IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ESHBACH BROTHERS, LP	:	**CIVIL ACTION**
	:	
v.	:	**No. 04-0089**
	:	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542	:	

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542	:	**CIVIL ACTION**
	:	
v.	:	**No. 04-0102**
	:	
ESHBACH BROTHERS LP	:	

MEMORANDUM AND ORDER

Savage, J. **March 2, 2006**

In these consolidated cases, one to enforce a labor arbitration award and the other to vacate the award, the issue is whether a decision of the National Labor Relations Board ("NLRB"), after a Section 10(k)[1] hearing, awarding work to one union precludes the competing union from pursuing a legal action under § 301 of the Labor Management Relations Act ("LMRA") to enforce an arbitration award for damages for breach of contract for the same work. The contractor argues that this case is controlled by *Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n v. NLRB*, which held that an NLRB ruling on a work jurisdictional issue trumps an arbitration award to the contrary. 1 F.3d 1419 (3d Cir. 1993) (" *Local 30*"). The union argues that this case is

[1] Section 10(k) reads: "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of [section 8(b)(4)(D)], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen . . . ." 29 U.S.C. § 160(k). Hence, proceedings before the NLRB brought under this section are characterized as "10(k) hearings."

distinguishable from *Local 30* because, unlike in *Local 30*, the union here did not instigate the job action which provoked the unfair labor practice charges resulting in the 10(k) hearing; and, if it is not sufficiently distinguishable, then the *Local 30* holding should be reexamined.

I conclude that the factual differences in this case and *Local 30* do not affect the application of the principle established in *Local 30*, specifically, that the NLRB's decision that one union is entitled to the work nullifies a contrary arbitration award of the work to a rival union. Furthermore, it is not a district court's prerogative to reexamine or challenge Third Circuit precedent. Therefore, because *Local 30* controls, I shall enter judgment in favor of the contractor and against the union.

Factual Background

Eshbach Brothers, LP ("Eshbach"), a union contractor, brought a declaratory judgment action seeking a declaration that it is not a party to any collective bargaining agreement with the International Union of Operating Engineers, Local 542 ("Local 542"), and that the arbitrator's award to the contrary is null and void because the arbitrator had no jurisdiction to determine the parties' dispute. Alternatively, Eshbach seeks to vacate the arbitrator's award.

Local 542 filed its own action against Eshbach to enforce the arbitrator's award that had determined that Eshbach was a party to the collective bargaining agreement that existed between the Employing Bricklayers Association ("Bricklayers Association") and Local 542, and had violated the agreement by giving work to another union, the Laborers International Union of North America ("Laborers Union"). The two cases have been consolidated.

Since the cases were filed, the NLRB conducted a 10(k) hearing and issued its Decision and Determination of Dispute, concluding that the Laborers Union was entitled to the work. *Laborers Int'l Union of N. Am. (Eshbach Brothers, LP),* 344 N.L.R.B. No. 4 (2005). The parties have now filed cross motions for summary judgment. The facts are not disputed. Resolution is a matter of law.

The dispute arises out of a construction project at Central Bucks High School where Eshbach, the masonry subcontractor, employed mason tenders who are laborers represented by the Laborers Union. Mason tenders stock bricks or cinder blocks for masons or bricklayers. Eshbach has a collective bargaining agreement with the Employing Bricklayers Union of the Delaware Valley and the Laborers' District Council of the Metropolitan Area of Philadelphia & Vicinity, which is not the agreement invoked by Local 542 at the arbitration proceedings.

A job jurisdictional dispute arose when Local 542's business agent claimed that the mason tenders should not have been operating pettibones, forklifts used to lift bricks or blocks onto scaffolding. Local 542 contended that the job belonged to its members and not the Laborers Union members. When the dispute was not resolved amicably, Local 542 picketed the construction site for a brief period.

Eshbach filed an unfair labor practices charge against Local 542 over the picketing. The charges were dismissed.

Local 542 filed a grievance under a collective bargaining agreement it had with the Bricklayers Association. Local 542 maintained that the Bricklayers Association was acting on Eshbach's behalf, and Local 542 claimed that Eshbach was bound by its membership in the Contractors Association of Eastern Pennsylvania and the State of Delaware.

Contending that the Bricklayers Association no longer had the authority to negotiate for it with Local 542, Eshbach refused to acknowledge Local 542's grievance. Local 542, as provided for in the collective bargaining agreement between the Bricklayers Association and various unions, demanded arbitration before the American Arbitration Association, which appointed an arbitrator to hear the grievance. Eshbach refused to participate in the arbitration, citing the absence of any agreement to arbitrate with Local 542. Without Eshbach's participation, the arbitrator conducted the hearing and awarded Local 542 double damages as pay-in-lieu of the work.

The actual job jurisdictional dispute is between Local 542 and the Laborers Union, which has asserted its claim to do the mason tending work. The Laborers Union contends that the operation of the fork lifts is within the scope of masonry construction and, consequently, within its union's jurisdiction.

While Local 542 pursued the arbitration, the Laborers Union sent a letter to Eshbach asserting its continuing right to the forklift work as part of mason tending and threatening to picket if the work were assigned to another union. Eshbach responded by filing unfair labor practice charges against the Laborers under 29 U.S.C. §§ 158(b)(1) and (4)(i) and (ii)(D).[2]

The parties, as well as other interested unions, filed unfair labor practice charges with the NLRB. After a hearing, the NLRB determined that the work fell within the Laborers Union's jurisdiction. At the same time, it found that Eshbach had withdrawn bargaining authority from the Bricklayers Association to bargain for it with Local 542. In essence, the

[2] Picketing for the purpose of coercing an employer to assign work to members of the picketing union rather than those of a rival union constitutes an unfair labor practice. 29 U.S.C. § 158(b)(4)(D).

NLRB found that Eshbach was not a party to the collective bargaining agreement with Local 542 that provided the forum for the arbitration proceeding that resulted in the award against Eshbach in its absence.

Analysis

The issue is settled. The NLRB's determination in a section 10(k) proceeding that decides the jurisdictional question in favor of one union takes precedence over an arbitrator's award to the contrary. *Local 30,* 1 F.3d at 1426. In *Local 30*, the union had picketed a job site because a rival union was doing work that the picketing union had done for the contractor on a similar project. The contractor responded by filing an unfair labor practice charge against the union, contending that the picketing was done for the purpose of having the work reassigned to its members in violation of 29 U.S.C. § 158(b)(4)(ii)(D). The union countered by filing a grievance, pursuant to the collecting bargaining agreement it had with a contractors' association, seeking payment in lieu of the work. The contractor refused to participate in the arbitration, claiming that its contract with the union had expired. The arbitrator found in the union's favor.

After holding a section 10(k) hearing, the NLRB determined that the union picketing was illegal because it was done to coerce the contractor to reassign the work to it, and that pursuing its § 301 (29 U.S.C. § 185) action to enforce the arbitration award, which contradicted the section 10(k) determination, constituted an unfair labor practice. The union petitioned the Third Circuit for review.

Relying on decisions of other circuits and the NLRB, the Third Circuit held that "pursuit of a section 301 breach of contract suit that directly conflicts with a section 10(k) determination has an illegal objective and is enjoinable as an unfair labor practice under

section 8(b)(4)(ii)(D)." *Id*. at 1426. Thus, an arbitration award of pay-in-lieu of work to a union other than the one which the NLRB awarded the work in a § 10(k) proceeding is unenforceable. *Id.* at 1428-29.

Local 542 argues that the *Local 30* holding does not apply because the union there had engaged in the illegal picketing that was the subject of the section 10(k) proceeding while here Local 542 did not do the picketing that instigated the unfair labor practice charges. The *Local 30* court did not make such a distinction and concluded it would not alter the effect of the section 10(k) determination. It observed that "the unfair labor practice charge is dismissed if the section 10(k) decision awards the disputed work to the union charged with an unfair labor practice . . . ." *Id.* at 1423 n.6. In other words, the § 10(k) determination is dispositive of entitlement to the work regardless of who is charged with the unfair labor practice.

Nor does it matter that both unions may have viable contracts with an employer. In affirming the NLRB's decision, the Third Circuit stated that a § 10(k) determination is "intended to resolve competing claims to work, even if both groups of employees claiming the work have legitimate contractual claims." *Local 30*, 1 F.3d at 1428. Thus, the distinction urged by Local 542 here does not affect the *Local 30* principle that the NLRB's contrary determination that the work belonged to one union overrides an arbitrator's award of pay-in-lieu of work in favor of another union.

Significantly, in its Decision and Determination of Dispute, the NLRB concluded that Eshbach was not a party to the agreement invoked by Local 542, finding that Eshbach had withdrawn its authorization for the Bricklayers Association to bargain on its behalf with Local 542. *Laborers Int'l Union of N. Am. (Eshbach Brothers, LP),* 344 NLRB No. 4 (2005).

The withdrawal was evidenced by a letter from Eshbach and an acknowledgment by Local 542. *Id*. Thus, even if Local 542 could pursue its action to enforce the award, the NLRB's finding in its determination precludes enforcement of the arbitrator's award.[3]

Conclusion

Under controlling Third Circuit precedent, the NLRB's determination that the Laborers Union was entitled to the work precludes Local 542 from enforcing the arbitrator's award to the contrary. Therefore, I must grant Eshbach's motion for summary judgment and deny Local 542's motion.

[3] The NLRB's conclusion is controlling so long as it is reasonable. *Local 30*, 1 F.3d at 1422 (citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

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ORDER

AND NOW, this 2nd day of March, 2006, upon consideration of Defendant Eshbach Brothers, LP's, Motion for Summary Judgment (Docket No. 04-102, Document No. 8), the International Union of Operating Engineers, Local 542's Cross-Motion for Summary Judgment (Docket No. 04-102, Document No. 10), and after oral argument, it is **ORDERED** as follows:

1. Eshbach Brothers' motion is **GRANTED**;

2. The International Union of Operating Engineers, Local 542's motion is **DENIED**;

3. **JUDGMENT IS ENTERED** in Civil Action No. 04-102 in favor of the defendant Eshbach Brothers and against the plaintiff International Union of Operating Engineers, Local 542.

/s/ Timothy J. Savage
TIMOTHY J. SAVAGE, J.