above, Laborers-represented employees cannot perform any of the tasks involving live connections, an important component to the installation work. See generally, *Electrical Workers Local 126 (Henkels & McCoy)*, 338 NLRB 1, 4 (2002) (finding it more economical and efficient to award work to employees who could perform all, rather than only some, of the job functions needed to complete the work in dispute).

CONCLUSIONS

After considering all the relevant factors, we conclude that the 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, relative skills, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Electrical Workers, not to that Union or its members.

F. Scope of the Award

The Employer requests a broad, state-wide award covering the work in dispute. The Board customarily does not grant a broad area-wide 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 this proceeding.

DETERMINATION OF DISPUTE

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

Employees of US Utility Contractor Company, Inc., represented by International Brotherhood of Electrical Workers, Local Union No. 71, are entitled to perform the trenching, laying of conduit, pulling of wiring, the installation of decorative lighting, and the installation of traffic signals at an Ohio Department of Transportation project located in Bucyrus, Ohio, performed by US Utility Contractor Company, Inc.

Dated, Washington, D.C. July 30, 2010

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD