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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

LABORERS INTERNATIONAL UNION OF)	BRIEF IN SUPPORT OF
NORTH AMERICA, LOCAL NO. 1184,)	MOTION FOR
)	RECONSIDERATION BY
Respondent)	TEAMSTERS LOCAL 166
and)	
)	
AMES CONSTRUCTION, INC.,)	Case No. 21-CD-674
)	
Employer)	
and)	
)	
TEAMSTERS, CHAUFFEURS, WARE-)	
HOUSEMEN, INDUSTRIAL AND ALLIED)	
WORKERS OF AMERICA, LOCAL 166,)	
)	
Party in Interest)	
)	

This Brief in Support of Motion for Reconsideration is made by TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN , INDUSTRIAL AND ALLIED WORKERS OF AMERICA, LOCAL 166, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS ("Teamsters") pursuant to NLRB

Rules and Regulations, Part 102, Section 102.48 on the grounds that material errors were made as to material facts and the law.

This case was a proceeding pursuant to Section 10(k) of the National Labor Relations Act based upon the unfair labor practice charge alleging a violation of Section 8(b)(4)(d) of the Act filed by AMES CONSTRUCTION, INC. ("Ames"). Ames asserted competing claims for truck driving at the Drop 2 Reservoir construction site, by the Teamsters and LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 1184 ("Laborers"). Ames and the Laborers contended the disputed work should be assigned to the Laborers. The Teamsters contended that the disputed work should be awarded to the Teamsters based upon the collective bargaining agreements, the past practice, the agreement between the International unions, area and industry practice, and relative skills and training. The Board on November 30, 2009, made the following determination:

Employees of Ames Construction, Inc., represented by Laborers International Union of North America, Local No. 1184, are entitled to perform all truck driving work, including, 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.

The Conclusion of the Board was that "employees represented by Laborers are entitled to perform the work in dispute" was based upon "employer preference, employer current assignment, and economy and efficiency of operations." The Board made it clear that "in making this determination, we are awarding the dispute work to employees represented by Laborers, not to that labor organization or its members."

The specific grounds and findings of material error are as follows:

I. Work Preservation Claim

The basis for rejecting the claim of Teamsters Local 166 that this case presents a dispute between Ames and Teamsters over the preservation of bargaining unit work was the limited history between Ames and Teamsters which the Board deemed insufficient to establish a work preservation claim (Decision II D, p. 2-3). While the Teamsters do not dispute that in California the only work between the Teamsters and Ames was the Cajon project (mistakenly referred to as El Cajon in the Decision), the Teamsters submit that reliance on this fact alone ignores material evidence supporting a finding of work preservation.

The Addendum to Agreement Between Ames Construction Inc. And Southern California District Council of Laborers and its Affiliated Laborers' Local Union 1184 (p. 6 and 7 of Jt. Ex. 1) states in paragraph 1:

The Employer employs employees performing work which the Employer has previously designated as the craft of Cement Mason, Pipefitter, and Teamster. The Employer has no collective bargaining agreement with any union covering these employees, and hereby recognizes the Union as their exclusive bargaining representative. The Union claims jurisdiction over the work being performed by these employees and the parties extend the scope of the MLA to cover such work, and the wage and fringe benefits provisions of the MLA shall apply except as modified by this Addendum.

The Addendum states in paragraph 3 that "...the Employer, if it so chooses, may pay the employees covered by this Addendum the predetermined rate established for the craft which the employer had previously designated for such work...."

In the Addendum, the Employer and Laborers Local 1184 state in writing that they are intentionally taking work the

Employer has designated Teamster work, as well as work of other craft unions, and assigning that traditional Teamster and other craft work to the Laborers. The Board in its decision recognizes that prior to the execution of the Addendum, there was no mention of truck driving in any Laborer collective bargaining agreement. There is no provision covering truck driving nor is there any classification for truck drivers in the Laborers Master Labor Agreement ("Laborers MLA") (Jt. Ex. 8). At the time the Laborers and the Employer executed the Addendum, June 5, 2007, the Employer and Teamsters had in March 2007 executed a Short Form agreement and the Teamsters were performing truck driving on the Cajon project (Jt. Ex. 7). The Laborers had not performed any truck driving for Ames as of June 2007 nor did they perform any truck driving in issue until the disputed work at issue in this case.

On the All-American Canal project, there were independent water truck drivers, so neither Laborers nor Teamsters (Tr. P. 26:11-13) The only reference in the hearing to Laborers driving trucks at the All American Canal was that "There was a rented- - that belonged to the Laborers." (Tr. P. 26:14-15) When Mike Kling, business representative for Teamsters Local 166, was asked why the truck driving work on the All American Canal was not pursued

by Teamsters, he testified without contradiction that he visited the All American Canal work site two to three times a month and "there were three to four owner-operator trucks there. There were no Ames trucks there, outside of a service truck, which is - - the fuel truck belongs to the operator , and the owner-operators...There were no water trucks of Ames on that project...." (Tr. P. 144:19-p.145:4). Accordingly, when the Drop 2 Reservoir project got under way, the Laborers had performed no truck driving for the Employer.

In this case, the Employer was clearly reassigning to the Laborers the work in issue as demonstrated by the language in the Addendum saying it was Teamster work. At the time the Addendum was executed its intent was to deprive Teamsters of contractually protected work.

Just as in *Teamsters Local 107 (Safeway Stores)* 134 NLRB 1320 (1961), Ames was assigning contractually protected work previously performed by Teamsters in direct violation of the collective bargaining agreement. Its doing so is what triggered the grievance filed by Teamsters (Jt. Ex. 3-6, 16) It was in direct violation of the Teamsters Short Form and MLA (Jt. 7 and 9) and it was in direct violation of the Laborers' Short Form (Jt. Ex. 1) which provides that all the construction master labor agreements, including that of the

Laborers and Teamsters MLA, will be adopted and agreed to by the parties. (Jt. Ex. 1, p. 2 section II A) The Laborers' Short Form further states in Section II C that "*Neither the Employer nor the subcontractor shall assign work covered by the Master Labor Agreements to employees represented by any other union.*" (Emphasis added) (Jt. Ex. 1, p. 2 section II C) The Addendum clearly states that the Laborers and Ames "extend the scope of the MLA to cover such work" (Jt. Ex. 1, p. 6 section 1). While the Laborers MLA is not even signed by Ames and Laborers Local 1184 (Jt. Ex. 8 pl 59), they by virtue of the Addendum are unilaterally agreeing to add work to the covered work of the Laborers MLA. Ames and the Laborers were seeking to expand the Laborers work jurisdiction by execution of the Addendum and accordingly *Safeway* as well as *T Equipment Corp*, 298 NLRB 937 (1990); *USCP-Wesco, Inc.* 280 NLRB 818 (1986) aff'd 827 F 2d 582 (9th Cir. 1987) are applicable to this case to establish the dispute is a work preservation dispute.

The Board in its decision cites *International Brotherhood of Teamsters, Local 107 (Reber-Friel Company)* 336 NLRB 518 (2001) however, in that case the Board found that the employees represented by the Teamsters and the Laborers had not previously performed the work in issue and

that the objective was work acquisition not work preservation. In contrast in this case, the evidence is clear that while the Teamsters had performed the work in issue, the Laborers had not. They had not prior to the All American Canal and they had not prior to the Drop 2 Reservoir. In this case the work acquisition is by the Laborers. It is the Teamsters that is seeking to preserve its work.

The case should have been dismissed in that the dispute was a work preservation dispute rather than a 10k jurisdiction dispute.

II. The Collective Bargaining Agreements

The Board in its decision finds that "the factor of collective-bargaining agreements does not favor awarding the work in dispute to either group of employees." (Decision II E, p. 3)

The Board found that "employees represented by both unions have performed truck driving work under their respective contracts." (Decision p. 3 section II E) This fact is not supported by the evidence. The only truck driving work done by the Laborers pursuant to the contracts was the work in dispute in this case. The fact the Laborers are performing the disputed work cannot be used as support for saying the Laborers are entitled to the disputed work.

In this case, there is no dispute that prior to the execution of the Addendum on June 5, 2007, the only employees entitled to do truck driving were the employees represented by Teamsters. The short form and Master Labor Agreement clearly identified the work as being Teamster work. As noted above, the Laborers Short Form Agreement executed by Ames and the Laborers provides that all the construction master labor agreements, including that of the Laborers and Teamsters MLA, will be adopted and agreed to by the parties (Jt. Ex. 1, p. 2 section 2 A). And as noted, it further states in Section II C that "*Neither the Employer nor the subcontractor shall assign work covered by the Master Labor Agreements to employees represented by any other union.*" (Emphasis added) (Jt. Ex. 1, p. 2, section 2 C) Yet that is precisely what the Laborers and Ames have done in this case.

The truck driving work is clearly covered by the Teamsters MLA. The Teamsters Short Form Agreement and the Teamsters MLA very specifically lists the truck driving positions that are set forth in the Davis Bacon DOL prevailing wage listing of classifications for the Drop 2 Reservoir project (Jt. Ex. 9 p. 44-46, Ex. 7 Article II A and Ex. 21). The wage provision of the Teamsters MLA is very specific that it covers the truck driving jobs at issue

in this case, mixers, belly dump trucks and water trucks. In contrast the Laborers Master Labor Agreement (Jt. Ex. 8) does not contain specific job classifications for truck driving such as appears in the Teamsters MLA. The Laborers MLA lists in Article XIX its wage scales (Jt. Ex. 8, p. 43-50). A traffic control pilot truck is listed as a classification. A cement dumper, which is not a mixer is listed. The classifications listed in the Laborers MLA are in keeping with the DOL Davis Bacon classifications which do not include truck drivers as a Laborers classification of work (Jt. Ex. 21).

Further the Laborers Short Form Agreement states clearly that work covered by one of the master labor agreements, which includes the Teamsters MLA, will not be given to employees represented by another union. This would mean that Teamster work covered by its MLA would not be given to the Laborers. Finally, the addendum makes it clear that the parties are knowingly giving Teamster work to the Laborers.

In evaluating the collective bargaining agreements, the Board did not consider the specific provisions noted above. "In interpreting collective-bargaining agreements, the specific is favored over the general." *Steelworkers Local 392 (BP Minerals)*, 293 NLRB 913, 914-915 (1989). Here the

Teamsters contract specifically refers to the disputed truck driving work while the Laborers contract does not refer to it at all. This is in contrast to *Laborers Local 1184 (Golden State Boring & Pipejacking)*, 337 NLRB No. 25 (2001) where the Laborers contract specifically referred to the disputed work of directional drilling. Clearly since it is the same Laborers Local in this case as in *Golden State*, the Laborers understand the need for specificity in the collective bargaining agreement. In *Golden State*, the NLRB said the specificity of naming the disputed work favors an award of the disputed work to the Laborers.

In this case, it is the Teamsters MLA contract that specifically refers to the disputed work. The Addendum cannot be considered as specifically awarding the work, because it was done under false pretenses of saying there was no collective bargaining agreement when there was in fact such an agreement with the Teamsters. More importantly, the Addendum cannot undo the Laborers MLA.

The collective bargaining agreements clearly favor the awarding the work in dispute to the employees represented by the Teamsters.

III. Area and Industry Practice

The Board found that area and industry practice "does

not favor an award of the work in dispute to employees represented by either Laborers or Teamsters." (Decision II, E3, p. 4)

The Laborers Short Form and the Addendum on their face demonstrate that there was an area and industry practice (Jt. Ex. 1). The Laborers short form as noted above provides that work covered by another MLA shall not be assigned to employees represented by another union. The Short Form recognizes the industry practice of Teamster work being just that Teamster work. The Laborers agreement does not have the disputed truck driving classifications because the work belonged to the Teamsters. The Addendum states that the Employer is recognizing the Laborers to perform and be assigned Teamster work.

The contractual recognition of the industry and area practice is supported by the testimony by Ames that he knew from his experience in the Midwest that there were jurisdictional lines - he testified that in "Minnesota if a Laborer touches a truck it is not going to be good and if a Teamsters touches a shovel it is not going to be good." (Tr. P., 76:5-9; p.77:1-2). Ames also acknowledged that these facts he stated were because he understood that Laborers and Teamsters have jurisdiction over certain work as a result of their Constitutions and their jurisdictional rights. (Tr. P.

77:4-8)

The Board focuses on Ames being new to California, but jurisdictional lines in construction are not based upon the state, but rather on traditional work performed by each union. The 1947 Memorandum of Agreement between the International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America and the International Hod Carriers' Building and Common Laborers' Union of America (Teamsters Ex. 1) and the 2004 Letter of Understanding between Laborers International Union of North America and the International Brotherhood of Teamsters (Teamsters Ex. 2) show that traditional jurisdictional division with truck driving belonging to employees represented by the Teamsters. These agreements are in keeping with Ames testimony concerning his knowledge of the division of work between to the two labor organizations.

The Board also relies upon Brennan saying that he was unclear if a particular union has exclusive jurisdiction over truck driving. There a number of reasons why such reliance is misplaced. This statement is in complete contradiction to the testimony of Ames noted above. Brennan had full knowledge of the Cajon project and the claim of the Teamsters to the truck driving work and the award of truck driving on the Cajon project to the Teamsters. In fact, he

testified that for the pre-job meeting on Cajon, the Laborers and the Teamsters were invited as were the other unions, "based on craft work traditionally done by these unions (Tr. P. 54: 1-3) The MLAs are clear that work covered by one MLA should not be assigned to employees covered by another MLA. Finally, the Addendum itself says that the Employer is recognizing Laborers for Teamster work. The only basis for Brennan and Ames believing that the Laborers had jurisdiction over truck driving was they said they did.

According to Brennan and Ames they signed the Short Form Agreement and addendum to that Agreement (Jt. Ex. 1) with the Laborers because the Laborers told them they had jurisdiction over the truck driving (Tr. P. 77:14-22). No document was shown to them by the Laborers confirming such jurisdiction. (Tr. P. 77:23-25) Indeed none could be in light of the agreements between the two International Unions relating to work jurisdiction (Teamsters Ex. 1 and 2). At the time the Addendum was executed, June 5, 2007 (Jt. Ex. 1 p. 6-7), Ames and the Laborers were aware that they were agreeing that work that was performed by Teamsters, as well as Cement Masons and Pipefitters, was being given to Laborers. The parties intentionally assigned work they knew belonged to other unions to the Laborers. They did so because the Laborers said they had jurisdiction over truck

driving work in June 2007 (Tr. P. 77:14-22; P. 96:5-12). It is clearly the Laborers position that there are no jurisdictional lines on construction projects and they have jurisdiction over all work. Mike Dea, Regional Manager and Recording Secretary for Laborers, testified that jurisdiction can be claimed by any trade. (Tr. P. 92:4-11). Clearly, if this statement were true, Section 10(k) would be meaningless.

The Board focuses on the fact that the only Ames project that the Teamsters worked on prior to the disputed work on the Drop 2 Reservoir was the Cajon project and the Board found that does not establish an industry practice. But, the Board disregards that there is absolutely no industry practice as to the Laborers. Prior to the Laborers performing the truck driving work in issue in this case, the Laborers performed no truck driving for the Employer. (Tr. P. 144:19-p.145:4). The Board's finding disregards the evidence noted above, the MLA language, the agreements between the International Unions, and the language of the Addendum.

IV. Relative Skills and Training

As noted above, prior to the Laborers performing the truck driving work in issue in this case, the Laborers performed no truck driving for the Employer. (Tr. P. 144:19-

p.145:4).

V. Employer Preference

The Employer did indicate a preference for the Laborers. However, preference alone cannot be the basis of the award of disputed work. *NLRB v. Longshoremen (ILWU) Local 50 (Brady-Hamilton Stevedore Co. (9th Cir. 1974) 504 F2d 1209, cert den sub nom Operating Engineers Local 701 v. Longshoremen (ILWU) Local 50, (1975) 420 U.S. 973*

VI. CONCLUSION

Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166 respectfully requests that the National Labor Relations Board grant the Motion for Reconsideration of its decision in this matter and find that the disputed work should be awarded to employees represented by Teamsters Local 166.

Dated: December 24, 2009 TOSDAL, SMITH, STEINER & WAX



Fern M. Steiner, attorney for
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN, INDUSTRIAL AND
ALLIED WORKERS OF AMERICA, LOCAL
166, A/W INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

1 Re: Laborers International Union of North America, Local No. 1184 (Ames Construction, Inc.)
2 Case No. 21-CD-674

3 PROOF OF SERVICE

4 I, the undersigned, hereby declare and state:

5 I am over the age of eighteen years, employed in the city of San Diego, California, and not
6 a party to the within action. My business address is 401 West A Street, Suite 320, San Diego,
7 California 92101.

8 I served the within document described as:

9 **Motion for Reconsideration by Teamsters Local 166**

10 on the date(s) and method indicated below:

11 <u>Party</u>	<u>Date & Method of Service</u>
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24 I declare under penalty of perjury under the laws of the State of California that the foregoing
25 is true and correct. Executed on December 24, 2009, at San Diego, California.

26 
27 ANGELA JAE
28