

International Longshoremen's Association, Local 333, AFL-CIO and Rukert Terminals Corporation and International Longshoremen's¹ Association, Local 1429, AFL-CIO. Case 5-CD-276

15 December 1983

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The charge in this Section 10(k) proceeding was filed 24 May 1983 by the Employer, alleging that the Respondent, International Longshoremen's Association, Local 333, AFL-CIO, (Local 333), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by International Longshoremen's Association, Local 1429, AFL-CIO (Local 1429). The hearing was held 29 June 1983 before Hearing Officer Gary L. Simpler.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Company, a Maryland corporation, is engaged in a pier and warehousing operation in the Port of Baltimore, Maryland, where it annually provides services to companies in interstate and foreign commerce valued in excess of \$50,000. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 333 and Local 1429 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer's primary business is the warehousing of cargo which has been unloaded from ships. The work of unloading cargo at the Employer's pier is performed as follows: A cargo owner contracts with a stevedoring company, whose employees are represented by Local 333, to unload cargo from a ship and with the Employer, whose employees are represented by Local 1429, to warehouse cargo. When a ship docks, employees repre-

sented by Local 333 unload the cargo from the ship onto the pier and then move it with the stevedoring company's forklifts to an intermediate point of rest to avoid congestion on the pier. Usually the intermediate point of rest is to the side of the unloading area or just inside the warehouse doors. When cargo reaches its intermediate point of rest, employees represented by Local 1429, using the Employer's forklifts, move it to its final point of rest either inside the warehouse or in the outside storage yard.

On 12 May 1983, employees of ITO Corporation (a stevedoring company), who are represented by Local 333, began unloading the cargo of the ship *Norad Thor* onto the pier and placing it at its intermediate point of rest and the Employer's employees began moving the cargo to its final point of rest. According to the Employer, around 2 p.m. Garris McFadden, president of Local 333, ordered the four or five employees represented by Local 1429 who were transporting the cargo to its final point of rest to stop working and instructed the employees represented by Local 333 to carry the cargo all the way to its final point of rest. McFadden denies ordering the employees represented by Local 1429 to stop transporting the cargo. Shortly thereafter, George F. Nixon Jr., the Employer's executive vice president, approached McFadden where the *Norad Thor* cargo was being unloaded. According to Nixon, McFadden told him that under a new procedure employees represented by Local 333 would transport the cargo all the way to its final point of rest and that if employees represented by Local 1429 loaded the cargo he would pull his men off the job. McFadden denies making this statement as well. Thereafter, employees represented by Local 333 unloaded all the cargo from the *Norad Thor* and transported it to its final point of rest.

B. Work in Dispute

The disputed work involves the movement of cargo which is discharged off a ship onto the wharf or pier to its final point of rest in a warehouse or storage yard. This work is performed with the use of forklifts. The cargo is stored at various locations inside of the warehouse, or at points around the storage yard at the direction of Rukert and in compliance with the specifications ordered by the shipper.

C. Contentions of the Parties

The Employer contends there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the dispute is properly before the Board. Regarding the merits of the dispute, the Employer

¹ Despite notice, Local 1429 did not appear at the hearing.

contends that the disputed work should be awarded to its employees who are represented by Local 1429 based on: its collective-bargaining agreement with Local 1429 and the lack of any collective-bargaining agreement with Local 333; employer past practice; relative skills and economy and efficiency of operations; and the absence of any joint board determinations, union agreements, or arbitration decisions bearing on the dispute.

In essence, Local 333 contends that this case is not properly before the Board because its actions "have not harmed the Employer" and because Local 1429 has not asked the Board to award the work in dispute to employees represented by it. Regarding the merits of the dispute, Local 333 contends that employees represented by it should be awarded the disputed work based on: a determination by the Baltimore District Council of the International Longshoremen's Association, Local 1429's collective-bargaining agreement, employer past practice, area practice, and economy and efficiency of operations.

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 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, according to the Employer's executive vice president, Local 333's president, McFadden, threatened a work stoppage if employees represented by Local 333 were not permitted to do the disputed work. An employee represented by Local 1429 also testified that McFadden ordered them to stop doing the disputed work. Since McFadden denied making either of these statements, there is a conflict in testimony over whether Section 8(b)(4)(D) has been violated. It is well settled, however, that a conflict in testimony does not prevent the Board from proceeding under Section 10(k), for, in such cases, the Board is required to find only that there is reasonable cause to believe that the Act has been violated.² Accordingly, without making a credibility resolution, we find, based on the foregoing evidence, and the record as a whole, that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.³

² *Operating Engineers Local 139 (McWad Inc.)*, 262 NLRB 1300, 1302 fn. 6 (1982).

³ There is no evidence or contention that either Local 1429 or the employees it represents have disclaimed the disputed work. On the contrary, two of the employees represented by Local 1429 testified in support of an award of such work to them. Accordingly, we find no merit in Local 333's contention that the Board should not proceed because Local 1429

As noted above, Local 333 contends that the Board should not proceed because the Baltimore District Council of the International Longshoremen's Association has awarded the disputed work to the employees whom it represents rather than the employees represented by Local 1429. Section 10(k) of the Act empowers the Board to hear jurisdictional disputes unless "the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustments of the dispute." Although Local 333 claims that the Baltimore District Council sent a letter to the Board stating its determination after holding a hearing at which it and Local 1429 participated, Local 333 has failed to introduce either a copy of such letter or any other documentary evidence verifying the Baltimore District Council's determination. Moreover, as Local 333 admitted, the Employer does not have a collective-bargaining agreement with it and did not participate in whatever proceeding took place before the Baltimore District Council. Accordingly, we find that there is no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act and that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

Neither of the labor organizations involved in this dispute has been certified by the Board as the collective-bargaining representative of the Employer's employees in an appropriate unit. The Employer currently has a collective-bargaining agreement with Local 1429 covering the wages and working conditions of the employees in its warehouse operating department. Section 12(d) of their collective-bargaining agreement provides:

has not asked the Board to award the work to the employees it represents.

Checkers, tractor drivers, or forklift operators working simultaneously and in conjunction with longshoremen on the pier, loading or discharging a vessel, or receiving cargo delivered to the warehouse by a longshoremen driver shall be paid the front door rate.

The employees who have been performing the disputed work are "forklift operators" and have been paid the "front door rate" in accordance with the foregoing provision of the contract. The Employer notes that the foregoing provision expressly contemplates that employees represented by Local 333 will carry cargo only as far as the "front door" of the warehouse, where it will be received by employees represented by Local 1429. Accordingly, we find that the collective-bargaining agreement between the Employer and Local 1429 specifically encompasses the work in dispute. The record further indicates that the Employer has no collective-bargaining agreement with Local 333. We therefore find that the factor of collective-bargaining agreements favors an award of the disputed work to the Employer's employees who are represented by Local 1429.

2. Company preference and past practice

The record indicates that the Employer has historically assigned the disputed work to its own employees represented by Local 1429. Although Local 333 presented evidence that the employees it represents have carried bagged cargo into the Employer's warehouse and then piled the bags, the Employer presented unrefuted evidence that this kind of work has not been done for 18 years. Based on the foregoing, we find that the Employer's past practice favors an award of the disputed work to its employees represented by Local 1429.

At the hearing and in its brief, the Employer expressed its preference that the disputed work continue to be performed by its employees represented by Local 1429. While we do not afford controlling weight to this factor, we find it favors an award of the work in dispute to employees represented by Local 1429.

3. Area and industry practice

Local 333 contends that area practice supports its claim to the disputed work. Local 333 presented evidence that the practice in other facilities was for employees represented by Local 333 to unload cargo and transport it to its final resting point. The Employer contends that the area practice is not relevant because the Employer's facility is unique. The Employer presented uncontradicted evidence that it operates the only privately owned marine

terminal and warehouse which handles bulk freight and which specializes in long-term storage, sorting of cargo, and order picking for customers. Accordingly, we find that the factor of area practice is not helpful to our determination.

4. Relative skills and economy and efficiency of operations

The record contains uncontradicted evidence that employees represented by both Local 333 and Local 1429 operate forklifts. The Employer, however, presented uncontradicted evidence that its employees have been trained in the proper procedures for sorting and storing cargo. Local 333 presented no evidence that employees represented by it are familiar with such procedures. We therefore find that the factor of relative skills favors an award of the disputed work to employees represented by Local 1429.

With respect to economy and efficiency of operations, the Employer presented uncontradicted evidence that the composition of the Local 333 gang varies from vessel to vessel depending on the stevedoring company hired by the cargo owner and the gang members available, and that it would be more efficient and economical to have its regular employees perform the disputed work. Furthermore, as noted above, the latter employees already have been trained in the proper procedures for sorting and storing cargo. Local 333 argues it is more economical to have employees represented by it perform the work since the work would be covered by the stevedoring company's bill to the cargo owner. However, it makes no showing that an award of the work in dispute to employees represented by it in fact would be as economical as an award to employees represented by Local 333.

We find, therefore, that the factor of economy and efficiency of operations favors an award of the disputed work to the employees represented by Local 1429.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Local 1429 are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's collective-bargaining agreement with Local 1429, company preference and past practice, relative skills, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Local 1429, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Rukert Terminals Corporation represented by the International Longshoremen's Association, Local 1429, AFL-CIO, are entitled to move cargo from its intermediate point of rest on the pier to its final point of rest in a warehouse or storage yard of Rukert Terminals Corporation in Baltimore, Maryland.

2. International Longshoremen's Association, Local 333, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Rukert Terminals Corporation to assign the disputed work to employees represented by it.

3. Within 10 days from this date, International Longshoremen's Association, Local 333, AFL-CIO, shall notify the Regional Director for Region 5 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.