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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 20

Painters & Allied Trades District Council 36
and Sign Display & Allied Crafts Local 510
(Freeman Exposition),

Charging Party,

and

Freeman Exposition,

Employer,

and

Teamsters Local 2785,

Union.

No. 20-CD-253060

**TEAMSTERS LOCAL 2785'S
CLOSING BRIEF**

I. INTRODUCTION

The Employer, Freeman Exposition, is not entitled to utilize or seek relief through the 10(k) process because the current work preservation dispute is a direct result of Freeman's action of providing, through the Painters and Allied Trades Local 501's ("Painters") 2012-2015 collective bargaining agreement, a portion of the established Teamsters Local 2785 ("Teamsters") jurisdiction to the Painters.

Even if the process was properly invoked, review of the relevant factors shows the work is properly awarded to the Teamsters who are currently performing the work.

II. THE NOTICE OF 10(K) HEARING SHOULD BE QUASHED

Section 10(k) of the National Labor Relations Act (“NLRA”) is designed to “protect employers from being the ‘helpless victims of quarrels that do not concern them at all.’” *NLRB v. Radio & Tele. Broad. Eng’rs Union, Local 1212 (CBS)*, 365 U.S. 573, 581 (1961) quoting H.R. Rep. No. 80-245 at 23 (1947). Board law is clear that the 10(k) procedure should not be utilized when the employer has created the situation leading to the dispute between two unions. 10(k) is only available to employers who are innocent bystanders in disputes between 2 unions, not employers who have created the dispute.

Further, 10(k) is only applicable to work jurisdiction disputes. Here, the Teamsters used the grievance procedure of its collective bargaining agreement (“CBA”) to maintain or preserve its work. By contrast, the Painters are attempting to extend their jurisdiction. When the true nature of a dispute is work preservation, there is no jurisdictional dispute and 8(b)(4)(D) and 10(k) of the NLRA are not properly invoked. *Int’l Ass’n of Machinists & Aerospace Workers, District Lodge 190 (SSA Terminal, LLC)*, 344 NLRB 1018 (2005), *affd.*, *Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 253 Fed. Appx. 625 (9th Cir. 2007).

The Board should not be used to “arbitrate disputes between an employer and a union, particularly regarding the union’s ‘attempt to retrieve the jobs’ of employees the employer chose to supplant by reallocating their work to others.” *See SSA Terminal*, citing *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818, 820-821 (1986), *affd.* sub nom. *USCP-Wesco, Inc. v. NLRB*, 827 F.2d 581 (9th Cir. 1987). This is particularly true when the dispute is of the employer’s own making:

Where a dispute is fundamentally one between an employer and a union, and concerns the union’s attempt merely to preserve the work it previously had performed, the Board will not afford the employer the use of a 10(k) proceeding to resolve a dispute of its own making.

Seafarers (Recon Refractory & Construction), 339 NLRB 825, 827 (2003), review denied, *Recon Refractory & Constr. Inc. v. NLRB*, 424 F3d 980 (9th Cir. 2005).

Since 1999, the collective bargaining agreement between the employer association and the Teamsters has provided, in the scope of agreement, for the driving of trucks with a capacity of over 1.5 tons to be performed by the Teamsters. Compare ER Ex. 8, p. 6 of 50 with ER Ex. 9, p. 8 of 64.¹ At all times, including prior to 1999, the work rules and work jurisdiction for the Teamsters has included the driving of all trucks and other vehicles regardless of capacity. ER Ex. 8, p. 20 of 50; ER Ex. 3, p. 23 of 96. In collective bargaining agreements prior to 2012, the Painters were able to drive vehicles, but only those that had a total vehicle capacity less than 1.5 tons. See ER Ex. 10, p. 9 of 40; 22 of 40. In proposals for the 2012-2015 CBA, the Painter's proposed and the employer agreed to modify the scope of work language of the CBA to eliminate any restriction based on vehicle capacity. See ER Ex. 11, p. 3 of 22; TR.vol.1, 175:25-176:5. This was accomplished with little discussion and no understanding of the impact it would have on the Teamsters work. TR. vol.1, 176:6-179:6; TR. vol. 2, 217:9-25. Thereafter, the predictable expansion of Painters performing traditional Teamster work occurred.

When this expansion exceeded more than a few runs a day, the Teamsters filed a grievance. TEM Ex. 1. It proceeded through the CBA's dispute resolution procedure, deadlocking at the board of adjustment and continuing to arbitration. TEM Ex. 3. The arbitrator held a hearing in which representatives of the Painters' testified at the request of the employer. After the hearing, the arbitrator issued a decision finding the employer violated the CBA by assigning work to the Painters that fell within the scope of work and jurisdiction of the Teamsters as defined by the collective bargaining agreement. ER Ex. 5.

After the arbitrator issued his decision and the work was reassigned to the Teamsters, the Painters sent a grievance which provided the alleged threat of economic action. This letter was sent on October 2, 2019. ER Ex. 1. For six weeks, the Painters did nothing more and did not

¹ ER Ex. refers to employer exhibits; TEM Ex. refers to Teamsters exhibits; TR. refers to the transcripts of the 10(k) hearing.

require the employer to adhere to the timelines of their mutual grievance procedure. TR. vol. 1, 116:25-118:3. The employer responded by letter on November 13, 2019 and immediately thereafter filed a charge against the Painters. ER Ex. 2; Board Ex. 1. The charge was withdrawn and refiled. It took months to be scheduled for hearing. In those 4 months, the Painters engaged in no economic action and did not push their grievance forward. TR. vol. 1, 118:4-12.

The Painters contend that the work in question, defined as the loading, unloading, and transportation of equipment and matters using “runner” vehicles (box trucks, panel vans, stake beds) during trade shows, has always been performed by its members. *See* Board Ex. 2, ¶ 5. Putting aside the truth of this position, even if it were true, that would not change the nature of this dispute. A “dispute does not lose its character as a work preservation dispute simply because more than one union may have a work preservation claim to the same work.” *SSA Terminal*, 344 NLRB at 1020.

The real dispute in this case is a contractual dispute between each of the unions with Freeman, based on the preservation of bargaining unit work. As such, it is not intended within the scope of Section 10(k) and the notice of hearing should be quashed. *Recon Refractory*, 339 NLRB at 827; *see also IBEW, Local 48 (Kinder Morgan Terminals)*, 357 NLRB 2217 (2011); *ILWU, Local 62-B v. NLRB*, 781 F.2d 919 (D.C. Cir. 1985).

III. APPLICATION OF THE FACTORS

In the event it is determined that the notice of 10(k) hearing should not be quashed, the factors that are relevant to determining the dispute support the Teamsters continuing to perform the work.

A. CERTIFICATIONS AND COLLECTIVE BARGAINING AGREEMENTS

Neither party provided any history on the certification or method of recognition although both Teamsters and Painters have long been established in the trade show industry in the Bay Area. TR. vol. 2, 253:8-255:1; TR. vol. 1, 154:19-155:8. Freeman bargains as part of a coalition of employers with each of these trades. TR. vol. 1, 37:24-38:6; 41:19-42:6. As outlined above, the CBA of the Teamsters has historically provided absolute jurisdiction over the driving of any

vehicles through established work rules. In 1999, a change was made to the scope of the agreement to specifically address vehicles with a capacity over 1.5 tons but the work rules remain unchanged to this day.

The Painters' agreements have also provided for driving but, until 2012, that driving was specifically limited to vehicles with a capacity of 1.5 tons or less. The 2012 agreement eliminated that limitation and intruded into the area of exclusive jurisdiction of the Teamsters.

The vehicles in question here are box trucks, panel vans, and stake beds. Per the employer's records, the capacity of these vehicles is as follows:

Vehicle Type	Payload
Ford E150 (passenger or panel van)	2,208 lbs
Ford E350 (stake bed or van)	4,110 lbs
Ford E450 (box truck)	8,646 lbs
Isuzu NPR (van)	6,453 lbs

ER Ex. 7. Payload is defined as "the load carried by a vehicle exclusive of what is necessary for its operation." *Merriam-Webster Dictionary*. Thus, the payload is the maximum capacity of what the vehicle can carry. A ton is 2,000 lbs. 1.5 tons is therefore 3,000 lbs. Under the terms of the Teamsters CBA, the E350, E450 and Isuzu NPR may be driven only by a Teamster.

By providing jurisdiction to the Painters, in the 2012 agreement, for driving stake beds, bob tails, and vans (ER Ex. 11, p. 3 of 22), the employer created this dispute.

The history of the collective bargaining agreements, and the current agreements as written, favor assignment of the work to Teamsters.

B. EMPLOYER PREFERENCE AND CURRENT ASSIGNMENT

Since October 2019, the work has been assigned to the Teamsters. The employer did not provide any testimony indicating there had been difficulties in implementing the change and

stated that the costs are about the same regardless of the union assigned to perform the work. TR. vol. 1, 74:25-75:17.

When asked about his preference, the senior vice president for operations/general manager of the San Francisco office stated:

Well, you know, it's a very difficult question for me because I find myself, you know, in the middle of two good reliable union partners. And you know, my primary concern is to manage our business and avoid any disruptions that are going to impede our profitability and their pay. So it's very difficult for me to kind of split the baby here, but years ago when I got here, this was not – this did not crop up as an issue for the first eight years of my tenure. So in hindsight, I kind of leaned on the side of the status quo, and I – still makes sense to me going forward.

TR. vol. 1, 77:1-10. The employer's response is vague and open to interpretation. At the time the testimony was provided, the status quo was (and had been for 4 months) that the work was being performed by the Teamsters. The status quo at the time of the arbitration was that a portion of the work was being performed by the Painters. This case does not hinge on employer preference.

The work is currently being performed, without incident, by the Teamsters.

C. EMPLOYER PAST PRACTICE

The employer past practice is mixed. As Freeman has grown, the number of additional runs per day has grown and it began a process of scheduling runs for multiple times a day. TEM Ex. 3. In the past, this was exclusively Teamster work except for the light vans used for emergency runs that had a capacity of under 1.5 tons, such as the E150 referenced above. Although the employer asserts that the work was performed solely by Painters in the past, the evidence does not support this and the arbitrator found to the contrary. ER Ex. 5, pp. 12-23.

Past practice does not support a change in the assignment of this work.

D. AREA AND INDUSTRY PRACTICE

Although broad generalities were discussed by all parties, the only witness with direct knowledge of similar operations at other area employers was Robert Fabris. He testified that at GES, which operates under the same CBAs for both the Painters and the Teamsters as Freeman

does, the work in question is performed by teamsters. TR. vol. 2, 229:24-230:5; TR. vol. 2, 212:13-213:11.

Mr. Fabris is the teamster foreman of GES. Based on the anticipated number of runs to be accomplished after a show is moved in, he requests from his boss for a dispatch of teamster drivers. These drivers then perform the errand runs using box trucks. The vice president of labor relations for GES, Guy Langlais, testified that his specific knowledge of the San Francisco operation is, in reality, quite cursory and is just “enough to [make him] dangerous.” TR. vol. 2, 220:1-7. The specific testimony of an individual at the facility is more reliable than an individual who comes in just for contract negotiations and learns only what is necessary to meet that obligation. TR. vol. 2, 213:12-214:5; 217:9-25.

The Teamster business agent, William Cromartie, testified that Freeman is the only operation using scheduled runs. TR. vol. 2, 269:4-270:4. He further testified that he has not experienced or heard of a problem with painters doing driving work at Curtin, the only other trade show operator with a full warehouse in the area. TR. vol. 2, 268:9-21.

The area and industry practice favors assignment of the work to teamsters.

E. RELATIVE SKILLS AND TRAINING

Teamsters who are dispatched for driving positions carry commercial drivers' licenses. They have passed the state tests to receive these licenses and comply with federal regulations to maintain these licenses.

The Painters provided evidence of their apprenticeship training. *See* Painters Exs. 3 and 4. However, no portion of their training covers driving anything other than a forklift. TR. vol. 1, 174:11-175:24. A forklift certification is separate and distinct from the work in question and the qualifications necessary to perform it.

The larger vehicles of all industry employers are driven by teamsters who hold the appropriate Class A and B licenses, with endorsements if necessary. TR. vol. 2, 284:13-285:14. They are the skilled drivers qualified for this work.

CERTIFICATE OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

I hereby certify that on March 10, 2020, I electronically filed the forgoing **TEAMSTERS LOCAL NO.2785’S CLOSING BRIEF** with the National Labor Relations Board, by using the NLRB’s e-filing system.

On March 12, 2020, I served the following documents in the manner described below:

TEAMSTERS LOCAL NO.2785’S CLOSING BRIEF

- (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld’s electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Jill Coffman, Regional Director National Labor Relations Board (NLRB), Region 20 901 Market Street, Suite 400 San Francisco, CA 94103 Jill.Coffman@nlrb.gov	Marta Novoa, Hearing Officer National Labor Relations Board (NLRB), Region 20 901 Market Street, Suite 400 San Francisco, CA 94103 Marta.Novoa@nlrb.gov
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 12, 2020, at Alameda, California.



Lara Hull