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AMES CONSTRUCTION, INC.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

AMES CONSTRUCTION, INC.,

and

LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL NO.
1184,

and

TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN INDUSTRIAL AND
ALLIED WORKERS OF AMERICA,
LOCAL 166, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Union Party in Interest.

CASE NO. 21-CD-674

**POST-HEARING BRIEF OF CHARGING
PARTY EMPLOYER AMES
CONSTRUCTION, INC.**

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A hearing in this matter was held on May 13, 2009, before Hearing Officer, Stephanie Cahn of NLRB Region 21, at Region 21's offices in Los Angeles, California. The hearing resulted from an unfair labor practice charge under Section 8(b)(4)(D) of the National Labor Relations Act ("Act") which alleges that Laborers International Union of North America, Local No. 1184 ("Laborers") engaged in unlawful conduct through a competing claim for work by the Teamsters, Chauffeurs, Warehousemen Industrial And Allied Workers Of America, Local 166, International Brotherhood Of Teamsters ("Teamsters"). Specifically, the Laborers engaged in proscribed activity with an object of forcing Ames Construction, Inc. ("Ames") to continue to assign truck driving work to employees represented by the Laborers rather than to employees represented by the Teamsters. (B. 1(a)-(g)).¹

All parties were afforded the right to participate in the hearing and did so.

I.

JURISDICTION

The parties stipulated that Ames is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. (B. 2). Additionally, the parties stipulated that the Teamsters and Laborers are labor organizations within the meaning of Section 2(5) of the Act. (Id.).

¹ Exhibits are referenced by "Ex." and designated by the respective party and number. Ames is designated by "ER", the Teamsters by "T", the Laborers by "L", Joint by "Jt", and the Board by "B". Transcript citations show "Tr." followed by the appropriate page numbers.

II.

THE DISPUTE

A. BACKGROUND AND FACTS²

1. The Parties and the Job Site

Ames is a general contractor in the construction industry, engaging in highway, heavy construction, and industrial projects. (Tr. 18). Ames is currently working on a project in Imperial County, California, the Drop 2 Storage Reservoir Canal and Structures project (the “Drop 2 project”) for the Bureau of Reclamation. (Tr. 19). The Teamsters and Laborers are unions both claiming work on the Drop 2 project.

The Drop 2 project was awarded to Ames in October 2008. (Tr. 19, 32). Work began on the Drop 2 project in late January, early February 2009. (Tr. 32). Both Ames and Laborers representatives recall that a pre-job meeting took place in February 2009. (Tr. 45, 95). The work involves moving 7 million cubic yards of earth along a six-mile lined concrete channel and installation of a 108 inch pipe. (Tr. 19). Ames employs approximately 70 to 75 employees on the Drop 2 project. (Tr. 20). Ames also operates trucks on the Drop 2 project. (Tr. 20).

2. The Disputed Work

The work at issue is truck driving as stipulated by the parties:

All truck drivers, but not limited to the operation of belly trucks and water trucks at the Drop 2 Storage Reservoir, Canal and Structures Project, located along Interstate Highway 8 in Imperial County, California. (B. 2).

² Ames moves to correct errors in the transcript as follows: At page 83, line 4, and page 149, line 25, questioning attributed to Mr. Lenz was actually done by Mr. Dohrmann.

Ames operates approximately 50 to 60 trucks on the Drop 2 project. (Tr. 21). Both the Laborers and Teamsters have the skills and training necessary to drive the trucks. (Tr. 66). The Laborers are licensed to drive trucks and the Laborers provide truck-driving training to its members. (Tr. 30, 88-89). The Teamsters also provide truck-driving training to its members. (Tr. 129).

The Laborers can drive trucks and perform other work on the Drop 2 project when not driving, such as when truck breakdowns occur. (Tr. 34). Truck breakdowns occur periodically on the Drop 2 project. (Tr. 49). The Laborers can perform work on the structural steel and backfilling the structures. (Tr. 29-30). Ames understood that the Teamsters would not have jurisdiction to perform other work on the Drop 2 project when not driving. (Tr. 44). The Teamsters could not perform Carpenters work, Pipe Fitter work, or Cement Mason work when not driving trucks. (Tr. 156-7). Instead, Teamsters could “assist” or “help” with project work, when no truck-driving work was available. (Tr. 130).

Due to the above efficiencies, Ames prefers to assign truck driving work to employees represented by the Laborers. (Tr. 22).

3. Work History

Ames completed two other projects in California prior to the Drop 2 project: Cajon, and All American Canal.

The Cajon project in San Bernardino County, California, was Ames’ first project in California. The Cajon project was awarded to Ames in August or December 2006. (Tr. 23). Ames signed a project only agreement with the Teamsters in approximately March 2007,

and the Teamsters drove trucks on the Cajon project. (Tr. 37, 38; Jt. 7). The Cajon project started in June 2007 and concluded in May 2008. (Tr. 59).

The All American Canal project was awarded to Ames in approximately January or February 2007, and work commenced on the project in approximately June 2007 and concluded in December 2008. (Tr. 31-32, 105). Ames signed a Short Form Agreement with the Laborers on approximately June 4, 2007, assigning all truck driving to the Laborers. (Tr. 35-36; Jt. 1). The Addendum to the Short Form Agreement between Ames and the Laborers on the All American Canal and Drop 2 projects assigns all work designated as the craft of Cement Mason, Pipefitter, and Teamster, to the Laborers and states that Ames has no agreement with any unions covering such employees. (Jt. 1).

Ames did not sign a contract with the Teamsters on the All American Canal project. (Tr. 26; Jt. 1). The Teamsters did not request the truck driving work on the All American Canal project. (Tr. 75, 120).

Ames subcontracted the water truck driving work on the All American Canal project. (Tr. 26). The Teamsters' Construction Master Labor Agreement provides that work coming within the jurisdiction of the Teamsters shall not be subcontracted out except to a firm or corporation signatory to a Teamster agreement. (Jt. 9, Article IV, Section 404). As indicated, the Teamsters did not perform the subcontracted driving, nor did they raise any issues about the work.

4. The Threat

The parties stipulated that on February 25, 2009, the Laborers' Business Agent, Michael Dea, sent Ames a letter regarding the work on the Drop 2 project. The letter said

the Laborers would not allow the assignment of work under its Agreement with Ames to be assigned to any other union and if reassignment occurred, the Laborers would take all economic action necessary to preserve their work, including, but not limited to picketing and work stoppages on the Drop 2 project. (Jt. 2). Since that letter was sent, Ames continued assigning the disputed work to the Laborers. (Tr. 10; Jt. 2).

B. THE CONTENTIONS OF THE PARTIES

The Laborers and Ames contend that a jurisdictional dispute exists and that there is no agreed-upon method to resolve the dispute. Ames and the Laborers rely upon the Laborers' threat to picket and shut down the job to demonstrate a purpose proscribed under Section 8(b)(4)(D) of the Act because the Laborers sought to retain the assignment of truck driving work despite a competing claim for the work from employees represented by the Teamsters. (Tr. 11).

Ames and the Laborers maintain that the disputed work should be awarded to employees the Laborers represent based on the factors traditionally considered by the Board in resolving jurisdictional disputes. Specifically, Ames and the Laborers agree that the collective bargaining agreement, as well as employer preference and past practice, relative skills and safety, industry practice, and economy and efficiency each favor an award of the disputed work to employees represented by the Laborers. (Id.).

The Teamsters contend that no jurisdictional dispute exists. Rather, a work preservation dispute exists between Ames and the Teamsters because Ames gave Teamsters' work to the Laborers. The Teamsters believe the disputed work is Teamsters' work and should be awarded to the Teamsters under Section 10(k). (Tr. 11-12).

C. **THE ACTION IS PROPERLY BEFORE THE BOARD UNDER §10(k)**

In determining whether a jurisdictional dispute exists, the Board looks to the real nature and origin of the dispute. This case is squarely on point with the dispute in South West Regional Council of Carpenters (Standard Drywall, Inc.), 348 NLRB 1250 (2006). In Standard Drywall, the Carpenters traditionally performed the disputed work and Standard Drywall only considered reassigning the work to the Plasterers because of a lawsuit the Plasterers filed. Under such circumstances, the Board determined a jurisdictional dispute existed, rather than a work preservation dispute as alleged by one of the unions. Id. at 1253.³

Here, the Laborers traditionally performed the disputed work and Ames only considered reassigning the work after the Teamsters filed a grievance on the Drop 2 project. Therefore, this is also a jurisdictional dispute.

Moreover, the Teamsters' truck driving work on the Cajon project is insufficient to establish a work preservation claim. See Operating Engineers Local 825 (Structure Tone, Inc.), 325 NLRB No. 77 (1998)(work on a few isolated occasions insufficient to establish work preservation claim), compare Seafarers (Recon Refractory & Construction), 339 NLRB 825, 828 (2003), (Union members' performance of work for a decade sufficient to establish work preservation claim).

³ It is understood the Teamsters will allege a work preservation dispute which is not properly before the Board in this Section 10(k) proceeding. Ames and the Laborers disagree with the Teamsters' characterization based upon the facts and law as described herein.

D. THE STATUTE APPLIES

Section 8(b)(4)(D) was violated. The Laborers declared that if the work assignment was changed from the Laborers to the Teamsters, the Laborers would picket the job and shut it down. (Tr. 10; Jt. 2). Such threats provide reasonable cause to believe Section 8(b)(4)(D) was violated. Electrical Workers Local 47 (Pouk & Steinle), 353 NLRB No. 113 (2009); South West Regional Council of Carpenters (Standard Drywall, Inc.), 348 NLRB 1250 (2006); Laborers Local 320 (Rockford Corporation), 330 NLRB 594 (2000).

Moreover, the Teamsters argument that the Laborers' threat to strike cannot be considered jurisdictional because the Laborers' contract with Ames prohibits strikes for jurisdictional disputes is without merit. It is well established that absent affirmative evidence that a threat to take proscribed action is a sham or the product of collusion, the Board will find that it amounts to proscribed conduct under 8(b)(4)(D). The Teamsters proffered no evidence that the Laborers' threat to strike was not genuine. Therefore, there is no basis for finding collusion between the Laborers and Ames. Standard Drywall, *above*, at 1254.

There being no agreed-upon method to resolve the dispute, the dispute is appropriately before the Board for determination. (Tr. 9). Standard Drywall, *above*, at 1253.

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. IBEW Local 1212 (Columbia Broadcasting), 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an

active 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. Laborers Local 1184 (Golden State Boring & PipeJacking), 337 NLRB 157 (2001).

1. Certification and Collective Bargaining Agreements

Here, no labor organization is certified to represent Ames' employees. Ames has a Section 8(f) collective bargaining agreement with the Laborers, but no agreement with the Teamsters on the Drop 2 project. The Laborers' agreement encompasses truck driving.

The Teamsters' agreement Ames did have was understood to be an 8(f) project agreement on the one job (Cajon). Consistent with that understanding, the Teamsters clearly took no steps to apply that agreement on subsequent work Ames performed on the All-American Canal. The Teamsters' position now contradicts the position to which Ames testified when the 8(f) project agreement was signed as well as the Teamsters' admitted failure to claim such work at the All-American Canal job.

Accordingly, the assignment of disputed truck driving work to the Laborers and the subsequent acceptance of the work by the Laborers, as well as the defense of the assignment in this hearing, demonstrate factors favoring an award of truck driving work to employees represented by the Laborers. See International Unit of Operating Engineers, Local Union No. 542, AFL-CIO (Caretto, Inc.), 325 NLRB 947 (1998).

2. Employer Preference and Past Practice

Ames confirmed its preferred assignment of truck driving work to employees represented by the Laborers. (Tr. 22). Ames used Laborers to operate trucks on the All

American Canal project. The Teamsters failed to claim the truck driving work on the All American Canal project. (Tr. 75, 120).

Employer preference and past practice favors an award of the disputed work to Ames' employees represented by the Laborers, as in International Unit of Operating Engineers, Local Union No. 542, AFL-CIO (Caretta, Inc.), *above*.

3. Area and Industry Practice

Teamsters admit they enjoy no monopoly on truck driving in connection with other work. (Tr. 66). The Addendum to the Short Form Agreement between Ames and the Laborers on the All American Canal and Drop 2 projects assigns all work designated as the craft of Cement Mason, Pipefitter, and Teamster, to the Laborers. (Tr. 35 - 36; Jt. 1).

In light of the special work, needs and practices of contractor at issue, this factor favors an award of truck driving work to truck drivers represented by the Laborers. See the comparable award to the Laborers, in Hod Carriers Local 166 (E&S Masonry), 187 NLRB 482 (1970).

4. Relative Skills and Training

Both the Laborers and Teamsters have the skills to drive the trucks on the Drop 2 project. (Tr. 66). Accordingly, this factor favors neither the Teamsters nor Laborers in an award of the disputed work. See Standard Drywall, *above*, at 1255.

5. Economy and Efficiency of Operations

Ames' witnesses testified that Ames' operations run more efficiently because if a truck broke down or work was otherwise unavailable to the truck driver, a Laborer could perform other Laborer work on the project. Teamsters could only "assist" with other project

work if the Teamster experienced a similar breakdown or lack of truck-driving work. (Tr. 29 - 30, 34, 130, 156 - 157).

Accordingly, this factor favors an award of the disputed work to employees represented by the Laborers. See Hod Carriers Local 166 (E&S Masonry), *above*, and Operating Engineers (Caretti), *above*.

III.

CONCLUSION

Based upon the relevant factors, truck driving employees represented by the Laborers should be awarded the work in dispute.

Dated: June 16, 2009

Respectfully submitted,

ATKINSON, ANDELSON, LOYA, RUUD, & ROMO

By: _____

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

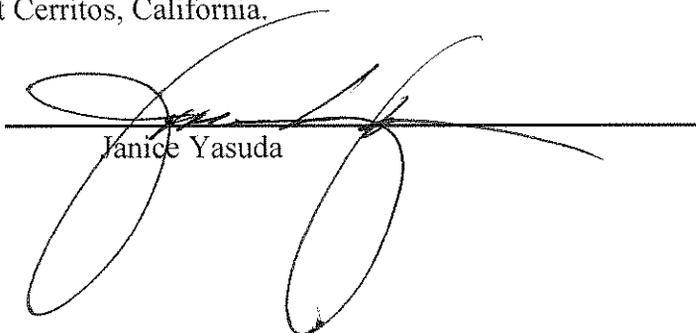
I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 12800 Center Court Drive, Suite 300, Cerritos, California 90703.

On June 16, 2009, I served the foregoing document described as **POST-HEARING BRIEF OF CHARGING PARTY EMPLOYER AMES CONSTRUCTION, INC.** on all interested parties in this action by:

See Attached List

(FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 16, 2009, at Cerritos, California.


Janice Yasuda

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