International Union of Operating Engineers, Local 4 *and* Massachusetts Building-Wreckers and Environmental Remediation Association, Inc. and JDC Demolition Company, Inc. *and* Laborers' International Union of North America, Local 1421. Cases 01–CD–137069 and 01–CD–138333

September 30, 2015

DECISION AND ORDER QUASHING NOTICE OF HEARING

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

This is a consolidated jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act following charges by Massachusetts Building-Wreckers and Environmental Remediation Association, Inc. (Building-Wreckers Association or BWA) and Employer JDC Demolition Company, Inc. (JDC) alleging violations of Section 8(b)(4)(D) of the Act, filed on September 19, 2014,[1] in Case 01–CD–137069 against International Union of Operating Engineers, Local 4 (Operating Engineers Local 4), and on October 7 in Case 01–CD–138333 against Laborers' International Union of North America, Local 1421 (Laborers' Local 1421). BWA and JDC allege that each union engaged in proscribed activity with an object of forcing JDC to assign certain work to employees it represents rather than to employees represented by the other union.

A hearing was held on October 20–24 before Hearing Officer Claire L. Powers. During the hearing, Operating Engineers Local 4 filed a motion to quash the 10(k) notice of hearing, asserting that the parties had agreed upon a method for the voluntary adjustment of the dispute—the Building and Construction Trades Department, AFL–CIO's Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Plan). The hearing officer issued a 10(k) Hearing Officer's Report without ruling on the motion. Thereafter, Building-Wreckers Association, Operating Engineers Local 4, and Laborers' Local 1421 filed posthearing briefs,[2] and upon leave by the Board, amicus curiae Plan subsequently filed a brief.

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 in these consolidated cases, we make the following findings.

I. JURISDICTION

The parties stipulated that Employer JDC is a Massachusetts corporation, with an office and place of business in Boston, engaged in the construction industry as a general contractor. The parties stipulated that JDC receives annual gross revenues in excess of $500,000, and purchases and receives at its Boston, Massachusetts facility and jobsites, goods and material valued in excess of $50,000 directly from points located outside the Commonwealth of Massachusetts. The parties also stipulated, and we find, that JDC is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board, and that Operating Engineers Local 4 and Laborers' Local 1421 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Procedural History

JDC has a subcontract with the Footprint Salem Power Plant in Salem, Massachusetts, for the demolition of numerous large fuel storage tanks, asbestos and oil remediation, and the removal of a 420-foot chimney from the site. The work began around mid-July 2014, and was expected to conclude by December 2014. JDC has separate collective-bargaining agreements with Operating Engineers Local 4 and Laborers' Local 1421, as further described below. It assigned work at the power plant project to employees represented by each union. Employees represented by Laborers' Local 1421 perform demolition or "wrecking" work inside the tanks and the chimney, and use bobcats and lulls[3] in confined spaces to break down and transfer contaminated debris to stockpiles inside and outside of the structures being demolished. Employees represented by Operating Engineers Local 4 perform various types of nonwrecking work on the demolition site in a symbiotic relationship with employees represented by Laborers' Local 1421, except that Local 4–represented employees do not perform interior work using the bobcat.

On June 4, at the request of Laborers' Local 1421, JDC provided a letter to the business manager of Laborers' Local 1421 assigning "all work with the Skidsteer(s), forklift/Lull operations on all Wrecking sites to . . . Local 1421," consistent with its past practice. In August, Operating Engineers Local 4 claimed the work performed by employees represented by Laborers'

[1] All dates are in 2014.

[2] Employer/Charging Party JDC did not file a separate brief.

[3] The parties also refer to bobcats and lulls as skidsteers and forklifts, respectively.

Local 1421 and engaged in several threats and job actions that led JDC to temporarily divide and reassign the work to employees represented by each union on a one-to-one ratio. In response, Laborers' Local 1421 delivered a letter to JDC on September 12, reclaiming the reassigned work and threatening a job action. On September 26, Laborers' Local 1421's business manager withdrew employees it represented from the jobsite in an effort to reclaim its original work assignment. As mentioned above, BWA and JDC filed charges against both unions based on these actions.

On October 17, the day after the Regional Director for Region 1 issued a notice of hearing in these cases, the International Union of Operating Engineers' director of jurisdiction filed a claim with the Plan administrator, asserting that BWA and JDC violated the Plan by filing charges with the Board.[4] The Plan administrator immediately directed the Laborers' International Union of North America (LIUNA) and JDC to process the jurisdictional dispute through the Plan. On October 20, LIUNA's president in turn directed Laborers' Local 1421 to cease and desist from violating Plan rules and to process the jurisdictional dispute through the Plan. Laborers' Local 1421 refused. By letter of October 22 to the Plan administrator, BWA refused as well.

B. Work in Dispute

The parties stipulated that the work in dispute is the operation of skidsteers (Bobcats) and forklifts/Lulls on all wrecking sites for the Footprint Salem Power Plant project at 57 Fort Avenue, Salem, Massachusetts.

C. Contentions of the Parties

Operating Engineers Local 4 urges the Board to grant its motion to quash notice of hearing because the parties have agreed upon a method for the voluntary adjustment of the dispute. It argues, as it did to the Plan administrator, that both Operating Engineers Local 4 and Laborers' Local 1421 are stipulated to the Plan through the affiliation of their respective Internationals with the Building and Construction Trades Department, AFL–CIO (BCTD). It also argues that JDC is stipulated to the Plan through its Short Form Agreement with Operating Engineers Local 4, in which JDC agreed to abide by the Plan as one of the terms of the collective-bargaining agreement between Operating Engineers Local 4 and the Labor Relations Division of the Associated General Contractors of Massachusetts, Inc. It adds that the Plan administrator has directed both Laborers' Local 1421 and JDC to process the dispute through the Plan.

Building-Wreckers Association and Laborers' Local 1421 contend that the Board is authorized to determine the merits of this jurisdictional dispute because BWA is neither stipulated to the Plan nor a party to an agreement binding it or its members to the Plan, and therefore not all parties have agreed on a method for the voluntary adjustment of the dispute. BWA further argues that the only collective-bargaining agreement to which it is a party, negotiated on behalf of Laborers' Local 1421, specifically exempts jurisdictional disputes from its "Procedure for Adjustment of Disputes and Arbitration." Thus, BWA concludes, because the parties' agreements do not provide for the same procedure, the Board may proceed to determine the merits of the jurisdictional dispute.

Amicus Plan argues that the relevant parties here are JDC, Operating Engineers Local 4, and Laborers' Local 1421, and that each is stipulated to the Plan pursuant to Plan procedures and the BCTD's Constitution. It denies that BWA is a responsible "employer" for purposes of resolving the jurisdictional dispute and thus all relevant parties are bound to utilize the Plan, divesting the Board of jurisdiction to determine the dispute.

D. Applicability of the Statute

Congress enacted Section 10(k) of the Act to establish a procedure for the Board to resolve work assignment disputes in situations where the parties are unable to do so voluntarily. The statutory prerequisites are: (1) there must be reasonable cause to believe that there are competing claims to the disputed work and that a party has violated Section 8(b)(4)(D) by using proscribed means to enforce its claim to the disputed work;[5] and (2) there must be a finding that the parties have not agreed on a method for the voluntary adjustment of the dispute. *Operating Engineers Local 150 (R&D Thiel),* 345 NLRB 1137, 1139 (2005); *Operating Engineers Local 150 (Diamond Coring Co.)*, 331 NLRB 1349, 1349–1350 (2000). When there is a single method for the voluntary adjustment of the dispute that binds all parties, the Board cannot hear the case. See *Carpenters Pacific Northwest Regional Council (Brand Energy Services)*, 355 NLRB 274, 276 (2010). Section 10(k) "provide[s] the parties with an opportunity to settle jurisdictional disputes among themselves without Government intervention whenever possible." *Carpenters Local 943 (Manhattan*

[4] Under the Plan, the filing of Board charges related to jurisdictional disputes constitutes an "impediment to job progress" that sets in motion the Plan's procedures for expedited arbitration. Plan Procedural Rules and Regulations, Art. III, VI.

[5] The parties stipulated that both Unions engaged in job actions to further their claims to the disputed work. We need not reach Operating Engineers Local 4's alternative argument that this is a work-preservation dispute, not a jurisdictional dispute, as we find that the parties have agreed on a method for the voluntary adjustment of the dispute.

Construction Co.), 96 NLRB 1045, 1048 (1951), review denied 198 F.2d 320 (10th Cir. 1952).

In this case, we agree with Operating Engineers Local 4 and the Plan that all relevant parties—Employer JDC and the two local unions claiming the disputed work—have agreed upon a method for the voluntary adjustment of the present dispute. Specifically, we find that the parties are stipulated to the Plan. JDC is stipulated to the Plan through a provision in a collective-bargaining agreement with Operating Engineers Local 4. It is undisputed that by signing a Short Form Agreement with Operating Engineers Local 4, JDC adopted the agreement between Local 4 and the Labor Relations Division of the Associated General Contractors of Massachusetts, Inc. That agreement contains a provision stating that "[t]he parties recognize that there is a voluntary Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. The parties hereto agree to abide by and conform to all rules and decisions of the Plan." As for the Unions, we find that Operating Engineers Local 4 and Laborers' Local 1421 are stipulated to the Plan through their respective parent unions' membership in the BCTD, the constitution of which requires submitting jurisdictional disputes to the Plan.[6] Moreover, LIUNA President Terry O'Sullivan invoked the Plan in directing Laborers' Local 1421 to cease and desist from impeding job progress by filing charges with the Board and to submit its jurisdictional dispute to the Plan. Both local unions' membership in the BCTD, along with JDC's contractual obligation to utilize the Plan in its collective-bargaining agreement with one of the unions, suffice to establish that all relevant parties are bound to resolve this dispute through the Plan. See, e.g., *Laborers Local 60 (Mergentime Corp.)*, 305 NLRB 762, 763 (1991); *Operating Engineers Local 139 (Allied Construction)*, 293 NLRB 604, 605–606 (1989); cf. *Iron Workers, Local 512 (Fabcon, Inc.)*, 203 NLRB 1017, 1018 (1973) (finding all relevant parties not bound to method for voluntary adjustment of dispute).

We reject BWA's contrary argument that not all parties are stipulated to the Plan, which rests on BWA's erroneous contention that it is a necessary party to this jurisdictional dispute. The Board has long held that "the employer making the work assignment, as well as the rival unions claiming the work, comprise the 'parties to such dispute,' and that all must approve and enter into a voluntary adjustment procedure in order to preclude a hearing and determination pursuant to [Section 10(k)]." *Bricklayers, Local No. 1 (Lembke Construction)*, 194 NLRB 649, 651 (1971); see also *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 940 (1989) ("[T]he company that ultimately controls and makes the job assignment . . . is deemed to be the employer."). There is no evidence that BWA made any job assignment related to the work in dispute at the Footprint Salem Power Plant project, and indeed the charges BWA filed identify only JDC as the employer. Nor does the exemption in the grievance/arbitration provision of the BWA–Laborers' Local 1421 collective-bargaining agreement prevent us from finding an agreed-upon method of voluntary adjustment, as it does not create a different procedure likely to lead to conflicting results. Cf. *Operating Engineers Local 318 (Kenneth E. Foeste Masonry)*, 322 NLRB 709, 712 (1996); *Laborers Local 242 (Johnson Gunite)*, 310 NLRB 1335, 1337 (1993). That exemption merely excludes jurisdictional disputes from being resolved through the parties' contractual grievance procedure. It does not prevent such disputes from being resolved through an alternative agreed-upon procedure, such as the Plan. In short, JDC and the Unions can and must adhere to their agreement to submit all jurisdictional disputes to the Plan.[7]

Accordingly, because all parties have agreed to submit jurisdictional disputes to the Plan, we shall quash the notice of hearing.

ORDER

The notice of hearing issued in this proceeding is quashed.

Dated, Washington, D.C. September 30, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

[6] Art. X of the BCTD's constitution states:

> All jurisdictional disputes between or among affiliated National and International Unions and their affiliated Local Unions and employers shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department . . . . Said present plan . . . shall be recognized as final and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions.

[7] Although BWA is correct that the Board resolved a similar jurisdictional dispute on the merits between different local unions and employers in *Laborers Local 310 (KMU Trucking & Excavating),* 361 NLRB No. 37 (2014), no party in that case invoked the Plan or asserted membership in the Building and Construction Trades Department, AFL–CIO. In addition, there is substantial evidence in this record that LIUNA and the International Union of Operating Engineers became members of BCTD in July 2014, 6 months after the hearing in *KMU Trucking* concluded. That decision therefore has no bearing on the Board's authority to hear this particular dispute.

Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

The Board's decision can be found at www.nlrb.gov/case/01-CD-137069 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor