Southwest Regional Council of Carpenters and Brand-Safway Services, LLC and Laborers International Union of North America, Local 169. Case 32–CD–251616

June 30, 2020

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). BrandSafway Services, LLC (the Employer) filed a charge on November 12, 2019, alleging that the Respondent, Southwest Regional Council of Carpenters (Southwest Council), 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 Laborers’ International Union of North America, Local 169 (Local 169). A hearing was held on February 18, 2020, before Hearing Officer Alexander M. Hajduk. During the hearing, Local 169 introduced a motion to quash the Section 10(k) notice of hearing, in which it asserted that Local 169 had not claimed the disputed work. Thereafter, the Employer, Southwest Council, and Local 169 filed post-hearing briefs.

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.

I. JURISDICTION

The parties stipulated that the Employer annually sells and ships goods valued in excess of $50,000 from its facility located in or about the Reno, Nevada area to customers located outside of the state of Nevada. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that Southwest Council and Local 169 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer provides scaffolding services for construction projects, including delivering, assembling, disassembling, and removing scaffolding. From early 2019 until August 2019, the Employer provided scaffolding for the Marriott Aloft hotel project in Reno, Nevada. It hired employees represented by Southwest Council to perform this work pursuant to their longstanding relationship, currently embodied in a collective-bargaining agreement in effect from July 1, 2018, to June 30, 2023. The agreement provides that “[t]he character of such work covered by this Agreement shall include but not be limited to . . . scaffold [work].”

On August 1, Local 169 sent a letter to the Employer and Brand Energy Services, which Local 169 believed was a predecessor to the Employer, informing them that Local 169 was filing a grievance against the Employer for assigning the scaffolding work at the Aloft hotel project, as well as “other work in the Union’s Jurisdiction,” to Southwest Council in violation of the Laborers’ Master Agreement (LMA). The LMA provides that employees represented by Local 169 are assigned work “[t]ending to [work].” The Employer, Safway Services, LLC, was a successor to Brand Energy Services.

On September 9, having learned from its business agents that Local 169 had claimed the work on the Aloft hotel project and work in northern Nevada generally, Southwest Council sent the Employer a letter threatening to strike and picket all the Employer’s jobs in northern Nevada if the Employer reassigned that work to Local 169.

During meetings on September 10 and 27, after Southwest Council–represented employees had performed the work in question, the Employer resolved the confusion about its corporate predecessor. The Employer and Local 169 agreed that the Employer was a successor to a different entity, Safway Services, LLC. Thereafter, Local 169 sent the Employer a letter asserting that the Employer, as a successor to Safway Services, LLC, was bound to the LMA. On October 2, Local 169 sent the Employer

3 All parties now agree that Brand Energy Services and the Employer are separate entities. On October 31, Local 169 amended the August 1 grievance to address work assignment issues with Brand Energy Services and its successor, Brandsafway Industries, LLC, which are unrelated to the dispute in the instant case. On January 22, 2020, Local 169 settled its grievance with Brandsafway Industries.

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another letter, informing it that Local 169 was filing a
grievance to determine whether the Employer was bound
to the LMA. The Employer responded that it was “not
willing to submit to the grievance and arbitration process
in the [LMA]” because it disputed that Safway Services,
LLC, had ever been a party to the LMA.

On February 14, 2020, the Employer emailed Local 169
with a list of other construction projects on which it was
performing scaffolding work, including the Double R of-

cice building in Reno, Nevada. The Employer asked Local 169
to respond to the email if it was planning to claim work on
these projects, stating that it would interpret no
response as Local 169 disclaiming the work. The record
does not establish whether Local 169 responded to the
Employer.

On February 18, 2020, the Employer’s construction
manager at the Double R project sent the Employer photos
that purportedly show a Local 169 business agent photo-
graphing the scaffolding work at the Double R project.

B. Work in Dispute

The parties stipulated, and we find, that the work in dis-
pute is the loading/unloading, moving, erecting, and dis-
mantling of scaffolding and related cleanup at the Marriot
Aloft hotel project in Reno, Nevada.

C. Contentions of the Parties

Local 169 moves to quash the notice of hearing, arguing
that there are no competing claims for the work in dispute
because it has not made a claim for that work. To begin,
it contends that its August 1 grievance was not a claim for
the disputed work because it was later amended and filed
against an entity not party to this proceeding. It also con-
tends that its October 2 grievance was not a claim for the
disputed work because it seeks only to determine whether
the Employer is bound by the LMA as a successor to Saf-
way Services, LLC, which Local 169 asserts was a signa-
tory to the LMA. Local 169 therefore argues that the Oc-
tober 2 grievance is for breach of contract and not a claim
for work, citing, among other cases, Laborers (Capitol
Drilling Supplies), 318 NLRB 809 (1995). Finally, it ar-
gues that it has not made a claim for the disputed work
because Local 169 Business Manager Richard Daly “tes-
tified truthfully that, until there is a resolution of the Oc-
tober 2, 2019, grievance he could not know what the future
might hold, or what path [Local 169] might choose.”

In addition to asserting that it did not claim the disputed
work, Local 169 also argues that because there is still a
question whether the Employer has an agreement with

Local 169, it would be inappropriate for the Board to de-
cide the jurisdictional dispute.

The Employer contends that Local 169 claimed the dis-
puted work by filing the August 1 grievance. The Em-
ployer also argues that Local 169 did not disclaim the dis-
puted work in either the October 2 grievance or the Octo-
ber 31 amendment to the August 1 grievance, nor did it
disclaim the work at the hearing.

Southwest Council contends that Local 169 claimed the
work through its August 1 and October 2 grievances.
Southwest Council argues that these grievances are claims
for work, not for breach of contract, and that Capitol Dril-
ing, above, is distinguishable. Accordingly, Southwest
Council contends that Local 169’s motion to quash should
be denied and that the Board should decide this jurisdic-
tional dispute.

On the merits, the Employer and Southwest Council as-
sert that the work in dispute should be awarded to employ-
ees represented by Southwest Council based on the fol-
lowing factors: Board certifications and collective-barg-
gaining agreements; employer preference, current assign-
ment, and past practice; area and industry practice; relative
skills and training; and economy and efficiency of opera-
tions.

D. Applicability of the Statute

The Board may proceed with a determination of a dis-
pute under Section 10(k) of the Act only if there is reason-
able cause to believe that Section 8(b)(4)(D) has been vi-
olated. This standard requires finding that there is reason-
able 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. Ad-
ditionally, there must be a finding that the parties have not
agreed on a method for the voluntary adjustment of the
dispute. See, e.g., Operating Engineers Local 150 (R&D
Thiel), 345 NLRB 1137, 1139 (2005). On this record, we
find that these requirements have been met.

1. Competing claims for work

The performance of the disputed work by Southwest
Council—represented employees establishes Southwest
Council’s claim to that work. Sheet Metal Workers Local
54 (Goodyear Tire & Rubber Co.), 203 NLRB 74, 76
(1973); see also Operating Engineers Local 513 (Thomas
Industrial Coatings), 345 NLRB 990, 992 fn. 6
(2005) (citing Laborers Local 79 (DNA Contracting), 338
NLRB 997, 998 fn. 6 (2003)). In addition, Southwest
Council’s threat of job actions if the Employer gave any
of the disputed work to Local 169 constituted a claim to

that Local 169 would “expect [the Employer] to follow the terms and
conditions of the agreement.”

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1 In fact, Daly provided evasive testimony on this point. For example, when asked directly whether Local 169 would claim the work if an arbi-
trator found the Employer was bound to the LMA, Daly replied simply
the work. See, e.g., *Thomas Industrial Coatings*, above at 992.

We find, despite its claims to the contrary, that Local 169 has also claimed the disputed work. Local 169 filed the August 1 grievance because it "recently observed workers employed by [the Employer] performing work, covered by the [LMA] in effect between the Union and [the Employer] on the Aloft Hotel project in Reno, and the Union recently became aware that [the Employer] has been performing other work in the Union's Jurisdiction." The LMA requires "employees to be cleared through the hiring hall of the Union." Local 169 also filed the October 2 grievance to determine whether the Employer is bound by the LMA.

Local 169’s arguments that its grievances did not constitute a claim for the disputed work are unconvincing. First, Local 169 never effectively disclaimed the disputed work claimed in the August 1 grievance, either when it amended the August 1 grievance or when it filed the October 2 grievance. The Board has found that a disclaimer of disputed work can eliminate a jurisdictional dispute only if the disclaimer is "clear, unequivocal, and unqualified and disclaim[s] all interest in the work in dispute." *Bakery Workers Local 334 (Interstate Brand Corp.),* 334 NLRB 1161, 1163 (2001) (quoting *Machinists Local 724 (ATSL, Inc.),* 317 NLRB 781, 782 (1995)). It is clear that Local 169’s August 1 grievance constituted a claim for the disputed work. The grievance eventually settled, but Local 169 never disclaimed the disputed work. As for the October 2 grievance, Local 169 Business Manager Daly admitted that if the arbitrator sustained the grievance and found the Employer was bound by the LMA, Local 169 would expect the Employer to "abide by the terms of the agreement," i.e., the LMA. Because Local 169 asserted in its August 1 grievance that the LMA would require assignment of the disputed work to employees it represents, the October 2 grievance to determine whether the Employer is bound by the agreement is also tantamount to a claim for the disputed work.

Second, Local 169’s argument that its October 2 grievance made no claim to the disputed work under *Capitol Drilling* is unpersuasive. In *Capitol Drilling*, the Board found that because the union’s grievance was filed only against the general contractor, not the subcontractor that actually assigned the work at issue, there was no competing claim for the work being performed by employees of the subcontractor. 318 NLRB at 810–812. Here, Local 169’s grievance was directed at the Employer, a subcontractor that had assigned the disputed work to employees represented by Southwest Council. As discussed above, the August 1 grievance expressly claimed the work under the LMA, and the October 2 grievance effectively claimed the work on the condition that the Employer was bound to the LMA. Accordingly, this case presents a traditional jurisdictional dispute in which each union claims that its contract covers the work at issue. See, e.g., *Carpenters Southeast Missouri District Council (International Riggers),* 306 NLRB 561, 562–563 (1992); *Carpenters Los Angeles Council (Swinerton & Walberg),* 298 NLRB 412, 413–414 (1990).\footnote{As noted above, although Local 169 amended this grievance on October 31, the amendment was not related to the work assignment question at issue.}

2. Use of proscribed means

We find reasonable cause to believe that Southwest Council used means proscribed by Section 8(b)(4)(D) to enforce its claims to the work in dispute. As noted above, on September 9, 2019, Southwest Council sent a letter to the Employer threatening to "strik[e] and picket[[] all [its] jobs" if the Employer reassigned the scaffolding work in northern Nevada to Local 169. The Board has long considered such threats to be a proscribed means of enforcing claims to disputed work. See, e.g., *Washington & Northern Idaho District Council of Laborers (Skanska USA Building, Inc.),* 366 NLRB No. 161, slip op. at 3 (2018); *Laborers Local 1184 (High Light Electric),* 355 NLRB 167, 169 (2010); *Bricklayers (Cretex Construction Services),* 343 NLRB 1050, 1052 (2004).

3. No voluntary method for adjustment of dispute

The parties stipulated, and we find, that there is no agreed-upon mechanism for the voluntary resolution of this dispute.

Based on the foregoing factors, 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, and we deny Local 169’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 (1961). The Board has
Local 169’s claim that the Employer is bound to the LMA is purely conjectural at this point. Notably, the record is devoid of any documentary evidence showing that the Employer was ever bound to the LMA.

7 Although this issue was addressed in Local 169’s October 2 grievance, which at the time of the hearing had been scheduled for arbitration, Local 169’s claim that the Employer is bound to the LMA is purely conjectural at this point.
are entitled to perform the work in dispute. We reach this conclusion relying on the following factors: Board certifications and collective-bargaining agreements; employer preference, current assignment, 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 Southwest Council, not to that labor organization or to its members.

**SCOPE OF THE AWARD**

The Employer and Southwest Council maintain that our award in this proceeding should encompass the entire geographic area in which the Employer performs the work and the competing unions’ jurisdictions overlap because disagreements and further unlawful conduct over the assignment of the disputed work will continue to arise on future projects. In support, they cite Local 169’s August 1 grievance that also referred to “other work” in its jurisdiction, Local 169’s October 2 grievance to determine whether the Employer is bound by the LMA, and photos taken as recently as February 18, 2020, that purportedly show a Local 169 business agent taking pictures of the Double R worksite where Southwest Council–represented employees were performing scaffolding work. Local 169 opposes the broad award because it is contrary to Board policy and it was not illegal for Local 169’s business agent to be present at or photograph the scaffolding at one of the Employer’s other worksites.

The Board normally limits a Section 10(k) award to the jobsite that was the subject of the unlawful Section 8(b)(4)(D) conduct or threats. See Carpenters (Prate Installations, Inc.), 341 NLRB 543, 546 (2004). To justify an areawide award, there must be (1) evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur, and (2) evidence demonstrating the offending union’s proclivity to engage in further unlawful conduct in order to obtain work similar to that in dispute. See, e.g., Laborers’ International Union of North America, Local 860 (Ballast Construction, Inc.), 364 NLRB No. 126, slip op. at 6 (2016).

We find that an areawide award of the disputed work is not warranted here. The Board generally declines to issue such an award where, as here, the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See, e.g., Laborers Local 1010 (New York Paving), 366 NLRB No. 174, slip op. at 5 (2018). No aspects of this case justify departing from the Board’s general practice. Here, the record does not indicate that the disputed work has been a continuous source of controversy and will continue to be so. The dispute was the first substantiated controversy arising over the disputed work and involved only one of the Employer’s jobsites. Accord Prate Installations, above at 546 (finding no proclivity for offending union to engage in further unlawful conduct where dispute was “the first substantiated controversy arising over the disputed work”). Further, even assuming that Local 169 prevails on its October 2 grievance, there is no independent evidence that Southwest Council is likely to engage in unlawful conduct at future job sites in pursuit of work similar to that in dispute. Id; see also Laborers Local 1010 (New York Paving), 366 NLRB No. 174, slip op. at 5 (citing Laborers Local 22 (AGC of Massachusetts), 283 NLRB 605, 608 (1987)). Accordingly, we shall limit the present determination to the disputed work located at the Marriott Aloft hotel jobsite in Reno, Nevada. See, e.g., Laborers Local 210 (Concrete Cutting & Breaking), 328 NLRB 1314, 1316 (1999).

**DETERMINATION OF DISPUTE**

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

Employees of BrandSafway Services, LLC represented by Southwest Regional Council of Carpenters are entitled to perform the loading/unloading, moving, erecting, and dismantling of scaffolding and related cleanup at the Marriott Aloft hotel project in Reno, Nevada.

Dated, Washington, D.C. June 30, 2020

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John F. Ring,                              Chairman

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Marvin E. Kaplan,                              Member

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William J. Emanuel, Member

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