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**International Brotherhood of Electrical Workers,
Local 196 and Aldridge Electric, Inc. and Inter-
national Union of Operating Engineers, Local
150.** Case 13–CD–068444

July 24, 2012

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND BLOCK

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Aldridge Electric, Inc. (the Employer) filed a charge on November 8, 2011, alleging that the Respondent, International Brotherhood of Electrical Workers, Local 196, violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local 150. A hearing was held on December 8, 2011, before Hearing Officer Kate M. H. Gianopulos. Thereafter, Local 196 and Local 150 filed posthearing briefs.¹ Local 150 also filed a motion to quash the Section 10(k) notice of hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.²

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 parties stipulated that the Employer is an Illinois corporation with its principal place of business in Libertyville, Illinois. They also stipulated that during the 12-month period preceding the hearing, a representative period, the Employer purchased and received goods and services valued in excess of \$50,000 directly from entities located outside the State of Illinois. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find, based on the stipulations of the parties, that Local 196 and Local 150 are

¹ We deny as moot the Employer's March 29, 2012 motion for an expedited decision in this matter, responded to by Local 150 on April 11, 2012. Cases alleging violations of Sec. 8(b)(4)(D) are accorded statutory priority in Board processing pursuant to Sec. 10(l) of the Act, and we have so treated this case.

² Member Griffin is recused and did not participate in the consideration of this case.

labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer specializes in electrical industry construction. The project at issue involves installation of approximately 400 miles of underground cable and aerial cable infrastructure for iFiber, an organization dedicated to bringing broadband internet to underserved areas in northern Illinois. Before it bid on the project, the Employer signed a memorandum of understanding with Local 196 setting preferential wage rates and benefits for employees working for it on the iFiber project.

Pursuant to a March 21, 1988 letter of assent, the Employer has been signatory to the agreement between Local 196 and the American Line Builders Chapter of the National Electrical Contractors Association. The current agreement is effective from March 7, 2011, through March 2, 2014. The American Line Builders Agreement covers the following work:

Outside utility and commercial power, high voltage pipe type cable, highway lighting, street lighting, airport lighting, government parks, traffic signals and all electrical underground work which is within the jurisdiction of the local union, as well as excavating and placing underground facilities, including electric, gas, telephone and cable television for telephone and electric utility companies when in a joint trench with electric and required by the customer.

(Electrical underground construction shall include excavation of earth related to all electrical equipment including, laying of conduits, ducts, cables and bases for street lights, traffic signals, transformers, pad mounted switch gear and excavation for manholes.)

Pursuant to an October 20, 1970 memorandum of agreement, the Employer has been signatory to the Rockford Heavy and Highway Agreement between Local 150 and the Northwestern Illinois Contractors Association. The current agreement is effective from June 1, 2011, through May 31, 2014. The Rockford agreement covers, in pertinent part, "pile driving and all other underground utility work, heavy construction work of all types, . . . and all assembly and disassembly of all production equipment on the jobsite coming under the jurisdiction of the Operating Engineers."

On June 17, 2011,³ after the Employer had been awarded its portion of the iFiber project, Local 150 sent the Employer a letter requesting that it schedule a pre-job

³ All dates are in 2011 unless stated otherwise.

conference regarding the iFiber project. On June 20, the Employer sent Local 196 a letter stating its intent to use Local 196 for “underground and aerial infrastructure and cabling within [Local 196’s] jurisdiction.” On June 22, Local 196 sent the Employer a letter acknowledging the Employer’s June 20 letter. Having learned of Local 150’s interest in the work, Local 196 further stated in its June 22 letter that the work was properly assigned to Local 196, and that “Local 196 will undertake it’s [sic] own action (including picketing) if work is improperly taken away from IBEW Local 196 based on the actions of other unions.”

In July, before construction had begun, Employer Vice President Wayne Gearig met representatives from Local 150 for a pre-job meeting. Gearig told Local 150’s representatives that the Employer was assigning all the work to Local 196. Local 150’s representatives disagreed with the assignment and stated that they thought the operating equipment work belonged to Local 150. In October, the Employer filed a charge against Local 150 alleging that Local 150 claimed the disputed work and that Local 196 threatened it would picket if the disputed work were re-assigned. After being informed that the charge needed to be filed against the party threatening unlawful action, the Employer withdrew its charge against Local 150 and filed the instant charge against Local 196.

B. Work in Dispute

The parties did not stipulate to the work in dispute. The notice of hearing described the disputed work as follows:

[I]nstalling a series of 144 count fiber optic links throughout the following Illinois counties: Joe Davies [sic], Stephenson, Whiteside, Carroll, Lee, Ogle, Boone, Winnebago, and LaSalle, pursuant to the iFiber project. Type of work covered is the installation of duct or conduit, installation of hand holes, installation of fiber optic cable along roadways, overhead and underground, fiber splicing, installation of splice boxes, and all related work to complete construction of fiber install using manual installation methods, cable plows and other heavy machinery such as bulldozers.

The Employer and Local 196 agree with this description. Local 150 contends that the work in dispute is limited to the use of heavy machinery, including mini excavators, trenchers, bulldozers, directional boring rigs, locators, plows, and skidsters, to install fiber optic cable. We find, based on the record, that the work in dispute is as follows: the installation of cable using mini excavators, trenchers, bulldozers, directional boring rigs, locators, plows, skidsters, and other heavy machinery for the Employer pursuant to the iFiber

project located in Jo Daviess, Stephenson, Whiteside, Carroll, Lee, Ogle, Boone, Winnebago, and LaSalle counties. See *Laborers Local 317 (Grazzini Bros.)*, 307 NLRB 1290, 1290 fn. 4 (1992) (finding work in dispute was limited to the finishing work associated with a ceramic tile installation project where one of the unions claimed only the finishing work).

C. Contentions of the Parties

Local 150 contends that the notice of hearing should be quashed. It contends that it has not claimed the disputed work. Relying on *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995), Local 150 argues that it has pursued only contractual grievances against the Employer for breaching the subcontracting clause of their collective-bargaining agreement. Local 150 further argues that Local 196’s threat to picket was simply a sham designed to trigger a 10(k) hearing. Finally, Local 150 contends that the parties agreed to submit this dispute to an agreed-upon method for voluntary adjustment. On the merits of the award, assuming they are reached, Local 150 asserts that the work in dispute should be awarded to employees represented by Local 150 based on the factor of relative skills and training.

The Employer⁴ and Local 196 contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated because of Local 196’s letter threatening picketing. They further contend that there are competing claims to the disputed work, and therefore the notice of hearing should not be quashed. Both the Employer and Local 196 assert that there is no agreed-upon method for voluntary adjustment of the dispute. On the merits, Local 196 asserts that the work in dispute should be awarded to employees represented by it based on the factors of collective-bargaining agreements, employer preference, current assignment and past practice, area and industry practice, relative skills, and economy and efficiency of operations.

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, there must be a finding that the parties have not agreed on a method for the voluntary adjustment of the dispute. See, e.g., *Oper-*

⁴ Although the Employer did not file a posthearing brief, at the hearing, the Employer’s representative adopted Local 196’s statement regarding the applicability of the Act.

ating *Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). On this record, we find that these requirements have been met.

1. Competing claims for work

We find that there is reasonable cause to believe that both Unions have claimed the work in dispute for the employees they represent. By its own admission, Local 196 has done so, and those employees have been performing the work. Despite its protestations to the contrary, Local 150 has claimed the work as well. In its June 17 letter to the Employer, Local 150 requested a pre-job conference regarding the iFiber project. According to the Rockford Heavy and Highway Agreement, the purpose of a pre-job conference is to provide Local 150 with the information necessary for the employees it represents to prepare to do the work at issue, including the employer's requirements for workmen, the probable starting date of the work, the duration of the job, and the machines to be used. In addition, at the pre-job conference, Local 150's representatives said that they thought the operating equipment work belonged to Local 150. See *J. P. Patti Co.*, 332 NLRB 830, 832 (2000) (finding reasonable cause to believe union claimed work where business agent asked employer to assign it to his union). Unlike the union in *Capitol Drilling*, supra, Local 150 has done more than peacefully pursue grievances against a general contractor for violating the subcontracting clause of its collective-bargaining agreement with the general contractor. Thus, this dispute is "a traditional 10(k) situation in which two unions have collective-bargaining agreements with the employer, and each union claims that its contract covers the disputed work assigned and controlled by the employer." *Laborers Local 81 (Kenny Construction Co.)*, 338 NLRB 977, 978 (2003).

2. Use of proscribed means

We also find that there is reasonable cause to believe that Local 196 used means proscribed under Section 8(b)(4)(D) to enforce its claim. Local 196's June 22 letter to the Employer, threatening it with picketing "if work is improperly taken away from IBEW Local 196 based on the actions of other unions," constituted a threat to take proscribed coercive action in furtherance of a claim to the disputed work. Further, Local 196 testified that it was planning to follow through on the threats made in this letter.

Local 150 urges the Board to find that Local 196's threat was in fact a sham in order to secure the work assignment through a 10(k) proceeding. We reject that argument. First, Local 150 points to Local 196's collective-bargaining agreement with the Employer, which

prohibits strikes or work stoppages, as evidence that Local 196 did not intend to follow through on its threats. A threat to strike or picket is not a sham, however, simply because the threatened action would have violated a no-strike clause. *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 4 (2010); *Lancaster Typographical Union No. 70 (C.J.S. Lancaster)*, 325 NLRB 449, 450-451 (1998). Second, Local 150 points to evidence of cooperation between the Employer and Local 196 during these 10(k) proceedings as evidence that the threat was the product of collusion. Specifically, Local 150 notes that the Employer first filed a charge against Local 150, that the Employer gave exhibits to Local 196's counsel to use at the hearing, that the Employer's vice president met with Local 196's counsel before the hearing, and that Local 196's business agent said that he would work with the Employer to have the 10(k) hearing resolved in its favor. Contrary to Local 150's contention, this evidence of cooperation is not affirmative evidence that Local 196's threat was the product of collusion. See generally *R&D Thiel*, supra at 1140 (finding no affirmative evidence of collusion where the Teamsters told the employer's president that it wanted him "to file a 10(k)").

3. No voluntary method for adjustment of dispute

We further find, in agreement with the Employer and Local 196, that there is no method for voluntary adjustment of the dispute to which all parties are bound. Local 150 asserts that all parties are bound by the AFL-CIO Building and Construction Trades Department's Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Plan). All parties to the dispute must be bound to the Plan for it to constitute an agreed-upon method of voluntary adjustment. See, e.g., *Laborers Local 1184 (High Light Electric)*, 355 NLRB 167, 169 (2010). The Board carefully scrutinizes the agreements at issue in order to determine if the parties are bound. *Id.*

Local 150 submitted into evidence a copy of a December 6 arbitrator's decision finding that the Employer and Local 150 were bound under the Plan. As Local 150 points out, the arbitrator noted in his decision that "[t]here is no dispute that IBEW is stipulated to the Plan." However, the arbitrator's decision cannot bind Local 196 to the Plan inasmuch as Local 196 was not party to the arbitral proceeding and did not agree to be bound by its results.⁵ *High Light Electric*, supra at 169.

⁵ The International Brotherhood of Electrical Workers did participate in the December 6 arbitral hearing, but Local 196 did not. Even if the arbitrator's decision establishes that the International is bound under the Plan, it does not necessarily follow that Local 196 was so bound. Local 196 Business Agent Eric Patrick testified, without contradiction, that only "inside" IBEW locals are bound under the Plan, that Local

Furthermore, the documents on which the arbitrator based his decision were not put into evidence in this proceeding. See *id.* Without those documents, the Board will not broadly interpret the arbitrator's statement to mean that Local 196 bound itself to the Plan. Finally, the collective-bargaining agreement between the Employer and Local 196 does not support a finding that Local 196 was bound by the Plan because it makes no reference to the Plan. See *id.* In these circumstances, we find that Local 150 has not established that Local 196 is bound under the Plan.⁶

Based on the foregoing, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that there is no agreed-upon method for the voluntary adjustment of the dispute. We accordingly find that the dispute is properly before the Board for determination, and 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 Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577 (1961). The Board's 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.

1. Board certifications and collective-bargaining agreements

Both Local 196 and Local 150 have binding contracts with the Employer. Language in each contract arguably covers the work in dispute. Therefore, the factor of collective-bargaining agreements does not favor an award to employees represented by either union. See *High Light Electric*, *supra* at 169.

2. Employer preference, current assignment, and past practice

The Employer assigned the disputed work to employees represented by Local 196 and prefers that they con-

tinue to perform the work. The Employer has a past practice of assigning similar work to employees represented by Local 196. Although the Employer has assigned similar work to Local 150 in the past, that work was performed by the Employer's power division, and a different division is performing the work on the iFiber project. Therefore, we find that the factors of employer preference, current assignment, and past practice favor awarding the disputed work to employees represented by Local 196.

3. Industry and area practice

Local 196 submitted letters from J. F. Edwards Construction Company, Michels Corporation, Trench-It, Gaffney's PMI, and CCS Utilities asserting that their companies perform the same type of cabling work in and around Illinois and that their companies use employees represented by Local 196 to perform that work. Local 150 Business Representative Michael Kresge testified, without contradiction, that Pirtano, Kirby Cable, and Midwest Underground are currently performing cabling work for the iFiber project with employees represented by Local 150. Kresge further testified that Illinois Hydraulic, Electric Conduit, Aspen Utilities, Mid-America Underground, RJ Underground, and Henkels & McCoy perform similar cabling work with employees represented by Local 150.

Based on the record evidence, we find that it is an area practice to assign this type of cabling work to employees represented by Local 196 and to employees represented by Local 150. Accordingly, we find that the industry and area practice factor does not favor an award of the disputed work to employees represented by either union.

4. Relative skills and training

Local 196 presented evidence that employees it represents have the training and skills necessary to perform the disputed work. Local 196 Business Agent Eric Patrick testified that Local 196 apprentices are trained in fiber optic, underground, and overhead cabling at the American Line Builders Apprenticeship Training facility in Medway, Ohio. After apprentices complete this preliminary training, they receive further training on the job, in the classroom, and by using books.

Local 150 presented no specific evidence of the training received by employees it represents. Business Representative Kresge did testify, however, that employees represented by Local 150 are performing similar cabling work on other portions of the iFiber project. And the Board has recognized that "Operating Engineers represents employees who are skilled in the operation of heavy equipment." *Operating Engineers Local 825 (Cruz Contractors)*, 239 NLRB 490, 493 (1978).

196 is an "outside" local, and that Local 196 is not affiliated with the Building and Construction Trades Department. See *Electrical Workers Local 357 (Western Diversified Electric)*, 344 NLRB 1239, 1240 (2005) (finding no agreed-upon method for voluntary adjustment existed where IBEW local testified that Plan only applied to work claimed under the inside agreement). The record is devoid of documentary evidence tending to show otherwise.

⁶ We find it unnecessary to reach whether Local 150 established that the Employer was bound under the Plan because all parties to the dispute must be bound if an agreement is to constitute an agreed-upon method of voluntary adjustment. *High Light Electric*, *supra* at 169.

Given these considerations, we find that the relative skills and training factor does not favor an award of the disputed work to employees represented by either union. See *id.*

5. Economy and efficiency of operations

Employer Vice President Gearig testified that it is more efficient to use equipment operators represented by Local 196 because the Employer can use the same employees to perform other work on the iFiber project, including setting hand-holes, pulling cable, and operating other machines. He further testified that, to his knowledge, employees represented by Local 150 or any other union could not engage in the same multitasking. Gearig also testified that there have been no safety or quality issues on the portions of the iFiber project already completed using employees represented by Local 196.

Local 150 took no position on the economy and efficiency of operations factor. Based on the uncontroverted testimony presented by the Employer, we find that the factor of economy and efficiency of operations favors awarding the disputed work to employees represented by Local 196. See, e.g., *Laborers (Eshbach Bros., LP)*, 344 NLRB 201, 204 (2005) (finding that economy and efficiency favored award of disputed work to “more versatile” employees who can perform work on a project in addition to the disputed work).

Conclusions

After considering all of the relevant factors, we conclude that employees represented by Local 196 are entitled to continue performing the work in dispute. We reach this conclusion relying on the factors of employer

preference, current assignment, and past practice and economy and efficiency of operations. In making this determination, we award the work to employees represented by Local 196, not to that labor organization or to 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 the Employer, Aldridge Electric, Inc., represented by International Brotherhood of Electrical Workers, Local 196, are entitled to perform the installation of cable using mini excavators, trenchers, bulldozers, directional boring rigs, locators, plows, skidsters, and other heavy machinery for the Employer pursuant to the iFiber project located in Jo Daviess, Stephenson, Whiteside, Carroll, Lee, Ogle, Boone, Winnebago, and LaSalle counties.

Dated, Washington, D.C. July 24, 2012

Mark Gaston Pearce, Chairman

Brian E. Hayes, Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD