IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CERTCO, INC.,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 695,

Defendant.

OPINION AND ORDER

11-cv-258-wmc

In this action, plaintiff Certco, Inc. seeks an order vacating an arbitration decision in favor of defendant International Brotherhood of Teamsters, Local Union No. 695 ("Local 695"), which found Certco violated a provision of the parties' collective bargaining agreement in transferring "unit work" to a new facility. Certco argues that this decision is contrary to two prior decisions of the National Labor Relations Board ("NLRB") and, therefore, preempted by them. The court disagrees. Because the NLRB's prior decisions on representational issues is not the same as that presented to the arbitrator in the union's grievance, the court finds that the dispute was arbitrable and that there is no basis to vacate the arbitration decision. Accordingly, the court will deny Certco's motion and enter an order on Local 695's counterclaim confirming the arbitration order.[1]

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[1] In its opposition brief to Certco's motion to vacate, Local 695 also seeks sanctions contending that Certco's appeal is frivolous. The court will deny Local 695's request because the appeal concerns the question of arbitrability, which is typically a judicial decision.

BACKGROUND[2]

A. The Parties

Certco, Inc. is an employer within the meaning of the Labor Management Relations Act of 1974 ("LMRA"), 29 U.S.C. § 142(3), 152(2). Certco is incorporated under Wisconsin law with its principal place of business here in Madison. Certco is engaged in the business of food distribution and operates several storage and distribution facilities in and around Madison, Wisconsin, including: (1) the Verona Road facility; (2) the Femrite facility; and (3) the Daniels facility. Products at the Daniels facility were formerly stored at the Helgesen facility.

Local 695 is a labor organization within the meaning of the LMRA, 29 U.S.C. §§ 142(3), 152(5). Local 695 represents approximately 145 bargaining unit employees employed by Certco. Local 695 has represented Certco employees since 1962.

B. Collective Bargaining Agreement

Local 695 and Certco entered into a collective bargaining agreement ("CBA") that was effective between July 1, 2005 and June 30, 2010, and are currently parties to a materially-identical agreement which expires in 2014. The following provisions from the CBA are material to this opinion:

> **Article 12. Work Assignments**
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> **Section 1.** The Employer agrees to respect the jurisdictional rules of the Union and shall not direct or require its employees or persons other than the employee in the

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[2] The parties have stipulated to the following facts. (Dkt. #12.)

> bargaining units here involved, to perform work which is recognized as the work of the employees in said units.
>
> . . .
>
> **Article 14. Subcontracting**
>
> **Section 1.** The Employer agrees that no work or services presently performed or hereafter assigned to the collective bargaining unit will be subcontracted or transferred for the purpose of circumventing the terms and provisions of this Agreement to any outside company which does not provide wages and conditions of employment substantially equivalent to those provided in contracts which other employers in this geographic area have with the International Brotherhood of Teamsters. However, it is understood that nothing contained in this Agreement shall prohibit the Employer from opening new facilities, closing existing facilities, consolidating facilities, transferring operation from one facility to another, or having store deliveries made by suppliers of items not now being manufactured by the Employer. The Employer retains the right to purchase goods in any form, contract or subcontract with any outside contractor for the performance of work or services or operations which are beyond the capabilities of available unit employees when they are needed or if the necessary machines, materials or tools are not available on the premises.

(Stip. Facts, Ex. D (Part 1) (dkt. #12-4) Arts. 12, 14.) Article 7 sets for a grievance and arbitration process for "any dispute or disagreement arising out of the application or interpretation of the terms of this Agreement." (*Id.* at Art. 7.)

C. Dispute about Helgesen Facility

Prior to 2004, Certco owned and operated only one facility -- the Verona Road facility. In February 2004, Certco announced its plans to open the Helgesen facility without a bargaining unit or governance by the CBA. In response to this announcement,

Local 695 maintained that it should represent Certco's employees at the Helgesen facility as "an accretion" to the bargaining unit for the Verona Road facility.[3] Certco disagreed and refused to apply the CBA to the Helgesen facility. On February 27, 2004, Local 695 filed a grievance over the opening of the Helgesen facility. Certco deemed the grievance nonarbitrable.

In March 2004, Certco opened the Helgesen facility. After opening this facility, Certco transferred certain products from Verona Road to the Helgesen facility, which as planned employed non-union workers. On June 4, July 14, and August 31, 2004, Local 695 filed unfair labor practices charges with the NLRB on the basis of Certco's refusal to arbitrate Local 695's grievance and to apply the CBA to employees working at the Helgesen facility, among other things. The NLRB issued a complaint in response to both charges.

On April 28, 2006, the NLRB issued a decision dismissing the allegations in the complaint. Material to the present dispute, the NLRB considered Local 695's complaint that Certco "has failed and refused to recognize the Union as the collective-bargaining representative of the Helgesen employees, has failed and refused to apply the collective-bargaining agreement to those employees, and has refused to arbitrate a grievance over the opening of that facility as nonunion." (Stip. Facts, Ex. A (dkt. #12-1) 9.) The NLRB described the issues raised by Local 695 as involving "the competing interest of

[3] "An accretion of employees within the context of labor law, is an amalgamation of one group of employees into an existing unit covered by a bargaining unit." *Yellow Freight Sys., Inc. v. Auto. Mechs. Local 701 Int'l Ass'n of Machinists, AFL-CIO*, 684 F.2d 526, 527 n.2 (7th Cir. 1982).

the collective-bargaining representative to preserve unit work and the Section 7 rights of employees to choose … not to be represented by a collective-bargaining representative." (*Id.*) In resolving this issue, the NLRB stated that "[t]he contract is of little assistance," and explained that the issue of accretion involves the "application of statutory policy, standards, and criteria," proper subjects for the NLRB rather than an arbitrator. (*Id.*) After considering the circumstances surrounding the Helgesen facility, the NLRB concluded that Local 695 had failed to rebut the presumption that the Helgesen facility was a separate facility for the purpose of determining accretion. (*Id.* at 10.)

D. Dispute about Femrite Facility

In December 2009, Certco opened another new facility, the Femrite facility, also staffed with non-union employees. After opening the Femrite facility, Certco relocated certain freezer work from the Verona Road facility to the new Femrite facility.

On April 16, 2010, Local 695 filed a charge with the NLRB, alleging, among other things, that Certco committed an unfair labor practice by refusing to recognize Local 695 and apply the CBA to the Femrite facility employees. The NLRB refused to issue a complaint in response and Local 695 appealed that decision.

In a September 1, 2010 letter, the NLRB denied the appeal, explaining that the union failed to meet its burden of "establishing that [Certco] had an obligation to bargain with the Union over its decision to relocate the freezer work to its new Femrite Drive facility." (Stip. Facts, Ex. B (dkt. #12-2) 1.) Citing the 2006 decision, the NLRB explained, "the evidence fails to establish that [Certco] was obligated to recognize the

Union at the new facility under the terms of the parties' collective bargaining agreement. Rather, the Board has held that the terms of the parties' collective bargaining agreement, permitted [Certco] to establish new facilities." (*Id.*) The NLRB also explained, "the evidence shows that [Certco's] decision to relocate the freezer work was not based upon labor costs. Rather, it appears that [Certco's] decision was based upon its need for a larger freezer facility and that there was no space to expand at the Verona Road facility." (*Id.*)

On December 23, 2009, Local 695 filed a grievance alleging that Certco had violated the CBA by removing bargaining unit work to its Femrite facility. On January 20, 2010, Local 695 filed a second grievance containing the same allegation. Certco denied the arbitrability of both grievances, but agreed to take them up in a single arbitration, while reserving its right to challenge their arbitrability depending on the result.

On September 29, 2010, a hearing was held in front of Arbitrator Karen J. Mawhinney. On January 19, 2011, the arbitrator issued her award. The arbitrator held that (1) both grievances were arbitrable, (2) Certco's transfer of work fell under the Verona Road CBA, and (3) the transfer was a violation of that agreement. The award ordered Certco to return all transferred work back to bargaining unit employees.

STANDARD OF REVIEW

In this appeal, Certco chose not challenge the merits of the arbitrator's decision; rather, Certco is solely challenging whether the dispute was arbitrable given the prior

NLRB decisions which it contends concerned the same issue. Specifically, Certco contends that this appeal presents a legal question -- "whether the Board's prior decisions take precedence over the arbitrator's subsequent award" -- and that the court accordingly should review the arbitrator's decision *de novo*. (Certco's Opening Br. (dkt. #13).) Although Local 695 contends that the court's role is limited to the question of "whether or not the Award has any basis in the parties' agreement," it, too, concedes a legal issue is involved. (Local 695's Opp'n (dkt. #14) 5-6.) Accordingly, the court will review the arbitrator's legal determination *de novo*.[4]

OPINION[5]

I. Arbitrability Determination

The law is well-established, and Local 695 concedes, that an NLRB decision takes precedence over an arbitration award on the same issue. *Carey v. Westinghouse,* 375 U.S. 261, 272 (1964) (explaining that the Board's decision that "employees involved in the controversy are members of one bargaining unit or another" would take precedence over the arbitrator's decision); *see also Int'l Union of Operating Eng'rs, Local Union v. Associated Gen. Contractors of Ill.*, 845 F.2d 704, 709 (7th Cir. 1988) ("Questions of representation under section nine of the National Labor Relations Act, 29 U.S.C. § 159 (1982), are

[4] If the court were to review the merits of the arbitration decision, its review, of course, would be far more limited. *See Major League Ballplayers Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) ("[I]f an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." (internal quotation marks and citations omitted)).

[5] The court has jurisdiction over this action pursuant to 29 U.S.C. § 185(c).

matters for the National Labor Relations Board."). This case, therefore, turns on whether the issue of representation of Certco's employees at the Femrite facility is distinct from similar issues concerning the transfer of unit work to non-union employees previously decided by the NLRB.

In *Carey*, the United States Supreme Court considered a motion to compel arbitration, which turned on whether the dispute at issue was a work assignment dispute or one concerning representation. The Court acknowledged the "blurred line that often exists between work assignment disputes and controversies over which of two or more unions is the appropriate bargaining unit." 375 U.S. at 268; *see also id.* at 269 (describing these disputes as "difficult to classify"). Here, the court is not confronted with two unions competing for bargaining rights, but with the similar "blurred line" between Local 695's grievances concerning representation and complaint concerning the transfer of unit work in violation of the CBA.

Certco primarily points to three decisions in support of its argument that the NLRB's decision on representation is the same as that considered by the arbitrator here, though none really clarifies where the line is drawn between representation and transfer disputes at a new facility. First, Certco cites to a Seventh Circuit decision, *Yellow Freight System, Inc. v. Automobile Mechanics Local 701 International Association of Machinists, AFL-CIO*, 684 F.2d 526 (7th Cir. 1982). In this case, the NLRB issued a decision requiring that an election be held among the mechanics at a new facility to determine the collective bargaining unit. *Id.* at 527. In so ordering, the NLRB found that "the accretion of the union's contract to the new terminal was inappropriate." *Id.* After the NLRB's decision

had issued, the union sought to arbitrate its grievance that Yellow Freight "had violated the agreement between [the union] and Yellow Freight when it refused to apply the labor agreement between Yellow Freight and [the union] to the [new] facility." *Id.* at 529. Yellow Freight filed an action in federal district court seeking an injunction against arbitration, arguing that any decision by the arbitrator would be preempted by the NLRB's earlier decision on representation. The district court granted the relief requested, finding that the NLRB's "decision to direct an election preempted the arbitrator's jurisdiction over the grievance and thus rendered moot any potential decision by an arbitrator." *Id.* The Seventh Circuit affirmed, reasoning that the NLRB's decision that "the mechanics constituted a separate unit was a sufficient determination that accretion of [the union's] contract concerning the Yellow Freight employees at the [new] facility was not required." *Id.* at 530. In other words, the NLRB's decision on representation concerned the same issue as the subject of the grievance the union wished to arbitrate. Here, however, the union sought arbitration on the issue of transfer of unit work only.

Second, Certco cites to *Chauffers, Teamsters and Helpers Local 776 Affiliated with International Brotherhood of Teamsters, AFL-CIO v. National Labor Relations Board*, 973 F.2d 230 (3d Cir. 1992). In *Chauffers*, the Third Circuit held that the union had committed an unfair labor practice in pursuing a lawsuit to enforce the arbitrator's award on a representational issue that conflicted with a prior decision by the NLRB on the same representational issue. Unlike here, the union's grievance specifically sought representation of employees in a new warehouse, and the arbitrator's decision expressly

dealt with this representational issue, concluding that the employer "violated the union recognition clause of the collective bargaining agreement by failing to apply it to the returns warehouse." 973 F.2d at 231.

Third, Certco cites to *Bell Cold Storage, Inc. v. Local No. 544*, 885 F.2d 436 (8th Cir. 1989). In this case, too, the Eighth Circuit held that an NLRB's decision on a representation issue preempts an arbitrator's decision. 885 F.2d at 439. The court, however, concluded that the NLRB had *not* issued a final decision on the issue of representation and affirmed the district court's decision to compel arbitration. *Id.* at 440.

In *Carey* and in subsequent opinions, the Seventh Circuit has consistently focused on what the union seeks in the grievance and whether that is distinct from the issue earlier addressed by the NLRB. *See, e.g.*, *Carey*, 375 U.S. at 268-69 ("[T]he board clarifies certificates where a certified union seeks to represent additional employees; but it will not entertain a motion to clarify a certificate where the union merely seeks additional work for employees already within its unit."); *Operating Eng'rs*, 845 F.2d at 709 ("The Union seeks to enforce the rights for the benefit of the employees already within the unit, not the benefit of the two involved in the dispute.").

Here, Local 695 sought to arbitrate its grievances concerning the transfer of unit work from the Verona Road facility to the Femrite facility. (Stip. Facts, Ex. C (dkt. #12-3) 18 ("The Union seeks to return unit work to the unit employees who should have been performing the work all along.").) Notwithstanding Certco's claims to the contrary, this issue is at least arguably distinct from its claimed obligation to recognize Local 695 as the collective-bargaining representative of the employees at the Femrite facility or to

apply the CBA to those employees. The court agrees with the arbitrator, that "while the issues before the NLRB arose from the same facts [as are the subject of the arbitration], the issues are not the same." (Stip. Facts, Ex. C (dkt. #12-3) 18.)

As Certco rightly points out, two sentences in the 2006 NLRB letter denying the union's appeal of the NLRB's decision to refuse to issue a complaint suggest that the NLRB may have considered the unit work issue in rendering its decision. (Stip. Facts, Ex. B (dkt. #12-2) 1 ("[T]he evidence shows that [Certco's] decision to relocate the freezer work was not based upon labor costs. Rather, it appears that [Certco's] decision was based upon its need for a larger freezer facility and that there was no space to expand at the Verona Road facility.").) This cursory discussion of the reasons underlying Certco's expansion decision is not material to its decision on representation. Even if this passage could be viewed as touching on the unit work issue, the relevant scope of the NLRB's preemption authority is limited to representational issues. *Operating Eng'rs*, 845 F.2d at 709 ("Questions of representation under section nine of the National Labor Relations Act, 29 U.S.C. § 159 (1982), are matters for the National Labor Relations Board.").

Still, Certco urges the court to look beyond the labels of Local 695's grievance to what it contends to be the union's true grievance: "Local 695 is seeking to represent the employees at Femrite, as the implication of the Arbitration Award is that the employees at Femrite would be subject to the Local 695's CBA." (Certco's Reply (dkt. #15) 8.)

The Seventh Circuit in *Operating Engineers*, 845 F.2d 704 (7th Cir. 1988), confronted a similar argument. While the union's grievance in that case did not directly

raise representational issues, the employers asserted that the union's grievance concerning unit work "would force the defendants to consider and resolve grievances regarding employees the Union does not represent." 845 F.2d at 709. The court rejected the employers' position, explaining that it viewed the union's complaint differently:

> The Union does not contend that it represents the two employees involved in the dispute. Instead, it alleges that the individuals were engaged in work which was within the Union's jurisdiction and thereby deprived its members of bargaining unit work. The Union seeks to enforce the rights for the benefit of the employees already within the unit, not the benefit of the two involved in the dispute. . . . To the extent the defendants assert that the Union is seeking to represent specific non-Union employees, they are incorrect. The Union does not seek to enforce its agreement as to the individuals performing the work. The Union seeks to compel the employers to honor the agreement for the benefit of workers who are within the bargaining unit. The issue here is not representational[.]

Id.

So, too, here. To the extent, Local 695 would read the arbitration award to require union representation of all Femrite and Daniels employees it would be preempted by earlier NLRB decisions. At the same time, the NLRB decisions did not address whether these facilities must use union workers to perform bargaining unit work under the parties' existing CBA. As to the latter, the arbitrator had the authority to issue an award.[6]

[6] Even if the court were to consider Local 695's complaint more broadly, it is not clear that the arbitrator's decision on the transfer of unit work issue requires union employees at the Femrite facility even for transferred freezer product work. Certco contends that "[a]s a practical matter, the only employees who could perform the Helgesen and Femrite work are new Certco employees at those locations," specifically rejecting Local 695's contention that its members could bid for positions. (Certco's Reply (dkt. #15) 9 & n.5.) If so, there may be no practical or meaningful change with regard to the composition of Femrite non-union employees. Moreover, it is at least possible that the

II. Local 695's Request for Sanctions

In their brief in opposition to Certco's motion to vacate the arbitration award, Local 695 also requests an award of sanctions. Local 695 contends that Certco's challenge here is simply an argument that the arbitrator was "wrong on the merits." (Local 695's Opp'n (dkt. #144) 14.) On this, Local 695 is mistaken. As the court explained above, Certco's challenge concerns whether its dispute with Local 695 is arbitrable; or whether the NLRB's prior decisions preempt the arbitrator's decision. This is a question of law, separate from the arbitrator's decision on the merits in favor of Local 695. "A question of arbitrability, as opposed to an interpretation of a CBA, is undeniably an issued for judicial interpretation." *Cuna Mut. Ins. v. Office & Professional Employees*, 443 F.3d 556, 562-63 (7th Cir. 2006) (noting that if the employer's challenge to an arbitration award involved "a true question of arbitrability," the court's review of the district court's sanction order "might be different"). As importantly in thinking about Local 695's right to fees or costs as a sanction, Local 695 itself recognized Certco's intent to appeal the issue of arbitrability post- arbitration:

> Concerning your comments on arbitrability, we believe the grievances are arbitrable, but understand that you may raise the issue of substantive arbitrability in a judicial proceeding.

(Stip. Facts, Ex. D (Part 3) (dkt. #12-6) 29.) In light of all of this, the court finds no basis for awarding sanctions.

Femrite facility work could be structured in such a way as to be different than unit work. In any event, that is not the issue before this court, but rather before the arbitrator.

ORDER

IT IS ORDERED that:

1) Plaintiff Certco, Inc.'s request that the court enter a judgment vacating the arbitration award is DENIED;

2) Defendant International Brotherhood of Teamsters, Local Union No. 695's counterclaim for an order confirming the arbitration award is GRANTED; and

3) The clerk of the court is directed to enter judgment in favor of defendant and close this case.

Entered this 30th day of September, 2012.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge