

Teamsters Local 20 and Midwest Terminals of Toledo International, Inc. and International Longshoremen's Association Local 1982. Case 08-CD-086589

April 30, 2013

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Midwest Terminals of Toledo International, Inc. (the Employer) filed a charge on August 3, 2012, alleging that the Respondent, Teamsters Local 20 (Teamsters), 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 the International Longshoremen's Association Local 1982 (Longshoremen). A hearing was held on October 24, 2012, before Hearing Officer Gina Fraternali. Thereafter, the Employer, Teamsters, and Longshoremen filed posthearing briefs.

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 Ohio corporation with its principal place of business located in Toledo, Ohio. During the past year, the Employer provided services valued in excess of \$50,000 to shipping companies that are engaged in interstate and foreign commerce. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties stipulated, and we find, that Teamsters and Longshoremen are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer provides stevedoring and warehousing services at the Port of Toledo in Toledo, Ohio. The Employer and its predecessors have used Teamsters- and Longshoremen-represented employees to perform work at the Port for over 40 years. The Employer, which acquired the facility in 2004, has a collective-bargaining relationship with both Unions.¹

¹ The Employer is bound to a collective-bargaining agreement with Teamsters, effective March 1, 2012, through February 28, 2015. At the time of the hearing, the Employer was operating under the terms and conditions of an expired collective-bargaining agreement with Long-

The Employer's stevedoring operations include the loading and offloading of cargo ships, and are performed exclusively by employees represented by the Longshoremen. The warehouse operations include loading and unloading of trains and trucks, and movement of cargo into and out of storage. The Employer assigns the warehouse work (unlike the stevedore functions) to both Teamsters- and Longshoremen-represented employees. It is the loading, unloading, and movement of cargo constituting the warehouse work that is the work in dispute. Both Teamsters' and Longshoremen's collective-bargaining agreements with the Employer contain provisions covering warehouse work.

The Employer generally maintains a division of the warehouse work between the two groups of employees, with St. Lawrence Drive, which runs through the facility, as the dividing line. Employees represented by Longshoremen primarily perform warehouse work in the area west of St. Lawrence Drive next to the docks, which is referred to as the "wet" side of the facility.² Teamsters-represented employees exclusively perform warehouse work in the area east of St. Lawrence Drive, referred to as the "dry" side of the facility. Cargo offloaded from ships that is to be stored on the dry side is currently transported from the wet side to the dry side by a third-party trucking company.

In October 2010, an employee represented by Longshoremen was disciplined for crossing St. Lawrence Drive to perform work on the dry side of the facility without authorization. In April 2011, Longshoremen began filing grievances, alleging that the Employer improperly expanded the scope of the work performed by Teamsters-represented employees on the dry side, to the detriment of Longshoremen-represented employees. The Employer and Longshoremen were scheduled to arbitrate the assignments in August 2012, and proposed to Teamsters that it participate. Teamsters declined arbitration and, by letter to the Employer dated July 31, 2012, stated that it had come to its attention that Longshoremen was "claiming work presently performed by members of Teamsters Local 20" and that if the Employer withdrew work from Teamsters, its members would engage in "all

shoremen, effective January 1, 2006, through December 31, 2010, and was a party to Longshoremen's master agreement for the Great Lakes District Council, Atlantic Coast District, effective January 1, 2011, through December 31, 2012.

² Longshoremen contends that until recently, its members regularly performed a significant portion of the warehouse work on the dry side of the facility, and that the Employer has gradually withdrawn this work and reassigned it to employees represented by Teamsters. The record reveals that, at the time of the hearing, Longshoremen-represented employees continued to handle a material known as petroleum coke, or sponge coke, on the dry side of the facility.

efforts to fight such withdrawal, including, but not limited to picketing activities.”

B. Work in Dispute

The parties stipulated that the work in dispute is the loading, unloading, and movement of cargo and materials at the Employer’s facility located at 3815 St. Lawrence Drive, in Toledo, Ohio.³

C. Contentions of the Parties

The Employer contends that there is reasonable cause to believe that Teamsters violated Section 8(b)(4)(D) based on Teamsters’ July 31 letter threatening picketing. The Employer and Teamsters assert that the work in dispute should be assigned to employees represented by Teamsters. They argue that the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations weigh in favor of Teamsters.

Longshoremen contends that the notice of hearing should be quashed, arguing that there is no reasonable cause to believe that Teamsters violated Section 8(b)(4)(D). It claims that Teamsters’ threat was a sham, made in collusion with the Employer, to obtain the work assignment preferred by the Employer, and that Teamsters has no intention of engaging in coercive action. Longshoremen further contends that there is no valid jurisdictional dispute because Longshoremen has a work preservation claim to the work. It asserts that the Employer has gradually removed work from Longshoremen-represented employees and assigned it to employees represented by Teamsters, and it argues that the Employer should not be allowed to manufacture a jurisdictional dispute to avoid its contractual obligations. Alternatively, Longshoremen argues that if the Board does exercise its jurisdiction under Section 10(k) of the Act, the work in dispute should be assigned to employees represented by Longshoremen based on the factors of collective-bargaining agreements, employer past practice, industry practice, relative skills, economy and efficiency of operations, and job loss.

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 rea-

³ The Board’s notice of hearing limited the disputed work to that performed on “the east/dry side” of the Employer’s facility; at the hearing, however, the parties stipulated that the dispute covers the entire facility, but not stevedore operations.

sonable cause to believe that there are competing claims to the disputed work 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.⁴ For the reasons discussed below, we find that these requirements have been met.

The parties stipulated, and we find, that Teamsters and Longshoremen both claim the work in dispute. Longshoremen made repeated demands for the work by filing over 20 grievances challenging the Employer’s assignment of warehouse work on the dry side of the facility to Teamsters members.⁵ Teamsters, by its July 31 letter to the Employer, asserted its claim to the work in dispute for the employees it represents. These claims are sufficient to establish reasonable cause that there are competing claims to the work in dispute.

We reject Longshoremen’s contention that this is a work preservation dispute outside the scope of Section 10(k). The work in dispute covers all of the warehousing work throughout the entire facility. The record establishes that both Teamsters- and Longshoremen-represented employees have a long history of performing portions of this work; neither group has performed the work exclusively. Where, as here, a union seeks to expand its work jurisdiction and claims work not previously performed by its members, its objective is not merely work preservation, but work acquisition, and the Board will resolve the dispute through a 10(k) proceeding.⁶

We further find reasonable cause to believe that Teamsters used proscribed means to enforce its claim to the disputed work. In its July 31 letter, Teamsters threatened to engage in picketing if the Employer reassigned disputed work performed by its represented employees as a result of Longshoremen’s claim. Longshoremen adduced no direct evidence showing that Teamsters did not seriously intend to carry out its threat or that the threat was the product of collusion between Teamsters and the Employer. In the absence of such evidence, the use of language that threatens economic action establishes reasonable cause to believe that Section 8(b)(4)(D) has been violated.⁷

⁴ See, e.g., *Operating Engineers Local 150 (R & D Thiel)*, 345 NLRB 1137, 1139 (2005).

⁵ See *Seafarers District NMU (Luedtke Engineering Co.)*, 355 NLRB 3022, 303 (2010) (union’s grievance against employer for wrongful assignment of work constitutes claim for work).

⁶ *Electrical Workers IBEW Local 48 (ICTSI Oregon, Inc.)*, 358 NLRB 903, 905 (2012); *Carpenters (Prate Installations, Inc.)*, 341 NLRB 543, 545 (2004).

⁷ *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1032 (2004).

Finally, the parties stipulated, and we find, that there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound.

Based on the foregoing, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that no agreed-upon method exists for adjustment of the dispute. 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.⁸ 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.⁹ The following factors are relevant in making the determination of this dispute.

1. Board certifications and collective-bargaining agreements

There is no evidence of Board certifications concerning the employees involved in this dispute. Teamsters and Longshoremen are each party to collective-bargaining agreements that cover the work in dispute. The Teamsters agreement makes the following assignment to Teamsters-represented employees: “forklift operators and warehousemen engaged in warehouse work at [the] facility east of St. Lawrence Drive.” The expired Longshoremen agreement, under which the parties were operating at the time of the hearing, more generally covers employees “in warehouse operations” and “warehousemen.” Although the Longshoremen agreement is arguably broader in that it contains no reference to the geographical scope of the work, both agreements contain specific references to warehouse work. Because the collective-bargaining agreements conflict, we find that this factor is inconclusive and does not favor an award of the work in dispute to employees represented by either Teamsters or Longshoremen.

2. Employer past practice

Since the Employer took over operations at the Port in 2004, its consistent practice has been to assign certain portions of the work in dispute to employees represented by Teamsters and other portions to employees represented by Longshoremen. As discussed above, the Employer’s current assignment generally divides the work between the two groups along a geographical boundary line. As the Employer’s practice has never been to as-

sign the work exclusively to either group of employees, the Employer’s past practice does not favor an exclusive award of the disputed work to employees represented by either Union.

3. Employer preference

Through testimony at the hearing and in its brief, the Employer expressed its preference to assign the disputed work to Teamsters-represented employees on account of their efficiency and skill.

The Employer’s testimony is largely conclusory and provides minimal support for its contention that Teamsters-represented employees possess a greater level of efficiency and skill than Longshoremen-represented employees. The record reveals that both employee groups have a long history of performing warehousing work, for which both groups possess the requisite skills. The only evidence to support the contention that an exclusive award to Teamsters-represented employees would increase efficiency of operations was that Teamsters-represented employees currently spend working time waiting idly for a third-party trucking contractor to transport cargo loaded onto trucks on the wet side over to the dry side, when Teamsters-represented employees are capable of performing this work themselves, as was the practice before the Employer began contracting with the trucking company in 2007. There was no testimony about Longshoremen-represented employees’ relative ability to perform the work currently assigned to the trucking company. Without comparative evidence about Longshoremen-represented employees, the evidence in the record is insufficient to support the Employer’s assertion regarding the two groups’ relative efficiency and skill.

Although the Board generally assigns substantial weight to employer preference, we decline to do so here, where the Employer’s stated preference is unsupported by considerations of economy, efficiency, or skill, and it is contrary to the Employer’s past and current practice.¹⁰

4. Industry and area practice

The record presents conflicting evidence on this factor. Longshoremen Vice President Andre Joseph testified that Longshoremen-represented employees are almost always the only group of employees working at ports along the East Coast as well as the ports of Cleveland, Indiana, and

⁸ *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577 (1961).

⁹ *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402, 1410 (1962).

¹⁰ See *Steelworkers Local 3-U (Greyhound Exposition)*, 302 NLRB 416, 420 (1991) (declining to give substantial weight to the employer’s preference for assignment of work in dispute due to inconsistency with longstanding assignment); *Miscellaneous Drivers Local 610 (Valley Plate Glass Co.)*, 196 NLRB 1140, 1142 (1972) (discounting factor of employer preference because employer did not support preference with relevant considerations).

Duluth. Thus, in his experience, the work in dispute is typically performed exclusively by Longshoremen-represented employees. On the other hand, the Employer's operations manager, Terry Leach, testified that the industry standard is that Longshoremen-represented employees perform stevedore operations and, once the cargo has been placed on the dock, Teamsters-represented warehousemen perform the disputed work of transporting and storing the cargo. In light of this conflicting evidence, we find that this factor does not favor awarding the work in dispute to either group of employees.

5. Relative skills

There is also conflicting evidence as to whether Longshoremen-represented employees possess greater skill than Teamsters-represented employees in performing the disputed work. Longshoremen-represented employees handle petroleum coke material using a specific type of small crane. Teamsters and Longshoremen witnesses testified that Teamsters-represented employees are not certified to operate the cranes. Conversely, Operations Manager Leach testified that Teamsters-represented employees are experienced in operating the cranes. Otherwise, both groups of employees are qualified to perform the disputed work. Based on the evidence presented, this factor does not favor an award of the work in dispute to employees represented by either Union.

6. Economy and efficiency of operations

As previously discussed, the Employer currently contracts with a third-party trucking company to transport cargo across the St. Lawrence Drive dividing line, a practice that is both costly and inefficient. The evidence establishes, however, that both groups of employees are qualified to transfer most, if not all, of the cargo that comes into the Port. Accordingly, it seems likely that awarding the work in dispute to either group would eliminate the need for the third-party trucking company without any adverse impact on the efficiency of the Employer's operations. Therefore, we find that there is insufficient evidence to establish that this factor favors one group over the other.

7. Job loss

As employees represented by both Unions have consistently performed a portion of the disputed work, an exclusive award of the work to either group of employees would likely result in displacement of employees represented by the other Union. Accordingly, we find that this factor does not favor an exclusive award of the work in dispute to employees represented by either Union.

Conclusions

After considering all of the relevant factors, we conclude that none of the factors traditionally considered by the Board favors an exclusive award of the disputed work to employees represented by one Union to the exclusion of the other employees to whom the Employer has assigned such work in the past. Here, employer preference, unsupported by other factors, is not a sufficient reason.¹¹ In these unusual circumstances, it is within the Board's power to assign the work, in accordance with the Employer's past practice, to employees represented by both Unions.¹² In reaching this conclusion, we give significant consideration to the factor of job loss, noting our reluctance to make an award that displaces employees absent a compelling reason. To avoid displacement, we shall apportion the work in a manner consistent with the Employer's practice in existence at the time the record in this case was closed, i.e., along the wet/dry division created by St. Lawrence Drive, with minor specifications, detailed below. As to the work of transporting cargo from the wet side over to the dry side, currently being performed by the trucking company, we award the work to the Teamsters-represented employees because they are capable of performing this work and did so before the Employer contracted with the trucking company in 2007. In making this determination, we award the work to employees represented by International Longshoremen's Association, Local 1982, and to employees represented by the Teamsters Local 20, not to either 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 Midwest Terminals of Toledo International, Inc., who are represented by International Longshoremen's Association, Local 1982, are entitled to perform, in a manner consistent with past practice, all loading, unloading, and movement of cargo and materials on the west/wet side of St. Lawrence Drive at the Employer's facility located at 3518 St. Lawrence Drive, Toledo, Ohio, including the loading of any trucks used to transfer cargo and materials across St. Lawrence Drive, subject to the proviso set forth below, and are entitled to continue performing the loading, unloading, and movement of petroleum (sponge) coke throughout the Em-

¹¹ See *Ironworkers Local 380 (Stobek Masonry Inc.)*, 267 NLRB 284, 287 fn. 8 (1983) (employer preference is not controlling when it is unsupported by other factors).

¹² See *Harley-Davidson Motor Co.*, 234 NLRB 1121, 1124 (1978).

ployer's facility. Employees of the same Employer, who are represented by Teamsters Local 20, are entitled to perform the loading, unloading, and movement of cargo and materials on the east/dry side of St. Lawrence Drive at the Employer's facility; provided, that these employees are also entitled to enter the west/wet side of the facility in order to transport cargo that is to be transferred from the wet side to the dry side across St. Lawrence Drive.

2. Teamsters Local 20 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Midwest Terminals of Toledo International, Inc. to assign the

portion of the disputed work awarded to employees represented by International Longshoremen's Association Local 1982, as set forth above, to employees represented by it.

3. Within 14 days from this date, Teamsters Local 20 shall notify the Regional Director for Region 8 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the portion of the disputed work awarded to employees represented by International Longshoremen's Association Local 1982, as set forth above, in a manner inconsistent with this determination.