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Local 876, International Brotherhood of Electrical Workers (IBEW), AFL-CIO and Newkirk Electric Associates, Inc. and Local 324, International Union of Operating Engineers, AFL-CIO. Case 07–CD–182456

May 19, 2017

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Newkirk Electric Associates, Inc. (the Employer) filed a charge on August 19, 2016,¹ alleging that Local 876, International Brotherhood of Electrical Workers, AFL–CIO (IBEW Local 876) 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 represented by IBEW Local 876 rather than to employees represented by Local 324, International Union of Operating Engineers, AFL–CIO (Operating Engineers Local 324). A hearing was held on October 13, 14, and 20 before Hearing Officer Mary Beth Foy. During the hearing, the hearing officer denied Operating Engineers Local 324’s motion to quash the Section 10(k) notice of hearing, in which Operating Engineers Local 324 asserted that the parties had agreed upon a method for the voluntary adjustment of the dispute—namely, the Building and Construction Trades Department, AFL–CIO’s Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Plan). Thereafter, the Employer, IBEW Local 876, and Operating Engineers Local 324 filed posthearing briefs. Upon leave by the Board, amicus curiae Plan subsequently filed a brief arguing that the Board does not have jurisdiction to determine the dispute because all parties are stipulated to the Plan. The Employer and IBEW Local 876 subsequently filed briefs in response to the amicus brief.

The National Labor Relations Board affirms the hearing officer’s rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

¹ All dates are in 2016 unless stated otherwise.

I. JURISDICTION

The parties stipulated that during the calendar year ending December 31, 2015, the Employer, a Michigan corporation, performed services valued in excess of \$50,000 in states other than the State of Michigan. The parties also stipulated, and we find, that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the Board’s jurisdiction, and that IBEW Local 876 and Operating Engineers Local 324 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is an electrical contractor that performs cell tower, substation, line, and tower work, industrial electrical work, high voltage electrical and engineering and maintenance work, and voice/data/video work. The Employer has performed tower work for utility companies for over 30 years, using IBEW Local 876–represented employees to complete the work. The Employer created a cell tower division in 1990. Cell tower sites require both ground and electrical work. The Employer generally uses two-person composite crews, comprised of an IBEW Local 876–represented employee and an IBEW Local 275–represented employee, to complete work on cell tower sites.

The Employer has had a collective-bargaining relationship with IBEW Local 876 since the 1970s. The most recent agreement of record, the Agreement Between American Line Builders Chapter of the National Electrical Contractors Association, and Local Unions No. 17 and 876, IBEW, Covering Teledata Work (the “C Agreement”), is effective through December 3, 2017. The C Agreement covers, in pertinent part, “all construction, installation, maintenance and removal of teledata facilities (voice, data and video), including outside plant, telephone and data inside wire.” The C Agreement also includes classifications of IBEW Local 876–represented employees who perform cell tower work, including cell tower techs, operators, and groundsmen.

Since 1984, the Employer also has had a collective-bargaining relationship with Operating Engineers Local 324. The Employer is bound to several collective-bargaining agreements between Operating Engineers Local 324 and certain employer organizations via a short form agreement. The short form agreement incorporates various contracts, which cover, in pertinent part, “construction of . . . roads,” “any work which requires excavation of earth . . . including, but not limited to, . . . con-

duits [and] general excavation,” “steel and metal erection work,” and “erection, operation, and maintenance of all hoisting and portable equipment.” In addition, the short form agreement states: “The parties hereto agree that in the event of a jurisdictional dispute with any other union or unions, the dispute shall be submitted to the Impartial Jurisdictional Disputes Board for settlement in accord with the plan adopted by the Building Trades Department of the AFL–CIO.”

In approximately January, Operating Engineers Local 324 Business Representative Brandon Poppo began to monitor the Employer’s jobsites for nonunion employees. Over the course of approximately 6 months, Poppo visited about 10 of the Employer’s jobsites and allegedly witnessed nonunion and IBEW Local 876–represented employees operating earth moving/dirt digging equipment and cranes, work believed by Operating Engineers Local 324 to be under its jurisdiction pursuant to the short form agreement. In a July 8 letter to the Employer, counsel for Operating Engineers Local 324’s fringe benefits funds notified the Employer that the Funds had reason to believe they were entitled to contributions for work covered by the short form agreement but assigned to employees not represented by Operating Engineers Local 324. The Funds threatened a lawsuit over the contributions. On August 12, the Employer notified IBEW Local 876 that it would be reevaluating the assignment of the work at issue and that a reassignment to Operating Engineers Local 324 was possible. IBEW Local 876, through its counsel, responded by email on August 17 that a reassignment to Operating Engineers Local 324 “would subject [the Employer] . . . to actions by [IBEW] Local 876 including, but not limited to, the filing of unfair labor practices, picketing, and other applicable conduct directed to challenge any reassignment” The Employer then filed an unfair labor practice charge, alleging that IBEW Local 876 had made a threat in violation of Section 8(b)(4)(D) of the Act.

On August 30, Operating Engineers Local 324 Director of Jurisdiction Terry George filed a notice of violation with the Plan seeking resolution of the jurisdictional dispute. That same day, the Plan administrator, Richard Resnick, sent a letter to the Employer’s vice president, Jim Anton, and IBEW President Lonnie Stephenson instructing the parties to cease the alleged violations and process the jurisdictional dispute through the Plan. On August 31, President Stephenson sent a letter to IBEW Local 876 Business Manager Chad Clark, which stated that “[p]ursuant to the attached communication from the Plan . . . you are hereby advised to take appropriate action to cease the alleged violations and any impediment to job progress in violation of the Plan [and to] instruct

[the Employer] . . . to take appropriate action to cease their impediment to job progress by withdrawing their [Board] charge over the jurisdictional dispute.” On September 1, Clark emailed Anton asking the Employer to withdraw its Board charge. On September 2, Clark sent a letter to President Stephenson confirming receipt of Stephenson’s August 31 request and stating that he had “fully complied with [the] directive.” At no point, however, did Clark clearly disclaim the work in dispute or withdraw IBEW Local 876’s threat of picketing. Resnick subsequently selected an arbitrator, who issued an interim ruling on September 9 that all the parties are stipulated to the Plan, despite IBEW Local 876’s status as an “outside” local.²

B. *Work in Dispute*

The parties stipulated that the work in dispute is the use of earth moving/dirt digging equipment, cranes, and other power-driven equipment in connection with the assembly, disassembly, erection, and modification of cell towers, including the hoisting of cell towers, clearing land, and constructing roads.

C. *Contentions of the Parties*

Operating Engineers Local 324 moves to quash the notice of hearing, arguing that the parties have agreed upon a method for the voluntary adjustment of the dispute. It argues that both Operating Engineers Local 324 and IBEW Local 876 are stipulated to the Plan through the affiliation of their respective international unions with the Building and Construction Trades Department (BCTD), AFL–CIO. It argues in addition that the Employer is stipulated to the Plan through its short form agreement with Operating Engineers Local 324, in which the Employer agreed to abide by the Plan. It also contends that IBEW President Stephenson’s letter and IBEW Local 876’s affirmative response to that letter “undermine” IBEW Local 876’s claim that it is not stipulated to the Plan.

Alternatively, if the notice of hearing is not quashed, Operating Engineers Local 324 asserts that the work in dispute should be awarded to employees it represents based on the Board’s established factors of past practice,

² Pursuant to IBEW Constitution, Art. 26, Sec. 4, outside locals have jurisdiction over “operation, maintenance and repair of equipment owned or operated by utility employers[;] [a]ll electrical construction work outside of isolated plants and the property lines of any given property[; and a]ll line work consisting of . . . concrete or metal . . . poles or towers, including wires, cables or other apparatus supported therefrom.” In sum, “outside” locals perform work outside buildings. See *Local 181, Operating Engineers (Service Electric Co.)*, 146 NLRB 483, 485 fn. 3 (1964).

area and industry practice, relative skills and training, and economy and efficiency of operations.

Amicus Plan, like Operating Engineers Local 324, argues that all the relevant parties here—the Employer, IBEW Local 876, and Operating Engineers Local 324—are stipulated to the Plan pursuant to Plan procedures and the BCTD’s Constitution and thus are bound to utilize the Plan, divesting the Board of jurisdiction to determine the dispute under Section 10(k).

IBEW Local 876 and the Employer contend that the Board is authorized to determine the merits of this jurisdictional dispute because IBEW Local 876, as an “outside” local, is neither stipulated to the Plan nor 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 pursuant to the requirement of Section 10(k). Specifically, they argue that the Board has repeatedly found that the Plan does not apply to or bind “outside” IBEW locals in any manner. In its response to the brief of amicus Plan, the Employer also argues that it is not stipulated to the Plan because the short form agreement between the Employer and Operating Engineers Local 324 binds the Employer only to the “Impartial Jurisdictional Disputes Board” (the Plan’s predecessor), not to any successor dispute resolution mechanisms and thus not to the Plan.

On the merits, IBEW Local 876 and the Employer assert that the work in dispute should be awarded to employees represented by IBEW Local 876 based on the factors of their collective-bargaining agreement, employer preference, current assignment, past practice, area and industry practice, relative skills and training, and economy and efficiency of operations.

The parties have stipulated that the jurisdictional award “should apply only in the geographical area . . . in which the jurisdiction of [IBEW] Local 876 and [Operating Engineers] Local 324 overlap.”

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 standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work and that a party has used proscribed means to enforce its claim to the work in dispute. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). Additionally, there must be a finding that there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound.

1. Competing claims for work

The parties stipulated, and we find, that Operating Engineers Local 324 and IBEW Local 876 both claim the work in dispute.

2. Use of proscribed means

There is reasonable cause to believe that IBEW Local 876 used means proscribed under Section 8(b)(4)(D) of the Act to enforce its claim to the work in dispute. As noted above, on August 17, counsel for IBEW Local 876 sent an email to the Employer’s counsel threatening to subject the Employer to certain actions, including, but not limited to, the filing of unfair labor practices, picketing and other applicable conduct if the disputed work were reassigned to Operating Engineers Local 324. The Board has long considered this type of threat to be a proscribed means of enforcing claims to disputed work. See *Laborers Local 110 (U.S. Silica)*, 363 NLRB No. 42, slip op. at 3 (2015).

3. No voluntary method for adjustment of the dispute

We further find, in agreement with the Employer and IBEW Local 876, that there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound. It is well settled that “all parties to the dispute must be bound if an agreement is to constitute an agreed method of voluntary adjustment.” *Laborers Local 1184 (High Light Electric)*, 355 NLRB 167, 169 (2010) (internal quotations omitted). The Board carefully scrutinizes the agreements at issue in order to determine if the parties are bound. *Id.*

The agreement between IBEW Local 876 and the Employer does not contain any provision binding Local 876 to the Plan. While IBEW Local 876 is affiliated with the IBEW, which is bound to the Plan, IBEW Local 876 Business Manager Chad Clark testified without contradiction that only “inside” IBEW locals are bound to the Plan, that IBEW Local 876 is an “outside” local, and that IBEW Local 876 is not affiliated with the BCTD. Consistent with this testimony, the Board has long “recognized the distinction between ‘inside’ and ‘outside’ locals of the IBEW and taken official note of the fact that the latter are not subject to the procedures for the resolution of jurisdictional disputes established by the [BCTD],” i.e., the Plan. *Electrical Workers, Local 44 (Utility Builders)*, 233 NLRB 1099, 1100 (1977); *Electrical Workers Local 357 (Western Diversified Electric)*, 344 NLRB 1239, 1240 (2005); *Local 542, Operating Engineers (W. V. Pangborne & Co.)*, 213 NLRB 124, 126–127 (1974) (citing cases).

Operating Engineers Local 324 argues that, regardless of any exemption from the Plan enjoyed by “outside”

local unions in the past, the action of IBEW Local 876's parent body, via IBEW President Stephenson's letter, and IBEW Local 876's affirmative response to that letter undermine IBEW Local 876's current claim that it is not stipulated to the Plan. Operating Engineers Local 324 asserts that if IBEW Local 876, an "outside" local, were not stipulated to the Plan, IBEW President Stephenson would not have advised the Local to cease violating the Plan and IBEW Local 876 would have objected to Stephenson's "directive" rather than indicated that it had "complied." Contrary to Operating Engineers Local 324's argument, however, we find that President Stephenson's letter alone is insufficient, under the circumstances, to establish that IBEW Local 876 is bound to the Plan in light of the countervailing evidence set forth above.³

Operating Engineers Local 324 also submitted into evidence a copy of the September 9 arbitrator's decision finding that the Employer, Operating Engineers Local 324, and IBEW Local 876 were all bound under the Plan.⁴ Amicus Plan argues that although IBEW did not participate in the arbitration hearing, neither IBEW nor IBEW Local 876 is relieved of its obligations under the Plan. However, the arbitrator's decision cannot bind IBEW Local 876 to the Plan inasmuch as IBEW Local 876 was not party to the arbitral proceeding and did not

³ In *Operating Engineers Local 4 (JDC Demolition)*, 363 NLRB No. 17, slip op. at 2-3 (2015), cited by Operating Engineers Local 324 in its posthearing brief, the Board held that Operating Engineers Local 4 and Laborers' Local 1421 were stipulated to the Plan through their respective parent unions' membership in the BCTD. There the Board noted that its finding was supported by the LIUNA president's invocation of the Plan in a letter 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." *Id.*, slip op. at 3. But *JDC Demolition* involved a jurisdictional dispute between an Operating Engineers local and a Laborers local—not, as here, between an Operating Engineers local and an "outside" IBEW local—and there was no evidence that either union in that case had established a longtime policy of excluding any of its sectors from the Plan's coverage. We read the Board's citation of the president's letter in *JDC Demolition* as only further confirming its immediately preceding finding that the Laborers and Operating Engineers locals involved were both stipulated to the Plan "through their respective parent unions' membership in the BCTD, the constitution of which requires submitting jurisdictional disputes to the Plan." *Id.* President Stephenson's letter to IBEW Local 876 and the Local's response, without more, are insufficient to establish that IBEW Local 876 is bound to the Plan in light of the historic exclusion from the Plan and its predecessors of "outside" IBEW locals, discussed above, and the Board's longstanding recognition of that exclusion.

⁴ Operating Engineers Local 324 submitted both the arbitrator's "expedited Award and Order" of September 9 and his "full Award and Order" of September 11. In his "full Award and Order," the arbitrator found that "the evidence presented by [Operating Engineers Local 324] convinced [him] that IBEW Local 876 is stipulated to the Plan, as acknowledged in their respective correspondence by the IBEW International President and IBEW Local 876 Business Manager."

agree to be bound by its results. *High Light Electric*, 355 NLRB at 169.⁵

In these circumstances, we find that Operating Engineers Local 324 has not established that IBEW Local 876 is bound under the Plan.⁶

Based on the foregoing, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and we further find 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, and we deny Operating Engineers Local 324's motion to quash the notice of hearing.

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, 577–579 (1961). The Board's 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

The parties stipulated that the Employer "is not failing to conform to an order or certification of the Board determining the bargaining representative for the employees performing the disputed work."

IBEW Local 876 and Operating Engineers Local 324 are each party to a collective-bargaining agreement with the Employer. The Employer and IBEW Local 876 are parties to a C Agreement, which "covers all construction, installation, maintenance and removal of teledata facilities (voice, data and video) . . ." The Employer and Operating Engineers Local 324 are parties to a short form agreement, which consists of contract language across various agreements that pertains to the cell tower construction process, including hoisting equipment, building roads and performing heavy construction work. We find that IBEW Local 876 and Operating Engineers Local 324 both have language in their agreements argua-

⁵ Even if the arbitrator's decision establishes that the International is bound under the Plan, it does not necessarily follow that IBEW Local 876 was so bound for the reasons stated above.

⁶ We find it unnecessary to decide whether the Employer was bound under the Plan because all parties to the dispute must be bound if an agreement is to constitute an agreed-upon method of voluntary adjustment, *High Light Electric*, 355 NLRB at 169, and we find that IBEW Local 876 is not bound to the Plan. We also need not address IBEW Local 876's contention that the Plan's arbitration procedure was deficient in this instance.

bly covering the work in dispute. We therefore find that this factor does not favor awarding the work to employees represented by either union. See *Laborers Local 860 (Ronyak Paving, Inc.)*, 360 NLRB 236, 240 (2014).

2. Employer preference, current assignment, and past practice

“The factor of employer preference is generally entitled to substantial weight.” *Laborers Local 265 (Henkels & McCoy, Inc.)*, 360 NLRB 819, 824 (2014). Employer Vice President Anton testified that the Employer prefers that IBEW Local 876–represented employees perform the work in dispute, and those employees are currently performing this work. See *Laborers Local 265 (AMS Construction)*, 356 NLRB 306, 310 (2010) (according weight to employer’s stated preference and also considering its current assignment of work in dispute). The Employer’s preference and current assignment are also consistent with its past practice of assigning this and similar work to IBEW Local 876–represented employees for the past 30 years. See *Utility Builders*, 233 NLRB at 1102. Accordingly, we find that the factors of employer preference, current assignment, and past practice all favor an award of the disputed work to employees represented by IBEW Local 876.

3. Area and industry practice

IBEW Local 876 Bargaining Unit Foreman Nate Breen testified that he formerly worked as a cell tower technician for Kent Power, a union contractor subject to the same C Agreement between IBEW Local 876 and the Employer. Operating Engineers Local 324’s Business Manager, Doug Stockwell, testified that Operating Engineers Local 324–represented employees perform the type of work in dispute here for several other companies. In view of the fact that both IBEW Local 876–represented employees and Operating Engineers Local 324–represented employees have performed the type of work in dispute here for other employers in the industry, we find that the factor of area and industry practice does not favor awarding the work to employees represented by either union. See *Plumbers, Local Union No. 741 (The Ashton Company)*, 256 NLRB 1022, 1025 (1981).

4. Relative skills and training

IBEW Local 876 presented testimony that the employees it represents possess specific skills and training relevant to the performance of the disputed work. IBEW Local 876–represented employees have been and are performing the work in dispute for the Employer, which confirms that they possess the requisite skills. In addition, Breen testified that IBEW Local 876–represented employees receive comtraining, which teaches cell tower

climbing safety; radio frequency training, which teaches how to handle live antennas at cell tower sites; and railroad safety training, which teaches procedures for working at a railroad cell tower site.

Operating Engineers Local 324 also presented testimony that the employees it represents possess the requisite skills and training to perform the disputed work. Operating Engineers Local 324 Executive Director for Labor Management Lee Graham testified that Operating Engineers Local 324’s extensive apprenticeship program provides instruction in the operation of heavy equipment. Moreover, Operating Engineers Local 324–represented employees perform the type of work in dispute here for several other companies, which further demonstrates that they possess the requisite skills.

In view of the fact that both IBEW Local 876–represented employees and Operating Engineers Local 324–represented employees possess the requisite skills and training to perform the work in dispute, we find that this factor does not favor awarding the work to employees represented by either union.

5. Economy and efficiency of operations

Employer Vice President Anton testified that it is more economical and efficient to assign the disputed work to employees represented by IBEW Local 876 because the Employer can use two-person composite crews, with one IBEW Local 876–represented employee performing the main tasks of digging, trenching, and cementing foundations while also assisting one IBEW Local 275–represented employee with pulling electrical wire. Anton further testified that if the Employer were forced to use an Operating Engineers Local 324–represented employee in place of an IBEW Local 876–represented employee, the Employer would have to add a third man to its composite crews, decreasing efficiencies and raising costs. Anton also testified that there would not be enough work for the Operating Engineers Local 324–represented employee, who could not be substituted for one of the existing crew members because he or she does not perform the same tasks. Accordingly, we find that the factor of economy and efficiency of operations favors awarding the disputed work to the employees represented by IBEW Local 876. See, e.g., *Seafarers District NMU (Luedtke Engineering Co.)*, 355 NLRB 302, 305 (2010) (finding economy and efficiency favors awarding work to employees who can perform all aspects of work in dispute over employees who can perform only one aspect); *R&D Thiel*, 345 NLRB at 1141 (considering additional costs associated with one group of employees sitting idle while another group works); *Laborers Local 113 (Michels Pipeline Construction)*, 338 NLRB 480,

484 (2002) (observing that “[h]aving fewer employees accomplishing the same task . . . reduces costs in time, money, and personal safety”).⁷

CONCLUSION

After considering all the relevant factors, we conclude that employees represented by IBEW Local 876 are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, current assignment, past practice, and economy and efficiency of operations. In making this determination, we award the work to employees represented by IBEW Local 876, not to that labor organization or to its members.

Scope of Award

The Board customarily does not grant an award of the work in dispute beyond the specific jobsites involved when the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. *Laborers Local 243 (A. Amorello & Sons)*, 314 NLRB 501, 503 (1994). Consistent with the Board’s customary practice and with the fact that the parties have stipulated that the jurisdictional award should apply only in the geographical area in which their jurisdictions overlap, we so limit the scope of this award.

⁷ Member Pearce relies on this factor only to the extent that the record shows that there would not be enough work for Operating Engineers Local 324—represented employees because they do not perform all the same tasks as employees represented by IBEW Local 876.

DETERMINATION OF DISPUTE

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

Employees of Newkirk Electric Associates, Inc. represented by International Brotherhood of Electrical Workers, Local 876, are entitled to use earth moving/dirt digging equipment, cranes, and other power-driven equipment in connection with the assembly, disassembly, erection, and modification of cell towers, including the hoisting of cell towers, clearing land, and constructing roads, when working for the Employer in the geographical area where the jurisdictions of IBEW Local 876 and Operating Engineers Local 324 overlap.

Dated, Washington, D.C. May 19, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD