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**Structural Steel and Bridge Painters Local Union 806 and Carabie Corp. and Kiewit Constructors, Inc./Weeks Marine, Inc., a Joint Venture and Building, Concrete, Excavating & Common Laborers Local 731. Case 2–CD–1162**

March 30, 2011

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS BECKER, PEARCE, AND HAYES

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Carabie Corporation (the Employer or Carabie) filed a charge on August 16, 2010,<sup>1</sup> alleging that Structural Steel and Bridge Painters Local Union 806 (Local 806) violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer not to reassign certain work from employees represented by Local 806 to employees represented by Building, Concrete, Excavating & Common Laborers Local 731 (Local 731). The hearing was held on October 28, November 9, and December 2 before Hearing Officer Joane Si Ian Wong. Thereafter, the Employer, Local 806, Local 731, and Kiewit Constructors, Inc./Weeks Marine, Inc. (Kiewit/Weeks) each filed a posthearing brief.

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 corporation, with an office and principal place of business in Mount Vernon, New York, is a painting contractor specializing in industrial and commercial structures, including such structures on bridges and highways. Kiewit/Weeks is a joint venture incorporated in New York. Kiewit has an office and principal place of business in Woodcliff, New Jersey, and Weeks has an office and principal place of business at Cranford, New Jersey. The parties stipulated, and we find, that the Employer and Kiewit/Weeks are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that Local 806 and Local 731 are labor organizations within the meaning of Section 2(5) of the Act.

<sup>1</sup> All dates are in 2010, unless otherwise indicated.

II. THE DISPUTE

*A. Background and Facts of the Dispute*

Kiewit/Weeks is a joint venture formed to perform the construction and replacement of the Willis Avenue Bridge in New York, New York. Kiewit/Weeks entered into an agreement with the Employer for the Employer to perform work on the bridge, including “protective sealing of structural concrete” and “protective sealing of structural concrete on new bridge deck.” The Employer has a collective-bargaining agreement with Local 806. Kiewit is a member firm of the General Contractors Association of New York (GCA), an association that negotiates contracts on behalf of its members with various unions engaged in heavy construction projects, including Local 731.

Employees represented by Local 806 began sealing the Willis Avenue Bridge in January. At some point in January, Kiewit/Weeks intervened, gave Local 806 a stop work order, and delegated the disputed work to employees represented by Local 731. Employees represented by Local 806 returned to perform the disputed work in February, but Kiewit/Weeks again intervened on February 9, and assigned the work to employees represented by Local 731 “in keeping with GCA and [Kiewit/Weeks] past practice.” Employees represented by Local 806, nevertheless, performed the disputed work again a few months later. In August, Angelo Serse, Local 806's business representative, told Linda Bautista, the Employer's chief financial officer, that Local 806 would picket and sue the Employer if the Employer gave the work to employees represented by Local 731. Employees represented by Local 806 finished the disputed work to the extent necessary to open the bridge, but disputed work remained to be completed at the time of the hearing.

*B. Work in Dispute*

The parties stipulated that the dispute concerns the assignment of certain sealing work, including deck sealing work, at the Willis Avenue Bridge site in New York, New York.

*C. Contentions of the Parties*

The parties stipulated that there are competing claims for the work in dispute. The Employer and Local 731 contend that Local 806 threatened to engage in proscribed activity and that there is no agreed-upon method for voluntary resolution of the dispute that would bind all parties. On the merits, Local 731 contends that Kiewit/Weeks is the ultimate employer, and that the disputed work should be awarded to Local 731-represented employees based on the factors of collective-bargaining

agreements, employer preference and past practice, area and industry practice, relative skills and training, and economy and efficiency of operation. Local 731 also seeks an award of areawide jurisdiction. Similarly, Kiewit/Weeks contends that the disputed work should be awarded to employees represented by Local 731 based on the same factors.

Local 806 contends that the disputed work should be awarded to employees it represents based on the factors of collective-bargaining agreements, area practice, employer preference and past practice, employee qualifications, economy and efficiency of operations, and safety. The Employer contends that the disputed work should also be awarded to employees represented by Local 806 based on the factors of employer preference and past practice, relative skills, efficiency of the operations, and area and industry practice.

#### 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 there are competing claims for 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, there must be a finding that the parties have not agreed on a method of voluntary adjustment of the dispute. See, e.g., *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). On the record, we find that this standard has been met.

First, we find that there is reasonable cause to believe that there are competing claims to the disputed work because all parties joined in stipulating to the existence of competing claims. In any event, where, as here, two unions have contracts and each union claims its contract covers the same work, the Board has found competing claims for disputed work. *Operating Engineers Local 3 (Central Concrete Supply)*, 355 NLRB No. 200, slip op. at 3 (2010).

Second, we find that there is reasonable cause to believe that Local 806 used means proscribed under Section 8(b)(4)(D) to enforce its claim. Local 806 agent Serse admitted telling Employer official Bautista that Local 806 would picket and sue the Employer if the Employer gave the work to employees represented by Local 731. Threatening to picket is a proscribed means of enforcing a claim to disputed work. *Operating Engineers Local 137 (Eastern Concrete Materials)*, 355 NLRB No. 57, slip op. at 3 (2010) (reasonable cause to believe that Operating Engineers and Teamsters used proscribed means to enforce their claims to the disputed work when

they threatened to picket and engage in job actions if employer reassigned the disputed work to employees represented by laborers).

Finally, we find that there is no method for voluntary adjustment of the dispute to which all parties have agreed. At the hearing, evidence was introduced regarding the dispute resolution procedures of the Building and Construction Trades Council, but not all the parties are bound to those procedures. *Operating Engineers Local 150 (Nickleson Industrial Service)*, 342 NLRB 954, 955 (2004) (“[I]n order for an agreement to constitute an agreed-upon method for voluntary adjustment, all parties to the dispute must be bound to that agreement.”). Accordingly, we proceed to the merits of the dispute.

#### E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors in light of the Board’s “[e]xperience and common sense.” *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 583 (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). Based on the following factors, which we find are relevant to determining this dispute, we conclude that the Employer’s employees represented by Local 806 are entitled to perform the work in dispute.

##### 1. Certifications and collective-bargaining agreements

The Board has not certified either Local 806 or Local 731 to represent these groups of employees. As to the factor of collective-bargaining agreements, both Local 806’s collective-bargaining agreement with the Employer and Local 731’s collective-bargaining agreement with the GCA are broad enough to cover the disputed work. Thus, Local 806’s agreement with the Employer specifically provides for employees to perform “all coatings<sup>2</sup> on structural steel and bridges.” Local 731’s agreement with GCA more generally provides for employees to perform “[a]ll concreting in . . . bridges . . . .”

In jurisdictional disputes, the relevant collective-bargaining agreement is the one negotiated with the employer who has ultimate control over the assignment of the disputed work. *Elevator Constructors Local 91 (Otis Elevator Co.)*, 340 NLRB 94, 96 (2003). Although Lo-

<sup>2</sup> Local 731 argues that the sealant applied at the Willis Avenue Bridge project is not a “coating,” but rather a penetrating agent. This issue was not litigated at the hearing, and thus is untimely. In any event, Angelo Longo, Local 731’s shop steward, testified that “the sealer is a coating.”

cal 731 contends that Kiewit/Weeks is the employer with ultimate control here, there is no evidence that it retained authority to assign or control the sealing work in its subcontract with Carabie. Thus, Carabie is the relevant employer, and it is Carabie's collective-bargaining agreement with Local 806 that is relevant. We therefore find that this factor favors awarding the disputed work to employees represented by Local 806. *Electrical Workers Local 71 (Capital Electrical Line Builders)*, 355 NLRB No. 24, slip op. at 4 (2010) (collective-bargaining factor weighs in favor of awarding disputed work to union representing subcontractor's employees where there is no evidence that general contractor has authority to assign or control those employees once it awards a subcontract); *Elevator Constructors Local 91 (Otis Elevator Co.)*, supra (collective-bargaining factor weighs in favor of awarding disputed work to union with agreement with employer that has ultimate control over assignment of the work).

## 2. Employer preference and past practice

Bautista and Rocco Miano, one of the Employer's supervisors, both testified that the Employer prefers assigning the disputed work to employees represented by Local 806. Bautista further testified that the Employer has only used employees represented by Local 806 to perform this type of work in the past. Thus, we find that this factor favors awarding the disputed work to employees represented by Local 806.

## 3. Area practice

Local 731 presented testimony and letters from contractors indicating that employees it represents have performed the disputed work for different contractors at a variety of jobsites in the New York area.<sup>3</sup> The evidence establishes that employees represented by Local 806 performed the disputed work for the Employer's projects with different general contractors on a variety of jobsites in the New York area. Serse, Local 806's business representative, also testified that Local 806 has contracts with companies other than the Employer that perform similar spraying of protective coatings. *Painters Local 8 (G. C. Zarnas & Co.)*, 317 NLRB 585, 586 (1995) (evidence that union is signatory to contracts with 67 contractors in 5 counties in Indiana is comparable to evidence that employees represented by the other union per-

<sup>3</sup> Local 731 also submitted evidence of prevailing wage determinations from the U.S. Department of Labor, New York Department of Labor, and the city of New York, which it wants the Board to recognize as "authoritative statements concerning area and industry practice on work and jurisdiction." It is unnecessary for us to do so. This evidence merely shows that employees represented by Local 731 perform similar work for area employers, a fact not in dispute.

formed disputed work for a variety of local businesses).<sup>4</sup> Based on the evidence presented, we find that this factor does not favor an award of the disputed work to either group of employees. *Id.*

## 4. Relative skills and training

Both unions presented evidence that employees they represent are trained to perform the disputed work. Serse, Local 806's business representative, testified that Local 806 provides a 3-year apprenticeship program where, among other skills, the apprentices are taught to perform properly the kind of spraying that was performed on the Willis Avenue Bridge project. Anthony D'Amato, Local 731's training director, testified that he provides a nonmandatory "concrete finishing and curing" class, where employees are taught how to seal concrete. Both groups of employees also receive on-the-job training. Moreover, both groups of employees have successfully performed the work on multiple occasions, which establishes their ability to do the work. *Laborers Local 210 (Surianello General Concrete Contractor)*, 351 NLRB 210, 213 (2007) ("Laborers-represented employees have successfully performed the work in dispute on a number of occasions, thus establishing their ability to do the work.").

Although each union presented evidence of the other union's alleged performance and safety deficiencies,<sup>5</sup> on this record, we find that employees represented by each union possess the relative skills and training necessary to perform the disputed work. Accordingly, we find that this factor does not favor awarding the disputed work to either group of employees.

## 5. Economy and efficiency of operations

The Employer does not employ laborers represented by Local 731. Both groups of employees were present and mobilized at the jobsite to perform tasks other than the disputed work. The employees represented by Local 731 were present at the jobsite erecting structural steel and the "forms" within which they poured the concrete,

<sup>4</sup> In support of its assertion that this factor weighs in favor of awarding the disputed work to employees it represents, Local 731 cites to *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787, 790 (1990). There, the Board found that the area practice factor favored employees represented by the Laborers because the evidence indicated that employees represented by the Iron Workers had performed the disputed work for only one contractor. Here, in contrast, there is evidence that Local 806 has contracts with employers other than Carabie who perform similar work.

<sup>5</sup> For example, John Clenithan, project quality manager for Kiewit/Weeks, testified that a resident engineer from New York City complained about the Employer's application of the sealant on the Willis Avenue Bridge project. Similarly, Miano, one of the Employer's supervisors, testified that he observed performance deficiencies in the work of employees represented by Local 731 one day in February.

and employees represented by Local 806 were on the site deleading the bridge and preparing it to be cut and stripped.

Employees represented by Local 806, however, when performing the disputed work, spray five times the amount of square footage per day, per worker, as employees represented by Local 731. Local 731 argues that work performed by employees represented by Local 806 is flawed because they used a sprayer that does not comply with the sealant manufacturer's requirements. The manufacturer's product description sheet for the sealant used on the Willis Avenue Bridge project recommends "us[ing] low pressure airless spray equipment . . . ." Although employees represented by Local 806 did not use an airless sprayer in their performance of the disputed work, Local 731 did not present evidence that use of a nonairless sprayer affected the quality of their spraying, or that using the sprayer was otherwise incorrect.<sup>6</sup>

Thus, we find that this factor favors awarding the disputed work to employees represented by Local 806.

<sup>6</sup> Moreover, a product description for the airless sprayer used by employees represented by Local 731 indicates that the sprayer is used "for . . . monthly spraying in residential and light commercial applications." Miano, one of the Employer's supervisors, testified that spraying the Willis Avenue Bridge deck was not a residential or light commercial job.

Local 731 also argues that employees it represents earn about \$16 less per hour than employees represented by Local 806 and thus are more economical. This fact, however, is not significant. "[I]t is the Board's practice not to rely on the differing rate of pay of employees in determining a jurisdictional dispute." *Southwest Regional Council of Carpenters (Standard Drywall, Inc.)*, 346 NLRB 478, 483 (2006) (citations omitted).

### Conclusion

After considering all the relevant factors, we conclude that employees represented by Local 806 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, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Local 806, and not to that union or its members. The determination is limited to the controversy that gave rise to this proceeding.

### DETERMINATION OF DISPUTE

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

Employees of Carabie Corp., represented by Structural Steel and Bridge Painters Local Union 806, are entitled to perform sealing work, including deck sealing work, at the Willis Avenue Bridge site in New York, New York.

Dated, Washington, D.C. March 30, 2011

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Craig Becker, Member

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Mark Gaston Pearce, Member

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Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD