Daily Labor Report®

177 DLR A-1

Arbitration

Second Circuit Backs Denial of Arbitration; Union Demands Raised Jurisdictional Dispute

A construction employer that negotiated collective bargaining agreements assigning different forms of caisson fabrication to units of the Laborers' International Union and the Carpenters and Joiners of America was not required to submit the dispute to arbitration under the Laborers' contract, the U.S. Court of Appeals for the Second Circuit held Sept. 11 in a per curiam opinion (*Construction Indus. Employers Ass'n v. Laborers Int'l Union Local 210,* 2d Cir., No. 08-4647, 9/11/09).

Affirming a lower court's summary judgment in favor of the Construction Industry Employers Association and a member company, the appeals court agreed that despite Laborers Local 210's assertion that its grievance against CIEA and McKinney Drilling Co. was a legitimate "work preservation" claim, the union was not entitled under its contract to demand arbitration of a jurisdictional dispute between labor unions.

The Second Circuit also held that the lower court properly granted the employer petition for a permanent stay of arbitration and was not required to allow an arbitrator to consider the question of arbitrability before acting.

Two Unions Had Claims to Caisson Work

According to the court, McKinney specializes in creating caissons, deep holes filled with reinforcing bar, or rebar, to create foundations for buildings. In firm and stable soil, the court said, caisson work requires drilling deep holes into the ground and filling them with concrete and rebar. However, when soil is soft or unstable, the contractor must also stabilize the caissons with steel pilings or braces.

McKinney is a member of CIEA, a multiemployer association that has entered collective bargaining agreements with Laborers Local 210 and with the Carpenters Local 289. Under the CIEA agreements, each union retains jurisdiction over the performance of certain work, and the court said McKinney is obligated by the contracts to hire members of the union with jurisdiction over specific work.

A Carpenters union collective bargaining agreement covering CIEA and McKinney gives the union jurisdiction over "drive and brace piling for caisson work," and the court said McKinney had interpreted the contract to require the firm to hire Carpenters union members whenever soil conditions require that caissons be fortified with steel braces or pilings.

At the same time, the opinion said, a Laborers contract gives that union's members jurisdiction over excavation work including "bracing and propping of … caissons." McKinney has interpreted the agreement to require hiring Laborers when caisson work can be performed without steel braces.

Dispute Led to Order Staying Arbitration

In 2008, McKinney won contracts to perform caisson work at industrial plants in Woodlawn and Tonawanda, N.Y. After testing the soil at the factory sites, the company concluded that steel braces would be needed and hired members of the Carpenters to perform the work, but on March 10, 2008, the Laborers notified CIEA and McKinney that workers represented by their union, rather than those represented by the Carpenters, were entitled to perform the caisson work. The Laborers union announced its intention to arbitrate the issue under its collective bargaining agreement.

Citing language in the Laborers agreement that "disputes of a jurisdictional nature" were not subject to the agreements' grievance and arbitration provisions, CIEA and McKinney filed a lawsuit in the U.S. District Court for the Western District of New York.

Citing Section 301 of the Labor-Management Relations Act, which gives courts jurisdiction to enforce collective bargaining agreements, and the Federal Arbitration Act, the employer asked the district court for a permanent stay of arbitration proceedings, and the trial court granted the application. Local 210 appealed to the Second Circuit.

Appeals Court Agrees Dispute Was Not Arbitrable

On appeal, the Laborers local argued that its demand for arbitration was not part of a jurisdictional dispute, but was an attempt to preserve work that Laborers members had traditionally performed or was an exercise of a right under Local 210's collective bargaining agreement to represent the employees handling caisson work for McKinney.

Additionally, the Laborers argued, the district court should have allowed an arbitrator to address the issue of arbitrability before resolving the dispute itself.

The Second Circuit said it was not persuaded by the Laborers arguments.

The appeals court said the controversy over the caisson work was a jurisdictional dispute "because it concerns the competing claims of two unions seeking to perform the same work for an employer." The court observed that the Laborers provided no evidence that the underlying dispute with McKinney involved a dispute over representation of the company's employees.

The court also noted that Local 210's claim that it was attempting to preserve its traditional work was unsupported by any evidence that the Laborers-represented workers had performed McKinney's caisson work on jobs where the use of steel piping was required. On the other hand, the court said, a McKinney official stated in an affidavit that during at least 30 years of working in Western New York, the company had always assigned such work to the Carpenters.

Finally, the opinion said, the Laborers failed to convince the appeals court that the issue of arbitrability should have been submitted to arbitration. Quoting *AT&T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643, 121 LRRM 3329(1986), the court said unless the parties to a contract clearly and unmistakably provide otherwise, "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."

Affirming the lower court's permanent stay of arbitration over the caisson dispute, the court said, "the Laborers Union points to no language in the CBA—and we see none—indicating that the parties clearly and unmistakably agreed to settle disputes of arbitrability through arbitration."

Judges Guido Calabresi, José A. Cabranes, and Peter W. Hall joined in the unsigned per curiam opinion.

Robert A. Doren of Bond, Schoeneck & King, argued the appeal for Construction Industry Employers Association. John A. Collins of Lipsitz Green Scime Cambria argued for Laborers Union Local 210.

By Lawrence E. Dubé

Text of the decision may be accessed at http://op.bna.com/dlrcases.nsf/r?Open=ldue-7vwrds.

ISSN 1522-5968