

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

LOCAL UNION NO. 550 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS, Charged Party – Labor Organization

CASE NO. 08-CD-159904

and

R.G. SMITH COMPANY, INC., Charging Party – Employer

and

THE INDIANA/KENTUCKY/OHIO REGIONAL COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, Party in Interest

and

SHEET METAL WORKERS’ LOCAL UNION NO. 33, AKRON DISTRICT a/w INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND TRANSPORTATION UNION, Party in Interest

CASE NO. 08-CD-160179

SHEET METAL WORKERS’ LOCAL UNION NO. 33, AKRON DISTRICT a/w INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND TRANSPORTATION UNION, Charged Party – Labor Organization

and

R.G. SMITH COMPANY, INC., Charging Party – Employer

and

THE INDIANA/KENTUCKY/OHIO REGIONAL COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, Party in Interest

and

**LOCAL UNION OF THE INTERNATIONAL
ASSOCIATION OF BRIDGE, STRUCTURAL,
ORNAMENTAL AND REINFORCING
IRONWORKERS, Party in Interest**

INTRODUCTORY STATEMENT

This is a jurisdictional proceeding under Section 10(k) of the National Labor Relations Act, as amended, following the filing of charges in Case No. 08-CD-159904 and Case No. 08-CD-160179. The charges were filed by R.G. Smith Company, Inc. (“Employer”) against Respondents, Local Union 550 of the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers (“Ironworkers”) and Sheet Metal Workers Local Union No. 33 (“Sheet Metal Workers”). The charges allege that the Ironworkers and Sheet Metal Workers engaged in proscribed activity with an objective of forcing the Employer to assign certain work to employees they represent rather than to employees represented by Millwrights Local Union 735, affiliated with the Indiana/Kentucky/Ohio Regional Council of Carpenters (“Millwrights”). These cases were consolidated and a hearing was held on December 1, 2015 before Hearing Officer Noah Fowle. Thereafter, the Employer, the Ironworkers and the Sheet Metal Workers filed post-hearing briefs with the National Labor Relations Board.

I. JURISDICTION

The parties stipulated that the Employer is engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act and that the Ironworkers and Sheet Metal Workers are labor organizations within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Employer engages in heavy industrial maintenance and equipment work in Northern Ohio. The Employer presently is signatory to a collective bargaining agreement with the

Ironworkers (Charging Party Exhibit 1). In fact, the Employer has been signatory to collective bargaining agreements with the Ironworkers for over seventy (70) years. (Tr. 135). The Employer also is presently signatory to collective bargaining agreements with the Sheet Metal Workers and the Millwrights. (Charging Party's Exhibits 2 and 3).

The work in dispute was located at the A.K. Steel Company in Mansfield, Ohio. The Employer was engaged by A.K. Steel to provide miscellaneous fabrication, rigging, off-loading, setting, aligning, bolting and welding of all water-cooled elbow sections and associated items with the water-cooled elbows. In addition, the project involved work on the south descale pump replacement project at A.K. Steel which included miscellaneous fabrication, rigging, off-loading, setting, aligning and bolting of the south descale pump, and all associated items with the south descale pump. (Tr. 13). The work referenced above was assigned by the Employer to the Ironworkers and the Sheet Metal Workers.

In September, 2015, Rick Reece, the manager of the Mansfield division of the Employer, received an e-mail from Dan Siverston, a business agent for the Millwrights, claiming the work that was assigned to the Ironworkers and the Sheet Metal Workers. (Tr. 77, Charging Party Exhibit 12). The e-mail made it clear to the Employer that the Millwrights would file a grievance claiming the work if it were not immediately assigned to the Millwrights.

On or about September 10, 2015, Mr. Reece forwarded a letter to Bill Sherer, Business Manager for the Ironworkers, advising him of the Millwrights claim. (Charging Party Exhibit 8). Mr. Sherer responded to the Employer's letter by his own letter dated September 11, 2015. In his letter, Mr. Sherer made it clear that the Ironworkers considered that the work on the A.K. Steel project to be that of the Ironworkers and that if it were assigned to the Millwrights, the Ironworkers would take action protesting the assignment, including the refusal to refer employees to R.G. Smith, the Employer. (Charging Party Exhibit 9). Mr. Reece sent a similar

advisory letter to the Sheet Metal Workers. The Sheet Metal Workers also responded in the same general fashion as did the Ironworkers. (Charging Party's Exhibits 6 and 7).

As a result of the letters from the Ironworkers and the Sheet Metal Workers, the charges in the instant unfair labor practice proceedings were filed by the Employer.

III. DISPUTED WORK

The work in dispute, as described through the stipulation of the parties (Tr. 13), essentially involves mill maintenance work and equipment setting work. The Employer argued in these proceedings that there are competing claims for the work by the Ironworkers and the Sheet Metal Workers on the one hand, and the Millwrights on the other hand. The Employer also contends that there is reasonable cause to believe that Section 8(b)(4)(ii)(D) of the Act has been violated because of threats to picket and strike over assignment of the disputed work to the Millwrights. The Employer, the Ironworkers and the Sheet Metal Workers all contend that the work in dispute should be awarded to the Ironworkers and the Sheet Metal Workers based on the factors of employer preference, past practice, area and industry practice, and economy and efficiency of operations.

Since the Millwrights did not appear at the hearing in this matter, the only evidence regarding the Millwrights position is a claim for the work in dispute. (Tr. 7-8). For obvious reasons, the Millwrights have presented no evidence and no rationale supporting their claim for the work in dispute.

IV. PROPRIETY OF SECTION 10(k) HEARING

The parties have stipulated that there are competing claims between the Ironworkers and the Sheet Metal Workers and the Millwrights for the work in question. (Tr. 14). Charging Party Exhibits 6, 7, 8 and 9 indicate that the Ironworkers and Sheet Metal Workers have threatened action if the work in question is assigned to the Millwrights. The parties have also stipulated that

no voluntary method for adjustment of the dispute is available in these proceedings. (Tr. 14).

V. LAW AND ARGUMENT

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. See: *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577-579 (1961). In several of its decisions, the Board has ruled 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. See: *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410-1411 (1962).

A.

The first factor that typically is considered by the Board in a dispute such as this is whether the work in dispute falls within the work jurisdiction provisions of the collective bargaining agreements of the unions that are parties to the dispute. Since the Employer is signatory to collective bargaining agreements with the Ironworkers, Sheet Metal Workers and the Millwrights, and those agreements arguably cover the work in dispute, the factor of collective bargaining agreement work jurisdiction does not favor an award to either group.

B.

The factors of employer preference and past practice weigh heavily in favor of the present assignment of the disputed work to the Ironworkers and Sheet Metal Workers. Geoff Nicely is the Chief Operating Officer for the Employer and has been employed by the Employer for approximately seventeen (17) years. Mr. Nicely testified in detail as to what is entailed in mill maintenance work and equipment setting work. (Tr. 31-32). It was precisely the type of work that was performed by the composite crew of Ironworkers and Sheet Metal Workers at the A.K. Steel project. When asked how long R.G. Smith has maintained the practice of assigning mill maintenance work and equipment setting work to Ironworkers and Sheet Metal Workers, he

responded as follows: “As long as I have ever been in the business, or as long as I can remember.” (Tr. 33). In response to the question as to what the preference of the Employer is concerning the future assignment of mill maintenance work and equipment setting work, Mr. Nicely responded: “The preferences in to use Ironworkers and Sheet Metal Workers.” (Tr. 34).

Rick Reece, division manager of the Employer’s Mansfield division, also testified. Mr. Reece has been employed in his present position for approximately twelve (12) years. Mr. Reece testified as to the definition of mill maintenance work and equipment setting work. (Tr. 64). He also stated that mill maintenance and equipment setting work was precisely the type of work that was assigned to the Ironworkers and the Sheet Metal Workers at the A.K. Steel project. Mr. Reece confirmed that it is the Employer’s practice to assign this type of work to the Ironworkers and the Sheet Metal Workers. He has never assigned mill maintenance work and equipment setting work to the Millwrights. (Tr. 65).

Mr. Reece testified that on two isolated occasions, involving projects at Timken Steel in Stark County, Ohio, the Employer did employ Millwrights. However, the employment of Millwrights was required under the National Maintenance Agreement and the assignment was not made pursuant to any local collective bargaining agreements. (Tr. 36). In both instances, the performance by the Millwrights was very poor. In each case, the work originally assigned to the Millwrights had to be completed by the Ironworkers. (Tr. 37). These isolated instances do not demonstrate a practice by the Employer of consistently utilizing Millwrights to perform mill maintenance and equipment setting work. To the contrary, this testimony confirms that it is the Employer’s preference not to use Millwrights on this type of industrial work. See, e.g., *Laborers Local 210 (Surianello General Concrete Contractor)*, 351 NLRB 210, 212 (2007); *Elevators Constructors Local 2 (Cone, Inc.)*, 349 NLRB 1207, 1210 (2007).

Mike Black, manager of the Employer’s industrial division, testified for the Employer

regarding the Employer's preferences and practices regarding the work in dispute. When asked about the Employer's history and preference regarding the assignment of this work, Mr. Black stated: "But, historically and predominantly, it goes to the Ironworkers and the Sheet Metal Workers." (Tr. 104).

Mr. Black also confirmed Mr. Reece's testimony regarding the two isolated instances when the Employer did utilize Millwrights for industrial work. As stated above, on one of the Timken jobs, the Millwrights could not perform appropriately and that work eventually was reassigned to the Ironworkers. (Tr. 37). On the second Timken job, the Millwrights simply quit working and left the Employer in a terrible predicament. The Ironworkers agreed to come to the assistance of the Employer and complete the work assigned to the Millwrights. The work was done well and well within the specifications and expectations of the Owner, Timken Steel.

The evidence cited above militates strongly the conclusion that the Employer's preference and practice is to assign the disputed work to the Ironworkers and the Sheet Metal Workers.

C.

The factors of area and industry practice also favor the Employer's assignment in this case.

William V. Sherer testified at this hearing as a witness for the Ironworkers. Mr. Sherer is the Business Manager/Financial Secretary-Treasurer for the Ironworkers. He has held that position for seven (7) years. (Tr. 123). Prior to his serving as Business Manager, Mr. Sherer served for three years as the Business Agent for the Ironworkers. For seven consecutive years prior to that time, Mr. Sherer was the full-time Coordinator for the Ironworkers Local Union 550 Joint Apprenticeship and Training Committee (JATC). (Tr. 131). The JATC is a comprehensive training program for apprentices in the ironworking industry.

During his testimony, the following question was posed to Mr. Sherer at Tr. 128:

- Q. Now, in your capacity as Business Manager, have you had occasion to visit job sites for work similar to or identical to the work that I've just described at the A.K. Steel project as being performed?
- A. Yes.
- Q. And who performs that work when you visit these job sites? Who has that work been assigned to?
- A. That work has been assigned to the Ironworkers at other facilities.

Mr. Sherer's testimony is consistent with the testimony of the Employer's witnesses, Mr. Nicely, Mr. Reece and Mr. Black. The mill maintenance and equipment setting work that was being performed at A.K. Steel in September, 2015, is the type of work that is being performed at various industrial sites throughout Ohio. Mr. Sherer clearly and unequivocally stated that work performed by the composite crew in the A.K. Steel facility is the type of work that Ironworkers in Northern Ohio typically and consistently perform at other industrial sites. (Tr. 127-128). Significantly, Mr. Sherer's testimony was unchallenged and unrebutted.

Based upon the foregoing, the Ironworkers submit that the Board should conclude that the Employer's assignment of the disputed work to the Ironworkers and Sheet Metal Workers is consistent with area and industry practices.

D.

The factors of relative skills and training plainly establish that the Employer's assignment of the work in question to the Ironworkers is appropriate.

During the course of the hearing, Mr. Sherer testified as to the training operations administered and provided by the Ironworkers. JATC operates a 5,000 square foot training facility in Canton, Ohio. The program has a full-time Coordinator, two full-time instructors and six (6) part-time instructors. Mr. Sherer is Chairman of the JATC. (Tr. 130-133). It is significant to note that Geoff Nicely, the COO for the Employer is a Trustee on the JATC. Mr.

Nicely confirmed that the training provided by the JATC is precisely the type of training needed for the work that was assigned to the Ironworkers at the A.K. Steel project. (Tr. 60-61).

At the hearing, Mr. Sherer identified and elaborated on Ironworkers Exhibits 3(a)-(n). These are parts of the curriculum that are taught to ironworker apprentices during their four year apprenticeship program. Mr. Sherer confirmed that this training is exactly the type of training that is needed to perform the work that was assigned to the Ironworkers at the A.K. Steel project. (Tr. 134).

Being trained for the work in question obviously is an important factor in determining a work assignment. However, it is equally important that the trade to which work is assigned be able to safely and appropriately perform that work. In this case, for safety reasons alone, the Employer's refusal to assign the work in question to the Millwrights was a correct one.

Mr. Black, the manager of the Employer's Industrial Division, testified concerning the safety record of the Millwrights on industrial jobs. He used the Timken caster facility job in 2014 as an example. Customers of the Employer, such as Timken Steel, typically expect an employer on their industrial jobs to have a 4.0 TRIR rating. (Tr. 119). A "TRIR" is an acronym for "Total Reportable Incident Rate" under OSHA. On the 2014 Timken project, the Millwrights had a TRIR of 29.3. (Tr. 118). All of the rest of the trades working on the project had a combined TRIR of 4.6. (Tr. 119). This clearly shows that the Employer had significant and well-founded concerns over the safety performance of the Millwrights on industrial projects.

For the reasons stated above, we submit that the factors of skills and training favor the Employer's assignment.

E.

The final and perhaps most compelling factor to be considered by the Board in a jurisdictional dispute is the Employer's position on economy and efficiency of operations. The

testimony in this case is replete with evidence that the composite crew of Ironworkers and Sheet Metal Workers will most efficiently and economically perform the work that has been assigned to them by the Employer.

During Geoff Nicely's testimony, the following question was posed:

- Q. Why use those trades? [Ironworkers and Sheet Metal Workers]
- A. Why? Basically, these trades are, in my opinion, more efficient, they're quicker, they're faster, they've been around that product or that equipment, they know the plant, they know the personnel, they've worked on these things. It's just second nature to this – to their trade, I believe.
- Q. And what is R.G. Smith's preference concerning the future assignment of mill maintenance and equipment setting work?
- A. The preference is to use Ironworkers and Sheet Metal Workers.

Mr. Reece's testimony was consistent with Mr. Nicely's. When asked why he would use Ironworkers and Sheet Metal Workers to do the type of work, i.e., mill maintenance and equipment setting work, at the A.K. Steel project, Mr. Reece testified:

- A. Specific for their skillset, knowledge of the equipment and their customers' relationships with my sheet metal workers and ironworkers.
- Q. And what is R.G. Smith's preference concerning the assignment of mill maintenance and equipment setting work?
- A. Sheet Metal Workers and Ironworkers. (Tr. 66).

Also see the testimony of Mr. Reece at Tr. 80-81.

Mr. Black testified concerning the efficiency of Ironworker crews compared to Millwrights crews. On the issue of efficiency, Mr. Black stated:

- Q. Are you satisfied that the Ironworkers and Sheet Metal Workers are capable and well-trained to perform equipment setting and mill maintenance work?
- A. Without question.
- Q. And how does that capability and training compare with the Millwrights?

- A. The capability and training is probably similar to the Millwrights but the efficiency is where I make my determination. The efficiency of the Ironworker crews and the Sheet Metal Worker crews [is] vast beyond the Millwright crews are. And efficiencies are what allow us to make money as a company. (Tr. 109).

Specifically, Mr. Black was asked to elaborate:

- Q. Specifically, what kinds of things were you seeing? Do you have any sense as to what was causing the delay on the millwrights side?
- A. Just – you know, there was a lot of just inefficiencies in the crews. A great example was I went into the casting tower one day, and I watched a millwright take an hour and a half to set up his instrument. An hour and a half. And I went out and I watched an ironworking crew set up their instrument in 10 minutes. You know, it should have been a 5-10 minute job to set up your instrument and be ready to take the shots necessary to align and install the equipment. (Tr. 107).

When asked to describe his experience using Millwrights on industrial projects, Mr. Black testified:

“Painful. It was painful to watch what they got done in a day. It was painful to see. It was painful to watch a guy take an hour and a half to set up a gun that you know should take 10 minutes, knowing its costing us money as a company. So I mean, painful would probably be my best word for it.” (Tr. 112).

When asked to estimate the increase in cost to the Company of using a Millwright crew as opposed to using a composite crew of Ironworkers and Sheet Metal Workers, Mr. Black stated: “...I would guess fifty percent more.” (Tr. 113).

The evidence in this case regarding economies and efficiencies of operation is compelling. This evidence is premised upon the actual experience that the Employer has had using Ironworkers, Sheet Metal Workers and Millwrights in the past. From the Employer’s standpoint, it is not even a close call. A composite crew of Ironworkers and Sheet Metal Workers clearly is more efficient and economic in the Employer’s performance of industrial

work. The Board should reach that same conclusion.

VI. POST-HEARING BRIEFS OF THE PARTIES

The Ironworkers adopt and incorporate by reference all of the arguments and contentions made by the Employer in its Post-Hearing Brief.

CONCLUSION

For these reasons, and upon the authorities cited herein, it is respectfully urged that the Employer's assignment of work to the composite crew of Ironworkers and Sheet Metal Workers be sustained.

Respectfully submitted,

/s/ Ronald G. Macala

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CERTIFICATE OF SERVICE

A copy of the foregoing was filed electronically with the National Labor Relations Board,
and served via email upon the following on this 22nd day of December, 2015:

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