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**Glaziers District Council 16 and MALV, Inc., d/b/a Service West and Carpenters 46 Northern California Counties Conference Board. Case 20–CD–752**

August 19, 2011

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE  
AND HAYES

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. MALV, Inc. d/b/a Service West (the Employer) filed charges on February 9, 2011,<sup>1</sup> alleging that the Respondent, Glaziers District Council 16 (Glaziers), 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 Glaziers rather than to employees represented by Carpenters 46 Northern California Counties Conference Board (Carpenters). The hearing was held on March 10 before Hearing Officer Olivia Vargas. The Employer 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

On March 1, the Board issued a Decision and Determination of Dispute involving substantially the same work and the same parties as in the instant case, with the exception that the San Francisco Building Trades Council (Trades Council) is not a party here. See *Glaziers District Council 16 (Service West)*, 356 NLRB No. 105 (2011) (*Service West I*).<sup>2</sup> The transcript in that proceeding was incorporated into the record in this case. Based on undisputed findings in the prior case, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Glaziers and the Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

<sup>1</sup> All dates are in 2011 unless otherwise specified.

<sup>2</sup> In *Service West I*, the Board granted the Trades Council's request to quash the notice of hearing with regard to it.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer installs modular office furniture in the San Francisco Bay area and elsewhere in California. It specializes in the installation of demountable walls, which are office walls set on a track system that may be disassembled and moved from one location to another without doing any harm to the building.

The Employer is a member of a multiemployer bargaining group, the Modular Installers Association. Since 1982, the Employer has been signatory to the Carpenters Master Agreement for Northern California and its Office Modular Systems Addendum (Carpenters Agreement). The current contract expires on June 30, 2012. The Employer has approximately 150 Carpenters-represented employees. These employees have performed all of the Employer's demountable wall installations, 95 percent of which have used glass panel partitions.

On January 10, Richard Hill, the Employer's counsel, notified Richard McCracken, the Glaziers' counsel, that the Employer would be installing glass partitioned demountable wall systems in the Bay Area over the following few months and that the Employer would be paying its Carpenters-represented employees wages and benefits equal to or in excess of the Glaziers' package. Hill also offered the Glaziers an opportunity to inspect the Employer's relevant payroll records. McCracken responded by indicating that a Glaziers representative would review the payroll records on a biweekly basis. Hill provided McCracken with the name and contact information for the Employer's payroll representative but expressed reservations about biweekly inspections. Thereafter, McCracken and then Hill left voice mail messages for each other but failed to make contact, and no one from the Glaziers contacted the Employer's payroll representative.

On February 9, the Employer began installing glass partitioned demountable wall systems at 505 Montgomery Street (505 Montgomery project). Novo Construction, the project's general manager subcontracted this work to the Employer. The Employer assigned the work to its Carpenters-represented employees. On these employees' first day on the job, approximately 12 Glaziers' pickets arrived at the site at 5:45 a.m. with signs which stated on the front: "Service West, Inc.—Unfair to District Council 16—Does Not Meet Area Wages and Fringe Benefits—Not an Effort to Organize Workers," and on the back: "Picket Sanctioned by SF Building & Construction Trades Council." All jobsite employees, except the Carpenters-represented employees, walked off the job. The picketing continued until about 11 a.m.

when Novo's superintendent established a reserve gate system. The same number of pickets returned to the site the following day carrying the same signs. The pickets honored the reserve gate system and no employees walked off the job. There were no further demonstrations.

Mark Vignoles, the Employer's President, testified that the Glaziers' picketing on February 9 "lost a day of work—a day of progress." Vignoles further testified that thereafter he received no assurances from the Glaziers that they would not engage in further picketing at the 505 Montgomery project or any other of the Employer's future projects. Adrian Simi, a Carpenters' field representative, testified that he, also, had not received these assurances from the Glaziers.

The Glaziers previously had picketed the Employer's employees as they installed glass partitioned demountable wall systems at 555 Mission Street (555 Mission project) on April 1, 2, 5, and 19, 2010; and at 101 California Street (101 California project) on July 21, 2010. In addition, the Glaziers demanded the disputed work at the Employer's Greylock project in Menlo Park (Greylock project). The work at issue at 101 California Street was the subject of the jurisdictional dispute and award of work to the Employer's Carpenters-represented employees in *Service West I*.

#### B. Work in Dispute

The work in dispute is the installation of demountable floor-to-ceiling wall systems with glass partitions.

#### C. Contentions of the Parties

The Employer contends that there are competing claims for the work in dispute, that there is reasonable cause to believe that the Glaziers violated Section 8(b)(4)(D), and that there is no agreed-upon voluntary method to adjust the dispute. On the merits of the dispute, the Employer contends that the factors cited in *Service West*—Carpenters Agreement, Employer preference, current assignment and past practice, area practice, relative skills and training, and economy and efficiency of operations—favor awarding the disputed work to Carpenters-represented employees. In light of the Board's decision in *Service West I*, the Employer seeks a broad jurisdictional award applicable to the Employer's current and future projects in the San Francisco Bay area.

The Glaziers did not appear at the hearing and have not filed a position statement.

#### 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) of the Act has been violated. This standard requires finding

that there is reasonable cause to believe that there are competing claims to the disputed work between rival groups of employees and that a party has used proscribed means to enforce its claim to the work in dispute.<sup>3</sup> Additionally, the Board will not proceed under Section 10(k) if there is an agreed-upon method for voluntary adjustment of the dispute.<sup>4</sup> For the reasons stated below, we find that this dispute is properly before the Board for determination under Section 10(k).

As the history of the disputed work in *Service West I* demonstrated, the Glaziers claimed at various times that the disputed work should be performed by employees represented by the Glaziers. The Board found that the Glaziers engaged in proscribed conduct by picketing at one of the disputed projects. The alleged purpose of the prior picketing was an area standards object, as reflected in the Glaziers' signage, but the Board found reasonable cause to believe another object of the picketing was to obtain the disputed work.

The Glaziers continued this conduct, albeit before *Service West I* issued, with picketing concerning the disputed work at the 505 Montgomery project with a similar area standards message. While the Glaziers made no specific claim for the work, they did not renounce the proscribed objective manifested in prior picketing at sites where the Employer used Carpenters-represented employees to perform the work in dispute. Further, despite being given the opportunity, they made no effort to verify their assertion that the Employer failed to pay wages commensurate with area standards. Even in cases where a union has made affirmative disclaimers of the proscribed work reassignment objective, the Board has found such disclaimers ineffective where the union subsequently engaged in purported area standards picketing without making any attempt to ascertain whether the targeted employer was actually paying standard wages. See *Carpenters Local 62 (Homebase, Inc.)*, 311 NLRB 984, 985 (1993) (disclaimer ineffective where disclaiming union engaged in area standards picketing but failed to verify employer's wage rate); *Operating Engineers Local 825 (Harms Construction)*, 273 NLRB 833, 835 (1984) (initial disclaimer tainted by subsequent pretextual area standards picketing where picketing union made no attempt to determine the accuracy of its claim that employer was paying less than area standard wages); *Building & Construction Trades Council (Neshaminy Constructors, Inc.)*, 265 NLRB 1194, 1196 (1982) (picketing union's claim that sole purpose was to protest the

<sup>3</sup> *Carpenters Local 624 (T. Equipment Corp.)*, 322 NLRB 428, 429 (1996).

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

destruction of area standards negated by failure to investigate alleged violation of area standards). We therefore find that the Glaziers' picketing at the 505 Montgomery project constituted an effective claim to the work in dispute. It is undisputed that the Employer's Carpenters-represented employees also claimed this work by actually performing it. Accordingly, we find there is reasonable cause to believe that there are competing claims for the work in dispute.

We further find reasonable cause to believe that the Glaziers has used proscribed means to enforce their claim for the disputed work by picketing at 505 Montgomery Street. This is so even assuming, *arguendo*, that the picketing had a valid area standards objective. It is well established that the proscribed work reassignment objective need not be the only objective of such conduct in order to bring it within the ambit of Section 8(b)(4)(D).<sup>5</sup>

Finally, in *Service West I*, the Board found that no agreed-on method exists for voluntarily resolving the dispute, 356 NLRB at slip op. 3, and no party to this proceeding contends otherwise.

Based on these facts, we find reasonable cause to believe that there are competing claims to the disputed work, that Section 8(b)(4)(D) has been violated by the Glaziers, and that there is no agreed-upon voluntary method to adjust the dispute. Accordingly, we find that Section 10(k) is applicable, and that the dispute is properly before the Board for determination.

#### *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).

In *Service West I*, 356 NLRB at slip op. 4–5, the Board found that employees represented by the Carpenters are entitled to continue performing the work in dispute based on the factors of bargaining agreements, employer preference, current assignment and past practice, area practice, relative skills and training, and economy and efficiency of operations. Based on essentially the same evidence with respect to the same factors, we make the same finding in this case. In making this finding, we

award the work to employees represented by the Carpenters, not to the labor organization or to its members.

#### Scope of Award

The Employer has requested that our award encompass not just the 505 Montgomery project but all of the Employer's future projects in the San Francisco Bay Area. "Normally, [Section] 10(k) awards are limited to the jobsites where the unlawful [Section] 8(b)(4)(D) conduct occurred or was threatened." *Carpenters (Pratt Installations, Inc.)*, 341 NLRB 543, 546 (2004). For the Board to issue a broad award, two prerequisites must be met—there must be: "(1) evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur; and (2) evidence demonstrating the offending union's proclivity to engage in further unlawful conduct in order to obtain work similar to that in dispute." *Id.*, citing *Electrical Workers Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1385 (1998). When evaluating these prerequisites, the Board looks to the offending union's other conduct. See *Electrical Workers Local 98 (Lucent Technology)*, 338 NLRB 1118, 1122 (2003); *Electrical Workers Local 98 (Swartley Bros. Engineers)*, 337 NLRB 1270, 1273 (2002).

As demonstrated by the facts in this case and in *Service West I* it is clear that the work of installing demountable floor-to-ceiling wall systems with glass partitions has been an ongoing source of controversy in the San Francisco Bay area. Accordingly, the first requirement for a broad order has been established. However, the second requirement—that the Glaziers has demonstrated a proclivity to engage in *further* unlawful conduct—is not shown on the record before us. The Glaziers picketing at the 505 Montgomery project to force the Employer to assign the disputed work to employees it represented, occurred *before* the Board decided *Service West I* and, thus, before the Union had been ordered to cease this conduct. Accordingly, the Glaziers cannot be said to have continued conduct found unlawful. Further, taken together, the Glaziers engaged in only two instances of proscribed conduct, neither in defiance of a Board order. We find that this fails to establish the "proclivity" necessary to warrant a broad order. See *Carpenters Local 13 (First Chicago NBD)*, 331 NLRB 281, 284 (2000) (finding two instances not in defiance of a Board order insufficient); *Laborers Local 210 (Concrete Cutting & Breaking)*, 328 NLRB 1314, 1316 (1999) (declining to grant broad award in the absence of a prior Board determination despite evidence of prior threats and claims to work on similar projects).

<sup>5</sup> *Sheet Metal Workers Local 19 (E. P. Donnelly, Inc.)*, 345 NLRB 960, 962 (2005).

Accordingly, as the two prerequisites for the issuance of a broad award are not met, we find that a broad order is not warranted here.<sup>6</sup>

#### DETERMINATION OF DISPUTE

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

1. Employees of MALV, Inc., d/b/a Service West represented by Carpenters 46 Northern California Counties Conference Board, are entitled to perform the installation of demountable floor to ceiling wall systems with glass partitions on the Employer's 505 Montgomery Street jobsite in San Francisco, California.

2. Glaziers District Council 16 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force MALV, Inc. d/b/a Service West to assign the work to employees represented by them.

3. Within 14 days from this date, Glaziers District Council 16 shall notify the Regional Director for Region 20 in writing whether it will refrain from forcing MALV, Inc., d/b/a Service West, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C. August 19, 2011

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Wilma B. Liebman, Chairman

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Mark Gaston Pearce, Member

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Brian E. Hayes, Member

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<sup>6</sup> Member Hayes would grant the Employer's request for a broad order based on the Glaziers' conduct in this case and in *Service West* 1.

(SEAL) NATIONAL LABOR RELATIONS BOARD