International Union of Operating Engineers a/w AFL–CIO, Local Union 825 *and* Structure Tone, Inc. and Market Halsey Urban Renewal, Party in Interest. Case 22–CD–765

May 30, 2008

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Structure Tone, Inc. (the Employer) filed a charge on October 16, 2007, alleging that the Respondent, International Union of Operating Engineers, Local Union 825 (Local 825 or the Union), 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 an employee it represents rather than to a Market Halsey Urban Renewal (Market Halsey) employee. The hearing was held on November 5, 2007, before Hearing Officer Lisa D. Pollack. Thereafter, the Employer filed a posthearing brief.[1]

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.[2]

I. JURISDICTION

The parties stipulated that, during the 12-month period preceding the hearing, the Employer, a New York corporation, purchased and received goods valued in excess of $50,000 directly from points located outside the State of New York. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties also stipulated, and we find, that Local 825 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 in the business of construction management. In 2006, Morgan Stanley hired the Employer to construct a data center in Newark, New Jersey, located on the second floor of a 13-story commercial building owned by Market Halsey. Morgan Stanley leases this space from Market Halsey. The project included two phases of construction. Phase one began in June 2006 and ended in August 2006. Phase two began in September 2007, with construction scheduled to end in January 2008. Phase one work included the construction of compartments to house data equipment, fabrication of work cubicles, and installation of air conditioning units, ceiling tiles, and flooring. Phase two involved an expansion of work completed during phase one.

Market Halsey employs Pepito Gonzalez to operate the building's freight elevator, available for free use by all tenants. Pursuant to this arrangement, the Employer used this elevator—with Gonzalez as its operator—to transport building materials during phase one.

As more fully detailed below, the Employer is party to a collective-bargaining agreement with Local 825. In July 2006, Local 825 learned of the Morgan Stanley project. Local 825 Agent Lino Santiago contacted Telly Fitanidis, the Employer's project manager, and claimed that the parties' agreement required that the Employer hire a union engineer to operate the elevator to transport building materials to the construction site. Fitanidis referred Santiago to Tom Matello, the Morgan Stanley representative assigned to the project. Santiago discussed Local 825's claim with Matello and also contacted Bob Klug, Market Halsey's chief engineer at the building. In an e-mail to Matello, Klug reported that building management agreed with Local 825's claim and wanted "to maintain harmony" with local unions. Fitanidis testified that as a result of these discussions, Matello directed that the Employer hire a union-represented employee to operate the elevator, when taken to the second floor, during the final 3 weeks of phase one. Under this agreement, Gonzalez continued to operate the elevator when used by all other tenants. The Employer paid the union operator's wages and benefits, but was reimbursed by Morgan Stanley.

In early September 2007, Local 825 first learned of phase two and that Gonzalez had resumed operating the elevator when used by the Employer to transport materials to the Morgan Stanley construction site. Santiago contacted Fitanidis several times during the month, each time claiming that the work belonged to a union operator. Fitanidis denied all of Santiago's claims, strongly expressing the Employer's position that the parties' agreement did not cover the work. There is no record evidence that Local 825 contacted Morgan Stanley or Market Halsey in an effort to achieve its goal. Instead, on October 1, 2007, Local 825 sent the Employer a letter stating its "[intent] to commence picketing to enforce contract rights."

[1] Local 825 did not file a posthearing brief. Market Halsey did not appear at the hearing nor did it file a brief.

[2] 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 Schaumber and Member Liebman 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.

On October 15, 2007, Local 825 began picketing the building's front and back entrances.[3] Picketers carried signs stating, "Unfair to Local 825, Structure Tone has violated a collective bargaining agreement with Local 825." Between 6:45 a.m. and 3:15 p.m. each day, 20 to 30 union members picketed the back entrance while 10 members picketed the front entrance. This picketing stopped all deliveries to tenants and the Employer. Local 825 terminated picketing on October 22, 2007, after the Employer filed the unfair labor practice charge in this case.

B. Work in Dispute

At the hearing, the parties stipulated that the work in dispute is "the operation of freight elevators at the Morgan Stanley construction project located at 165 Halsey Street, Newark, New Jersey."

C. Contentions of the Parties

The Employer contends that there are competing claims to the work and that there is reasonable cause to believe that Local 825 violated Section 8(b)(4)(D) of the Act. It further argues that there is no agreed-upon method for voluntary adjustment of the dispute. On the merits, the Employer asserts that its collective-bargaining agreement with Local 825 does not favor assigning the disputed work to a union-represented employee. Additionally, the Employer argues that employer preference, area practice, and economy and efficiency of operations favor continuing to assign the disputed work to a Market Halsey employee.

At the hearing, Local 825 contended that its collective-bargaining agreement with the Employer, employer preference and past practice, area practice, and Joint Board determinations favor assigning the disputed work to an employee it represents.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute under Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 510 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This 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. Id. Additionally, the Board will not proceed under Section 10(k) if there is an agreed-upon method for voluntary adjustment of the dispute. Id.

[3] The freight elevator is located at the building's back entrance, near a loading dock used by the Employer during construction. Tenants use the front entrance to access the building's unmanned passenger elevators.

1. Competing claims for the work

Local 825 stipulated that it claims the disputed work. The record shows that Gonzalez has operated the freight elevator when used by the Employer during phase two of construction. Gonzalez' continued performance establishes an additional claim to the disputed work. See *Operating Engineers Local 513 (Thomas Industrial Coatings)*, 345 NLRB 990, 992 fn. 6 (2005) (employees' performance of work in dispute is "evidence of a claim for the work . . . even absent a specific claim."). Accordingly, there is reasonable cause to believe that there are competing claims to the disputed work.

2. Use of proscribed means

This case is atypical because Local 825 directed its picketing at the Employer rather than Market Halsey, the party that employs the operator who currently performs the work in dispute. This case nevertheless presents a situation which Section 8(b)(4)(D) was intended to remedy. As the Board noted in *Plumbers Local 195 (Gulf Oil)*:

> Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization to engage in proscribed activity with an object of "forcing or requiring *any employer* to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." The Board has interpreted this language as showing the "clear intent of Congress to protect not only employers whose work is in dispute from such [proscribed] activity, but *any* employer against whom a union acts with such a purpose."

275 NLRB 484, 485 (1985) (emphasis in original; footnote omitted) (quoting *Longshoremen ILA Local 1911 (Cargo Handlers)*, 236 NLRB 1439, 1440 (1978)).

As stated above, Local 825 picketed the Employer after it repeatedly denied Local 825's demands that the parties' agreement required reassignment of the disputed work to a union operator. That picketing also affected Market Halsey because it took place at all entrances to the building and stopped all tenant deliveries. Thus, it is clear that Local 825 aimed its picketing at the Employer with an object of forcing the Employer to reassign the disputed work or, through the Employer, forcing Market Halsey to reassign the disputed work. See *Painters District Council 9 (Apple Restoration)*, 313 NLRB 1111, 1112 fn. 3 (1994). This establishes reasonable cause to believe that Local 825 used proscribed means to enforce its claim to the work. Id.

3. No agreed-upon method for voluntary resolution of dispute

The collective-bargaining agreement between the Employer and Local 825 provides that, where a jurisdictional dispute arises, any party may file a complaint with the plan for the settlement of jurisdictional disputes in the construction industry. At the hearing, Local 825 acknowledged that it contacted the plan administrator about pursuing a complaint, but that the administrator could not decide the dispute because Market Halsey was not a signatory to the parties' agreement. Therefore, the Board may proceed under Section 10(k) because this agreed-upon method cannot resolve the dispute. See *Laborers Local 1184 (Golden State Boring & Pipejacking)*, 337 NLRB 157, 159 (2001) (although parties bound to submit dispute to settlement plan, Board determined dispute after the plan administrator refused to decide it).

For these reasons, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that there is no available agreed-upon method for voluntary adjustment of the dispute.

Local 825 contended, however, that Section 10(k) is inapplicable because the dispute concerns its attempt to recapture bargaining unit work acquired during phase one of construction. To this end, the Board has held that "if a dispute is fundamentally over the preservation, for one group of employees, of work they have historically performed, it is not a jurisdictional dispute." *Machinists District 190 Local 1414 (SSA Terminal, LLC)*, 344 NLRB 1018, 1020 (2005). Here, however, the union-represented operator performed the work for only 3 weeks during phase one of construction. Moreover, this assignment of work was at the direction of Morgan Stanley "to maintain harmony" with local unions. Thus, this limited performance of work does not constitute a history of performance sufficient to establish a work preservation claim. See, e.g., *Teamsters Local 107 (Reber-Friel Co.)*, 336 NLRB 518, 521 (2001) (union members' performance of work on a "few isolated occasions" insufficient to establish a work preservation claim). Cf. *Seafarers (Recon Refractory & Construction)*, 339 NLRB 825, 828 (2003) (union members' performance of work for a decade sufficient to establish a work preservation claim).

Therefore, 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 of this dispute.

1. Certifications and collective-bargaining agreements

At the hearing, the parties stipulated that there are no Board certifications concerning the employees involved in this dispute. Accordingly, we find that the factor of Board certifications does not favor awarding the disputed work to either employees represented by Local 825 or Market Halsey employees.

The Employer's collective-bargaining agreement with Local 825 covers all employees "engaged in the operation of power equipment . . . used in the construction, alteration and repair of buildings . . . ." It defines building construction work as the "construction of building structures, including modifications thereof, or additions or repair thereto, intended for use for shelter, protection, comfort or convenience." Additionally, for covered work, the agreement provides that "an Engineer shall be employed on all elevators and hoists (freight or passenger, permanent or temporary) . . . where used for hoisting building materials . . . or tools and equipment . . . ."

These broad provisions can be read to cover the disputed work in this case. The Employer describes the construction in this case as "interior renovation work" and argues that the parties' agreement only encompasses "building structural work." The Employer does not, however, cite any specific contractual provisions to support this contention. Additionally, there is no record evidence of a collective-bargaining agreement covering Gonzalez or any other Market Halsey employees who might perform the work in dispute. Thus, on balance, the factor of collective-bargaining agreements favors awarding the work in dispute to employees represented by Local 825.

2. Employer preference and past practice

As a threshold issue, we note that Local 825 argued at the hearing that the Board should give weight to the alleged preference of Market Halsey that the work in dispute be performed by union-represented employees. We reject this contention. As described above, Local 825 did not include Market Halsey in discussions concerning reassignment of the disputed work. Without additional evidence, Local 825 cannot demonstrate Market Halsey's current preference. Furthermore, by exclusively seeking the disputed work from the Employer, Local 825 limited this dispute to itself and the Employer. Therefore, we will only consider the Employer's preference. The Em-

ployer prefers that the work in dispute continue to be performed by a Market Halsey employee. Thus, we find that the factor of employer preference favors an award of the disputed work to Market Halsey employees.

Additionally, the parties disagree as to whether the hiring of a union-represented operator during phase one of construction constitutes evidence of the Employer's past practice. As described above, the Employer had no involvement in this decision. The union-represented operator began phase one work—at no cost to the Employer and at Morgan Stanley's direction—only after Market Halsey agreed with the Union's claim. Accordingly, we will not consider this as evidence of the Employer's past practice.

Local 825 presented evidence that in 2007, an employee represented by it operated an elevator during an Employer construction project in Jersey City, New Jersey.[4] Local 825 asserts that this evidence establishes an employer past practice that favors awarding the work in dispute to an employee it represents. Even assuming that the Jersey City project involved work comparable to the disputed work in this case, this single instance is insufficient to establish controlling employer past practice.[5] Therefore, we find that the factor of employer past practice does not favor awarding the disputed work to either employees represented by Local 825 or Market Halsey employees.

3. Area practice

The Union introduced letters from seven local contractors, demonstrating their practice of assigning the operation of elevators to union-represented employees. This evidence, however, is too inconclusive to establish a clear area practice with regard to the work in dispute. These letters fail to specifically describe the work involved nor do they set forth any facts and circumstances surrounding the work.

Santiago testified that employees represented by Local 825 recently operated elevators for local contractors during the construction of two new high schools and a new hospital. In contrast, phase two work involves substantially less construction in a completed structure. Furthermore, unlike the projects cited by Local 825, phase two work occurs at a time when the building is occupied by tenants and the elevator has been turned over to the building's owner. Thus, this evidence is not sufficiently comparable to constitute controlling area practice.

Finally, union member Lee Hubbard testified about past construction work completed at the Market Halsey building. Hubbard testified that, between 1999 and 2002, several subcontractors hired employees represented by Local 825 to operate the building's freight elevators.[6] As here, this construction occurred at a time when structural work was complete, tenants occupied the building, and elevators had been turned over to Market Halsey. However, this limited evidence of assignment of work to Local 825, some 5 years ago, is insufficient to demonstrate prevailing area practice. Accordingly, we find that this factor does not favor awarding the disputed work to either employees represented by Local 825 or Market Halsey employees.

4. Relative skills and training

It is undisputed that operation of the freight elevator involves opening and closing the elevator door and controlling a lever to move the elevator between floors. Santiago testified that no special training or license is required to perform this work. On these facts, we find that employees represented by Local 825 and Market Halsey employees have the skills and training necessary to perform this simple work. Thus, this factor does not favor an award to either employees represented by Local 825 or Market Halsey employees.

5. Economy and efficiency of operations

Fitanidis testified that, during phase one, the union-represented employee operated the elevator during Employer deliveries and Gonzalez operated it for all other tenant deliveries. Fitanidis further testified that if the Employer and a tenant required use of the elevator at the same time, even when it could hold both parties and their materials, one party would have to wait until the other party's operator completed the delivery. Because a Market Halsey employee delivers materials to all but one floor, it is more efficient for that employee to also transport materials to the Morgan Stanley construction site. See, e.g., *Elevator Constructors Local 2 (Kone, Inc.)*, 349 NLRB 1207, 1211 (2007). Otherwise, the Union operator would remain idle while the Market Halsey operator completed the bulk of deliveries. See id. Accordingly, we find that the factor of economy and efficiency

[4] Local 825 Business Agent Cesar Gamio testified that the Employer conducted construction work on seven floors of a completed 30-story building. Gamio further testified that tenants occupied the building during this project and the Employer had near dedicated use of one of the building's four or five freight elevators. Gamio reported that the Employer initially hired a security guard and laborer to operate this elevator. Gamio testified that the Employer reassigned the disputed work to a union-represented operator after Local 825 claimed the work under the parties' collective-bargaining agreement.

[5] Thus, we find it unnecessary to decide whether this evidence is comparable employer past practice.

[6] Hubbard testified that subcontractors used six of the building's freight elevators. The record evidence suggests that Market Halsey currently makes available only one of these freight elevators for tenant use.

of operations favors awarding the disputed work to Market Halsey employees.

6. Joint Board determinations

Local 825 introduced a number of joint board decisions granting operation of elevators to employees represented by Operating Engineers Locals throughout the United States. These decisions do not set forth an underlying rationale, are expressly limited to the jobs in issue, and include no evidence that the work and underlying facts are comparable to this case. Furthermore, the Employer was not a party to any of these disputes and is, therefore, not bound by them. Hence, this factor does not favor an award to either employees represented by Local 825 or Market Halsey employees. See *Iron Workers Local 1 (Advance Cast Stone Co.)*, 338 NLRB 43, 47 (2002).

Conclusion

After considering all the relevant factors, we conclude that a Market Halsey employee is entitled to continue performing the work in dispute. Although the factor of collective-bargaining agreements favors awarding the disputed work to employees represented by Local 825, we find that this factor is outweighed by the factors of employer preference and economy and efficiency of operations, which favor awarding the disputed work to Market Halsey employees. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the follow0ing Determination of Dispute.

1. Market Halsey Urban Renewal employees are entitled to perform the operation of freight elevators at the Morgan Stanley construction project located at 165 Halsey Street, Newark, New Jersey.

2. International Union of Operating Engineers, Local Union 825 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Structure Tone, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, International Union of Operating Engineers, Local Union 825 shall notify the Regional Director for Region 22 in writing whether it will refrain from forcing Structure Tone, Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.