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International Union of Elevator Constructors, Local 3, AFL-CIO and Otis Elevator Company. Case 14-CD-156706

October 21, 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 (the Act). The Otis Elevator Company (Otis) filed a charge on July 24, 2015, alleging that the Respondent, International Union of Elevator Constructors, Local 3, AFL-CIO (Union) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing Otis to assign certain elevator cab interior refinishing work to employees it represents rather than to the unrepresented employees of Renaissance Metals, Inc. d/b/a Mid America Metals (Mid America). A hearing was held on August 18, 2015, before Hearing Officer Neale K. Sutcliff. Thereafter, Otis and the Union filed posthearing briefs. The Union also filed a motion to quash the Section 10(k) notice of hearing and a motion to correct an error in the hearing transcript.¹

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

Otis, a corporation with its principal offices in Farmington, Connecticut, and a facility at 8240 Brentwood Industrial Drive, St. Louis, Missouri, is engaged in the installation, maintenance and repair of elevators. The parties stipulated that during the 12 months prior to the hearing, a representative time period, Otis purchased and received at its Missouri facilities goods valued in excess of \$50,000 directly from points outside the State of Missouri.

Mid America, a corporation with its principal offices in Ozark, Missouri, and a facility at 1906 Delmar Boulevard, St. Louis, Missouri, refinishes architectural metal, stone, and wood on commercial and residential projects. The parties stipulated that during the 12 months prior to the hearing, a representative time period, Mid America purchased and received at its Missouri facilities goods

valued in excess of \$50,000 directly from points outside the State of Missouri.

We find that Otis and Mid America are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

In light of the parties' stipulation and other undisputed record evidence, we further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

BSI Constructors (BSI) was the general contractor on a project to remodel the Lennox Hotel in downtown St. Louis. As part of the remodeling project, BSI subcontracted with Otis to modernize four of the hotel's elevators. This included updating the elevators' mechanical and electrical systems so that they complied with relevant codes and refinishing the cabs' interiors. The elevator renovation began in January 2015 and was scheduled to be completed in August 2015.²

Otis has a longstanding collective-bargaining relationship with the Union. At the time of the relevant events in this case, Otis was bound by the collective-bargaining agreement between the Union and the National Elevator Bargaining Association. In performing the BSI subcontract, Otis employed as many as four Union-represented employees in the elevator mechanic and helper classifications.

Three of the four elevators Otis was contracted to modernize were passenger elevators that required extensive interior refinishing work. The fourth was a service elevator that did not require interior refinishing. Otis' Union-represented mechanics and helpers performed mechanical and electrical work and were also responsible for operating the elevators prior to code inspections. Once the mechanical and electrical tasks were complete, the elevators were inspected for code compliance. After the elevators passed inspection, responsibility for their operation was returned to BSI, but Otis employees often continued to operate them. Two of the passenger elevators (elevators 3 and 4) passed inspection and were turned over to BSI in April. A third passenger elevator (elevator 2) passed inspection in August.

Otis' subcontract with BSI required it to contract with a "professional metals refinishing contractor" to renovate the three passenger cabs' interiors. Interior renovation work included refinishing the interiors' bronze front returns, panels, entrance jambs and inside headers. Otis chose Mid America, a nonunion company, as the refin-

¹ All parties have consented to the Union's motion to correct an error in the hearing transcript, and we grant the motion.

² All dates are 2015 unless otherwise indicated.

ishing subcontractor. Otis had contracted such work to Mid America before. Mid America's interior renovation work did not start until the other modernization and renovation work was complete.

Mid America's employees were to perform the bronze refinishing work in the evening once the other project workers had left for the day so that they could work without interruption or risk of scratches or blemishes to refinished cab interiors. To give Mid America's employees access to the elevators, they were to be parked and locked (i.e., disconnected from the electrical power source) at the end of the day on the first floor with the doors open. Refinishing the bronze in each cab was expected to require two employees working two evenings. The work on elevators 3 and 4 was scheduled to start on July 20.

On July 9, Otis' modernization superintendent instructed one of the Union-represented mechanics to park and lock elevators 3 and 4 at the end of day on July 20. The mechanic replied that the Union would not allow him to park and lock the elevators with their doors open. Later that same day, the Union's business manager telephoned the modernization superintendent and asserted that the Union had jurisdiction over interior refinishing work. The business manager said that the issue could be resolved if Otis paid a Union-represented employee to "stand by," i.e., watch but not work, while Mid America employees performed the refinishing work. The business manager also told the modernization superintendent that the Union would continue to order the mechanic not to park and lock the elevators with the doors open.

On July 20, Otis' modernization superintendent directed another mechanic to park and lock elevators 3 and 4 so that Mid America could work on them that evening. This mechanic likewise said that the Union would not allow him to park the elevators with the doors open. Later that same day, the Union's business manager again telephoned the modernization superintendent to claim the interior refinishing work and to inform Otis that the Union would persist in ordering mechanics not to park the elevators with the doors open. During this call, the business manager also asserted that leaving the elevator doors open was a safety issue and that the mechanic might be personally liable if anyone was hurt. The modernization superintendent disputed the safety claim. The mechanic did not leave the elevators parked with the doors open, but Mid America employees were unable to do interior refinishing work that evening for other reasons.

On July 21, Otis' senior field operations manager telephoned the Union's business manager in an effort to resolve the interior refinishing issue. The business manager

said that the dispute was a jurisdictional issue, not a safety matter. He again suggested that Otis pay Union-represented employees to "stand by" while Mid America employees worked. The business manager also said that Union-represented mechanics would continue to refuse to leave the elevators with the doors open even if Otis directed them to do so because the interior refinishing work was the Union's work. In response, Otis filed a Section 8(b)(4)(D) charge against the Union on July 24.

B. Work in Dispute

The disputed work involves the refinishing of bronze front returns, panels, entrance jambs, and headers inside three passenger elevator cabs at the Lennox Hotel in St. Louis.

C. Contentions of the Parties

Otis avers that the Union violated Section 8(b)(4)(D) of the Act by threatening to induce and inducing Otis employees to engage in partial work stoppages—i.e., twice refusing to park and lock elevators 3 and 4 with the doors open so that interior refinishing work could proceed—unless the disputed refinishing work was reassigned to Union-represented employees. On the merits of the award, Otis argues that the disputed work was properly assigned to Mid America's unrepresented employees on the basis of area practice, relative skills, company preference and past practice, and economy and efficiency of operations.

The Union moves to quash the notice of hearing, arguing that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. It contends that the July 2015 exchanges between its business manager and member employees, on the one hand, and Otis managers on the other about the disputed work concerned only elevator 2, which had not yet been inspected and turned over to BSI. The Union concedes that it claimed the disputed work on elevator 2. It asserts, however, that its business manager did not induce Otis employees to engage in a partial work stoppage. Rather, the Union argues, Otis employees independently refused to park and lock elevator 2 with the doors open because of their concerns about the safety of doing so and the risk of being held personally liable for any accidents. The Union presents no argument on the factors to consider for awarding the disputed work.

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 requires finding there is reasonable cause to believe that there are competing claims to the disputed work and that a party has used proscribed means to en-

force its claim to the work in dispute. See, e.g., *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004). “This reasonable cause standard is substantially lower than that required to establish that the statute has in fact been violated. In addition, the Board’s Section 10(k) procedure, unlike the unfair labor practice procedure, does not call for assessments of the credibility of witnesses.” *Plumbers Local 562 (Charles E. Jarrell Contracting)*, 329 NLRB 529, 531 (1999) (quoting *Plumbers Local 562 (C & R Heating & Service Co.)*, 328 NLRB 1235, 1235 (1999)). Additionally, the Board will not proceed under Section 10(k) if there is an agreed-upon method for voluntary adjustment of the dispute that binds all parties. See, e.g., *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005).

1. Competing claims to work in dispute

First, we find reasonable cause to believe that there were competing claims to the disputed bronze refinishing work. There is no dispute that unrepresented Mid America employees were prepared to perform the work that had been subcontracted to Mid America. Further, as noted above, the Union’s business manager claimed the work in at least three discussions with Otis managers. Additionally, the business manager twice proposed that Otis pay one or more Union-represented employees to stand by while Mid America employees performed the work, and the Board has found that comparable pay-in-lieu grievances are essentially claims for disputed work. See, e.g., *Operating Engineers, Local 18 (Nerone & Sons, Inc.)*, 363 NLRB No. 19, slip op. at 3 (2015); *Laborers Local 265 (AMS Construction)*, 356 NLRB 306, 308 (2010).

2. Use of proscribed means

Second, we find reasonable cause to believe that the Union used proscribed means to enforce its claims to the disputed work. As stated above, Union-represented employees twice refused to park and lock elevators with their doors open so that Mid America employees could do refinishing work. On both occasions, the employees said that the Union would not allow them to do so. Shortly following those refusals, the Union’s business manager telephoned Otis’ modernization superintendent to claim the refinishing work, and the business manager conveyed the same claim to Otis’ senior field operations manager. During those calls, the business manager threatened that the Union would continue to instruct employees it represents to refuse to park and lock the elevators with the doors open in order to prevent Mid America employees from performing the disputed work. He also stated that Union-represented employees would never comply with Otis’ instructions to leave the elevators with

the doors open because the interior refinishing work was the Union’s work. These comments by the business manager are undisputed.

In finding reasonable cause to believe that the Union used proscribed means to enforce its claims to the disputed work, we reject the Union’s arguments that Otis’ parking and locking directions related only to elevator 2 and that employees decided of their own accord not to follow Otis’ directions due to concerns about safety and personal liability.³ As all concede, Mid America was not scheduled to perform disputed work on elevator 2 during the relevant time period (July 2015). The modernization and renovation work on elevator 2 was not yet complete. It would have been contrary to industry practice and to the terms of Otis’ contract with BSI for Mid America to have started its refinishing of elevator 2 before the other work on that elevator was finished.

In contrast, there is no question that modernization and renovation work on elevators 3 and 4 was complete in July and that those elevators were ready for Mid America’s employees to perform interior refinishing work. Consequently, the evidence provides reasonable cause to believe that Otis directed Union-represented employees to park and lock elevators 3 and 4 in July, not elevator 2. Further, there were no safety and personal liability concerns relating to elevators 3 and 4 that might have given Union-represented employees pause about leaving those elevators parked and locked with the doors open. Moreover, the evidence suggests that individual employees did not arrive at safety and personal liability concerns on their own. Rather, the Union suggested those concerns to them as reasons for refusing to do assigned tasks.

3. No voluntary method for adjustment of disputes

The Union and Otis stipulated that there is no voluntary adjustment procedure in place to resolve the jurisdictional dispute.

Based on the foregoing, we find that there are competing claims for the work in dispute, reasonable cause to believe that Section 8(b)(4)(D) has been violated, and no agreed-upon method for the voluntary adjustment of the dispute. Accordingly, we find that the dispute is properly before the Board for determination, and we deny the Union’s motion to quash the notice of hearing.

³ The Union’s efforts to defeat a “reasonable cause” finding by raising purported evidentiary conflicts are without merit. “It is well settled that a conflict in testimony does not prevent the Board from proceeding under Sec. 10(k) because in this type of proceeding the Board is not charged with finding that a violation did in fact occur, but only that reasonable cause exists for finding a violation.” E.g., *Elevator Constructors Local 5 (Stuart-Dean Co.)*, 310 NLRB 1189, 1191 fn. 4 (1993).

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 Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 576-586 (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 to our determination of this dispute.

1. Board certifications and collective-bargaining agreements

There are no relevant Board certifications.

Mid America's employees are unrepresented and therefore are not covered by a collective-bargaining agreement. The tasks or functions that fall within the Union's work jurisdiction are specified in Article IV of the collective-bargaining agreement between the Union and the National Elevator Bargaining Association. That provision does not expressly cover interior refinishing. The Article IV language on which the Union relies states that bargaining-unit employees are entitled to perform "[t]he assembly of all cabs complete." That wording does not establish that the Union has jurisdiction over interior refinishing work, which does not involve "assembly." Further, the Union does not dispute Otis' assertion that there are no court rulings or arbitration awards supporting the Union's claim to such work. Thus, we find that this factor does not favor the assignment of the disputed work to either Union-represented employees or Mid America's employees.

2. Employer preference, current assignment, and past practice

Otis assigned the disputed work to Mid America's unrepresented employees, and the evidence indicates that Otis was satisfied with the work quality of those employees. Otis has used Mid America or one of its competitors to do interior refinishing on all of its elevator modernization and renovation projects in the St. Louis area and throughout the country. The Union does not dispute that fact.

The Union presented one witness who testified concerning the performance of interior refinishing work by Union-represented employees. This witness testified about one instance of a Union-represented employee performing interior refinishing. He did not say that it was common for Union-represented employees to do interior refinishing work, and there is no such evidence

in the record. Evidence of "isolated instances" does not show a past practice of using Union-represented employees to perform interior refinishing work. See *Laborers' Local 310 (KMU Trucking & Excavating)*, 361 NLRB No. 37, slip op. at 4 (2014). We find, therefore, that the factors of employer preference, current assignment and past practice favor assigning the disputed work to employees of Mid America.

3. Industry and area practice

The overwhelming weight of evidence establishes that both in the St. Louis area and throughout the country, Otis and other large elevator modernization and renovation contractors exclusively use specialty contractors like Mid America to do interior refinishing work. Otis managers with decades of experience testified that they had always used specialty contractors like Mid America to do interior refinishing work. An experienced manager with KONE, Inc., a competitor of Otis, testified that he has exclusively used specialty firms for interior refinishing work.

A Mid America executive testified concerning numerous projects on which Mid America has performed interior refinishing work for Otis and other elevator renovation contractors. Documentary evidence shows that Mid America has performed specialty refinishing work in Missouri, Georgia, Texas, North Carolina, South Carolina and elsewhere. On the other hand, a Union witness testified to one instance of a Union-represented employee performing interior refinishing work. The record evidence shows that the use of specialty firms by Otis and other large elevator contractors to perform interior refinishing work is an area and industry practice. Thus, the factors of industry and area practice favor assigning the work to employees of Mid America.

4. Relative skills and training

Unchallenged testimony established that Mid America employees receive extensive training in every aspect of interior refinishing work and in the safe use of hazardous chemicals involved in that work. This training includes opportunities to work on a mock-up elevator at a Mid America facility. In contrast, the Union's apprenticeship program does not include any training in refinishing work. In discussions with Otis, the Union's business manager conceded that Union-represented employees might not have the training or skills to do the work. He argued, however, that Otis should either provide the necessary training or use Union-represented employees on composite crews with employees who possess the requisite skills and training. The business manager also suggested that the skills deficit be solved by paying Union-

represented employees to watch the work being performed by Mid America employees.

Based on all of the relevant evidence, we find that the factor of relative skills and training favors awarding the work to employees of Mid America.

5. Economy and efficiency of operations

As discussed above, Union-represented employees do not have training or experience in refinishing elevator cab interiors. In order to perform the disputed work, they would first have to be trained to do it, at a substantial cost in time and money. In contrast, employees of Mid America already possess the necessary skills and can perform the disputed work without delay. The Union suggests that Otis utilize composite crews of qualified (Mid America) and unqualified (Union-represented) employees or that Otis pay Union-represented employees to watch as the work is performed by employees of Mid America, for whose work Otis must also pay. However, both proposals would be less economical and efficient than simply having employees of Mid America perform the work. As a result, we find that the factor of economy and efficiency of operations strongly favors awarding the work to employees of Mid America.

6. Prior Board cases

In *Elevator Constructors Local 5 (Stuart-Dean Co.)*, 310 NLRB 1189 (1993), the Board awarded elevator interior refinishing work to the employees of a specialty subcontractor, Stuart-Dean Co., Inc., rather than to the principal elevator contractor's employees represented by another International Union of Elevator Constructors local. Stuart-Dean is a competitor of Mid America and is identified as such in the record in this case. The nationwide multiemployer collective-bargaining agreement applicable in that case was a predecessor of the National Elevator Bargaining Association contract here, and the other relevant facts were strikingly similar to this case in every respect. Consequently, the factor of prior Board cases also favors awarding the disputed work to employees of Mid America.

CONCLUSION

After considering all of the relevant factors, we conclude that employees of Mid America are entitled to per-

form the work in dispute. We reach this conclusion relying on the factors of employer preference, current assignment, past practice, industry and area practice, relative skills and training, economy and efficiency of operations, and a prior Board decision.

DETERMINATION OF DISPUTE

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

1. Employees of Renaissance Metals, Inc. d/b/a Mid America Metals are entitled to perform the refinishing of bronze front returns, panels, entrance jambs and headers inside three passenger elevator cabs at the Lennox Hotel in St. Louis.

2. International Union of Elevator Constructors, Local 3, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Otis Elevator Company to assign the disputed work to employees represented by it.

3. Within 14 days from this date, International Union of Elevator Constructors, Local 3, shall notify the Regional Director for Region 14 in writing whether it will refrain from forcing Otis Elevator Company, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C. October 21, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD