Sheet Metal Workers International Association, AFL–CIO, Local Union 88 and A. W. Farrell & Son, Inc. *and* United Union of Roofers, Waterproofers, and Allied Workers, Local 162. Case 28–CD–096857

January 30, 2014

DECISION AND ORDER QUASHING NOTICE OF HEARING

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On January 23, 2013, A. W. Farrell & Son, Inc. (the Employer) filed the charge in this 10(k) proceeding, alleging that the Respondent, Sheet Metal Workers International Association, Local Union 88 (Sheet Metal Workers Local 88 or Local 88), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Sheet Metal Workers Local 88 rather than to employees represented by United Union of Roofers, Waterproofers, and Allied Workers, Local 162 (Roofers Local 162 or Local 162). Hearing Officer Barbara Beaubrun Baynes conducted a hearing on June 13, 2013. Thereafter, the Employer, Local 88, and Local 162 filed briefs in support of their positions.

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

The parties stipulated that the Employer is a corporation with offices throughout the United States, including an office and place of business in Las Vegas, Nevada. They also stipulated that during the 12-month period preceding the hearing, a representative period, the Employer performed services valued in excess of $50,000 outside the State of Nevada. 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 Sheet Metal Workers Local 88 and Roofers Local 162 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 roofing services at various sites in and around Las Vegas, Nevada. Specifically, the Employer attaches metal, tar, dirt, or other material to the top of a building to prevent moisture and sun damage, and also constructs the underlayment for the roof.

The Employer and Roofers Local 162 have a collective-bargaining relationship embodied in a series of collective-bargaining agreements, the most recent of which was effective from September 1, 2010, through July 31, 2012.[1] That agreement covered:

> All regular full-time and part-time skilled roofer and damp and waterproof workers, including apprentices, pre-apprentices, allied workers, other classifications of workers and any person performing the duties of all safety monitoring of work, excluding managers, guards and supervisors as defined in the Act.

The Employer also has a collective-bargaining relationship with Sheet Metal Workers Local 88. That relationship was embodied in three collective-bargaining agreements: the Standard Form Agreement, the Moisture Control Agreement, and the National Building Enclosure Agreement. The Moisture Control Agreement was effective May 1, 2011, through April 30, 2013, and provided:

> The Union shall have jurisdiction over all skilled roofers and damp and waterproof workers, including apprentices, pre-apprentices, allied workers, other classifications of workers and any person performing the duties of all safety monitoring of work performed [within the state of Nevada]. The work jurisdiction of the Union shall be all roofing and waterproofing systems or products whenever the primary function of such systems or products is to prevent the intrusion or migration of moisture. These systems or products shall include but not [sic] limited to all those outlined in this Article.

In April 2011, Roofers Local 162 represented the Employer's six roofing employees. On April 28, 2011, Sheet Metal Workers Local 88 faxed to Local 162 letters from all six employees resigning their membership in Local 162. Those employees subsequently joined Local 88 and continued to perform the Employer's roofing work.

In a letter to the Employer dated January 21, 2013, Local 88's Business Manager, Byron Harvey, expressed pleasure that the Employer had assigned "all of its roofing in Las Vegas" to Local 88's members. The letter stated, "Should the assignment of any of this work be given to Roofers-represented workers, we would have no recourse but to picket any jobs where such misassignment occurs."

[1] In *A. W. Farrell & Son, Inc.*, 359 NLRB 1463, 1464–1465 (2013), the Board found that the Employer agreed to extend its collective-bargaining agreement with Local 162 through July 31, 2012. The Board also found, in the absence of exceptions, that the Employer established a 9(a) relationship with Local 162. Id., 1463 fn. 1.

B. Work in Dispute

The work in dispute is all roofing work performed by the Employer in and around Las Vegas, Nevada.

C. Contentions of the Parties

Roofers Local 162 contends that the notice of hearing should be quashed. In support, it asserts that the present controversy is not a jurisdictional dispute within the meaning of Section 10(k) of the Act because neither it nor Sheet Metal Workers Local 88 contends that the work should be reassigned to a different group of employees. Instead, according to Local 162, the dispute is over which union is the representative of the same group of employees. Local 162 also contends that, if the Board denies the motion to quash, the record does not provide an adequate basis for comparing skills, efficiencies, or other factors that the Board traditionally considers when determining disputes under Section 10(k) of the Act.

The Employer, conversely, contends that a jurisdictional dispute exists. The Employer asserts that it has collective-bargaining relationships with two unions claiming jurisdiction over the disputed work. The Employer contends that not all of its current employees were former members of Roofers Local 162, and that even those employees who were members of that union have resigned their membership. The Employer also contends that the Board should award the work in dispute to employees represented by Sheet Metal Workers Local 88 on the basis of collective-bargaining agreements, employer preference, area and industry practice, employer past practice, economy and efficiency of operations, relative skills and training, and previous Board and arbitral decisions.

Local 88 also contends that a jurisdictional dispute exists because the Employer hired several employees out of Local 88's hiring hall and because those employees who were formerly represented by Local 162 resigned from that union and subsequently joined Local 88. Local 88 contends that the work in dispute should be awarded to the employees it represents on the basis of collective-bargaining agreements, employer past practice, area practice, skills and training, 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., *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). On this record, we find that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated.

Although the Employer and Local 88 have framed the issues in terms of a work assignment dispute, it is evident that the dispute is not over the assignment of work to one group of employees rather than to another group. Rather, as asserted by Local 162, the dispute concerns which union will represent the employees who are currently performing the Employer's roofing work. None of the parties has raised any objection to the performance of the roofing work by the Employer's current employees. Local 88 threatened to picket if the Employer assigned the work to employees represented by Local 162. At the hearing and in its brief to the Board, Local 162 stated repeatedly that it does not seek reassignment of the work in dispute to any other employees. Instead, it seeks only to be recognized as the 9(a) representative of the employees currently performing the work in dispute. The Employer also wants its current employees to continue performing the work in dispute.

It is well established that a dispute within the meaning of Section 8(b)(4)(D) requires a choice between two competing groups. *Carpenters Local 1307 (J & P Building Maintenance)*, 331 NLRB 245, 247 (2000); *Food & Commercial Workers Local 1222 (FedMart Stores)*, 262 NLRB 817, 819 (1982). In this regard, the Board has stated:

> "There must, in short, be either an attempt to take a work assignment away from another group, or to obtain the assignment rather than have it given to the other group.
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> . . . .
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> "A demand for recognition as bargaining representative for employees doing a particular job, or in a particular department, does not to the slightest degree connote a demand for the assignment of work to particular employees rather than to others."

Laborers Local 1 (DEL Construction), 285 NLRB 593, 595 (1987) (quoting *FedMart Stores*, 262 NLRB at 819).

We also reject the Employer's and Local 88's argument that a jurisdictional dispute exists because the Employer's current employees are not the same group of employees who were formerly represented by Local 162. What matters is that all parties agree that the employees currently performing the Employer's roofing work

should continue to perform that work. Finally, we reject the argument that a jurisdictional dispute exists because some of the employees resigned their memberships in Local 162 and joined Local 88. The employees' membership in one union or the other is irrelevant to a dispute under Section 10(k), which deals with assignments of work between two competing groups of employees. See *FedMart Stores*, 262 NLRB at 818–819 (no dispute within the meaning of Section 10(k) where some of the employees performing the work in dispute resigned from one bargaining representative and joined another).

In light of the foregoing, we conclude that the dispute here does not concern the assignment of work to one group of employees rather than another within the meaning of Section 8(b)(4)(D). Accordingly, as this matter is not a jurisdictional dispute within the meaning of Section 10(k), we shall quash the notice of hearing.

ORDER

IT IS ORDERED that the notice of hearing issued in this case is quashed.