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Local Union 550 of the International Association of Bridge, Structural, Ornamental And Reinforcing Ironworkers and R.G. Smith Company, Inc. and The Indiana/Kentucky/Ohio Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America and Sheet Metal Workers' Local Union No. 33, Akron District A/W International Association of Sheet Metal, Air, Rail And Transportation Union

Sheet Metal Workers' Local Union No. 33, Akron District A/W International Association of Sheet Metal, Air, Rail and Transportation Union and R.G. Smith Company, Inc. and The Indiana/Kentucky/Ohio Regional Council of Carpenters, United Brotherhood of Carpenters And Joiners of America and Local Union 550 of the International Association Of Bridge, Structural, Ornamental And Reinforcing Ironworkers. Cases 08-CD-159904 and 08-CD-160179

March 23, 2016

**DECISION AND DETERMINATION OF DISPUTE
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. R.G. Smith Company, Inc. (the Employer) filed a charge on September 11, 2015, and an amended charge on October 14, 2015, alleging that Ironworkers Local Union No. 550 (Ironworkers) 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 represented by Ironworkers rather than to employees represented by the Indiana/Kentucky/Ohio Regional Council of Carpenters (Millwrights). The Employer also filed a charge on September 17, 2015, and an amended charge on October 14, 2015, alleging that Sheet Metal Workers Local 33 (Sheet Metal Workers) 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 represented by Sheet Metal Workers rather than to employees represented by Millwrights. These two cases were consolidated on October 27, 2015. A hearing was held on December 1, 2015, before Hearing Officer Noah Fowle. The Employer,

Ironworkers, and Sheet Metal Workers each filed a posthearing brief.¹

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, we make the following findings.

I. JURISDICTION

The Employer, Ironworkers, and Sheet Metal Workers stipulated that the Employer is an Ohio corporation, based in Canton, Ohio, where it is engaged in the business of construction contracting. During the 12 months preceding the filing of the charge, the Employer purchased and received goods and materials valued in excess of \$50,000 directly from points outside of the State of Ohio. These 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 Ironworkers and Sheet Metal Workers are labor organizations within the meaning of Section 2(5) of the Act. We additionally find that Millwrights is a labor organization within the meaning of Section 2(5) of the Act.² Millwrights proffered no evidence or argument to contradict any of these jurisdictional findings.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer, which performs industrial contracting work in Northern Ohio, is signatory to collective-bargaining agreements with Ironworkers, Sheet Metal Workers, and Millwrights. The collective-bargaining agreement with Ironworkers is in effect from May 1, 2013, to April 30, 2016; the agreement with Sheet Metal Workers is in effect from August 1, 2013, to May 31, 2017; and the agreement with Millwrights is in effect from June 1, 2013, to April 30, 2018. The jurisdiction of

¹ Representatives for the Employer, Ironworkers, and Sheet Metal Workers appeared at the hearing. Millwrights did not enter an appearance or file a posthearing brief.

² Although Millwrights did not appear at the hearing or submit a posthearing brief, the Employer submitted its collective-bargaining agreement with Millwrights as an exhibit. That agreement identifies Millwrights as "the exclusive bargaining agent for all Employees who perform work within the scope of this Agreement," and states that the parties' purpose in entering into the agreement "is to set forth an agreement on rates of pay, hours of work and other conditions of employment so as to promote orderly and peaceful relations between the Employers and their Employees represented by" Millwrights. We find this language supports a finding that Millwrights is a labor organization under Sec. 2(5) of the Act. Cf. *Electrical Contractors, Inc.*, 331 NLRB 839, 839 (2000), *enfd.* 245 F.3d 109 (2d Cir. 2001). Additionally, Millwrights has previously been found to be a labor organization under the Act. See *Laborers' Union Local 310 (Safeway Services, LLC)*, 363 NLRB No. 25, slip op. at 1 (2015).

all three agreements includes several of the same counties in Northern Ohio, including Ashland, Carroll, Coshocton, Holmes, Medina, Portage, Richland, Stark, Summit, Tuscarawas, and Wayne. Additionally, the agreements all cover broad categories of work typical of industrial contracting, including tasks generally performed during the installation and maintenance of heavy machinery.

As part of its industrial contracting, the Employer often performs mill maintenance and equipment setting work, which consists of the repair and maintenance of manufacturing machinery in industrial settings as well as the placing and installation of equipment in industrial facilities. Representatives of the Employer testified that it has a long-held practice of assigning such mill maintenance and equipment setting work to workers represented by Ironworkers and Sheet Metal Workers, sometimes in composite crews including both Ironworkers-represented and Sheet Metal Workers-represented employees.

In June 2015,³ Millwrights filed a pay-in-lieu grievance under its collective bargaining agreement, claiming that it should have been assigned mill maintenance and equipment setting work at the ArcelorMittal facility in Shelby, Ohio, which the Employer had assigned to Ironworkers-represented and Sheet Metal Workers-represented employees. Eventually, the Employer and Millwrights attended a Step 4 grievance meeting on September 22, which Millwrights ended because it lacked legal representation. Subsequently, the Employer and Millwrights attended a settlement meeting, where Millwrights withdrew the grievance but maintained a claim to the work.

Earlier in September, the Employer had performed more than 30 jobs during a 10-day plant shutdown at AK Steel in Mansfield, Ohio. Some of this mill maintenance and equipment setting work was being performed by Ironworkers-represented and Sheet Metal Workers-represented employees; specifically, two jobs involving water cooled elbow replacement and pump replacement were assigned via letter to a composite crew of employees represented by Ironworkers, Sheet Metal Workers, and Pipefitters Local No. 42, respectively. These letters did not encompass the full breadth of the work to be completed at the AK Steel job. However, it was the practice of the Employer to send out job assignments by letter when it was necessary to clarify a work assignment, such as in the case of composite crews. On September 8, Dan Siverston, a representative of Millwrights, sent an email to Rick Reece, the Employer's Mansfield

division manager, claiming that the Employer was "performing [Millwrights] work using the wrong craft yet again." The letter further stated that Millwrights would have "no other recourse except to file another grievance" if work on the AK Steel project was not assigned to employees represented by Millwrights. As of the hearing, no such grievance had been filed.

On September 10, the Employer's chief operating officer, Geoffrey Nicely, sent separate letters to Ironworkers' representative William Sherer and Sheet Metal Workers' representative Jerry Durieux, advising them that Millwrights had threatened to file a grievance and that it might be necessary to reassign mill maintenance and equipment setting work at the AK Steel project to workers represented by Millwrights. On September 11, Nicely received responses from both Ironworkers and Sheet Metal Workers. Ironworkers asserted that, were the Employer to reassign work to workers represented by Millwrights, it would "engage in whatever activity we deem appropriate to protect our work jurisdiction," including "withholding the referral of [I]ronworkers to your company as well as engaging in picketing. . . ." Sheet Metal Workers stated that it would "engage in any activity we deem necessary to protect our work," including withholding referral of Sheet Metal Workers and filing grievances if the work were reassigned. As a result, the Employer filed the charges in this case.

B. Work in Dispute

As clarified and stipulated by the parties at the hearing, the work in dispute is:

Water Cooled Elbow Replacement work for the Employer's AK Steel project in Mansfield, Ohio, including miscellaneous fabrication, rigging, off loading, setting, aligning, bolting and miscellaneous welding of all Water Cooled Elbow sections, and associated items with Water Cooled Elbows; and

South Descale Pump Replacement work for the Employer's AK Steel project in Mansfield, Ohio, including miscellaneous fabrication, rigging, off loading, setting, aligning, and bolting of South Descale Pump, and all associated items with South Descale Pump.⁴

³ All dates are in 2015 unless otherwise noted.

⁴ In its brief, the Employer argues that the Board should extend the work in dispute beyond the stipulated work to include all of the mill maintenance and equipment setting work performed at the AK Steel project, which encompasses over 30 different jobs. Given that the parties stipulated to the work in dispute at the hearing, and no party raised the issue of broadening the work in dispute prior to the Employer's brief, we find that the work in dispute only includes the Water Cooled Elbow and Pump Replacement Work stipulated to at the hearing. Cf. *Construction & General Laborers Local Union No. 146 (Modern Acoustics)*, 267 NLRB 1123, 1124 (1983) (broadening the work in

C. Contentions of the Parties

The Employer, Ironworkers, and Sheet Metal Workers contend that there are competing claims to the work in dispute, that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated by Ironworkers' threat to picket if the work in dispute was reassigned to employees represented by Millwrights, and that the parties have not agreed on a method for voluntary adjustment of the dispute. Sheet Metal Workers further contends that it has not violated Section 8(b)(4)(D) because it threatened only to assert its remedial rights under the collective-bargaining agreement should work be reassigned to employees represented by Millwrights. Finally, the Employer, Ironworkers, and Sheet Metal Workers all contend that the work in dispute should be assigned to a composite crew comprising both Ironworkers-represented and Sheet Metal Workers-represented employees, based on the factors of employer preference and past practice, relative skills and training, and economy and efficiency of operations. The Employer and Ironworkers additionally argue that the work in dispute should be assigned to a composite crew comprising both Ironworkers-represented and Sheet Metal Workers-represented employees based on area and industry practice. As previously stated, Millwrights did not appear at the hearing or file a posthearing brief. Accordingly, the evidence and contentions of the Employer, Ironworkers, and Sheet Metal Workers stand uncontradicted.

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. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This standard requires finding that there is reasonable cause to believe that there are competing claims for the disputed work between or among rival groups of employees and that a party has used proscribed means to enforce its claim to that work. Additionally, there must be a finding that the parties have not agreed on a method for voluntary adjustment of the dispute. *Id.* On this record, we find that this standard has been met.

1. Competing claims for work

We find reasonable cause to believe that Ironworkers, Sheet Metal Workers, and Millwrights have all claimed the work in dispute. Both Ironworkers and Sheet Metal Workers have stipulated that they claim the work in dispute, and they have also claimed the work by their Sep-

dispute beyond the notice of hearing where the matter was fully litigated).

tember 11 letters to the Employer objecting to the possible reassignment of the work to employees represented by Millwrights. Furthermore, the performance of this work by Ironworkers and Sheet Metal Workers evidences a claim to the work at issue. See *Operating Engineers Local 513 (Thomas Industrial Coatings)*, 345 NLRB 990, 992 fn. 6 (2005).

We also find reasonable cause to believe that Millwrights has claimed the work. Millwrights' representative Siverston threatened to file a grievance if work at the AK Steel project was not reassigned to employees represented by Millwrights. See *Laborers' International Union of North America, Local 265 (Henkels & McCoy)*, 360 NLRB No. 102, slip op. at 4 (2014) (finding threat to file a grievance to be evidence of claim for work). The legitimacy of this threat to file a grievance seeking the disputed work is underscored by Millwrights' previous pay-in-lieu grievance, which constituted a demand for similar mill maintenance and replacement work. See, e.g., *Laborers Local 265 (AMS Construction)*, 356 NLRB 306, 308 (2010) (finding pay-in-lieu grievances to be effective claims for disputed work). Although Millwrights eventually settled and withdrew the prior grievance, it explicitly did not disclaim the work, lending credence to the assertion that Millwrights is claiming the disputed work in this case. Finally, this assertion remains uncontroverted owing to Millwrights' failure to appear at the hearing.

2. Use of proscribed means

Ironworkers admits, and we find, that there is reasonable cause to believe that Ironworkers used proscribed means to enforce its claim to the work in dispute.⁵ Ironworkers sent a letter to Employer's chief operating officer threatening to picket the Employer if it reassigned the work in dispute to employees represented by Millwrights. The Board has long considered this type of threat to be a proscribed means of enforcing claims to disputed work. *Laborers Local 110 (U.S. Silica)*, 363 NLRB No. 42, slip op. at 3 (2015).

3. No voluntary method for adjustment of dispute

We also find no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound. The Employer, Ironworkers, and Sheet Metal Workers

⁵ Because we find that there is reasonable cause to believe that Ironworkers used proscribed means to enforce its claim, the jurisdictional element is satisfied, and we find it unnecessary to pass on whether there is reasonable cause to believe that Sheet Metal Workers violated Sec. 8(b)(4)(D). See *Operating Engineers, Local 18 (Nerone & Sons)*, 363 NLRB No. 19, slip op. at 4 (2015) (where Sec. 8(b)(4)(D) charges were filed against two unions, finding Sec. 10(k) applicable based on one union's use of proscribed means to enforce claim to disputed work).

stipulated that there is no voluntary adjustment procedure in place among the parties to resolve the current work dispute. Millwrights did not so stipulate, but proffered no evidence or argument to the contrary.

Based on the foregoing, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that there is no agreed-upon method for the voluntary adjustment of the dispute. We accordingly 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. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577–579 (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. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

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

1. Certifications and collective-bargaining agreements

The Employer, Ironworkers, and Sheet Metal Workers stipulated that, in assigning the work in dispute, the Employer is not failing to conform to an order or Board certification.

As stated above, the Employer’s collective-bargaining agreements with Ironworkers, Sheet Metal Workers, and Millwrights all cover work performed in Richland County, where the AK Steel project is located. In addition, all three collective-bargaining agreements are broadly written to cover the performance of mill maintenance and equipment setting work, listing numerous tasks inherent in the installation and repair of industrial machinery. Therefore, we find that this factor does not favor an award to any of the groups of employees.

2. Employer preference and past practice

The Employer has assigned the disputed work to employees represented by Ironworkers and Sheet Metal Workers, and it prefers that this work remain with them. Additionally, the Employer’s representatives have testified that they have a longstanding past practice of assigning mill maintenance and equipment setting work to Ironworkers-represented and Sheet Metal Workers-represented employees. Nicely testified that the Employer regularly assigns mill maintenance and equipment setting to employees represented by Ironworkers or Sheet Metal Workers and has done so for all of Nicely’s 17 years with the Employer. Reece and Mike Black, man-

ager of the Employer’s industrial division, echoed Nicely’s testimony.

The Employer’s representatives could only recall three isolated examples where employees represented by Millwrights were contacted to perform mill maintenance and equipment setting work in conjunction with the Employer. Reece testified that, on one occasion, he sought to hire a worker represented by Millwrights for a local project at the Millwrights’ urging, but that the worker in question never returned his calls. Nicely testified to two projects where Millwrights-represented employees were hired to work at the Timken steel plant in 2011 and again in 2013. The first time, the employees performed poorly, and the Timken Company requested that they be removed. The second time, the Employer did not choose to employ Millwrights-represented employees but was forced to do so under the National Maintenance Agreement. Black testified that the Millwrights did not get along with the Ironworkers who were also assigned to the project, and eventually all of the Millwrights walked off the job. These isolated instances do not undercut the Employer’s assertions that its general practice for over a decade has been to hire Ironworkers-represented and Sheet Metal Workers-represented employees to perform mill maintenance and equipment setting work, such as the work in dispute. Accordingly, we find that this factor favors an award to employees represented by Ironworkers and Sheet Metal Workers.

3. Area and industry practice

The Employer did not present any evidence that it is the common area or industry practice to employ employees represented by Ironworkers and Sheet Metal Workers for mill maintenance and equipment setting work, nor did Sheet Metal Workers present any testimony on this factor. Sherer testified that in his capacity as business manager for Ironworkers, he has had many opportunities to visit job sites for work “similar or identical to the work performed at the AK Steel project,” and that the work at these projects “has been assigned to the Ironworkers at other facilities.” Sherer did not provide further details to support these assertions. Given that none of the parties has presented any substantiated evidence on this factor, we find that this factor does not support an award to any of the groups of employees.

4. Relative skills and training

The Employer, Ironworkers, and Sheet Metal Workers all presented testimony that employees represented by Ironworkers and Sheet Metal Workers possess the skills and training to perform the disputed work and that they are experienced in doing so. Nicely testified that both Ironworkers and Sheet Metal Workers maintain compre-

hensive training and apprenticeship programs to ensure that their represented employees have the necessary skill to complete the work in dispute, and that employees represented by these two unions have extensive on-the-job experience from past projects with the Employer. Reece testified that the work in dispute is specific to the skill set of Ironworkers and Sheet Metal Workers, as the Employer has consistently assigned mill maintenance and equipment setting work to employees represented by these unions. Sherer and Durieux, testifying for Ironworkers and Sheet Metal Workers respectively, both provided detailed explanations of the comprehensive training given to their constituent employees with regard to the skills necessary for the disputed work. Ironworkers and Sheet Metal Workers also submitted multiple exhibits demonstrating elements of their training programs, including those subjects relevant to the disputed work.

By contrast, the record does not include evidence about the skills and training of employees represented by Millwrights. Nicely and Reece testified that they do not have knowledge of Millwrights' training programs. Black acknowledged that the Millwrights may very well have similar training, but testified to their poor performance at the Timken project, where he witnessed a Millwrights-represented employee taking 90 minutes to set up a piece of leveling equipment, while the Ironworkers-represented employees set up the same equipment in 10 minutes. Black also testified that Millwrights had a significantly higher injury rate on the job compared to Ironworkers and Sheet Metal Workers. Thus, we find that this factor favors an assignment of work to employees represented by Ironworkers and Sheet Metal Workers.

5. Economy and efficiency of operations

The Employer presented testimony that it is more efficient to assign the disputed work to employees represented by Ironworkers and Sheet Metal Workers. Nicely testified that in his experience, workers represented by Ironworkers and Sheet Metal Workers are more knowledgeable, work faster on the job, and have worked frequently with the Employer's local clients, such as AK Steel. Because of their familiarity with the type of work being done and the clients' facilities, Ironworkers-represented and Sheet Metal Workers-represented employees can work much more efficiently. Reece also testified that Ironworkers and Sheet Metal Workers have strong relationships with the Employer's local clients, and that employees represented by these unions were substantially more efficient and experienced. Black's testimony drew a more direct comparison between employees represented by Ironworkers and Sheet Metal

Workers, on one hand, and Millwrights-represented employees on the other, highlighting his on-the-job observations at the Timken facility in 2011 and 2013. On the first job, Timken requested that the Millwrights be removed from the job, citing poor productivity. On the second job, Black witnessed the incident, described above, where a Millwrights-represented employee took an inordinate amount of time to set up a simple piece of equipment. Black also recalled having to break up composite crews of Ironworkers and Millwrights on the second Timken job because they were not working well together. Black further testified that eventually, all of the Millwrights walked off the second Timken job, leaving the Ironworkers to finish all of the work on that project. These inefficiencies, according to Black, would dramatically increase expenses for the Employer should Millwrights-represented employees be assigned the work. Accordingly, we find that this factor favors an award of the disputed work to the employees represented by Ironworkers and Sheet Metal Workers.

CONCLUSION

After considering all of the relevant factors, we conclude that employees represented by Ironworkers and Sheet Metal Workers are entitled to perform the work in dispute. We reach this conclusion based on the factors of employer preference and past practice, relative skills and training, and economy and efficiency of operations. In making this determination, we award the work to employees represented by Ironworkers and Sheet Metal Workers, not to those labor organizations or to their members.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of R.G. Smith Company, Inc. who are represented by Ironworkers Local Union No. 550 and Sheet Metal Workers Local 33 are entitled to perform certain water cooled elbow and pump replacement work performed by R.G. Smith Company at the AK Steel project in Mansfield, Ohio.

Dated, Washington, D.C. March 23, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran,

Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD