

Ironworkers District Council of the Pacific Northwest and International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 751 and Hoffman Construction Company and Contract Glass, Inc. and International Brotherhood of Painters and Allied Trades, AFL-CIO, Local 1140. Case 19-CD-434

14 December 1984

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

The charge in this Section 10(k) proceeding was filed 17 July 1984 by Hoffman Construction Company (Hoffman), alleging that the Respondent District Council and Respondent Local 751 violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing or requiring Hoffman and Contract Glass, Inc. (Contract) to assign certain work to employees it represents rather than to employees represented by International Brotherhood of Painters and Allied Trades, AFL-CIO, Local 1140 (the Glaziers). The hearing was held 5 September 1984 before Hearing Officer John W. Cunningham.¹

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

Hoffman, an Oregon corporation, is engaged as a general contractor at its facility in Portland, Oregon, and at various jobsites in several States, where it annually purchases and receives goods and materials valued in excess of \$50,000 which are shipped to it directly from States other than Oregon. Based on the foregoing, we find that Hoffman is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Contract, a Washington corporation, is engaged at its Redmond, Washington facility and various jobsites in the States of Washington and Alaska as a glazing contractor on commercial jobs. During the past year Contract has provided services

valued in excess of \$50,000 directly to customers located outside the State of Washington. From the foregoing, we find that Contract is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

It is not disputed, and we find, that Glaziers is a labor organization within the meaning of Section 2(5) of the Act.

A collective-bargaining agreement between International Association of Bridge, Structural and Ornamental Ironworkers and the National Contractors Association (NCA), of which Hoffman is a member, states that "[t]he Employer recognizes the Association as the sole and exclusive bargaining representative for all employees employed on . . . work coming under the jurisdiction of the Association." It contains a union-security clause and a grievance and arbitration procedure, as well as provisions regarding wages, hours, and other terms and conditions of employment and both Respondents District Council and Local 751 pursued claims based on the contract. We find that Respondent District Council and Respondent Local 751 are labor organizations within the meaning of Section 2(5) of the Act. *Mac Towing, Inc.*, 262 NLRB 1331 (1982).

II. THE DISPUTE

A. Background and Facts of Dispute

Hoffman is the general contractor on the SOHIO Petroleum building in Anchorage, Alaska. It subcontracted the installation of glazed aluminum window frames, aluminum window walls, entrance doors, and miscellaneous metal work to Contract. Contract, using a system of its own design, prefabricated the glazed windows, pre-cut the compensating channels (that portion of the window assembly directly attached to the building), and had the material shipped to the jobsite. The job superintendent for Contract arrived at the job on 1 March 1984 and work on Contract's portion of the job began on 12 March or shortly thereafter.

As noted above, Hoffman, through its membership in NCA, has a collective-bargaining agreement with the Ironworkers International. Contract has a collective-bargaining agreement with Local 118 of the Painters and Allied Trades Union, but entered into a prehire agreement with Glaziers prior to the commencement of this job. Contract began its work with two employees from its home location and with persons hired through the Glaziers' hall. At times as many as seven glaziers were used on the job. By the time of the hearing the installation of the aluminum frames was over 99 percent complete.

¹ All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. The attorney for Respondents District Council and Local 751 stated that he was appearing specially, therefore he did not join in any of the normal stipulations, however, he did participate in the hearing, presenting a witness and cross-examining others. Hoffman filed a brief

Around 12 March, when the material for the job arrived at the jobsite, Ernie Niece, Contract's job superintendent, was approached by a person later identified to him as the Ironworkers' steward on the job and asked if the metal belonged to Contract. When Niece replied that it did, the steward asked if Contract employees were going to install the metal. When Niece replied in the affirmative, the steward said that it was Ironworkers' work. When Niece countered that it was Glaziers' work, the steward said that he was going to see his business agents. Niece said, "Go ahead, do what you want" to which the steward replied, "Well, we could throw a sign on you."

About this time, Wayne Thomas, labor relations manager for Hoffman, received a telephone call from John Abshire, business manager of Respondent Local 751, expressing his concern about glaziers performing ironworkers' work. On 14 March a telegram was sent to Thomas stating, *inter alia*, that several requests for a meeting with Contract had failed and that Hoffman should take immediate action to resolve the issue before work began on 15 March.

Sometime after that LeRoy E. Worley, general organizer and president of Respondent District Council, called Thomas. The conversation was in the same vein as the earlier conversation between Abshire and Thomas. Shortly after this conversation Thomas received a letter from Worley dated 30 March which made a formal request for a copy of Hoffman's subcontract with Contract, asserting the request was necessary because of Hoffman's subcontracting of work which the District Council claimed was within its jurisdiction.

On the same date Worley also sent a letter to Thomas stating that he was instituting the grievance procedure concerning the subcontracting to Contract. Worley alleged the basis of the grievance was "the flagrant [sic] method of subcontracting this work in such a manner that the Ironworkers will not have an opportunity to perform their traditional work."

On 3 April Thomas replied to Worley with a letter asserting that Contract, the independent employer who had made the assignment of work, was not a party to the District Council's contract and, therefore, Hoffman questioned whether an arbitration to which Contract was not a party would be dispositive of the District Council's claim. Thomas went on to suggest that Worley contact the Glaziers to see if they would be willing to comply with past decisions of the Jurisdictional Disputes Board referred to in the District Council's contract.

On 15 May the following telephone message was received in Thomas' office in his absence:

Will picket Thurs AM 17th all N.W. sites with Ironworkers. Pickets will say "Failure to process grievances of Ironworkers."

The next day Thomas called Worley who confirmed that he had made the call and said that he just wanted to get Thomas' attention.

Although Hoffman contested the arbitrability of the grievance, the grievance machinery proceeded and a hearing was set for 23 July. On 17 July Hoffman filed the instant charge. On 24 July the attorney for the Respondents sent a letter to the attorney for Hoffman asserting that no jurisdictional dispute was involved, but rather a dispute concerning the interpretation and application of the subcontracting clause of the agreement between Hoffman and the District Council, which should be arbitrated.

A hearing was held on the grievance in late August at which Hoffman raised the issue of arbitrability and asked the arbitrator to defer to the Board's processes. Briefs on the arbitration were not due until 3 weeks after the hearing herein.

Contract continued to perform the work with employees represented by the Glaziers and has not employed any employees represented by the Respondents on this project.

B. Work in Dispute

The disputed work involves the construction, installation, and preparation of certain metal frames for glass and the installation of glass into the metal frames at the SOHIO Alaska Petroleum Company headquarters building in Anchorage, Alaska.

C. Contentions of the Parties

Hoffman, the only party to submit a brief, contends that the work in dispute should be awarded to employees represented by the Glaziers, citing employer preference, industry practice, economy and efficiency of operation, the past practice of Contract, and the skills of the glaziers.

The Glaziers contends that the work in dispute should be awarded to employees it represents because of their skills, area practice, employer preference, and economy and efficiency of operation.

Contract contends that the work in dispute should be awarded to employees represented by the Glaziers because of the glaziers' skills, economy and efficiency of operation, practice in the Anchorage area, and its collective-bargaining agreements with Glaziers and with other locals of International Brotherhood of Painters and Allied Trades, AFL-CIO.

District Council and Local 751, although denying the jurisdiction of the Board on unspecified constitutional and due process grounds, appeared specially at the hearing and urged (1) mootness because the work in dispute is "99.9%" finished, (2) the nonexistence of a jurisdictional dispute because District Council and Local 751 never made a demand on Contract for the work in dispute, (3) the appropriateness of deferral to an arbitrator's decision on a grievance by the Respondents against Hoffman claiming a violation of a subcontracting clause in the collective-bargaining agreement between Ironworkers and NCA which binds Hoffman and the Respondents, and (4) the lack of any threats concerning the assignment of the work.

D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

There is no contention here that there is an agreed-on method for the voluntary resolution of the dispute inasmuch as the Respondents deny the existence of any dispute with Contract. In any event, Contract has not agreed to be bound by the revised Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. The Respondents do claim that the Board should defer to the grievance-arbitration procedure on their claim of a violation by Hoffman of a subcontracting clause in their agreement. Inasmuch as Contract is not a party to the collective-bargaining agreement between Ironworkers and Hoffman, and has not agreed to be bound by it, we find that there is no agreed-on method for resolution of the dispute and we decline to defer to the grievance-arbitration machinery of that agreement. *Stage Employees IATSE (Metromedia)*, 225 NLRB 785, 787-788 (1976).

As to the mootness contention, the Board has long held that a jurisdictional dispute is not moot; in spite of the completion of the work involved, where there is evidence of similar disputes in the past or there is nothing to indicate that such disputes will not arise in the future.² The record is clear that glazing contractors will continue to install the type of work in dispute in the future in the Anchorage area and that the Respondents will continue to assert jurisdiction over the work involved. There is a real likelihood, therefore, that similar

disputes will arise in the future. Accordingly, we find that the dispute is not moot.

As to the nonexistence of a demand on Contract by the Respondents, it is clear that an attempt to force the indirect assignment of work from employees of one employer (Contract) to employees of another (Hoffman) is within the reach of Section 8(b)(4)(D). *Electrical Workers IBEW Local 3 (Western Electric)*, 141 NLRB 888, 894 (1963), enfd. 339 F.2d 145 (2d Cir. 1964). As for the alleged lack of a threat in support of any demand for the work in dispute, the Board has held that the filing of grievances, as here, against employers who have no control over the assignment of the work (i.e., Hoffman), applies indirect pressure on an employer in the assignment of the work, *Pulp & Paper Workers Local 194 (Georgia Pacific)*, 267 NLRB 26 (1983), and is coercive within the meaning of Section 8(b)(4)(ii). *Millwrights Local 102 (Frederick Meiswinkel, Inc.)*, 260 NLRB 972 (1982). In any event, there is unrefuted testimony that a steward of Respondent Local 751 threatened to "throw a sign" on Contract after claiming the disputed work.

As to the Respondents' attempt at the hearing to disclaim the work of Contract's employees, such tardy disclaimer is ineffective, particularly in light of the simultaneous pursuit of the grievance against Hoffman. See *Laborers Local 910 (Brockway Glass)*, 226 NLRB 142, 143 (1976).

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find 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 (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.

1. Certification and collective-bargaining agreement

None of the labor organizations involved in this dispute has been certified by the Board as the collective-bargaining representative of Contract's em-

² *Electrical Workers IBEW Local 581 (National Telephone & Signal)*, 223 NLRB 538 (1976), and cases cited at fn 2

employees in an appropriate unit. The record does indicate that Contract has recognized Glaziers and currently has a collective-bargaining agreement with Glaziers covering the wages and working conditions of "all workmen . . . who are required to use any of the recognized tools of the trade covered by this Agreement," such being "tools and machines as is necessary in the performance of skilled glaziers and glass workers work." The agreement specifically includes the installation of metals related to storefront and window construction and unitized and prefabricated curtain wall systems. We therefore find that the collective-bargaining agreement is sufficient to cover the work in dispute. The record further indicates that Contract has no employees represented by the Respondents and has no collective bargaining with those Unions. Moreover, Contract is not a member of NCA with whom the Respondents maintain a collective-bargaining agreement. We therefore find that the factor of collective-bargaining agreements favors an award of the disputed work to the employees of Contract who are represented by Glaziers.

2. Employer assignment, area practice, and preference

Contract has assigned the work in dispute to employees represented by the Glaziers and prefers this assignment. Other glazing contractors in the Anchorage area have used employees represented by the Glaziers to perform the same type of work on numerous occasions. Area practice, the employer's assignment, and Contract's preference all strongly favor the assignment to employees represented by the Glaziers.

3. Relative skills

Employees performing glazing work who are represented by the Glaziers are required to complete an apprenticeship program or to demonstrate their ability to perform glazing work which requires working to tolerances of one-eighth inch, handling glass by "feel" to prevent damage, an ability developed only through experience, and sealing joints of various types (glass to glass, glass to metal, metal to metal, metal to concrete) with various compounds to prevent moisture invasion. Employees represented by the Ironworkers do not work to such close tolerances. We find that this factor favors the award of the work to employees represented by the Glaziers.

4. Economy and efficiency of operations

It is more efficient to use a crew composed only of employees represented by the Glaziers rather than a composite crew composed of some employees represented by the Glaziers and some employees represented by the Ironworkers, or a crew composed of employees represented by the Ironworkers working under the supervision of Contract's superintendent and job foreman who are skilled in the glazing trade. This factor favors the award to employees represented by the Glaziers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Glaziers Local 1140 are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement between Contract and Glaziers, employer assignment, area practice, employer preference, relative employee skills, and economy and efficiency of operation. In making this determination, we are awarding the work to employees represented by International Brotherhood of Painters and Allied Trades, AFL-CIO, Local 1140, 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.

1. Employees of Contract Glass, Inc. represented by International Brotherhood of Painters and Allied Trades, AFL-CIO, Local 1140, are entitled to perform construction installation and preparation of certain metal frames for glass and the installation of glass into the metal frames at the SOHIO headquarters building project in Anchorage, Alaska.

2. Ironworkers District Council of the Pacific Northwest and International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 751, are not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Contract Glass, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Ironworkers District Council of the Pacific Northwest and International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 751, shall notify the Regional Director for Region 19 in writing whether it will refrain from forcing Hoffman Construction Company or Contract Glass, Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.