Iron Workers Local Union No. 112 *and* Freesen Inc. and Mid-Central Illinois Regional Council of Carpenters. Case 33–CD–448

April 21, 2006

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. The charge in this proceeding was filed on November 16, 2005,[1] by Freesen Inc. (the Employer) alleging that the Respondent, Iron Workers Local Union No. 112 (Iron Workers) 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 Mid-Central Illinois Regional Council of Carpenters (Carpenters).

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 engaged in construction in Illinois, Missouri, Oklahoma, Texas, Indiana, and Iowa. The Employer annually performs services valued in excess of $50,000 directly to customers located outside the State of Illinois, and annually purchases and receives at its Illinois jobsites goods valued in excess of $50,000 directly from suppliers located outside the State of Illinois. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Iron Workers 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, a highway contractor, is engaged in the business of highway construction. It is a signatory member of the Associated General Contractors of Illinois, through which it is bound to a series of collective-bargaining agreements with Iron Workers, Carpenters, and Laborers' International Union of North America, Local No. 165 (Laborers). The Employer's most recent agreement with Iron Workers is effective from May 1, 2005 to April 30, 2009, and its most recent agreement with Carpenters is effective from September 1, 2001 to July 31, 2006.[2]

The Employer is responsible for stage 2 of a project to upgrade interstate 74 through East Peoria and Peoria, Illinois. The Employer's responsibilities include estimating, managing, and performing all major excavation work, and the construction of all structures and bridges. The Employer began the project in August 2004. Part of the project involved the setting of precast concrete beams for bridges at various points along the roadway. The beams are cast offsite, lifted into place, and affixed in one of three ways: on a masonry base of stiff grout, on a fabric pad, or on steel bearings. The Employer has not previously set precast concrete beams on steel bearings.

Around January 2005, Iron Workers Foreman Doug McClister approached the Employer's manager of bridges and structures, William Coates, and asked if the Employer had assigned the setting of precast concrete beams. Coates responded that he did not know if the Employer had made the assignment. McClister then reminded Coates that Iron Workers set the precast concrete vault beams at the Employer's Cabin Town job in Bloomington, Illinois in 2003–2004.[3]

On February 2, the Employer's CEO, James Buhlig, met with Iron Workers Business Manager Johnnie Short, Carpenters Vice President Darrel Moody, and other representatives from both unions to discuss the interstate 74 project. At the meeting, Buhlig acknowledged that contracts with both unions covered the work of setting precast concrete beams, and proposed that a composite crew of Carpenters, Iron Workers and Laborers[4] perform the work. Carpenters rejected the proposal while Iron Workers agreed to it. Buhlig reminded Carpenters that on the Cabin Town project in 2003–2004, the Employer assigned Iron Workers to set all precast beams, and Carpenters did not object to that assignment. Buhlig ended the meeting by stating that the Employer's managers would consult and announce their decision. He told them that the Employer would make the assignment from the standpoint of economic efficiency, and that it was leaning towards assigning the work in the same manner as another bridge builder, O'Neal Construction. O'Neal Construction had assigned the setting of precast concrete beams on steel bearings to employees represented by

[1] Unless otherwise indicated, all dates are in 2005.

[2] Although Carpenters did not appear at the hearing, the Employer submitted into evidence its collective-bargaining agreement with Carpenters.

[3] The beams on that job were set on fabric pads.

[4] Buhlig testified that he included Laborers because the Employer's collective-bargaining agreement with Laborers obligated the Employer to assign at least one employee represented by Laborers as a carpenter tender for every three Carpenters' represented employees it employed on all its projects.

Iron Workers, and the setting of all other precast concrete beams to employees represented by Carpenters.

By letter to the Employer dated February 9, Carpenters' executive secretary, James Dalluge, protested the Employer's intention to assign to Iron Workers the setting of precast beams on steel bearings. In the letter, Carpenters threatened to file a grievance concerning the assignment of this work to Iron Workers.

On February 11, Buhlig sent a letter to Iron Workers and Carpenters assigning the "setting of all pre-cast I-beams that are set on steel bearings" to employees represented by Iron Workers, and the setting of "all other precast I-beams" to employees represented by Carpenters. A few days later, the Employer began the project using employees represented by Iron Workers to set the precast concrete beams on steel bearings.

By letter dated February 24, the Employer responded to Carpenters' February 9 letter, asserting that the dispute was not arbitrable because jurisdictional disputes are excluded from the grievance process under the Carpenters' collective-bargaining agreement, and that Carpenters had no valid claim to the disputed work.

By letter dated March 2, Dalluge disputed the Employer's statement that Carpenters had no valid claim for the work, and stated that the Employer's assignment violated the Employer's collective-bargaining agreement with Carpenters. Dalluge added that if the Employer would not process the grievance then "all legal action will be taken to resolve this matter."

Shortly before March 25, Buhlig and Iron Workers Business Manager Short had a brief telephone conversation in which Buhlig related that Carpenters was still pursuing the assignment of setting all precast beams. Short stated that Iron Workers would fight to keep its assignment.

On March 25, Short sent a letter to the Employer stating that if the setting of the precast concrete beams on steel bearings was reassigned to employees represented by Carpenters, Iron Workers would "take every action available to [them] to see to it that the work in dispute is performed by Iron Workers, . . . which could well include [a] job action. . . ."

On November 8, Carpenters filed a lawsuit against the Employer under Section 301 of the Labor-Management Relations Act in the United States District Court for the Central District of Illinois. In its lawsuit, Carpenters sought payment for all work assigned by the Employer to Iron Workers in the setting of precast concrete beams.

Shortly afterwards, Buhlig informed Short that Carpenters had filed suit in Federal court. In a letter dated November 14, Short stated that "all setting of pre-cast concrete falls within work that is performed exclusively" by Iron Workers, and should the Employer take any step to reassign the disputed work, Iron Workers would "take all available legal action," including "post[ing] pickets on affected job sites." Subsequently, the Employer filed the instant unfair labor practice charge against Iron Workers. The Employer also filed with the district court a motion to stay Carpenters' lawsuit pending the outcome of the case before the Board. The district court has not yet ruled on the Employer's motion.

In a letter to the Region, dated December 2, Carpenters stated that it disclaims the work in dispute, but that it does not waive any claim to the work at issue pending before the district court, and that any resulting Board action would not affect in any way its pending court proceeding.

B. Work in Dispute

The Board's notice of hearing states that the work in dispute is "setting precast concrete beams on steel bearings on the Upgrade I-74 project, Peoria, Illinois."

C. Contentions of the Parties

The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. The Employer maintains that Iron Workers made several demands for the work in dispute, and that in its letter of November 14, Iron Workers threatened to picket the Employer. The Employer also contends that Carpenters' letter to the Region did not unequivocally disclaim the work in dispute because it explicitly reserved the right to pursue the same work in its lawsuit. The Employer also contends that no voluntary means exist for adjustment of the jurisdictional dispute. As to the merits of the dispute, the Employer contends that the work should be assigned to employees represented by Iron Workers, based on the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills and training, and economy and efficiency of operations.

Iron Workers also argues that Carpenters' disclaimer is ineffective because of Carpenters' stated intent to pursue its lawsuit, and that the work in dispute should be assigned to the employees it represents based on the factors of the collective-bargaining agreements, employer preference and past practice, area and industry practice, and relative skills and training.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work among rival

groups of employees and that a party has used proscribed means to enforce its claim to the work in dispute. See *Electrical Workers Local 3 (Slattery Skanska, Inc.),* 342 NLRB 173, 174 (2004). The Board will not proceed under Section 10(k) if there is an agreed-upon method for voluntary adjustment of the dispute. Id.

1. Competing claims for work

The evidence establishes that Iron Workers claims the disputed work. That claim is demonstrated not only by the fact that employees it represents perform the work, *Longshoremen Local 14 (Sierra Pacific Industries)*, 314 NLRB 834, 836 (1994), but also by Iron Workers' November 14 statement that it would take all available action, including picketing, if the disputed work were reassigned.

We find that there is reasonable cause to believe that Carpenters claims the work in dispute, as well. As set forth above, in the February 2 meeting, Carpenters claimed the disputed work by refusing the Employer's proposal of a composite crew of employees represented by Iron Workers, Carpenters, and Laborers. Further, in letters dated February 9 and March 2, Carpenters stated that it would file a grievance if the Employer did not assign the disputed work to employees represented by Carpenters, and that it would pursue all avenues if the Employer did not process the grievance. Finally, Carpenters filed its lawsuit in district court concerning the work in dispute.

Although Carpenters' December 2 letter to the Region purports to disclaim interest in the disputed work, we find the disclaimer ineffective.[5] To be effective, a disclaimer must be a clear, unequivocal, and unqualified disclaimer of interest in the work in question. *Laborers Local 79 (DNA Contracting)*, 338 NLRB 997, 998–999 (2003); *Operating Engineers Local 150 (Interior Development),* 308 NLRB 1005, 1006 (1992). As noted above, Carpenters' disclaimer was qualified by the statement that it did not waive any claim to the work at issue in the district court proceeding. Plainly, Carpenters' continuing lawsuit is inconsistent with any disclaimer of interest in the work.[6] And we therefore reject the purported disclaimer.

2. Use of proscribed means

As discussed above, in its November 14 letter to the Employer, Iron Workers threatened that it would "take all legal action" including "post[ing] pickets on affected job sites." On this basis we find that there is reasonable cause to believe that Iron Workers' threat constituted proscribed means to enforce its claim to the work in dispute.

3. No voluntary method for adjustment of dispute

There is no evidence that either Carpenters or Iron Workers is bound to the dispute resolution procedure in the other union's collective-bargaining agreement with the Employer. Moreover, the dispute resolution provision in Carpenters' collective-bargaining agreement with the Employer specifically excludes jurisdictional disputes. 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." *Plumbers Local 393 (Therma Corp.)*, 303 NLRB 678, 680 (1991). Thus, we find that that there is no agreed-upon method for the voluntary adjustment of the dispute to which all parties are bound.

Based on the foregoing, we find there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Therefore, we find that the dispute is properly before the Board for determination.

D. 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 deciding this dispute.

1. Collective-bargaining agreements

The record shows that the Employer has been signatory to a series of collective-bargaining agreements with Iron Workers, the most recent of which is effective from

[5] The Carpenters did not appear at the hearing or file any brief in this matter. Consequently, there is no motion to quash based on the alleged disclaimer, and there is arguably a procedural basis to refuse to quash the 10(k) proceeding. We have nonetheless addressed the substantive issue, and we deny it on the merits.

[6] See *Laborers Local 931 (Carl Bolander)*, 305 NLRB 490, 491 (1991) (grievance requesting compliance with collective-bargaining agreement constituted a claim for the disputed work); *Plumbers District Council 16 (L&M Plumbing, Inc.)*, 301 NLRB 1203, 1204 (1991) (union's continued pursuit of grievance found inconsistent with its assertion that it disclaimed interest in the disputed work); *Longshoremen Local 1294 ILA (Cibro Petroleum Products)*, 257 NLRB 403, 406 (1981) (statement that disclaimer is conditioned on success of Federal lawsuit found not to be an unequivocal disclaimer of the disputed work). Member Liebman agrees that the Carpenters' continuing lawsuit, which seeks pay-in-lieu relief, is inconsistent with a disclaimer of interest in the disputed work. See *Laborers Local 542 (Eshbach Bros.),* 344 NLRB 201, 202 fn. 4(2005).

2005 to 2009. The Employer's agreement with Iron Workers covers work involved in the construction of highways and bridges including "handling, erection and construction of all . . . steel . . . all precast, prestressed, preassembled masonry panels and poststressed concrete structures. . . ."

The record also establishes that the Employer has a collective-bargaining agreement with Carpenters, which covers "highway and heavy construction including all work involved in the construction of roads . . . highways . . . bridges" and the "setting of pre-cast and pre-stressed beams, girders and deck."

Both collective-bargaining agreements arguably cover the work in dispute. Under these circumstances, we find that the factor of collective-bargaining agreements does not favor an award of the disputed work to either group of employees.

2. Employer preference and past practice

Both Employer CEO Buhlig and Manager Coates testified that the Employer assigned the disputed work to employees represented by Iron Workers, and that the Employer prefers that the work in dispute continue to be performed by Iron Workers-represented employees.

At the hearing, Buhlig testified that the Employer had never before installed precast concrete beams on steel bearings. The record does show, however, that the Employer has previously assigned similar work to employees represented by Iron Workers.[7] Both Buhlig and Coates testified that the Employer has always assigned to these employees the installation of steel girders on steel bearings. Coates further testified that the installation of girders on steel bearings entails "the same setup" as the installation of concrete beams, because the same bearing is used in both instances.

In view of the Employer's preference, and its past practice with respect to installations involving steel bearings, we find that this factor favors an award of the disputed work to employees represented by Iron Workers.

3. Area and industry practice

Iron Workers Business Manager Short testified that the setting of precast concrete and steel beams on steel bearings has been performed by Iron Workers-represented employees for other contractors within the Peoria-East Peoria area. Specifically, he testified that employees represented by Iron Workers performed the setting of beams in the original construction of interstate 74 through Peoria and East Peoria. Short further testified that, on a 2002 project, employees represented by Iron Workers set both the iron girders and the concrete beams of a new bridge. In addition, Iron Workers introduced into evidence letters of assignment from other area contractors, involving the installation of iron girders on steel bearings or precast concrete beams on fabric or masonry pads.

There is no evidence addressing whether there is an area or industry practice of Carpenters-represented employees performing this work.

We find from the above evidence that this factor favors an award of the disputed work to employees represented by Iron Workers.

5. Relative skills and training

The Employer and Iron Workers presented testimony that employees represented by Iron Workers are skilled in the installation of precast concrete beams and other structures. Iron Workers' apprentice coordinator Brian Stanley testified that Iron Workers' apprentice program takes 3 years to complete and includes over 100 hours of classroom instruction. He added that the program requires apprentices to work under the supervision of one or more journeymen, and that they spend 1,500 to 2,000 hours in the field while in the program. Stanley further testified that Iron Workers apprentices are also required to purchase manuals and watch training video modules demonstrating rigging, setting, and installation of precast concrete beams.

The record contains no evidence of the training received by employees represented by Carpenters.

Accordingly, we find that this factor favors an award to employees represented by Iron Workers.

6. Economy and efficiency of operations

Employer managers Buhlig and Coates both testified that the Employer can perform the work more efficiently and economically with Iron Workers. They testified that assigning the work to Iron Workers requires a crew of only five employees. The crew consists of one employee to relay signals from the crew to the crane operator, two employees to rig the beam before it is lifted, and two employees to assist in placing the beam on the pintles in the bearing base, once the beam is guided into place, to adjust the bearings as necessary, and to install the anchor bolt.

Buhlig and Coates testified that, by contrast, if the work in dispute is assigned to employees represented by Carpenters, the Employer would have to use a six or seven person crew. The crew would consist of one Carpenters-represented employee to be the signal person,

[7] The Board has found that an employer's past practice of assigning similar work is a relevant consideration in determining whether this factor favors an award to a particular group of employees. See, e.g., *Laborers Local 172 (Henkels & McCoy)*, 313 NLRB 978, 981 (1994); *Sheet Metal Workers Local 18 (Circle T Construction)*, 209 NLRB 470, 471–472 (1974).

two employees represented by Laborers for rigging (as required under its collective-bargaining agreement with Laborers if a Carpenters-represented employee is used),[8] two employees represented by Carpenters to set the beams into place, and two Iron Workers-represented employees to adjust the bearings and set the anchor bolt. Buhlig and Coates testified that the employees represented by Iron Workers would be needed on that crew because only they can adjust the bearings and set the anchor bolts for the retainers.

Accordingly, we find that this factor favors an award of the disputed work to the employees represented by Iron Workers.

Conclusions

After considering all the relevant factors, we conclude that the employees represented by Iron Workers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference and past practice, area and industry practice, relative skills and training, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Iron Workers, 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 Freesen, Inc., represented by Iron Workers Local Union No. 112, are entitled to perform the setting of precast concrete beams on steel bearings on the Upgrade I-74 project, Peoria, Illinois.

[8] See fn. 4, supra.