

International Brotherhood of Electrical Workers, Local 48, AFL–CIO and Kinder Morgan Terminals and International Longshore and Warehouse Union, Local 4, AFL–CIO. Case 36–CD–000236

December 31, 2011

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Kinder Morgan Terminals (the Employer or Kinder Morgan) filed a charge on March 23, 2011, alleging that International Brotherhood of Electrical Workers, Local 48, AFL–CIO (IBEW) 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 it represents rather than to employees represented by the International Longshore and Warehouse Union, Local 4, AFL–CIO (ILWU). A hearing was held on April 4, May 2, and 3, 2011, before Hearing Officer Jessica Dietz.¹ Thereafter, Kinder Morgan, IBEW, and ILWU each filed a posthearing brief.

The Board affirms the hearing officer’s rulings, finding them free from prejudicial error. On the entire record, we make the following findings.

I. JURISDICTION

The parties stipulated that the Employer is a Delaware corporation engaged in operating a cargo handling terminal at the Port of Vancouver in Vancouver, Washington. The parties also stipulated that during the last 12 months, a representative period, the Employer received gross revenues valued in excess of \$500,000, and purchased and received goods valued in excess of \$50,000, at its Vancouver, Washington location directly from suppliers outside of the state of Washington. 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 and that IBEW and ILWU are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Kinder Morgan has operated the bulk shipping terminal at the Port of Vancouver since around 1995. It operates the facility under a management contract with the Port of Vancouver, the owner. Under the contract, Kind-

er Morgan acts as manager of terminal operations for marine terminal services and stevedoring. The Port of Vancouver retains possessory rights and the agreement does not create a leasehold. Kinder Morgan is responsible for the general cleanup, maintenance and repair (M&R), supplies, and agreed-upon improvements with respect to the property.

The work performed at the terminal includes offloading, storing, and loading dry bulk products to be shipped. The products are received by rail, then offloaded and moved to storage by conveyor, and later moved again by conveyor and loaded onto the vessels docked at the facility.

Kinder Morgan has at all relevant times been a member of the Pacific Maritime Association (PMA). All PMA members are bound to a collective-bargaining agreement, the Pacific Coast Longshore Contract Document, with the ILWU. The most recent agreement is effective July 2008 to July 2015. Since it began operations at the Port of Vancouver, Kinder Morgan has employed ILWU-represented mechanics to maintain and repair the cargo handling equipment. Kinder Morgan currently employs four full-time ILWU-represented workers and routinely hires extra workers from ILWU’s local dispatch hall to perform M&R work.

Under its management contract with the Port of Vancouver, Kinder Morgan agrees to comply with all applicable rules and regulations of the Port and applicable federal, state and local laws, ordinances and regulations. A Washington State inspector, responsible for the Port of Vancouver’s compliance with state electrical regulations, testified at the hearing. According to the inspector, under the parties’ management contract, Kinder Morgan cannot directly hire electrical workers, because it does not own the property or have any lease permitting such hiring. He testified, without contradiction, that state regulations require that Kinder Morgan subcontract any electrical work to a licensed electrical contractor with employees possessing appropriate electrical licenses.

Accordingly, at all times, Kinder Morgan has hired electrical subcontractors on an as-needed basis to perform necessary installation and electrical repairs on the cargo loading equipment. These subcontractors have all been signatories to collective-bargaining agreements with IBEW, including Kinder Morgan’s most recent electrical subcontractor, Accurate Electric of Oregon (Accurate). Accurate electricians work an average of 1 to 2 days a week at the terminal. Three of them have routinely worked at the terminal for several years. More often than not, it is ILWU-represented workers at Kinder Morgan who call Accurate to send electricians to perform needed electrical work.

¹ On the first day of the hearing, ILWU moved to quash the notice of hearing. The hearing officer received evidence on the motion but left its resolution to the Board.

Between July 15 and September 1, 2010, ILWU filed six grievances against Kinder Morgan. All six grievances claimed lost work opportunities for ILWU M&R mechanics—specifically, that Kinder Morgan had employed Accurate employees to perform electrical work at its Port of Vancouver facility, in alleged violation of the PMA bargaining agreement. It is undisputed that Accurate employees performed the electrical work specified in the grievances, which requires a journeyman electrician license.

The six grievances were discussed at meetings of the Joint Port Labor Relations Council and finally heard by an Area Arbitrator. IBEW was not a party to those proceedings. The arbitration hearing occurred on April 12, 2011, and no decision had issued as of the hearing in this case.

After learning of ILWU's grievances, IBEW grew concerned about its potential loss of work. By letter dated December 9, 2010, IBEW informed Kinder Morgan that it would do whatever was necessary to keep the work that had always been performed by IBEW electricians. In a March 18, 2011 letter to Kinder Morgan, IBEW more directly addressed the issue by stating that if the disputed work was not assigned to its members, it would picket Kinder Morgan or take other economic action.

B. Work in Dispute

The parties do not agree on the scope of work in dispute. The notice of hearing defines the work as certain tasks performed by employees of Accurate, including, but not limited to, those tasks described in the six ILWU grievances. Kinder Morgan and IBEW stipulated to that description of the work. In the alternative, IBEW also stipulated to the description set forth in their collective-bargaining agreement with Accurate, which includes any electrical work. ILWU describes the work as M&R of all stevedore cargo handling equipment, including electrical and electronic M&R. We find, based on the record, that the work in dispute is the electrical work performed to install and maintain the cargo handling equipment at the facility operated by Kinder Morgan. This includes all of the work described in the grievances filed by ILWU as well as all other electrical work not specifically covered by the grievances.

C. Contentions of the Parties

In its motion, ILWU contends that the notice of hearing should be quashed because this is not a legitimate case involving competing claims between two unions for the same work within the scope of Sections 8(b)(4)(D) and 10(k). Instead, it claims that this is a contractual and work preservation dispute created by Kinder Morgan,

and that it should be resolved through arbitration. ILWU also contends that IBEW's threat was contrived to create the appearance of a jurisdictional dispute and obtain the work assignment preferred by the Employer. Should the Board disagree with this position and find that there is a valid jurisdictional dispute and deny the motion to quash, ILWU maintains that the disputed work should be awarded to ILWU-represented workers based on the factors of collective-bargaining agreements, past practice, and economy and efficiency of operations.

Kinder Morgan and IBEW urge the Board to deny ILWU's motion to quash, contending that there is a true jurisdictional dispute, that IBEW-represented workers have historically performed the work, and that the parties are not all bound by a common dispute—resolution agreement. They also contend that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. On the merits, Kinder Morgan and IBEW contend that the work in dispute should be awarded to IBEW-represented employees, based on the following factors: employer preference, current assignment and past practice, area and industry practice, relative skills and training, 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 to the disputed work between rival groups of employees; (2) a party has used proscribed means to assert its claim to the work in dispute; and (3) the parties have not agreed on a method of voluntary adjustment of the dispute. See, e.g., *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004).

On this record, we find that this standard has been met. The parties stipulated that both ILWU and IBEW claim the work in dispute. There is reasonable cause to believe that IBEW used means proscribed by 8(b)(4)(D) to assert its claim: in its March 18, 2011 letter, IBEW threatened to picket the Employer if the work was reassigned, and there was no evidence that it would not follow through with the threats. Although ILWU claims that the threat was a sham contrived by Kinder Morgan, it offered no evidence in support of this assertion. The parties stipulated that there was no agreed-upon method for voluntary adjustment of the dispute.

We find without merit ILWU's contention that the instant proceeding is a contractual dispute between Kinder Morgan and ILWU over preservation of bargaining unit work for ILWU-represented employees, and therefore does not fall within the scope of Section 10(k) of the Act.

In cases relied on by ILWU, the Board has quashed 10(k) notices, finding that the disputes concerned work preservation claims based on alleged contract violations, rather than traditional jurisdictional disputes. *Machinists District 190 Local 1414 (SSA Terminal LLC)*, 344 NLRB 1018 (2005), *affd.* 253 Fed. Appx. 625 (9th Cir. 2007); *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818 (1986), *affd.* 827 F.2d 581 (9th Cir. 1987); *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320, 1320 (1961). But in all of the cases where the Board quashed a notice of hearing based on a work preservation claim, the work in dispute was historically performed by the union claiming the breach of its agreement with the employer. By contrast, when as here a union is claiming work for employees who have not previously performed it, the objective is not work preservation, but work acquisition. The Board will resolve that dispute through a 10(k) proceeding. See, e.g., *Teamsters Local 174 (Airborne Express)*, 340 NLRB 137, 139 (2003); *Stage Employees IATSE Local 39 (Shepard Exposition Services)*, 337 NLRB 721, 723 (2002); *Teamsters Local 107 (Reber-Friel Co.)*, 336 NLRB 518, 521–522 (2001). In the present case, it is clear that IBEW-represented employees have performed the work in dispute, not only during the more than 15 years since before Kinder Morgan took over terminal operations, but during the term of Kinder Morgan’s predecessor. Thus, this is not a case about “work preservation,” because there are no ILWU jobs to preserve. Moreover, the terms of Kinder Morgan’s collective-bargaining agreement with ILWU do not provide, nor have they ever provided, that the work in dispute is within ILWU’s jurisdiction. We thus find reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated, and that the dispute is properly before the Board for determination. We accordingly deny the ILWU’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 based on the evidence presented by the parties. *NLRB v. Electrical Workers 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. E.g., *Machinists Lodge 1743 (J.A. Jones Construction Co.)*, 135 NLRB 1402, 1410–1411 (1962).

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

1. Certifications and collective-bargaining agreements

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

Kinder Morgan does not employ IBEW-represented employees, and those two parties do not have a contract. Although Accurate is signatory to a collective-bargaining agreement with IBEW for electrical work performed by electricians, Kinder Morgan is not bound by the terms of that agreement.

As a member of the PMA, Kinder Morgan is bound to a collective-bargaining agreement with ILWU. Section 1.71 of both the current and prior agreements sets forth the scope of work and ILWU’s jurisdiction as “the maintenance and repair of all stevedore cargo handling equipment.” The current agreement, however, contains new provisions addressing the work in light of the introduction of new technologies. Section 1.72, one of the new provisions, provides that ILWU’s jurisdiction applies to the M&R of all present and forthcoming stevedore cargo handling equipment, which shall constitute the functional equivalent of such traditional ILWU work. Section 1.73 defines the scope of ILWU work to include “the pre-commission installation per each Employer’s past practice . . . , post-commission installation, reinstallation, removal, maintenance and repair, and associated cleaning of all present and forth-coming technological equipment related to the operation of stevedore handling equipment . . . and its electronics, that are controlled or interchanged by PMA companies.” Several “letters of understanding” providing exceptions to ILWU’s contractual jurisdiction of M&R work were added to the agreement during the course of the 2008 negotiations, but none applies to the work at issue here.

As just shown, the PMA bargaining agreement’s jurisdictional work description is very general, including among other things “the maintenance and repair of all stevedore cargo handling equipment.” But there is no explicit mention of electrical work or any similar work arguably described in ILWU’s contractual grievances.² ILWU argues that more recent additions to the collective-bargaining agreement address the subcontracted electrical work. But both the testimony and contract language demonstrate that the collective-bargaining agreement changes were directed at new work to be based on the introduction of new technologies. There is no evidence that electrical work associated with cargo handling equipment conducted at Kinder Morgan’s facility is any different from when Kinder Morgan took over the termi-

² Although new sec. 1.73 uses the term “electronics,” it, too, is directed at forthcoming technological improvements. In any event, we find that description too vague to cover the electrical work at issue here.

nal in 1995, nor is there evidence of new equipment with more sophisticated technology installed in those 15-plus years. The applicable collective-bargaining agreement provisions have remained the same, as has the work and who performs the work.

Under the circumstances described above, we find that this factor does not favor an award of the disputed work to either group of employees.

2. Employer preference, current assignment and past practice

It is undisputed that Kinder Morgan prefers that the work in question be performed by IBEW-represented employees, that the work is currently performed by IBEW-represented employees, and that the work has been performed by IBEW-represented employees since before Kinder Morgan took over operations in 1995.³ In fact, ILWU does not dispute that its own members typically call in Accurate's electricians to perform the electrical work at the terminal. Kinder Morgan officials testified that they similarly use subcontractors with IBEW-represented employees for the electrical work at two other terminal facilities in the same geographical area, while employing ILWU-represented employees for M&R pursuant to the PMA collective-bargaining agreement. They also testified, consistent with the testimony of the Washington state electrical inspector, that Kinder Morgan was required under its contract with the Port of Vancouver and state regulations to subcontract the electrical work to a licensed electrical firm. Therefore, this factor favors awarding the work to the employees represented by IBEW.

3. Area and industry practice

There was very little evidence presented of area practice. As stated above, Kinder Morgan officials testified that they used IBEW-represented employees to perform the work in dispute at its other facilities in the area. Except for ILWU's presentation of a very few examples of their mechanics performing electrical work or being licensed to perform such work, there is no evidence of the practice of other area employers with respect to performing this work. No party introduced any evidence with respect to industry practice.

We find this factor does not favor an award of the work in dispute to either employee group.

³ ILWU attempted to show that employees it represents performed some minor electrical work prior to Kinder Morgan's operation of the facility, but, as stated above, the record establishes that the work at issue has consistently been performed by IBEW-represented employees, whether employed by Accurate or other subcontractors.

4. Relative skills and training

There is a substantial difference between the skills, training, and certifications of ILWU-represented employees and IBEW-represented employees relative to the work in dispute. IBEW has an extensive apprenticeship and training program. All IBEW electricians complete a 5-year apprentice program, which includes classroom and on-the-job training, to earn their journeyman license. In addition, they are required to take 24 hours of continuing education each year.

The record establishes that all of the IBEW-represented employees performing the work in dispute, as well as IBEW-represented employees in general, not only possess the requisite skills and training to perform the work in dispute, but are very experienced in that type of work. In addition, the electrical subcontractors and their employees are all properly licensed. There is no evidence that Kinder Morgan considered any of the work in dispute performed by IBEW-represented employees to be unsatisfactory. Rather, the Kinder Morgan representatives spoke about the excellent quality of IBEW-represented employees' work.

In contrast, ILWU has no comparable apprentice program and members acquire such electrical knowledge as they possess on the job. At the hearing, ILWU witnesses were able to identify only six local ILWU members with any type of electrical license, and none of them was able to perform the Kinder Morgan electrical work due to retirement, full-time employment by a different company, or inadequate licensure. There was also testimony that there may be a few other ILWU members with electrical licenses located farther away.

We find that the factor of relative skills and training favors an award of the work to employees represented by IBEW.

5. Economy and efficiency of operations

Record evidence shows that using IBEW-represented employees instead of ILWU-represented employees is more economical and efficient. Several Kinder Morgan representatives testified that it would be much more expensive to use ILWU-represented employees. It is clear that Kinder Morgan does not need people to perform the disputed electrical work on a full-time basis. In fact, the disputed work is performed as infrequently as once a week. An electrical contractor comes in on short notice and Kinder Morgan pays only for the time worked. When IBEW-represented subcontractor employees are called, they are efficient because they possess the requisite training, experience, and licensing. If Kinder Morgan were to use its full-time ILWU employees, it would suffer the inefficiencies resulting from their lesser skills, risk po-

tential liability for their lack of licensure, and delay completion of routine M&R work. ILWU's suggestion to transfer its more qualified members from other locals would require hiring them on a full-time basis when, as stated, only on-call work is needed, and would thereby increase Kinder Morgan's costs.

We find this factor favors an award of the disputed work to employees represented by IBEW.

Conclusion

After considering all the relevant factors, we conclude that employees represented by IBEW are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, current assignment and past practice, relative skills and training, and economy and efficiency of operations. In making

this determination, we are awarding the disputed work to employees represented by International Brotherhood of Electrical Workers, Local 48, AFL-CIO, not to that labor organization or its members. This 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 represented by International Brotherhood of Electrical Workers, Local 48, AFL-CIO, are entitled to perform the electrical work related to installing and maintaining the cargo handling equipment for Kinder Morgan Terminals at the Port of Vancouver in Vancouver, Washington.