Operative Plasterers' & Cement Masons' International Association, Local 262 *and* JJC Stucco and Carpentry Corp./Sessa Plastering Corp. and International Union of Bricklayers & Allied Craftworkers, Local 1. Case 29–CD–630

July 15, 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. JJC Stucco and Carpentry Corp./Sessa Plastering Corp. (Employer) filed charges on December 23, 2008,[1] alleging that the Respondent, Operative Plasterers' & Cement Masons' International Association, Local 262 (Plasterers), 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 represented by Plasterers rather than to employees represented by International Union of Bricklayers & Allied Craftworkers, Local 1 (Bricklayers). The hearing was held on March 4, 2009, before Hearing Officer Nancy Reibstein. Thereafter, Plasterers filed a motion to quash notice of hearing and a brief in support thereof, and Bricklayers filed a posthearing brief.

The National Labor Relations Board[2] affirms the hearing officer's rulings, finding them free from prejudicial error.[3] On the entire record, the Board makes the following findings.

[1] The hearing officer inadvertently found that the charge was filed on December 28, 2008.

[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 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. See *Snell Island SNF LLC v. NLRB*, __ F.3d __, 2009 WL 1676116 (2d Cir. June 17, 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed __ U.S.L.W. __ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

[3] The hearing officer inadvertently stated that the December 29, 2008 Notice of Charge Filed was dated May 29, 2008.

I. JURISDICTION

The parties stipulated at the hearing that JJC Stucco and Sessa Plastering are domestic corporations with principal offices and places of business located at 139 Toledo Street, Farmingdale, New York (the Farmingdale facility), and have been and are engaged in providing construction services at various sites in the New York City metropolitan area. During the past year, JJC Stucco and Sessa Plastering, respectively, in the course and conduct of their business operations, purchased and received at the Farmingdale facility goods, products, and materials valued in excess of $50,000 directly from points outside the State of New York.

The parties further stipulated, and we find, that JJC Stucco and Sessa Plastering are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act and are subject to the jurisdiction of the Board, and that Plasterers and Bricklayers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts

The Employer and Bricklayers are parties to a collective-bargaining agreement initially for the period February 1, 2006, through January 31, 2009, and then extended through January 31, 2012. The agreement states that the Employer recognizes Bricklayers pursuant to Section 9(a) of the Act as the exclusive collective-bargaining agent for all employees within Bricklayers' jurisdiction.

The Employer and Plasterers are not parties to a collective-bargaining agreement.

1. Jamaica Hospital

Jamaica Hospital was building a nursing home. Barr & Barr, Inc. was the general contractor. It subcontracted the exterior insulation and finish systems (EIFS) work to the Employer. The Employer began work on the project in March 2008,[4] using employees represented by Bricklayers. Article VII of the collective-bargaining agreement, entitled, WORK INCLUDED, expressly includes "any and all EIFS" and "preparation, installation, and repair of all interior and exterior insulation systems."

On April 3, Plasterers notified Bricklayers by letter that Plasterers had learned that members of Bricklayers employed by the Employer were performing "the jurisdictional work (EIFS)" of Plasterers on the Jamaica Hospital project. Plasterers requested that Bricklayers arrange with Plasterers for a jobsite meeting to be held under step 1 of the New York Plan for the Settlement of Jurisdictional Disputes (the New York Plan) not later

[4] All dates are 2008, unless stated otherwise.

than April 8. On April 8, Bricklayers notified Plasterers by reply letter that neither Bricklayers nor the Employer had "stipulated to, or [were] bound by" the New York Plan, that the New York Plan accordingly had no authority over the matter, and that there was consequently no basis for scheduling any meeting pursuant to the procedures of the New York Plan. On April 9, by reply letter to Bricklayers, Plasterers reasserted its claim that the New York Plan had authority over the matter.

According to the uncontradicted testimony of Barr & Barr Project Manager Michael Burns, Plasterers Representative Mario Perez visited the Jamaica Hospital jobsite in late May or early June.[5] Perez demanded that Burns shut down the Employer's work on the project because Barr & Barr was "a union company" and the Employer's employees were "not union members." Burns refused. Perez told Burns that "they would have to shut down the Company and set up a picket line."[6]

Again according to Burns' uncontradicted testimony, Perez visited the jobsite again in early July, accompanied by Plasterers International Representative Wayne Ebetson.[7] Referring to the Employer's employees, Ebetson told Burns:

> [A]ll of those guys working out there on the EIFS System were non-union and . . . that we [i.e., Barr & Barr] had to shut the job down—Barr and Barr [had] to go out there and physically stop them from working.

Burns told Ebetson that after Perez' earlier visit to the jobsite, Bricklayers Business Agent Wynall Longdon[8] visited the jobsite at Burns' request and certified that all of the Employer's employees on the project were active members of Bricklayers. Either Ebetson or Perez (Burns could not recall which) replied that it was Plasterers' work. Burns told them to take the matter up with Bricklayers. Ebetson and Perez then departed.

2. Bronx Terminal Market

Bronx Terminal Market was building a garage and two retail buildings (retail A and B). Plaza Construction Corporation was the general contractor. It subcontracted certain stucco and plastering work to Donaldson Acoustic. Donaldson in turn initially subcontracted the stucco work on retail A and B to Cooper Plastering. Cooper performed plastering work on retail A with employees represented by Plasterers, but was unable to complete its work on retail B in a timely manner.

According to the uncontradicted testimony of Plaza's Field Superintendent James Lumbe, an individual who identified himself to Lumbe on the jobsite as a Plasterers representative (but whose name Lumbe could not recall at the hearing) visited the jobsite in June. He told Lumbe that Plaza should not recommend the Employer for work on the project "and that [Plaza] should give it to Cooper or another Representative of 262 [i.e., Plasterers]." Nevertheless, Plaza subcontractor Donaldson subcontracted the remaining EIFS and certain plastering work on retail B and the garage to the Employer.

The Employer began work on the project on July 2, using its employees represented by Bricklayers. Again according to Lumbe's uncontradicted testimony, Plasterers representatives (whose names Lumbe could not recall at the hearing) visited the jobsite on July 2. They told Lumbe that the Employer's employees who were doing EIFS work on the jobsite were not members of Plasterers, did not have "union cards," and were illegal aliens. They told Lumbe that they were going back to their union hall and discuss with their president the possibility of putting up a picket line on the jobsite.

On November 6, Plasterers notified Bricklayers by letter that Plasterers had learned that the Employer, "a signatory contractor of" Bricklayers, had been awarded "the jurisdictional work (EIFS)" of Plasterers on the Bronx Terminal Market project. Plasterers requested that Bricklayers arrange with Plasterers for a jobsite meeting to be held under step 1 of the New York Plan not later than November 11. Bricklayers did not respond to this letter, but subsequently notified Plasterers by a November 20 letter that Bricklayers was not subject to the New York Plan; that it was not prepared voluntarily to submit to the New York Plan, "particularly in any disputes we may have with any [Plasterers] local"; and that the New York Plan accordingly had no authority over Bricklayers.

B. Work in Dispute

The parties stipulated that the work in dispute is the Exterior Insulation and Finish System (EIFS) work being performed at the Jamaica Hospital and the Bronx Terminal Market.

C. Contentions of the Parties

Bricklayers contended in its opening statement at the hearing, and the Employer expressly agreed on the record,[9] that there is reasonable cause to believe that Plas-

[5] Perez did not testify.

[6] The hearing officer inadvertently stated that Burns testified that Perez told him that *Bricklayers* would put up a picket line. As shown, however, Perez threatened that *Plasterers* would put up a picket line.

[7] Ebetson did not testify.

[8] Longdon's first name is spelled "Wynall" in the transcript, but it is shown on Bricklayers' printed letterhead as "Winall." Plasterers Exh. LCL 262-1(H).

[9] The Employer was represented at the hearing by its president and owner, Anthony Sessa. He did not make an opening or closing statement. Although he testified as a witness on behalf of Bricklayers, he

terers has violated Section 8(b)(4)(D) of the Act and that the work in dispute should be assigned to employees represented by Bricklayers. Bricklayers also contended at the hearing, on behalf of itself and the Employer, that there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound.

In its posthearing brief, Bricklayers contends that there are competing claims, from it and Plasterers, for the work in dispute, and it reasserts its contentions as to 8(b)(4)(D) reasonable cause and no method for voluntary adjustment. It further contends that the work in dispute should be assigned to employees it represents on the basis of: (1) its collective-bargaining agreement with the Employer, which states that "any and all EIFS" work shall be performed by employees represented by Bricklayers, and the absence of any collective-bargaining agreement between the Employer and Plasterers; (2) the Employer's preference for and past practice of assigning the work in dispute to employees represented by Bricklayers; (3) the relative skills of employees represented by Bricklayers over employees represented by Plasterers for performing the work in dispute; and (4) economy and efficiency of operations resulting from assigning the work in dispute to employees represented by Bricklayers rather than to employees represented by Plasterers.

Plasterers did not introduce any evidence to rebut the testimony of Burns and Lumbe on the issue of whether there is reasonable cause to believe that Plasterers has violated Section 8(b)(4)(D) of the Act, or any evidence to rebut Bricklayers' evidence that the work in dispute should be assigned to employees represented by that labor organization. Plasterers has instead moved to quash the notice of hearing on the asserted grounds that there is an agreed-upon method for voluntary adjustment of the dispute to which all parties are bound, and that the Board should therefore defer to that method rather than decide the jurisdictional dispute. More specifically, Plasterers continues to maintain that it, Bricklayers, and the Employer are all bound by and subject to the New York Plan. Plasterers also asserts that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated because the evidence fails to demonstrate that it threatened jurisdictional picketing.

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 there are competing claims for the disputed work among rival groups of employees,[10] and that a party has used proscribed means to enforce its claim to the work in dispute.[11] In addition, the Board must find that there is no agreed on method for the voluntary adjustment of the dispute.[12] 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. Bricklayers has at all times claimed the work in dispute for the employees it represents, and these employees have been performing this work. Plasterers has claimed the work by the statements of Perez and Ebetson to Barr & Barr Project Manager Burns at the Jamaica Hospital jobsite, the statements of Plasterers representatives to Plaza Field Superintendent Lumbe at the Bronx Terminal Market jobsite, and by its correspondence with Bricklayers about the asserted applicability of the New York Plan to the jurisdictional disputes at both locations.[13]

2. Use of proscribed means

We find that there is reasonable cause to believe that Plasterers has violated Section 8(b)(4)(D) of the Act. It is well established that a picketing threat constitutes proscribed means.[14] Here, there is reasonable cause to believe that Plasterers threatened to picket the Employer. At the Jamaica Hospital project, as set forth more fully above, Plasterers Representative Perez demanded that Barr & Barr Project Manager Burns shut down the Employer's work on the project because Barr & Barr was "a union company" and the Employer's employees were "not union members." When Burns refused, Perez told Burns that "they would have to shut down the Company and set up a picket line." Perez and Plasterers International Representative Ebetson subsequently told Burns that the work in dispute was Plasterers work, that the Employer was using employees represented by the Bricklayers to do it, and that Barr & Barr had to shut the job down.

At the Bronx Terminal Market project, Plasterers representatives told Plaza Field Superintendent Lumbe that the Employer's employees doing EIFS work on the jobsite were not members of Plasterers, did not have "union cards," and were illegal aliens, and that they [the Plaster-

did not participate in the examination of other witnesses. The Employer has not filed a brief.

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

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

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

[13] See *Bakery Workers Local 205 (Metz Baking Co.)*, 339 NLRB 1095, 1097 (2003).

[14] See *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1032 (2004).

ers' representatives] were going back to their union hall and discuss with their president the possibility of putting up a picket line on the jobsite.

Again, Plasterers did not introduce any evidence to rebut the above evidence. In its posthearing brief, Plasterers broadly asserts that "the evidence regarding the alleged Section 8(b)(4)(D) violation is inherently unbelievable"; that it must be inferred from the record evidence that "the [Employer] itself did not in reality consider itself . . . to be threatened with jurisdictional picketing"; and that the Bricklayers' allegation of threats by the Plasterers was "concocted as a sham to invoke the Board's jurisdiction." We reject these contentions.

First, as to the alleged "inherent unbelievability" of the evidence of Plasterers' threats, the testimony in support of a showing that Plasterers has violated Section 8(b)(4)(D) is uncontradicted. But even a conflict in testimony on this general issue in a proceeding under Section 10(k) does not prevent the Board from finding evidence of reasonable cause to believe that Section 8(b)(4)(D) has been violated, and from proceeding with a determination of the dispute. In a 10(k) proceeding, the Board is not required to find that the unfair labor practice alleged has actually occurred, but need only find that reasonable cause exists to believe that there has been a violation of Section 8(b)(4)(D). The Board may consider contradicted testimony—and thus, a fortiori, uncontradicted testimony—in finding such reasonable cause.[15] Second, as to the validity of the evidence in support of a finding of such reasonable cause here, Burns and Lumbe were both called as witnesses by the General Counsel, and there is nothing that even arguably tends to show that their testimony was concocted. Third, in determining whether there has been an unlawful threat, the Board does not inquire into whether the recipient actually felt threatened. Rather, the Board applies an objective standard, not attempting to assess the actual success or failure of the alleged coercion, but rather assessing only whether the recipient of the remark would reasonably be coerced by it.[16]

3. No voluntary method for adjustment of dispute

Plasterers asserts that it, Bricklayers, and the Employer are all bound and subject to the New York Plan for the Settlement of Jurisdictional Disputes. In its opening statement at the hearing, Bricklayers asserted (and the Employer did not disagree), that "[t]he Bricklayers have not stipulated to the New York Plan and probably never will. [The Employer] has not stipulated to the Plan." Subsequently, Employer President and Owner Sessa testified that the Employer is not "part of" the New York Plan, and Bricklayers President Santo Lanzafame testified that Bricklayers had not "stipulated to" the New York Plan. There was no testimony that the Employer or Bricklayers had stipulated to, were bound by, or were in any way subject to the New York Plan.[17]

The New York Plan states that it is "entered into by and among the Building & Construction Trades Council of Greater New York [BCTC] . . . and on behalf of its constituent local unions, and the Building Trades Employers' Association [BTEA] and on behalf of its members." It does not name any individual participating unions or employers. Sessa was asked at the hearing if the Employer was a member of any employer association, and he replied that the Employer was a member of the "Walls and Ceiling Association."[18] Lanzafame testified that Bricklayers is not a member of "any of the Building and Construction Trades of New York."

Plasterers argues that the record establishes that the Employer is bound by and subject to the New York Plan on the basis of the following: (1) the Employer is a member of the WC&C;[19] (2) the "Who We Are" page of the WC&C website states that "WC&C members are automatically members of the BTEA;" (3) correspondingly, the February 24, 2009 "Useful Links" page of the BTEA website lists WC&C as a member Association. Therefore, argues Plasterers, the Employer, as a member of the WC&C, is automatically a member of the BTEA, and because BTEA is a party to the New York Plan, the Employer is bound by and subject to the New York Plan.

We are not persuaded by that argument. First, section 1(b) of article II, APPLICABILITY, of the New York Plan states in pertinent part that "[t]he procedures and decisions emanating from this Plan shall apply to . . . [a]ny employer that has executed an agreement to be bound by the procedures and decisions of this Plan." There is no evidence that the Employer has executed any such agreement; indeed, as shown above, the evidence is directly to the contrary. Second, the WC&C and BETA website pages introduced into evidence by Plasterers were not accompanied by any authenticating or explana-

[15] *Longshoremen ILA (Reserve Marine Terminals)*, 317 NLRB 848, 850 fn. 2 (1995), and cases cited therein.

[16] See, e.g., *Dorsey Trailers, Inc.*, 327 NLRB 835, 851 (1999), enfd. in pertinent part 233 F.3d 831 (4th Cir. 2000), and cases cited therein.

[17] The only witness that Plasterers called at the hearing was its attorney, Steven Kern, to authenticate certain documentary evidence introduced by Plasterers.

[18] Sessa was referring to the Association of the Wall-Ceiling and Carpentry Industries (WC&C), which is identified as such in the record.

[19] In addition to Sessa's testimony, the February 23, 2009 "Our Members" page of the WC&C website, introduced into evidence by Plasterers together with the other website pages discussed infra, lists Sessa Plastering Corp., one of the Employer entities in this proceeding, as a member.

tory testimony. Indeed, Plasterers Attorney Kern, who was sworn in as a witness to introduce these documents into evidence, testified only that he downloaded the documents from the websites, did not know when the information in the website had last been updated, and did not know whether the information contained in the documents was true.[20]

We find that the record fails to establish that the Employer is bound by or subject to the New York Plan.[21] Consequently, we find that the record fails to establish that there exists an 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 and we deny Plasterers' motion to quash 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 (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).

Plasterers did not call any witnesses or otherwise introduce any evidence on the merits of the dispute. Indeed, it repeatedly expressly declined on the record to do so.

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. However, the Employer is subject to a Section 9(a) collective-bargaining agreement with Bricklayers that expressly covers the type of work in dispute, i.e., in the terms of the agreement, "any and all EIFS" and "preparation, installation, and repair of all interior and exterior insulation systems." The Employer does not have a collective-bargaining agreement with Plasterers. Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Bricklayers.

2. Employer preference and past practice

The Employer's preference and past practice is to assign EIFS work to employees represented by Bricklayers. Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Bricklayers.

3. Area and industry practice

The Employer used employees represented by Bricklayers to perform the work in dispute on the Jamaica Hospital and Bronx Terminal Market projects. Cooper Plastering, on the other hand, used employees represented by Plasterers to perform the work in dispute on a different part of the Bronx Terminal Market project. There is no other evidence of area or industry practice in this matter. Accordingly, we find that this factor does not favor award of the work in dispute to employees represented by either Bricklayers or Plasterers.

4. Relative skills

Bricklayers presented testimony that its members possess the required skills and training to perform the disputed work and are experienced in doing so. There is no comparable testimony about employees represented by Plasterers. Employer President Sessa testified that Jamaica Hospital General Contractor Barr & Barr checked the Employer's work on the project every day, that it voiced no complaints about the quality of the work being done, and that Barr & Barr liked the way the Employer acted and produced. On the other hand, Sessa testified that he was told by Donaldson Acoustic Manager Bill Carlin that one of the reasons Donaldson did not assign all of the work in dispute on the Bronx Terminal Market project to Cooper was because "Cooper Plastering was not producing fast enough in order to complete the job."[22] Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Bricklayers.

5. Economy and efficiency of operations

Sessa testified that Bricklayers could readily provide more manpower, with relevant experience, than Plasterers. Bricklayers Business Agent Longdon testified that about one-half of the employees represented by Plasterers who performed the work in dispute for Cooper Plastering on retail building A on the Bronx Terminal Market project had been brought in from Las Vegas. Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Bricklayers.

[20] The Bricklayers' attorney immediately objected to the introduction of these documents on the grounds that they were being offered for the truth of the matters asserted therein. The hearing officer reserved her ruling on the objection but subsequently admitted the documents into evidence without explanation or comment.

[21] Consequently, we find it unnecessary to address Plasterers' argument that Bricklayers is bound by and subject to the New York Plan.

[22] There was no objection to the introduction of this testimony.

Conclusions

After considering all the relevant factors, we conclude that the employees represented by Bricklayers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, relative skills, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Bricklayers, not to that Union or its members. The determination is limited to the controversies that gave rise to this proceeding.

DETERMINATION OF DISPUTE

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

Employees of JJC Stucco and Carpentry Corp./Sessa Plastering Corp. represented by International Union of Bricklayers & Allied Craftworkers, Local 1, are entitled to perform the Exterior Insulation and Finish System (EIFS) work at the Jamaica Hospital, 134th Street and 91st Avenue, Jamaica, New York, and the Bronx Terminal Market, 149th Street and River Street, Bronx, New York.

Operative Plasterers' & Cement Masons' International Association, Local 262, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Barr & Barr, Inc., Plaza Construction Corp., JJC Stucco or Carpentry Corp./Sessa Plastering Corp. to assign the disputed work to workers represented by it.

Within 14 days from this date, Operative Plasterers' & Cement Masons' International Association, Local 262 shall notify the Regional Director for Region 29 in writing whether it will refrain from forcing the above companies, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C. July 15, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD