

International Union of Operating Engineers, Local No. 487 and Epic One Corporation Construction Management & Contractors. Case 12-CD-300

26 August 1983

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Epic One Corporation Construction Management & Contractors, herein called the Employer, alleging that International Union of Operating Engineers, Local No. 487, herein called Operating Engineers, has violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees represented by it rather than to unrepresented employees employed by the Employer.

Pursuant to notice, a hearing was held before Hearing Officer Eduardo Escamilla on 22 February 1983.¹ All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer and Operating Engineers filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The Employer, a Florida corporation with its principal place of business in Miami, Florida, is engaged in the building and construction industry as a general contractor. During the year preceding the hearing, the Employer purchased and received goods and materials directly from sources outside the State of Florida having a value in excess of \$50,000. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the policies of the Act to assert jurisdiction herein.

¹ All dates herein are in 1983, unless otherwise indicated.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that Operating Engineers is a labor organization within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. The Work in Dispute

The work in dispute involves the operation of a Pettibone crane at the Employer's construction site located on Northwest Seventh Avenue and LeJeune Road in Miami, Florida (herein called the LeJeune jobsite).²

B. Background and Facts of the Dispute

The Employer is the construction manager for the LeJeune jobsite, which involves the construction of a six story office building. In late 1982, the Employer purchased two pieces of machinery, a Pettibone crane and a concrete pump truck. The Employer decided, on or about 29 December 1982, to do some of the construction work itself, using its own unrepresented employees. In addition to his duties as a laborer and mechanic, employee Floyd Thuditt was assigned, beginning on 3 January, to operate the Pettibone crane. Thuditt had prior working experience with cranes, in addition to getting a 1-week hands-on training course from the manufacturer's representatives.

On three occasions, in October, November, and December 1982, Respondent's agent, William Henson, had spoken with Mario Licea, area manager for the Employer, at the LeJeune jobsite. In essence, on all three occasions, according to Licea, Henson stated that he "wanted to supply us with operating engineers for any equipment we may have on this job." Also, when Henson spoke with Licea in December 1982, he asked Licea to sign a contract with Operating Engineers. Licea responded to Henson similarly on all three occasions, stating that the Employer was receiving bids and had made no final decision as to whether it would be doing any construction.

When Henson returned to the jobsite on 18 January 1983, he spoke with Superintendent James D. Blackstone, Jr., asking Blackstone, according to Blackstone's testimony, if he were going to allow Respondent to supply "some professional people." Blackstone replied that he was satisfied with his

² The 10(k) notice of hearing described the work in dispute as involving the operation of a Pettibone crane, concrete pump truck, pumps, air compressors, and elevators at the LeJeune jobsite. The record establishes that the operation of any of the above-mentioned equipment, excluding the Pettibone crane, is purely speculative. In addition, the Employer and Operating Engineers agree that the only work in dispute is the operation of the Pettibone crane.

present operator. Henson said that using Respondent's people could save the Employer money in the long run. Blackstone said it was up to Licea, to which Henson stated he had gotten nowhere with Licea. Then, Henson told Blackstone that "you are just going to force me to put a picket on this job."

Respondent, on the morning of 19 January 1983, established a picket line with signs which claimed the Employer paid below area standard wages. Approximately 2 weeks later, the picketing ceased.

C. *The Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that Respondent violated Section 8(b)(4)(D) of the Act and the proceeding is properly before the Board for determination of the dispute. The Employer argues that, on the basis of the Employer's assignment and preference, economy and efficiency of operation, and the lack of a general area practice, the work in dispute should be assigned to unrepresented employees employed by the Employer.

Operating Engineers asserts that, on the basis of the skill of employees represented by it, area practice, and economy and efficiency of operation, the work in dispute should be assigned to employees represented by Operating Engineers.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that (1) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and (2) the parties have not agreed upon a method for the voluntary adjustment of the dispute.

Prior to assignment of the disputed work, Operating Engineers, in late 1982, made three requests that it be allowed to provide the Employer with employees represented by it; on the last occasion, it requested that the Employer sign a contract. By 18 January, the pettibone crane was in use, operated by an unrepresented employee; Operating Engineers demanded that he be replaced with a union-represented employee or that it would picket the jobsite. The following day, the Union began its picketing, which lasted 2 weeks. At the hearing, the parties testified that there was no adequate method for the voluntary adjustment of the dispute.

On the basis of the entire record, and notwithstanding that Respondent's picket signs alleged an area standards' object in the picketing, it is clear that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the volun-

tary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires that the Board make an affirmative award of dispute work after giving due consideration to various factors.³ The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.⁴

The following factors are relevant in making the determination of the dispute before us:

1. Board certification and collective-bargaining agreement

There is no evidence that Operating Engineers or any other labor organization has been certified by the Board as the collective-bargaining representative for a unit of the Employer's employees. The Employer has no collective-bargaining agreement with Operating Engineers. This factor, therefore, does not favor either party.

2. Employer assignment and preference

The Employer has assigned the work, and prefers an assignment, to its unrepresented employees. This factor favors an assignment of the work to the unrepresented employees employed by the Employer.

3. Area practice

The business manager of Operating Engineers, Shears, testified that there is no area practice relating to the operation of a pettibone crane. In light of the foregoing, this factor does not favor either party.

4. Relative skills

As to the relative skills, Shears testified that employees represented by Operating Engineers are qualified to operate the pettibone crane. Area Manager Licea testified that Thuditt had experience in operating cranes, and that he had been instructed at the jobsite during the first week of January on the operation of this pettibone crane. This factor, therefore, does not favor either party.

³ *NLRB v. Electrical Workers & IBEW Local 1212 (Columbia Broad-casting System)*, 364 U.S. 573 (1961).

⁴ *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402 (1962).

5. Economy and efficiency of operation

The Pettibone crane is only utilized on a part-time basis at the LeJeune Center site as an auxiliary piece of equipment. When the Employer decided to use the crane, it took one of its full-time laborers, Thuditt, and had him include in his job the operation of the crane. It is clear that Thuditt has duties at the jobsite independent of operating the crane. If an employee represented by Operating Engineers were assigned to operate the crane, the Employer would not only be adding an employee who could not be effectively utilized in a full-time capacity but the Employer would also be placed in the position of utilizing Thuditt's services in a less than fully efficient manner. We thus find the factor of economy and efficiency of operations favors an award to the Employer's unrepresented employees.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that unrepresented employees employed by the Employer are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's assignment and preference, and the economy and efficiency of operation. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following Determination of Dispute:

1. The unrepresented employees of the Employer are entitled to perform the operation of the Pettibone crane at the LeJeune jobsite in Miami, Florida.

2. International Union of Operating Engineers, Local 487, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Epic One Corporation Construction Management & Contractors to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Union of Operating Engineers, Local No. 487, shall notify the Regional Director for Region 12, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.