Southwest Regional Council of Carpenters and Performance Contracting, Inc. and Sheet Metal, Air, Rail and Transportation Workers, Local Union 105. Case 31–CD–284678

March 28, 2022

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS KAPLAN, WILCOX, AND PROUTY

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Performance Contracting, Inc. (the Employer) filed a charge on October 18, 2021, alleging that the Respondent, Southwest Regional Council of Carpenters (Carpenters), 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 Sheet Metal, Air, Rail and Transportation Workers, Local Union 105 (SMART Local 105). A hearing was held on November 17, 2021, before Hearing Officer Jake Yocham. Thereafter, the Employer and Carpenters filed posthearing briefs.1

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, the Board makes the following findings.

I. JURISDICTION

The Employer is a corporation with an office and place of business in Lenexa, Kansas. During the fiscal year ending September 30, 2021, the Employer provided services valued in excess of $50,000 directly to entities located outside the State of Kansas. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

SMART Local 105’s March 30, 2021 LM-2 form, which clearly identifies it as a labor organization, was entered into the record. We further note that the Board has previously found SMART Local 105 to be a labor organization under the Act. See, e.g., S.E. Clemens Inc., 363 NLRB 879, 879 (2016). Accordingly, we find that SMART Local 105 is a labor organization within the meaning of Section 2(5) of the Act. We further find, based on the record evidence, that Carpenters is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer is a construction contractor in various specialty trades, including but not limited to the installation of framing, drywall, acoustical and specialty ceilings, exterior cladding (the outer sheen of buildings), and insulation. The Employer is party to a national agreement with the United Brotherhood of Carpenters and Joiners of America and is bound by a local agreement with Carpenters covering several southern California counties, including Los Angeles.

In February or March 2021,2 the Employer began installing exterior prefabricated corrugated metal and aluminum composite material panels (exterior cladding) on a building project located at 10800 West Pico Boulevard, Los Angeles, California 90064 (West Pico project). It assigned the work to employees represented by Carpenters.

By letter dated August 4, SMART Local 105 notified the Employer that it was grieving the Employer’s use of Carpenters to install sheet metal panels at the West Pico project. The Employer does not have a collective-bargaining agreement with SMART Local 105 and is not a member of the Southern California Chapter of the Sheet Metal and Air Conditioning Contractors’ National Association (SMACNA), the employer organization for sheet metal contractors in Southern California.

By letter dated August 11, the Employer informed SMART Local 105 that employees represented by the Carpenters possessed the correct training and tools to perform the work at the West Pico project and asserted that SMART Local 105 had no claim to the work. The Employer attached a copy of a letter from Carpenters, confirming that Carpenters-affiliated employees had the skill and ability to do the work and had claimed it. In response, SMART Local 105 insisted that the work in question fell under its jurisdiction and requested a meeting to discuss the situation. On August 30, the Employer met with SMART Local 105, but the latter ended the meeting when it realized that the Employer had invited Carpenters to attend.

SMART Local 105 subsequently asked the Local Joint Adjustment Board (LJAB) to hear its grievance against the Employer, and the Southern California Chapter of SMACNA advised the Employer that a hearing had been scheduled. The Employer promptly

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1 Although notified of the hearing, SMART Local 105 did not appear or file a brief.

2 All dates are in 2021 unless otherwise noted.
objected to the hearing, insisting that the LJAB did not have jurisdiction over it because “PCI is not a party to the SMART Local 105/SMACNA Southern California CBA[ ] or any other agreement with Local 105. Nor has [the Employer] delegated its bargaining rights to SMACNA Southern California.” The Employer further argued, among other things, that although it had contracted with sheet metal union subcontractors to perform sheet metal flashing work in Southern California, the exterior cladding work on the West Pico project was not sheet metal work, and had historically been performed by Carpenters.

Shortly thereafter, Carpenters notified the Employer of its position with respect to SMART Local 105’s decision to proceed with its grievance over the Employer’s assignment of corrugated metal and aluminum composite material panel work at the Employer’s jobs, including the West Pico project. Carpenters’ October 11 letter stated, “Simply put, this is the Carpenters’ work, falls within the Carpenters’ collective bargaining agreement (CBA) with the Employer, and has historically been done by the Carpenters.” After explaining that it viewed SMART Local 105’s pursuit of its grievance “as a demand that PCI re-assign the Carpenters’ work” to SMART Local 105, Carpenters stated, “Should PCI process the [SMART Local 105] grievance or attempt to re-assign to [SMART Local 105] the Carpenters’ work, the Carpenters will take all actions it deems appropriate to protect ou[ir] work and jurisdiction including picketing and striking all of PCI’s current and future jobs.”

On October 19, the LJAB held a hearing, which the Employer did not attend, on SMART Local 105’s grievance. The Employer was subsequently notified that the LJAB had issued a decision and award adverse to the Employer. SMART Local 105 has never disclaimed the disputed work.

B. Work in Dispute

The parties did not stipulate to the work in dispute. The notice of hearing described the work in dispute as “Corrugated metal and Aluminum Composite Material panel work at 10800 West Pico Boulevard, Los Angeles, California 90064.” Carpenters agree with this description. The Employer describes the disputed work as “the installation of exterior pre-fabricated corrugated metal and Aluminum Composite Material (‘ACM’) sandwich panels (‘the disputed work’) for a project at PCI’s construction site located at 10800 West Pico Boulevard, Los Angeles, CA 90064 (‘the West Pico Project’).”

We find, based on the parties’ descriptions, that the disputed work is as follows:

The installation of exterior pre-fabricated corrugated metal and aluminum composite material panels at 10800 West Pico Boulevard, Los Angeles, California 90064.

C. Contentions of the Parties

The Employer and Carpenters contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. They claim that there are competing demands for the disputed work, and that Carpenters threatened to picket and strike if the Employer assigned the disputed work to SMART Local 105. They further contend that there is no agreed-upon method for voluntary adjustment of the dispute. As to the merits of the dispute, both the Employer and Carpenters contend that the work should be awarded to employees represented by Carpenters based on Carpenters’ collective-bargaining agreement; employer preference and past practice; area and industry practice; relative skills and training; and economy and efficiency of operations. As noted, SMART Local 105 did not file a brief.

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. Additionally, 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). We find that these requirements have been met.

1. Competing claims for work

We find that there is reasonable cause to believe that both Carpenters and SMART Local 105 have claimed the work in dispute for the employees they respectively represent. By its own admission, Carpenters has done so, and the employees it represents have been performing the work. See Sheet Metal Workers, Local 54 (Goodyear Tire & Rubber Co.), 203 NLRB 74, 76 (1973) (“[It]s performance of the work indicates that [it] claim[s] the work in dispute.”); see also Operating Engineers Local 513 (Thomas Industrial Coatings), 345 NLRB 990, 992 fn. 6 (2005) (same) (citing Laborers Local 79 (DNA Contracting), 338 NLRB 997, 998 fn. 6 (2003)). More-
over, by letters dated August 4 and August 13, SMART Local 105 claimed the work that the Employer had assigned to Carpenters.

2. Use of proscribed means

We find reasonable cause to believe that Carpenters used means proscribed by Section 8(b)(4)(D) to enforce its claim to the work in dispute. As set forth above, by letter dated October 11, Carpenters stated that “Should PCI process the [SMART Local 105] grievance or attempt to re-assign to [SMART Local 105] the Carpenters’ work, the Carpenters will take all actions it deems appropriate to protect ou[r] work and jurisdiction including picketing and striking all of PCI’s current and future jobs.” This statement constitutes a threat concerning the assignment of the exterior panel work, “and the Board has long considered such threats to be a proscribed means of enforcing claims to disputed work.” Washington & Northern Idaho District Council of Laborers (Skanska USA Building, Inc.), 366 NLRB No. 161, slip op. at 3 (2018) (citing Operating Engineers, Local 150 (Patten Industries), 348 NLRB 672, 674 (2006)).

3. No voluntary method for adjustment of dispute

We further find no agreed-upon method for voluntary adjustment of the dispute. The Employer and Carpenters so contend, and SMART Local 105 provided no evidence to the contrary.

Based on the foregoing, 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.

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 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 (1962). The following factors are relevant in making the determination of this dispute.

1. Board certifications and collective-bargaining agreements

The work in dispute is not covered by any Board orders or certifications.

As noted above, the Employer is party to a national agreement with the United Brotherhood of Carpenters and Joiners of America and is bound by a local agreement with Carpenters. The Employer cited three sections of the local agreement that it argues cover the disputed work:

105.1.1 All work in connection with the installation, erection and/or application, carrying, transportation, handling, stocking and scrapping of all materials and component parts of wall and partitions regardless of their material composition or method or manner of their installation, attachment or connection, including but not limited to all floor and ceiling runners, studs, stiffeners, cross bracing, fire blocking resilient channels, furring channels, doors and windows, including frames, casing, molding, base accessory trim items, gypsum drywall materials, laminated gypsum systems, backing board for all systems, including but not limited to thin coat and other finished systems, plastic and/or paint finished bases, finish board, fireproofing of beams and columns, fire proofing of chase, sound and thermal insulation materials, fixture attachments including all layout work, preparation of all openings for lighting, air vents or other purposes, and all other necessary or related work in connection therewith.

105.1.2 No limitation shall be placed on the work covered by this Section by reason of the surface or texture or purpose for which the materials described herein are used, designed or intended.

105.1.3 It is further specifically understood that the installation, tying and connection of all types of light iron and metal studs and all types of light iron furring erected to receive the materials specified in this article, including but not limited to gypsum wallboard, walls, partitions, ceiling heat panels, backing boards, plastic or acoustical materials or any material attached to the above described light iron construction is specifically included in the work covered by this Section.

There is no evidence that the Employer has a collective-bargaining agreement with SMART Local 105 covering the disputed work.

Accordingly, we find that the factor of collective-bargaining agreements favors awarding the disputed work to employees represented by Carpenters.

2. Employer preference, current assignment, and past practice

The Employer assigned the work in dispute to employees represented by Carpenters and prefers that they continue to perform the work. The Employer’s general manager Dan O’Dell testified that the Employer is
pleased with the quality of the work performed by Carpenters, as are the Employer’s clients. Since at least 2018, the Employer has had a past practice of assigning work of the kind in dispute to Carpenters-represented employees. The Employer has never assigned similar work to SMART Local 105.

We find that this factor favors awarding the work in dispute to employees represented by Carpenters.

3. Industry and area practice

The record contains testimonial and documentary evidence (including letters of assignment) that other employers have assigned work of the kind disputed here to employees represented by Carpenters. Stephen Araiza, Carpenters’ director of contract administration, testified that employees represented by Carpenters perform this type of work for dozens of other contractors in the area. General Manager O’Dell testified that while he was not 100 percent certain what the Employer’s competitors did, he would be surprised if they did not use Carpenters-represented employees to perform similar work. There is no evidence of an industry or area practice of similar work being performed by employees represented by SMART Local 105.

We find that this factor weighs in favor of awarding the work in dispute to the employees represented by Carpenters.

4. Relative skills

Both the Employer and Carpenters presented evidence that employees represented by Carpenters possess the requisite training, skill, and experience to perform the disputed work. Regarding their relative skills and experience, General Manager O’Dell testified that since at least 2018, employees represented by Carpenters have performed work of the kind in dispute for the Employer, and he stated that “we’re very pleased with the results” and that “[o]ur customers were pleased with—with the work that the Carpenters did on all those projects.” In addition, the record contains the outline for one of Carpenters’ training courses related to exterior metal panels and Director of Contract Administration Araiza’s testimony describing the training program. In an answer to a question, Araiza testified that the installation of panels can be performed by other unions, but he did not identify those other unions. No evidence was presented regarding the relative skills of the employees specifically represented by SMART Local 105.

We find that this factor weighs in favor of awarding the disputed work to employees represented by Carpenters.

5. Economy and efficiency of operations

Both the Employer and Carpenters claim that the factor of economy and efficiency of operations favors awarding the work to employees represented by Carpenters. Citing Washington & Northern Idaho District Council of Laborers (Skanska USA Building, Inc.), 366 NLRB No.161 (2018), the Employer argues that this factor favors awarding the work to the employees represented by Carpenters because the work is nearing completion. However, in that case, the Board also relied on evidence that replacing laborers with cement masons would actually “disrupt the project schedule because Cement Masons would be required, pursuant to specification requirements, to produce a mockup of the resinous coating they would install, which would need to be approved by the architect and University of Washington representatives.” Id., slip op at 4. No comparable evidence exists here.

Carpenters’ reliance on Operating Engineers Local 825 (Walters & Lambert), 309 NLRB 142 (1992), is similarly misplaced, because the record contained evidence demonstrating that it would be more efficient to use laborers rather than operating engineers to perform the disputed work. Thus, for example, the record there showed that even if the employer hired operating engineers to perform the disputed work, it would still need to employ laborers on the site, and that laborers could assist masons when idle, whereas the operating engineers would remain idle when not operating forklifts because of their work restrictions. Id. at 145. No comparable evidence was presented here.

Accordingly, we find that this factor does not favor awarding the disputed work to employees represented by either union.

CONCLUSIONS

After considering all of the relevant factors, we conclude that employees represented by Carpenters are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements; employer preference, current assignment, and past practice; industry and area practice; and relative skills. In making this determination, we award the work to employees represented by Carpenters, not to that labor organization or to 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 Performance Contracting, Inc., represented by Southwest Regional Council of Carpenters, are
entitled to perform the installation of exterior pre-fabricated corrugated metal and aluminum composite material panels at 10800 West Pico Boulevard, Los Angeles, California 90064.

Dated, Washington, D.C.  March 28, 2022

______________________________________
Marvin E. Kaplan,                              Member

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Gwynne A. Wilcox,                           Member

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David M. Prouty,                              Member

(SEAL)            NATIONAL LABOR RELATIONS BOARD