

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Laborers' International Union of North America, Local 860 and Headlands Contracting & Tunneling, Inc. and Indiana, Kentucky, Ohio Regional Council of Carpenters. Case 08-CD-087934

August 24, 2016

DECISION AND DETERMINATION OF DISPUTE
BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Headlands Contracting & Tunneling, Inc. (the Employer), filed a charge on August 23, 2012, alleging that Laborers' International Union of North America, Local 860 (the Laborers), 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 Indiana, Kentucky, Ohio Regional Council of Carpenters (the Carpenters). The hearing was held on November 28, 2012, before Hearing Officer Laural S. Wagner. The Carpenters did not participate in the hearing. No party filed a posthearing 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, we make the following findings.

I. JURISDICTION

The Employer and the Laborers stipulated that the Employer, an Ohio corporation with a primary place of business located at 150 Parker Court, Chardon, Ohio, performs construction work in the sewer and tunnel industry. Within the 12 months preceding the filing of the charge, the Employer purchased and received goods at its Chardon, Ohio facility valued in excess of \$50,000 directly from suppliers located outside the State of Ohio. The Employer and the Laborers 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 the Laborers and the Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

Walsh Construction Company (Walsh) is the general contractor in charge of a construction project at the East-

erly Tunnel Dewatering Pump Station located at 788 East 140th Street, Cleveland, Ohio (the Easterly project). On or about May 10, 2012, Walsh hired the Employer as a subcontractor to perform the structural and concrete work on the Easterly project. The Employer's portion of the job was expected to take 2 years to complete.

The Employer has a collective-bargaining relationship with the Laborers. On May 1, 1995, the Employer¹ signed a letter of assent recognizing the Laborers as the exclusive collective-bargaining representative of its employees engaged in work within the chartered trade jurisdiction of Laborers' International Union of North America, AFL-CIO, and employed in "Highway-Heavy-Municipal and Utility Construction in the State of Ohio." The letter of assent specified that the Employer agrees to be bound by the Ohio Highway-Heavy-Municipal-Utility State Construction Agreement between Laborers' District Council of Ohio and the Ohio Contractors Association Labor Relations Division (the Laborers Agreement). The letter of assent renewed automatically because neither party terminated the letter of assent under the termination clause, and therefore the Employer continued to be bound by the Laborers Agreement then in effect. The Laborers Agreement in effect at the time of this dispute had a term from May 1, 2010, through April 30, 2013.

The Employer also has a collective-bargaining relationship with the Carpenters. On September 19, 2002, the Employer signed a letter of assent with the Carpenters² whereby the Employer agreed to be bound by the collective-bargaining agreement between the Northeast Ohio Council of the United Brotherhood of Carpenters and Joiners of America and numerous multi-employer associations (the Carpenters Agreement). The letter of assent renewed automatically because neither party terminated the letter of assent under the termination clause, and therefore the Employer continued to be bound by the Carpenters Agreement then in effect.³ The Carpenters Agreement in effect at the time of this dispute had a term from May 1, 2009, through May 31, 2013.

The Employer utilized employees represented by the Laborers to perform the structural and concrete work on the Easterly project.

Brian Allen, the Employer's owner, testified that on or about August 10, 2012, Bill Karkoff, a business representative for the Carpenters, telephoned and said that the structural work on the Easterly project belonged to employees represented by the Carpenters. Karkoff remind-

¹ At the time, the Employer was known as H&T Construction Co.

² At the time, the Carpenters were known as Ohio & Vicinity Regional Council of Carpenters.

³ Although the letter of assent was introduced into the record as a joint exhibit, the Carpenters Agreement was not.

ed Allen that the Employer had a contract with the Carpenters and that the Easterly project fell within its jurisdiction. Allen scheduled a meeting with Karkoff for August 17 to discuss the matter further, but the meeting did not occur. Allen never again heard from Karkoff about the work in dispute.

Allen further testified that on or about August 15, Charles Weitzel, a project manager for Walsh, told him to put some Carpenters-represented employees on the Easterly project and that Walsh would reimburse the Employer for any extra cost for doing so. According to Allen, Weitzel said the Carpenters were putting pressure on him to use Carpenters-represented employees on the Easterly project, that it had become “a public relations problem for Walsh,” and that “if [the Employer] hire[s] a couple of Carpenters, all this goes away.” Soon after, Allen called Anthony Liberatore, business manager for the Laborers, and informed him of his conversation with Weitzel.

The next day, August 16, Allen received a letter from Liberatore that stated: “Please be advised that Laborers’ Local 860 will have no choice but to strike if [the Employer] assigns structure work to Carpenters on the Northeast Ohio Regional Sewer District Easterly Tunnel Dewatering Pump Station.”

There is no evidence that the Employer ever used Carpenters-represented employees on the Easterly project. There has not been a strike.

B. Work in Dispute

The Employer and the Laborers stipulated that the work in dispute is the erection and dismantling of any structural work/form, including all patented form systems that are used to hold or form concrete, and any reinforced structural concrete work at the Easterly Tunnel Dewatering Pump Station located at 788 East 140th Street, Cleveland, Ohio.

C. Contentions of the Parties

The Employer and the Laborers contend that there are competing claims for the work in dispute, that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated by the Laborers’ threat to strike if the work in dispute were reassigned to employees represented by the Carpenters, and that the parties have not agreed on a method for voluntary adjustment of the dispute. The Employer and the Laborers further contend that the work in dispute should be assigned to employees represented by the Laborers based on the factors of collective-bargaining agreements, employer preference and current assignment, past practice, area and industry practice, relative skills and training, and economy and efficiency of operations.

As stated, the Carpenters did not appear at the hearing or file a posthearing brief. Accordingly, the contentions of the Employer and the Laborers stand uncontradicted, as does the evidence the Employer and the Laborers introduced at the hearing.

D. Applicability of the Statute

The Board may proceed with determining a dispute pursuant to 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 the work. *Id.* Additionally, there must be a finding that the parties have not agreed on a method for the voluntary adjustment of the dispute. *Id.* On this record, we find that this standard has been met.

1. Competing claims for work

The Employer and the Laborers stipulated, and we find, that the Laborers have claimed the work in dispute. We also find reasonable cause to believe that the Carpenters have claimed the work. Allen, the Employer’s owner, testified that on or about August 10, 2012, Carpenters Business Representative Karkoff told him that the work in dispute belonged to employees represented by the Carpenters because the Easterly project fell within the jurisdictional scope of the Employer’s contract with the Carpenters.

2. Use of proscribed means

As described, on August 16, 2012, the Employer received a letter from the Laborers Business Manager Liberatore stating that the Laborers would “have no choice but to strike” if the Employer assigned the work in dispute to employees represented by the Carpenters. Such a threat establishes reasonable cause to believe that the Laborers used proscribed means to enforce its claim to the work in dispute. See *Electrical Workers, Local 48 (Kinder Morgan Terminals)*, 357 NLRB 2217, 2218 (2011).

3. No voluntary method for adjustment of dispute

Finally, the Employer and the Laborers stipulated, and we find, that there is no agreed-upon method for the voluntary adjustment of this dispute that would bind all parties.

We therefore find that this 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 (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 this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence of a Board certification concerning the employees involved in this dispute.

The Employer is subject to a collective-bargaining agreement with the Laborers. The Laborers Agreement, which the Employer accepted and adopted via its letter of assent with the Laborers, specifically covers, among other things, “Water Treatment Facilities Construction” and “Pumping Stations.” This language clearly covers the work in dispute.

The Employer is also subject to a collective-bargaining agreement with the Carpenters. The Employer’s letter of assent with the Carpenters, however, does not specifically describe the scope of the work; rather, the letter merely provides that it covers work “performed by Carpenters” in various counties, including Cuyahoga County, Ohio, where the work in dispute is located. Although the letter of assent binds the Employer and the Carpenters to the Carpenters Agreement, the Carpenters Agreement was not introduced into the record, and no other evidence concerning the scope of the Carpenters Agreement was presented at the hearing.

Because there is no evidence establishing that the Carpenters Agreement clearly covers the work in dispute, we find that this factor favors an award of the disputed work to employees represented by the Laborers. See *Laborers’ Union Local 310 (Safway Services, LLC)*, 363 NLRB No. 25, slip op. at 3 (2015).

2. Employer preference and current assignment

Allen, the Employer’s owner, testified that the Employer preferred to assign, and has assigned, the work in dispute to employees represented by the Laborers. Accordingly, we find that this factor favors an award of the disputed work to employees represented by the Laborers.

3. Employer past practice

Allen testified that the Employer has always used employees represented by the Laborers to perform structural

concrete work and that the Employer has never used Carpenters-represented employees to perform such work. Accordingly, we find that this factor favors an award of the disputed work to employees represented by the Laborers.

4. Area and industry practice

Allen testified that the area and industry practice is for employees represented by the Laborers to perform structural concrete work. In contrast, the record does not include evidence regarding area and industry practice as it pertains to employees represented by the Carpenters. Accordingly, we find that this factor favors an award of the disputed work to employees represented by the Laborers.

5. Relative Skills

Allen testified that employees represented by the Laborers have the skills and training necessary to perform the work in question. Specifically, Allen testified that the Laborers’ hiring hall “has a pretty good inventory of skilled tunnel-hands” because “[t]hey’ve done a lot of [that type of work].” In contrast, the record does not include evidence on whether employees represented by the Carpenters have received relevant training or possess the skills to perform the work in dispute. Accordingly, we find that this factor favors an award of the disputed work to employees represented by the Laborers.

6. Economy and efficiency of operations

Allen testified that using employees represented by the Laborers to perform the structural concrete work on the Easterly project provides certain efficiencies over using Carpenters-represented employees. Specifically, Allen testified that Carpenters-represented employees would only assemble the concrete forms; they would not perform other related tasks, such as pouring the concrete, tying the rebar, dismantling the forms, and moving the forms. By contrast, employees represented by the Laborers would perform all of the tasks associated with the job. In these circumstances, we agree with the Employer that Laborers-represented employees provide certain efficiencies. Accordingly, we find that this factor favors an award of the disputed work to employees represented by the Laborers.

CONCLUSIONS

After considering all of the relevant factors, we conclude that employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and current assignment, employer past practice, area and industry practice, relative skills, and economy and efficiency of operations. In

making this determination, we are awarding the work to employees represented by the Laborers, not to that 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.

Employees of Headlands Contracting & Tunneling, Inc., represented by Laborers' International Union of North America, Local 860, are entitled to perform the erection and dismantling of any structural work/form, including all patented form systems that are used to hold or form concrete, and any reinforced structural concrete work at the Easterly Tunnel Dewatering Pump Station located at 788 East 140th Street, Cleveland, Ohio.

Dated, Washington, D.C. August 24, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD