International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289 *and* SSA Marine, Inc. and International Longshore and Warehouse Union. Case 19–CD–502

January 22, 2010

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. SSA Marine, Inc. (the Employer), filed charges on June 10, 2009, alleging that the International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289 (IAM), violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by the International Longshore and Warehouse Union (ILWU).[1] The hearing was held from June 29 to July 2, 2009, before Hearing Officer Sara Dunn. Thereafter, the Employer, the IAM, and the ILWU each filed a posthearing brief.

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

I. JURISDICTION

The parties stipulated that the Employer, a Washington corporation, operates at marine terminals and provides stevedore services in Puget Sound, including at cruise ship terminals in Seattle, Washington. They also stipulated that during the past calendar year, a representative period, the Employer purchased and received goods valued in excess of $50,000 directly from suppliers located outside the State of Washington. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the IAM and the ILWU are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

For over 40 years, the Employer and its predecessors have operated and managed marine cargo terminals and provided stevedoring services at various ports located on the Puget Sound in Washington, including the Port of Seattle where the instant dispute arose.

Since the 1940s, the Employer has had collective-bargaining agreements with the IAM that have covered all maintenance and repair (M&R) work on equipment owned and/or leased by the Employer in the Puget Sound area. Since at least 2002, the agreement between the Employer and the IAM has stated that "IAM-represented employees will maintain and repair all equipment owned or leased by [the Employer] in the Puget Sound area."

Traditionally, the Employer has referred most of its M&R work on Employer-owned or -leased equipment to employees represented by the IAM. Those employees often do M&R work onsite at various terminals in the Puget Sound area. In the event that the work is complicated or requires special tools or manuals, the equipment is transported to terminal 18, where IAM-represented employees have always performed M&R work for the Employer, its affiliates, and its predecessors.

The Employer has also had a longstanding relationship with the ILWU, through a multiemployer association. The Pacific Maritime Association (PMA) bargains with the ILWU on behalf of companies at the various ports on the West Coast, including the Port of Seattle. For more than 40 years, the Employer has been a member of the PMA and has utilized ILWU-represented employees to provide traditional longshore work. ILWU-represented employees have also performed certain M&R work for the Employer and other PMA members at several ports along the West Coast, although not in the Puget Sound area. The collective-bargaining agreement covering the ILWU-represented employees who work for the Employer was negotiated by the ILWU and the PMA.

[1] The Pacific Maritime Association (PMA) filed a Motion to Intervene in this case, which was denied by the Regional Director for Region 19 on June 26, 2009.

[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 *Teamsters Local 523 v. NLRB*, ___F.3d___, 2009 WL 4912300 (10th Cir. Dec. 22, 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

On July 1, 2008, the PMA and the ILWU entered into a Memorandum of Understanding (MOU) setting forth an agreement for the years 2008–2013. Pursuant to a provision in the MOU, the Employer, in exchange for the ILWU's acceptance of labor-saving technologies (among other ILWU concessions), would assign to ILWU mechanics M&R work on equipment at "all new marine terminal facilities" that commence operations after July 1, 2008.

The Port of Seattle recently completed construction of terminal 91, a passenger cruise terminal facility located at pier 91, which had previously been used as an open pier and yard for cargo ships. The Employer then moved its preexisting cruise-ship operations from terminal 30, where IAM-represented employees had been performing the M&R work, to the new facility at terminal 91. Terminal 91 began regularly operating as a passenger cruise terminal on April 24, 2009. That operation is seasonal; terminal 91 will receive cruise ships from about April to about October each year.

The Employer assigned the M&R work at terminal 91 to ILWU-represented employees, who have performed it ever since.[3] The work is currently being performed by one full-time ILWU-represented mechanic. A part-time, ILWU-represented mechanic, dispatched from the PMA-ILWU joint dispatch hall, works on the days when passenger vessels are present, usually Wednesdays, Saturdays, and Sundays. The M&R work at terminal 30 continues to be performed by IAM-represented employees.

Upon learning that the Employer had assigned the terminal 91 M&R work to ILWU-represented employees, the IAM filed a grievance under its collective-bargaining agreement with the Employer. On May 8, 2009, an arbitrator sustained that grievance and directed the Employer to make its IAM-represented employees whole. The arbitrator did not, however, direct the Employer to reassign the disputed work to those employees.

On May 12, 2009, the Employer received a letter from IAM Local 289 Business Agent Don Hursey, stating that the IAM would take all actions necessary to obtain reassignment of the M&R work at terminal 91 back to the IAM. Additionally, the IAM threatened to engage in concerted activity, including picketing, if the Employer did not reassign the disputed work to employees represented by the IAM.

[3] The work is being performed by ILWU-represented employees of Harbor Industrial, the company contracted by SSA Marine to perform the disputed work at terminal 91. The parties stipulated that for purposes of the l0(k) proceedings, SSA Marine was the employer of the ILWU-represented employees because, under the contract with Harbor Industrial, SSA Marine controls and assigns the work in dispute.

B. Work in Dispute

The parties stipulated that the work in dispute is the maintenance and repair on the Employer's stevedoring and terminal service power equipment while it is present at Terminal 91 in Seattle, Washington.

C. Contentions of the Parties

No party is arguing that this case presents a work-preservation dispute, and not a jurisdictional dispute, as contemplated by Section 10(k) of the Act. See, e.g., *Machinists District 160 Local 289 (SSA Marine)*, 347 NLRB 549, 550 (2006). All parties agree that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. The parties also agree that the IAM and the ILWU have competing claims for the M&R work at Terminal 91. Each labor organization asserts that its collective-bargaining agreement covers the disputed work.

The IAM contends that the work in dispute should be assigned to employees it represents based on the factors of collective-bargaining agreements, past practice, area and industry practice, relative skills, economy and efficiency of operations, job loss, and friction. The IAM further contends that the Board should take into account the arbitrator's finding that the Employer's assignment of the work to ILWU-represented employees violated its collective-bargaining agreement with the IAM. The ILWU contends that the work in dispute should be assigned to employees it represents based on the factors of employer preference, economy and efficiency of operations, and job loss. The ILWU argues that the factors of collective-bargaining agreements, area and industry practice, and relative skills are "at worst neutral" and, therefore, "do not favor changing the status quo."

The Employer's contentions largely track those of the ILWU. In particular, the Employer emphasizes its preference and that economy and efficiency of operations favor continuing the work assignment to ILWU-represented employees. It also asserts that maintaining the status quo would reduce the potential for interunion friction at Terminal 91 because it would eliminate the need for ILWU-represented longshoremen to interact with mechanics represented by the IAM.

D. Applicability of the Statute

The Board may proceed with determining a dispute pursuant to Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel),* 345 NLRB 1137, 1139 (2005).

This standard requires finding that there is reasonable cause to believe that there are competing claims for the disputed work between rival groups of employees and

that a party has used proscribed means to enforce its claim to the work. Id. Additionally, there must be a finding that the parties have not agreed on a method for the voluntary adjustment of the dispute. Id.

1. Competing claims for work

The parties stipulated, and we find, that the ILWU and the IAM both claim the work in dispute.

2. Use of proscribed means

As described, on May 12, 2009, the Employer received a letter from the IAM stating that it would take all actions necessary, including picketing, to obtain assignment of the disputed work. Such a threat establishes reasonable cause to believe that the IAM used proscribed means to enforce its claim to the work in dispute. *Laborers Local 731 (Tully Construction Co.),* 352 NLRB 107, 109 (2008).

3. No voluntary method for adjustment of dispute

Finally, the parties stipulated, and we find, that there is no agreed-upon method for the voluntary adjustment of this dispute that would bind all parties.

We therefore find that this 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 IBEW 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, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence of a Board certification concerning the employees involved in this dispute.

As indicated above, the Employer is subject to collective-bargaining agreements with both the IAM and the ILWU. The IAM's current collective-bargaining agreement with the Employer provides that "IAM-represented employees will maintain and repair all equipment owned or leased by [the Employer] in the Puget Sound area." This language clearly covers the work in dispute.[4]

That work, however, is arguably subject to the ILWU-PMA agreement as well. Under section 1.731 of that agreement, PMA employers must assign to ILWU mechanics M&R work on equipment at "all new marine terminal facilities." At the same time, section 1.731 is limited by a July 28, 2008 letter of understanding between the PMA and the ILWU. Under that letter, a PMA employer may vacate a "red-circled facility" and relocate its operations to another facility within the same port and retain its incumbent non-ILWU mechanic work force. The "red-circled facility" exception, however, does not apply to newly constructed terminals subject to ILWU jurisdiction under section 1.731. Accordingly, it appears that the M&R work at Terminal 91 is covered by the ILWU's contract *only if* Terminal 91 is considered a new terminal facility.

The parties vigorously debate that question. On the one hand, the Employer and the ILWU emphasize that terminal 91 has an entirely new passenger building, new gangways to facilitate passengers boarding the cruise ships, and some new equipment, all of which favors their contention that terminal 91 is new. On the other hand, the IAM points out, correctly, that terminal 30 was a "red-circled facility," and argues that the changes at terminal 91, which has always been in existence in some form, did not transform it into a new facility. In particular, the IAM emphasizes that the vast majority of the equipment housed at terminal 91 was simply relocated from terminal 30, which favors its contention that terminal 91 is not new. The record lends support to both parties' contentions. In that circumstance, we find that the ILWU has asserted at least a colorable contract claim to the work in dispute.[5]

Nevertheless, we find that the language of the IAM's agreement indisputably covers such work. Accordingly, we find that the factor of collective-bargaining agreements slightly favors an award of the work in dispute to employees represented by the IAM. See *Laborers*

[4] In making this finding, we do not rely on the May 8, 2009 arbitration award obtained by the IAM because the ILWU was not a party to that proceeding and was not bound thereby. See *Machinists District 160 Local 289 (SSA Marine)*, 347 NLRB at 551 fn. 4.

[5] The ILWU contends that we should defer to the joint determination of the Employer, the PMA, and the ILWU that terminal 91 is a "new" facility under the ILWU-PMA agreement, citing *ILWU (Howard Terminal)*, 147 NLRB 359 (1964). *Howard Terminal* involved a jurisdictional dispute that hinged on whether certain cranes were "new" or "old." Id. at 363. In considering the ILWU's contract claim to the work in that case, the Board observed that a joint industry board had determined that the crane work was "new" work to be assigned to ILWU-represented employees. Id. at 366. Contrary to the ILWU's suggestion, however, the *Howard Terminal* Board did not hold that contractual claims must always be resolved in accordance with the contracting parties' interpretation. Rather, as demonstrated in *Howard Industries*, the parties' interpretation is one factor to be considered in all the circumstances. There, the Board also considered the applicable contract language itself and the reasons for its inclusion in the parties' agreement. Id. We have taken the same approach here.

Michigan District Council (Walter Toebe Construction Co.), 353 NLRB No. 114, slip op. at 3 (2009).

2. Employer preference and current assignment

The factor of employer preference is generally entitled to substantial weight. See *Iron Workers Local 1 (Goebel Forming)*, 340 NLRB 1158, 1163 (2003). Edward DeNike, the Employer's senior vice president, testified that the Employer preferred to assign, and has assigned, the disputed work to employees represented by the ILWU. DeNike explained that the Employer had made a commitment as a member of the PMA to award M&R work at new facilities to the ILWU, and he testified that "it was in the best interests of the industry for [the Employer] to go along with that commitment."

The IAM contends that the Board's usual practice of according considerable weight to an employer's preference is inappropriate here because the Employer provided no basis for its preference other than its commitment under the PMA's contract with the ILWU. Don Hursey, the IAM's business representative, testified that the PMA "forced" DeNike to say that he did not prefer the IAM anymore. Although DeNike never explicitly denied that he was pressured by the PMA, he testified that the term "forced may be a little heavy." The IAM argues that DeNike's testimony "[did] not in any way deny the thrust of the conversation—that [the Employer] was going to assign the disputed work to the ILWU not because of a free and rational choice . . . but because of some kind of outside pressure being placed upon it."

The Board does not generally examine the reasons for an employer's preference unless there is evidence that the employer was coerced into its preference. Compare *Local Laborers 829 (Mississippi Lime Co.)*, 335 NLRB 1358, 1360 fn. 5 (2001) (deferring to employer preference where there was no evidence that it was not reflective of free and unencumbered choice) with *Longshoremen ILWU Local 50 (Brady-Hamilton Stevedore Co.),* 223 NLRB 1034, 1037 (1976), reversed on other grounds 244 NLRB 275 (1979) (employers' "preference" that changed only after union's members engaged in a work stoppage that forced the reassignment of work was not representative of a free and unencumbered choice). Here, even if the Employer's preference had been influenced by its obligations as a member of the PMA, that would not establish coercion or that its preference was somehow illegitimate. Moreover, contrary to the IAM's contention, the record shows that the Employer's preference to use ILWU-represented mechanics at Terminal 91 was based not only on its contractual obligations, but also on the potential friction between the two unions. Accordingly, we find that this factor favors an award of the disputed work to employees represented by the ILWU.

3. Employer past practice

The Employer has a practice of assigning M&R work in the Port of Seattle to IAM-represented mechanics. Accordingly, we find that this factor favors an award of the disputed work to employees represented by the IAM.

4. Area and industry practice

Both IAM and ILWU mechanics perform M&R work on the West Coast. In Seattle, the majority of this work is done by IAM-represented mechanics. In the nearby, similarly sized Port of Tacoma and other Puget Sound facilities, most M&R work is performed by ILWU-represented employees. We find that both unions have a practice of performing work of the kind in dispute and, accordingly, that this factor does not favor an award to either group of employees. See *Laborers Michigan District Council (Walter Toebe Construction Co.)*, supra, slip op. at 5.

5. Relative Skills

Since at least 1999–2000, mechanics represented by the IAM have performed M&R work on cruise ships at the Port of Seattle. Darrell Stephens, a maintenance manager for the Employer, testified at a 2006 Board hearing in another case[6] that IAM mechanics are "the most qualified people that we can possibly assemble." At the hearing in the instant matter, Stephens testified that he still maintains that opinion. Additionally, IAM mechanics are required to possess more tools than ILWU mechanics, and the IAM provides an on-site library to assist its mechanics in their M&R work.

The record also establishes that employees represented by the ILWU have successfully, and without complaint, performed the work in dispute since April 2009. DeNike testified that ILWU-represented mechanics are competent and skilled to perform the disputed work. Moreover, John Castronover, the ILWU-represented mechanic employed full time at terminal 91, has over 20 years of experience working as a mechanic or technician and has obtained certifications in several types of skills relevant to M&R work.

On this record, we find that employees represented by both unions have the skills and training necessary to perform the work in question. This factor, therefore, does not favor an award of the disputed work to either group of employees.

[6] *Machinists District 160 Local 289 (SSA Marine)*, 347 NLRB at 552.

6. Economy and efficiency of operations

The Employer contends that ILWU-represented mechanics provide certain efficiencies over IAM-represented mechanics. Joseph Weber, an area manager for the PMA, testified that ILWU-represented mechanics, unlike those represented by the IAM, can perform traditional longshore work during times when M&R work is unavailable. Additionally, DeNike testified that, although the Employer currently utilizes one full-time ILWU-represented mechanic at Terminal 91, it can order additional mechanics from the PMA-ILWU joint dispatch hall when cruise ships are in port.

The IAM contends that it would be more efficient for the Employer to have a full-time work force of steadily employed IAM-represented mechanics than having to call for additional mechanics from the PMA-ILWU joint dispatch hall.

In the circumstances of this case, particularly because the need for mechanics at Terminal 91 may vary depending on weekly and seasonal demands, we agree with the Employer that the ILWU-represented mechanics provide certain efficiencies. Accordingly, we find that this factor favors an award of the disputed work to employees represented by the ILWU.

7. Job Loss

The Board will consider job loss when making an award of the work in dispute. See, e.g., *Iron Workers Local 40* (*Unique Rigging*), 317 NLRB 231, 233 (1995). Weber testified that the use of ILWU-represented mechanics at Terminal 91 prevented at least one layoff, and DeNike testified that the work assignment did not result in the layoff of any IAM mechanics. On the other hand, the IAM generally contends that the Employer's "reassignment" of the IAM's "historical work" caused some loss in hours of work for IAM-represented employees. The IAM also argues that, if the work had been properly assigned to IAM-represented employees, there would have been no job losses for ILWU-represented employees because they had never previously performed such work in the Seattle area. In these circumstances, we find that the factor of job loss does not favor either group of employees.

Conclusion

After considering all the relevant factors, we conclude that employees represented by the ILWU are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference and economy and efficiency of operations, both of which favor the ILWU-represented employees. We find that these factors outweigh the factors that favor an award of the work to IAM-represented employees: past practice and collective-bargaining agreements, the latter of which favors the IAM only slightly. In making this determination, we are awarding the work to employees represented by the ILWU, 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.

1. Employees of SSA Marine, represented by the International Longshore and Warehouse Union, are entitled to perform maintenance and repair work on SSA Marine's stevedoring and terminal service power equipment while it is present at Terminal 91 in Seattle, Washington.

2. International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force the Employer to assign the disputed work to workers represented by it.

3. Within 14 days from this date, International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289 shall notify the Regional Director for Region 19 in writing whether it will refrain from forcing the Employer, 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. January 22, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD