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Michigan Laborers' District Council, AFL–CIO *and* Michigan Infrastructure & Transportation Association, Inc. (Walter Toebe Construction Company) and Michigan Regional Council of Carpenters of United Brotherhood of Carpenters and Joiners of America. Case 7–CD–577

March 20, 2009

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Michigan Infrastructure & Transportation Association, Inc. (MITA), on behalf of the Walter Toebe Construction Company (the Employer), filed charges on October 23, 2008, alleging that the Respondent, Michigan Laborers' District Council, AFL–CIO (Laborers), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by the Michigan Regional Council of Carpenters of United Brotherhood of Carpenters and Joiners of America (Carpenters). The hearing was held on November 20 and 21, 2008, before Hearing Officer Vicki Claire Lessard. Thereafter, the Employer and Laborers each filed a posthearing brief, and Carpenters filed a brief in support of its position.

The National Labor Relations Board[1] 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 is a Michigan corporation engaged in site preparation and construction of highways, roads, and ramps at various jobsites. During the calendar year ending December 31, 2007, the Employer had gross revenues in excess of $1 million, and purchased goods valued in excess of $50,000 from suppliers located outside the State of Michigan. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers and Carpenters 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 performs heavy highway construction work within the Detroit, Michigan area. The Employer is a member of MITA and, as such, is party to collective-bargaining agreements with both Laborers, effective June 1, 2008, to May 31, 2013, and Carpenters, effective June 1, 2003, to May 31, 2008.

The MITA agreement with Laborers requires the Employer to use Laborers-represented employees for highway construction and airport construction work in Michigan. Article II of the agreement defines highway construction work as, "all work ordinarily included in public or private highway construction contracts . . . such as, for example, bridges . . . any concrete slab work, sound barrier walls." The MITA agreement with Carpenters requires the Employer to recognize Carpenters as the collective-bargaining representative for its employees performing "bridge construction work (including pile driving . . .), retaining wall and highway pumping station construction work which [the Employer performs] in the State of Michigan."

In July 2007, work started on the Gateway Four Project (Gateway Project) in Detroit, Michigan, which involved rebuilding entrance and exit ramps along several miles of the interstate highway I-75 leading to the Ambassador Bridge. As part of this project, the Employer was responsible for installing mechanically stabilized earth (MSE) walls.[2] The Employer started the MSE work in the fall of 2007 and assigned that work to employees represented by Laborers.

Also in the fall of 2007, Tony Stewart, a business agent for Carpenters, contacted Robert Jones, the Employer's vice president, and asked that the MSE installation work on the Gateway Project be assigned to employees represented by Carpenters. Jones responded that the Employer "has been using strictly Laborers on that work for 10, 12 years." Jones discussed the matter further with Tom Stover, the Employer's president, but the Employer did not change its work assignment. Thereafter, on April 15, 2008, Carpenters filed a grievance claiming that the installation of the retaining walls at the

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] At the hearing, the Employer presented a DVD describing MSE installation as follows: a footing, gravel or other type of leveling slab is laid on the ground; a row of interlocking precast concrete panels is placed by a back hoe and is guided into place; metal straps are attached to the backs of the panels and are laid out behind the panels; dirt is pushed over the straps by loaders and, when it is within several feet of the panels, the backfilling and dirt compacting is done manually with shovels; the panels are waterproofed; and the next layer of straps are attached and fully backfilled before the next row of precast concrete panels are put into place. After the wall is installed, coping is used to lock the wall into place.

Gateway Project should be assigned to employees represented by Carpenters.[3]

In May or June 2008, Robert Patzer, MITA's executive vice president, told Laborers Business Manager Gary Jorgensen about Carpenters' grievance. In response, Jorgensen stated that Laborers would "do whatever [it] had to" to protect the work for employees represented by Laborers, including "signing" (i.e., picketing) the job. Thereafter, by letter to Patzer dated June 26, 2008, Jorgensen stated:

> This [MSE work] is Laborers' work and job assignments, area practice and the overall history will defend our position. If, for some reason, this work is assigned to the Carpenters, even through arbitration, the Laborers will be forced to take all the necessary steps to protect our Jurisdiction and Assignment of Work.
>
> Let me repeat myself, all means and methods and resources required will be exercised.

B. Work in Dispute

The parties stipulated that the work in dispute is the unloading, setting, leveling, and coping of precast concrete for mechanically stabilized earth (MSE) walls at the Employer's jobsite at the Gateway Project in Detroit, Michigan.[4]

C. Contentions of the Parties

The Employer and Laborers contend that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated by Laborers' threat to take economic action if the disputed work were reassigned to employees represented by Carpenters. The Employer and Laborers further contend that no voluntary means exist for adjustment of the jurisdictional dispute. Finally, the Employer and Laborers argue that the work in dispute should be assigned to employees represented by Laborers based on the factors of employer preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations.

Carpenters contends that the threat by Laborers was contrived to invoke the instant proceeding and to derail Carpenters' grievance against the Employer. Thus, Carpenters contends the Employer's charge should be dismissed. Alternatively, Carpenters contends that the portion of the MSE work that is in dispute should be assigned to employees it represents (as part of a composite team of employees represented by Carpenters and Laborers) based on the factors of collective-bargaining agreements, area and industry practice, relative skills, and economy and efficiency of operations.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be 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: (1) there are competing claims for the disputed work among rival groups of employees;[5] (2) a party has used proscribed means to enforce its claim to the work in dispute;[6] and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.[7] On the record, we find that this standard has been met.

1. Competing claims for work

We find that there are competing claims for the work. Laborers has at all times claimed the work in dispute for the employees it represents, and these employees have been performing this work. Carpenters claimed the work by Business Agent Stewart's statement to Employer Vice President Jones, and by filing a grievance challenging the Employer's assignment of the work to Laborers. See *Bakery Workers Local 205 (Metz Baking Co.)*, 339 NLRB 1095, 1097 (2003).

2. Use of proscribed means

We also find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. It is well established that a picketing threat constitutes proscribed means. See *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1032 (2004). Here, there is reasonable cause to believe that Laborers threatened to picket the Employer. Laborers Business Manager Jorgensen told MITA Executive Vice President Patzer that Laborers would "do whatever [it] had to" in order to protect the work assignment to employees it represents, including "signing." Further, in its June 28, 2008 letter, Laborers reinforced the prior threat by stating it would take "all necessary steps" and exercise "all means and methods and resources" if the disputed work were reassigned to Carpenters.

Carpenters argues that Laborers' threats were contrived to invoke this 10(k) proceeding, evidenced by the fact that Laborers' letter was not issued contemporaneously with Jorgensen's verbal threat to picket. Carpenters does not, however, offer any direct evidence demonstrating that Laborers did not intend its threat seriously. In the absence of such evidence, a charged party's use of language that, on its face, threatens economic action is sufficient to find reasonable cause to believe that Section 8(b)(4)(D) has been violated. See, e.g., *Cretex*, above at 1032.

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[3] The parties stipulated that the grievance was still pending at the time of the hearing, and that the arbitration was postponed in deference to the instant proceeding.

[4] The parties further stipulated that there is no dispute regarding site preparation, backfill, cleanup, or poured in place coping.

[5] *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001).

[6] See, e.g., *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004).

[7] *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1138–1139 (2005).

3. No voluntary method for adjustment of dispute

The parties stipulated, and we find, that there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound.

Accordingly, we 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 (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 in this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence of Board certifications concerning the employees involved in this dispute.

The Employer is subject to 8(f) collective-bargaining agreements with both Laborers and Carpenters. Laborers' contract with MITA, to which the Employer is bound, includes the following description of work to be performed by employees represented by Laborers: "Earth Retention Barrier and wall and M.S.E. wall installer (including sound, retaining and crash barrier)."

The applicable Carpenters contract states that it governs "retaining wall . . . work which the Contractors perform in the State of Michigan." Carpenters argues that retaining wall work is synonymous with MSE wall work, because an MSE wall is nothing more than a precast retaining wall. However, Employer Vice President Jones and Chris Peyerk, the president of Dan's Excavating (a heavy highway contractor), both testified that MSE work is not similar to retaining wall work. They testified that an MSE wall has no structural integrity, and the earth is retained by layers of fabric, geotextiles, and straps intertwined with layers of sand. In contrast, they added, traditional retaining walls consist of reinforced concrete footings, driven by pile driving equipment, which hold back the earth.

Carpenters also relies on the "Craft Jurisdiction Exhibit 1" in its agreement with the Employer, which cites "the installation and handling of any and all precast material used to form a wall or barrier." MITA Executive Vice President Patzer testified, however, that Exhibit 1 was not negotiated, but rather was inserted after the signature page of the agreement, and was not referenced in the agreement itself. More importantly, the language in this exhibit does not specifically mention MSE work.

Although the language of the Carpenters' collective-bargaining agreement arguably covers the work in dispute, the language of the Laborers' agreement specifically claims such work. Accordingly, we find that the factor of collective-bargaining agreements slightly favors an award to employees represented by the Laborers. See *Laborers Local 731 (Tully Construction Co.)*, 352 NLRB 107, 109 (2008).

2. Employer preference and past practice

The Employer, in accordance with its past practice, assigned the disputed work at the Gateway Project to its employees represented by Laborers.

At the hearing, Employer Vice President Jones testified that the Employer has previously assigned the MSE work to Laborers without complaints. According to Jones, the Employer has employed individuals represented by Laborers for at least a dozen MSE projects and, since at least 1991, the Employer has not employed any employees represented by Carpenters to perform the disputed work. Laborers Vice President Bruce Ruedisueli testified that in 1993 there was a brief dispute between Laborers and Carpenters over MSE work at the Employer's Blue Water Bridge Project. However, that dispute was quickly resolved when the Employer told Carpenters that the work was assigned to employees represented by Laborers. Since then, employees represented by Laborers have performed the Employer's MSE work.

Carpenters presented testimony from Ronald Maracle, a carpenter formerly employed by the Employer, that in 2006 he performed MSE work on a small, 1- to 2-day project for the Employer. Carpenters also relies on a March 5, 2004 joint arbitration board decision, resolving a grievance filed against the Employer under its agreement with MITA involving a precast sound wall project at the intersection of I-75 and Square Lake Road. The decision resolved that the parties would agree to use a joint laborer/carpenter composite crew in the future to "complete installation of the precast parts and to erect precast wall panels." Laborers, however, was not a party to this proceeding, and the decision does not specifically refer to MSE work.

Carpenters' evidence of past practice does not outweigh the evidence clearly establishing the Employer's preference for, and past practice of, using employees represented by Laborers to perform work of the kind in dispute. Accordingly, we find this factor favors an award of the disputed work to employees represented by Laborers.

3. Area and industry practice

MITA Executive Vice President Patzer testified that two contractors, Dan's Excavating and the Employer, perform 60–65 percent of the MSE work in southeastern Michigan with employees represented by Laborers. Dan's Excavating President Peyerk testified that his company does approximately 50 percent of the MSE work in southeastern Michigan with employees represented by Laborers, and has never assigned MSE work to employees represented by Carpenters. Peyerk also testi-

fied that 5 percent of his active jobsites involve MSE work, and that he was not aware of his company using a composite crew of Laborers and Carpenters for that work. Laborers also provided letters of assignment for MSE work from area contractors.

Carpenters also presented evidence that its members have performed work of the kind in dispute. Milford Reynolds, director of heavy and highway operations for Carpenters, testified that members of Carpenters have performed MSE work in Michigan as part of composite crews of employees represented by Laborers and Carpenters. Reynolds added that Dan's Excavating and the Employer are the only two employers in the industry who do not use composite crews for the MSE work. Carpenters also presented assignment letters from two area employers that specifically referred to the performance of MSE work.[8]

The evidence above shows a practice of performing work of the kind in dispute with members of Laborers and Carpenters. Accordingly, we find that this factor does not favor an award to either group of employees.

4. Relative skills

Laborers presented testimony that its members possess the required skills and training to perform the disputed work and are experienced in doing so. MITA Executive Vice President Patzer, Employer Vice President Jones, and Laborers Vice President Ruedisueli all testified that employees represented by Laborers have performed MSE work for the Employer and that the Employer is satisfied with the quality of their work.

Carpenters also presented testimony that its members have the requisite skills needed to perform the disputed work. Director Reynolds testified that employees represented by Carpenters have the necessary skills to perform the applicable precast duties, and that their apprentice training involves precast retaining wall installation. He added that the training for precast walls is similar to the training for MSE wall work.

The record shows that employees represented by both unions have the skills and training necessary to perform the work in question. Accordingly, we find that this factor does not favor an award to either group of employees.

5. Economy and efficiency of operations

Employer Vice President Jones testified that in a 10-hour workday at the Gateway Project, the actual placement and assembly of the panels takes about 3 hours. For the remaining time, employees represented by Laborers perform other MSE tasks, including the placement of geotextile material and the completion of the backfilling process. In contrast, if Carpenters-represented employees were assigned the disputed work, they would not perform other MSE work on the project. Carpenters contends that its members can easily perform multiple tasks on MSE and related work. However, it is undisputed that Carpenters seeks only a portion of the MSE work for the employees it represents, which would leave Laborers-represented employees to perform the placement of geotextile material, waterproofing, backfilling, and strapping work.

Jones added that Carpenters-represented employees on the Gateway Project currently work in set crews handling "steel sheet piling work . . . foundation piling work . . . cast-in-place concrete walls . . . cast-in-place concrete abutments and piers for the bridges . . . parapet walls," and that a carpenter could not be safely pulled off one of those projects to be assigned MSE work for 45 minutes. Further, such reassignment would effectively shut down the Carpenter's crew operations during that period.

Laborers Vice President Ruedisueli similarly testified that it is efficient to perform the disputed work with employees represented by Laborers, because they also perform other MSE work such as waterproofing, strapping, and backfilling.

In view of the foregoing evidence, we find that this factor favors an award of the disputed work to the Employer's employees represented by Laborers.

Conclusions

After considering all the relevant factors, we conclude that the employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of certifications and collective-bargaining agreements, employer preference and past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Laborers, not to that Union or 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 Walter Toebe Construction Company, represented by Michigan Laborers' District Council, AFL–CIO, are entitled to perform the unloading, setting, leveling, and coping of precast concrete for mechanically stabilized earth (MSE) walls at the Employer's jobsite at the Gateway Project in Detroit, Michigan.

Dated, Washington, D.C. March 20, 2009

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member

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[8] Carpenters presented additional assignment letters referring to precast concrete work, but not specifically to MSE work.