

OPEIU, Amalgamated Local 98, AFL-CIO¹ and Royal Crest Dairy Division, Hawthorne Melody, Inc. and Local Union No. 379, Retail, Wholesale, Department Store Union, AFL-CIO.
Case 9-CD-422-2

30 September 1983

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Royal Crest Dairy Division, Hawthorne Melody, Inc., herein called the Employer, alleging that OPEIU, Amalgamated Local 98, AFL-CIO, herein called OPEIU, had 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 its members rather than to employees represented by Local Union No. 379, Retail, Wholesale, Department Store Union, AFL-CIO, herein called RWDSU.

Pursuant to notice, a hearing was held before Hearing Officer Richard W. Kopenhefer on 16 May 1983. 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.

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 parties stipulated, and we find, that the Employer, a Delaware corporation, is engaged in the production, sale, and distribution of dairy products from its Dayton, Ohio, facility. During the 12 months preceding the hearing, a representative period, the Employer purchased and received at its Dayton, Ohio, facility goods valued in excess of \$50,000 which were shipped directly from points outside the State of Ohio. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and we find that it will effectuate

the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that OPEIU and RWDSU are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. Background and Facts of the Dispute

Since 1969, except for a period of a few months in late 1982 and early 1983, the Employer has utilized two tractor-trailer routes to deliver dairy products directly from its Dayton facility to customers in the Columbus, Ohio, area. The employees assigned to these direct-delivery routes have at all times material herein been represented by OPEIU, which was certified by the Board in 1969 to represent a unit of the Employer's employees, including drivers. Since that time, the Employer has had a series of collective-bargaining agreements with OPEIU. In early 1982, the Employer purchased certain assets of a Columbus, Ohio, dairy that was going out of business. In connection with the purchase, it hired some of the employees of the other dairy who had been represented by RWDSU for a number of years. The Employer voluntarily recognized RWDSU as the bargaining representative of the employees hired from the other dairy and entered into a collective-bargaining agreement with RWDSU. The Employer utilized driver-salesmen represented by RWDSU to make deliveries to its customers in the Columbus area who previously had been customers of the defunct dairy. The driver-salesmen represented by RWDSU picked up the products for their deliveries at the Employer's Columbus dairy after the products were delivered there from the Employer's Dayton plant in tractor-trailers driven by employees represented by OPEIU. Normally, the products were unloaded from the trailers, sorted, and reloaded onto small delivery trucks driven by the driver-salesmen represented by RWDSU. In some cases, a partial load was left on a trailer to be picked up and delivered to a large customer by a driver-salesman represented by RWDSU, using a truck tractor to haul the trailer.

In late 1982, the Employer lost its largest customer on one of the two Dayton-Columbus direct-delivery routes. The Employer temporarily terminated the route and assigned the remaining customers on that route to driver-salesmen represented by RWDSU. In early 1983, the Employer lost its largest customer on the second direct-delivery route, temporarily terminated that route, and again as-

¹ The name of this Union appears as amended at the hearing.

signed the remaining work to employees represented by RWDSU. Immediately after each of the direct-delivery routes was terminated, the Employer's distribution manager, Lentz, promised representatives of OPEIU that the Employer would reestablish two Dayton-Columbus direct-delivery routes as soon as possible, to be assigned to employees represented by OPEIU. However, Lentz also stated that the Employer needed time to do a study of distribution in the Columbus area. With these assurances, OPEIU agreed to hold off processing a pending grievance that it had filed on the elimination of the routes. In March 1983 the Employer completed a study from which it concluded that it could achieve substantial savings by reestablishing two Dayton-Columbus direct-delivery routes, and in the same month it did reestablish two such routes, serving some customers that had been on the original direct-delivery routes and some that had always been served by employees represented by RWDSU. The Employer assigned this work to employees represented by OPEIU. Several employees represented by RWDSU were laid off as a result of the creation of the new routes. Employees represented by RWDSU filed grievances over the transfer of customers away from their unit. In early April 1983 Lentz informed OPEIU business agent Miller that employees in the unit represented by RWDSU had filed grievances. Miller responded by threatening to strike the Employer if any of the work on the new routes was reassigned away from employees represented by OPEIU. Later the same month, Miller repeated this threat. On 21 April, the Employer filed a charge alleging that OPEIU had violated Section 8(b)(4)(D) of the Act by making the threats to strike.

B. *The Work in Dispute*

The work in dispute involves the delivery by tractor-trailer truck of milk and milk byproducts to certain customers of the Employer in the Columbus, Ohio, area.²

C. *The Contentions of the Parties*

The Employer contends that the disputed work has been properly assigned to its employees represented by OPEIU on the basis of the OPEIU's certification by the Board, the Employer's contract with OPEIU, the Employer's preference, the job skills of employees represented by OPEIU, industry practice, and efficiency of operations. OPEIU

² The notice of hearing described the work in dispute as "The delivery of milk and milk by-products in the Columbus, Ohio area." It is clear from the record, however, that the description of the work in dispute in the notice of hearing is overly broad and the actual work in dispute is as described above.

takes a position consistent with that of the Employer.

RWDSU contends that the work in dispute should be awarded to employees represented by it. It argues that there is no reasonable interpretation of the collective-bargaining agreement between OPEIU and the Employer which would give OPEIU a colorable claim to the work, while its own collective-bargaining agreement with the Employer establishes a clear right to it. RWDSU also asserts that industry practice favors awarding the work to employees it represents and that they possess the requisite skills to perform such work. RWDSU asserts that there is no evidence that the assignment of the work to employees represented by OPEIU has actually resulted in savings to the Employer.

D. *Applicability of the Statute*

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

As noted above, an OPEIU representative twice threatened to strike the Employer if the Employer were to reassign any of the disputed work away from employees represented by OPEIU. Based on the foregoing, and the record as a whole, we find that there is reasonable cause to believe that an object of these statements was to force or require the Employer to continue to assign the disputed work to employees represented by OPEIU and that a violation of Section 8(b)(4)(D) has occurred.

No party contends, and the record contains no evidence showing, that there exists an agreed-upon method for voluntary adjustment of this dispute to which all parties are bound. Accordingly, we find this matter is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed 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

³ *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961).

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

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

1. Certification and collective-bargaining agreements

In 1969, OPEIU was certified by the Board as the exclusive bargaining representative of a unit of the Employer's employees including all retail and wholesale drivers.⁵ It appears from the record that beginning at that time and continuing until the Employer temporarily discontinued the Dayton-Columbus direct-delivery routes in late 1982 and early 1983 the employees who drove on those routes were in the unit represented by OPEIU. RWDSU has never been certified by the Board to represent any of the Employer's employees involved in the present dispute. Accordingly, we find that the factor of certification tends to favor an award of the disputed work to employees represented by OPEIU.

The collective-bargaining agreement between the Employer and OPEIU covers production, maintenance, and transportation employees, including tractor-trailer drivers. It also provides that "all delivery of milk or ice cream products in [the] area covered by the current routes, including Columbus, shall be performed by drivers under this agreement" The collective-bargaining agreement between the Employer and RWDSU covers employees including route salesmen and "wholesale semi-driver routemen" based in Columbus, Ohio. It further provides, "The Company shall not transfer from the Sale Classification any wholesale customer . . . located within the Company's Wholesale sales area"

The language of each collective-bargaining agreement arguably covers the work in dispute. The RWDSU contract provides that wholesale customers shall not be assigned away from driver-salesmen in the unit represented by that Union. Part of the work in dispute is deliveries to wholesale customers historically served by driver-salesmen in that unit. On the other hand, the OPEIU contract provides that deliveries in the "area covered by the current routes, including Columbus" (emphasis supplied) shall be assigned to employees represented by OPEIU and the work in dispute consists of deliveries in an area served by the routes that existed at the time the collective-bargaining agreement was entered into; namely, the Columbus, Ohio, area. Because both collective-bargaining agreements arguably cover the work in dispute, we find that this factor does not favor an

⁵ At the time of the certification, the name of the Union was Milk and Ice Cream Drivers and Dairy Employees Union, Local 98, AFL-CIO.

award of the work to employees represented by either Union.

2. Employer's preference and past practice

The past practice with respect to the Employer's assignment of the disputed work is mixed. Following the Employer's acquisition of assets of the defunct dairy, part of the disputed work was performed by employees represented by each Union. The portion of the disputed work performed by employees represented by OPEIU was temporarily reassigned to employees represented by RWDSU after the Employer lost major customers on its direct-delivery routes. When the restructured direct-delivery routes were created, all disputed work was assigned to employees represented by OPEIU. There is no evidence to contravene the Employer's assertion that the assignment of all the disputed work to employees represented by RWDSU was a transitional measure, put into effect only until the Employer was able to determine the most efficient way of restructuring the Columbus deliveries. Accordingly, we find that the factor of past practice does not favor an award of the work in dispute to either group of employees.

At the hearing and in its brief, the Employer expressed its preference that the work in dispute continue to be performed by employees represented by OPEIU. Accordingly, although not entitled to controlling weight, the factor of employer preference favors an award of the disputed work to employees represented by OPEIU.

3. Relative skills

Uncontroverted evidence establishes that employees represented by both Unions have the skills required to make deliveries by tractor-trailer. Employees represented by OPEIU made such deliveries along the two previously existing direct-delivery routes. At the same time, employees represented by RWDSU had, until recently, made some of their Columbus-area deliveries to large customers using tractor-trailers. Although employees represented by RWDSU admittedly have never taken over-the-road routes similar in length to the Dayton-Columbus routes, there is no contention that this makes a meaningful difference in terms of ability to perform the work in dispute. Accordingly, we find that the factor of relative skills is inconclusive and does not favor an award of the disputed work to either group of employees.

4. Industry and area practice

At the hearing, witnesses for the Employer and OPEIU testified that other dairies in the Midwest use direct-delivery routes to serve their major cus-

tomers, and that direct-delivery routes are generally regarded in the industry as the most efficient means of serving large customers. On the other hand, the witness for RWDSU testified that other dairies in the area use the depot-distribution method in metropolitan areas, and use direct-delivery routes only where they do not have local depot distribution systems established. Accordingly, we find the factors of industry and area practice inconclusive.

5. Economy and efficiency of operations

At the hearing, the Employer presented uncontroverted evidence that restructuring the deliveries in Columbus by creating the two new direct-delivery routes was projected to save it approximately \$7,000 per month. Witnesses for the Employer explained that the projected savings would result from avoiding the need to unload substantial amounts of product from tractor-trailers and reload it onto local delivery trucks at the Columbus depot, from reduction in fuel and equipment costs, and from reduction in labor costs. Although the Employer was unable at the hearing to introduce specific figures showing the amount of savings resulting from the institution of the new routes, witnesses for the Employer testified without contradiction that substantial savings had been realized. They also testified without contradiction that direct-delivery to major customers would increase customer satisfaction because of quicker delivery resulting in longer "shelf life" of the milk products.⁶ Further, the Employer's distribution manager, Lentz, testified that he would be able to respond more effectively to complaints or concerns of the major Columbus customers by having Dayton drivers report directly to him at the end of each day. There is no evidence, and RWDSU does

⁶ "Shelf life" is the period of time that dairy products may remain on a retailer's shelves for sale to customers before approaching spoilage.

not contend, that an award of the disputed work to employees represented by RWDSU would result in similar savings. Accordingly, we find that the factor of economy and efficiency of operations favors an award of the disputed work to employees represented by OPEIU.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by OPEIU are entitled to perform the work in dispute. We reach this conclusion relying on the fact that OPEIU has been certified by the Board to represent a unit of the Employer's employees including classifications which cover the work in dispute; such an award results in greater economy and efficiency of operations; the employees represented by OPEIU possess the requisite skills to perform such work; and such an award is consistent with the Employer's preference. In making this determination, we are awarding the work in question to employees who are represented by OPEIU, but not to that Union or its members. 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 makes the following Determination of Dispute:

Employees of Royal Crest Dairy Division, Hawthorne Melody, Inc., who are represented by OPEIU, Amalgamated Local 98, AFL-CIO, are entitled to perform the work of delivery by tractor-trailer truck of milk and milk byproducts to certain customers of the Employer in the Columbus, Ohio, area.