Boston Building and Construction Trades Council; Laborers International Union of North America, No. 88; Laborers International Union of North America, Local 223; Bridge, Structural and Ornamental Iron Workers, Local No. 7; International Union of Operating Engineers, Local No. 4; International Brotherhood of Electrical Workers, No. 103; and United Brotherhood of Carpenters and Joiners of America, No. 56 ***and*** **Methuen Construction Company, Inc.** Case 1-CD-680

28 March 1984

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 following a charge filed by Methuen Construction Company, Inc. (the Employer) alleging that each of the above-named Respondents violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to its members rather than to employees of the Employer or its subcontractor.

The hearing was held before Hearing Officer John T. Downs 6 and 26 October 1983. The Employer and Respondents Iron Workers and Operating Engineers appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the isuses. Respondent Laborers Local 223 also appeared at the hearing but did not participate because Local 223, by letter, disclaimed any interest in the disputed work. The remaining Respondents also disclaimed interest in the work, and therefore they did not participate at the hearing.[1]

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. Upon the entire record, the Board makes the following findings.

II. THE BUSINESS OF THE EMPLOYER

The Employer is a Massachusetts corporation with its principal place of business in Methuen and is engaged in the construction industry as a general contractor. During the past year the Employer purchased materials from outside the Commonwealth of Massachusetts having a value in excess of $50,000. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and 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 Respondent Iron Workers and Respondent Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

In November 1982 the Employer began the installation of a sewer main pursuant to a contract with the Boston Water and Sewer Commission. The Employer assigned the equipment operation work to its own employees, and it assigned the major portion of the concrete reinforcement work to its subcontractor Fiore Construction. The Employer assigned a minor portion of this latter work to its own employees. At the time the instant dispute arose, the project's concrete reinforcement work had not yet begun.

On 20 January 1983[2] some 200 picketers came to the project site, and some of the Employer's equipment was damaged. None of the picketers carried signs identifying any union. However, Joseph Quilty, business agent for Respondent Iron Workers, admittedly was at the scene, and Gerold Burke, a police officer, testified that certain other individuals identified themselves to him as "ironworkers." On 23 January the Employer met with representatives of the Sewer Commission and various unions including Respondents Operating Engineers and Iron Workers. The Employer's Vice President Michael Chace testified that at that meeting Walter Ryan, a representative of the Operating Engineers, asked if the Employer wanted to have two or three hundred people milling around the site and suggested that the Employer "sign up" and use members of the Operating Engineers. Iron Workers representative Quilty told Chace at that meeting that he was interested in having his membership do the ironwork. The Employer's Project Superintendent Joseph Silva testified that he spoke with Operating Engineers representative Carl Bucci after this meeting. Silva said Bucci told him that he wanted "a piece of the action" and that the Employer could put its own operators to work on

[1] There is no issue in this case as to the disclaimers because no party contends that these disclaimers do not effectively renounce claims over the work in question. Accordingly, this decision is limited to resolving the jurisdictional disputes only with regard to Respondents Iron Workers and Operating Engineers.

[2] All dates refer to 1978 unless otherwise noted.

other jobs. A second meeting was held 25 January. Chace said that various other union representatives requested that the Employer assign work to their members.

B. *The Work in Dispute*

The work in dispute with respect to Respondent Operating Engineers involves the operation of heavy equipment and with respect to Respondent Iron Workers involves the installation of steel rods for concrete reinforcement and miscellaneous structural steel fabrication at the New Boston Main Interceptor Sewer Project in South Boston, Massachusetts.

C. *The Contentions of the Parties*

The Employer contends that the equipment operation work should be awarded to its employees and that the ironwork should be awarded to the employees of its subcontractor Fiore Construction and its own employees. The Employer asserts that it prefers to utilize its own employees and those of its subcontractor; that these employees are qualified to perform the work; that it has assigned the work to them; and that this assignment is efficient and economical because these employees have performed similar work for the Employer in the past.

In their joint brief neither Respondent Operating Engineers nor Respondent Iron Workers argues that it should be awarded the work. Rather, they argue that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. Respondents point out that Iron Workers business agent Quilty had only limited contacts with the Employer and that Quilty was primarily interested in ascertaining the identity of the subcontractor who would perform the concrete reinforcing work. Respondents argue that, because no concrete reinforcing work was then being performed at the jobsite in January no violation of Section 8(b)(4)(D) could have occurred. Respondents argue that Operating Engineers representatives Ryan and Bucci requested only a contract and that a demand for a contract is not prohibited by Section 8(b)(4)(D). Respondents contend that the Employer misconstrued the request for a contract as a demand for the work. Respondents further contend that the Operating Engineers representatives did not demand that the Employer replace its employees with members of the Operating Engineers.

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.

On the basis of the entire record, we conclude 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 voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act.

As noted above, Iron Workers business agent Quilty was present at the scene of the mass picketing. According to police officer Burke, other individuals who were there identified themselves to him as "ironworkers." In addition, Quilty testified that his attendance at the 23 January meeting was for the purpose of asking for an opportunity to participate in the ironwork. In these circumstances, we find there is reasonable cause to believe that Respondent Iron Workers has violated Section 8(b)(4)(D). While the Employer's ironwork was not yet in progress as of January, this does not preclude the existence of a jurisdictional dispute because the work shortly was to begin. *Longshoremen ILWU Local 8 (Port of Portland)*, 233 NLRB 459 (1977). Moreover, even though the ironwork now is complete, the dispute is not moot absent evidence that the dispute will not arise again if the Employer later performs similar work in the Iron Workers jurisdiction. *Boilermakers Local 744 (Williams Crane Service)*, 232 NLRB 164 (1977).

With respect to Respondent Operating Engineers, we note that there is conflicting evidence as to what occurred at the 23 January meeting. Thus, Chace testified that Ryan asked that the Employer use members of the Operating Engineers and impliedly threatened a picket of "2 or 3 hundred" people. Ryan denied making these statements. In a proceeding under Section 10(k) the Board is not charged with finding a violation but only with finding whether there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. In so doing we need not conclusively resolve conflicts in testimony. *Electrical Workers IBEW Local 103 (Maki Electrical)*, 227 NLRB 1745 (1977). In addition, Silva testified that Operating Engineers representative Bucci asked him for "a piece of the action" and suggested that the Employer put its employees to work on other jobs. In these circumstances, we find that there is reasonable cause to believe that Respondent Operating Engineers has violated Section 8(b)(4)(D).

There is no evidence that the parties have any agreed-upon method of resolving the dispute. 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 the Board to make an affirmative award of disputed work after taking into account the evidence supporting the claims of the parties and balancing all relevant factors. *NLRB v. Electrical Workers, IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961).

1. Relative skills

The employees of the Employer and Fiore Construction possess the requisite skills to perform the work in dispute. There is no evidence as to the skills of employees represented by the Operating Engineers or the Iron Workers.

2. The Employer's assignment and preference

The Employer prefers to assign and has assigned the disputed work to its employees and to employees of Fiore Construction. These factors favor an assignment to the employees of the Employer and Fiore Construction.

3. Economy and efficiency of operation

The Employer has used its employees and its subcontractor's employees to perform similar work in the past, and thus their continued performance of the disputed work makes for a more efficient operation than would be the case if the work were awarded to other employees. These factors favor an assignment to employees of the Employer and Fiore Construction.

Conclusion[3]

On the record as a whole, and after full consideration of all relevant factors involved including the Employer's assignment and preference, economy and efficiency of operation, and employees' relative skills, we conclude that employees of Methuen Construction and Fiore Construction are entitled to perform the disputed work. The determination is limited to the controversy that gave rise to this proceeding.

[3] No party claims that any certification or collective-bargaining agreements are relevant in making the determination of this dispute.

DETERMINATION OF DISPUTE

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

1. Employees of Methuen Construction Company, Inc. and Fiore Construction are entitled to install steel rods for concrete reinforcement and miscellaneous structural steel fabrication at the New Boston Main Intercepter Sewer Project in South Boston, Massachusetts.

2. Employees of Methuen Construction Company, Inc. are entitled to operate heavy equipment at the New Boston Main Interceptor Sewer Project in South Boston, Massachusetts.

3. Bridge, Structural and Ornamental Iron Workers, Local No. 7 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Methuen Construction Company, Inc. to assign the disputed work to employees represented by that labor organization.

4. International Union of Operating Engineers, Local No. 4 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Methuen Construction Comany, Inc. to assign the disputed work to employees represented by that labor organization.

5. Within 10 days from this date, Bridge, Structural and Ornamental Iron Workers, Local No. 7 and International Union of Operating Engineers, Local No. 4 shall each notify the Regional Director for Region 1 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.