

**International Brotherhood of Electrical Workers,
Local Union 202 and W. B. Skinner, Inc. and
Northern California District Council of Labor-
ers, AFL-CIO and Laborers Local Union No.
261, AFL-CIO. Case 20-CD-613**

11 July 1984

**DECISION AND DETERMINATION OF
DISPUTE**

**BY MEMBERS ZIMMERMAN, HUNTER, AND
DENNIS**

The charge in this Section 10(k) proceeding was filed 4 November 1983 by the Employer, alleging that the Respondent, the Electrical Workers, 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 continue to assign certain work to employees it represents rather than to employees represented by the Laborers. The hearing was held 30 January 1984 before Hearing Officer David K. Senty.

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 California corporation, is engaged in the business of general engineering, including the installation of underground television cable. During calendar year 1983, the Employer performed services valued in excess of \$50,000 for Viacom Cablevision of San Francisco. During calendar year 1983 Viacom, a California corporation, had gross revenues from individual subscribers in excess of \$1 million and during the same period purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of California. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties stipulate, and we further find, that Electrical Workers and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer is a subcontractor of Viacom Cablevision of San Francisco. Viacom possesses the exclusive franchise to install and operate a cable television system in the city and county of San Francisco. Pursuant to its franchise agreement,

Viacom is required to install underground and aerial television cable throughout residential areas of San Francisco in accordance with a construction plan and timetable extending into calendar year 1988 agreed to by the city and Viacom.

Viacom subcontracted some of the work of excavation and installation of underground cable to the Employer in June 1982. As a prerequisite to their agreement, Viacom required the Employer to sign a collective-bargaining agreement with Electrical Workers covering the work to be performed under this subcontract. Viacom's employees who had been performing the work are represented by Electrical Workers, and Viacom's policy and practice is to require all its subcontractors to sign an agreement with Electrical Workers prior to commencing work. The Employer signed a contract with Electrical Workers and also hired some persons who had performed this work as employees of Viacom. It also purchased some of the equipment used by Viacom in performing the work. In approximately January 1983 the Employer took over all of Viacom's underground construction work.

In August 1982 the Laborers approached the Employer about assigning to its members the underground construction work being performed by employees represented by Electrical Workers. When the Employer refused to reassign the work to employees represented by Laborers, the Laborers grieved the refusal under the 1980-1983 Master Agreement, to which the Employer was allegedly bound. The grievance was referred to a board of adjustment, which found for the Laborers. The Employer did not participate in the board of adjustment proceeding. The board of adjustment arbitration award directed the Employer to pay 15 laborers listed in the grievance "from August 19, 1982, forward to the completion of the project." The Laborers subsequently sought and obtained enforcement of the arbitration award in the San Francisco County Superior Court.¹

Upon learning of the claim by the Laborers to the work being performed by employees represented by it, Electrical Workers, in a letter dated 3 October 1983, threatened "to take whatever action is necessary, including picketing to prevent such assignment." This letter gave rise to the charge in this case.

¹ The Employer did not appear in the Superior Court proceeding, and has filed a motion to set aside the court order confirming the arbitration award. That motion, which was entered into the record of the 10(k) proceeding, asserts, inter alia, that the Superior Court's order was a default judgment resulting from the inadvertence and excusable neglect of the Employer's counsel, who erred in calendaring the date of appearance. The Employer's motion was, at the time of the hearing, pending before the Superior Court, with a hearing scheduled for 7 February 1984.

B. *Work in Dispute*

The disputed work is all work involving the excavation and laying of underground cable and related conduits carrying television signals throughout the city and county of San Francisco.

C. *Contentions of the Parties*

At the commencement of the hearing counsel for the Laborers stated on the record that the Laborers disclaim interest in the disputed work, and moved that the notice of 10(k) hearing be quashed on the basis that there is no jurisdictional dispute. The Employer opposed the Laborers' motion, taking the position that the disclaimer is inconsistent with the Laborers' Superior Court enforcement of its arbitration award requiring the Employer to pay members of Laborers for performance of the work in dispute. Counsel for the Laborers moved, alternatively, to continue the hearing until after the Superior Court hearing on the Employer's motion to set aside the Superior Court's order confirming the Laborers arbitration award. The hearing officer denied these motions, whereupon counsel for the Laborers declined to participate further in the proceeding and left the hearing room. Laborers in its brief to the Board reasserts its disclaimer of interest in the work, and renews its motion to quash.

The Employer contends that the Board should determine the merits of this dispute because there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated and there is no agreed-upon method of voluntary resolution. With respect to the merits, the Employer asserts that its assignment of the disputed work is consistent with factors on which the Board relies in resolving work assignment disputes. Thus, the Employer maintains that both the Employer and Viacom have traditionally assigned the disputed work to employees represented by Electrical Workers in Marin County, California, as well as in the city and county of San Francisco; that the Employer and Electrical Workers are signatory to a collective-bargaining agreement covering the disputed work; that the performance of the disputed work requires the operation of numerous pieces of heavy equipment and a high degree of coordination of effort between all of the various crews performing the total job; and that it prefers the disputed work to be assigned to employees represented by Electrical Workers.

The Electrical Workers' position essentially is in agreement with that of the Employer. It specifically asserts that the Laborers' disclaimer of interest in the work in dispute should not be given effect, and contends that the record supports the assign-

ment of the disputed work to employees represented by it.

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, the Electrical Workers in its letter of 3 October 1984 informed the Employer that it would take whatever action was necessary, including picketing, to prevent the Employer from reassigning the disputed work. Accordingly, we find that there is reasonable cause to believe that an object of the Electrical Workers' threat was to force the Employer to continue to assign the disputed work to employees represented by Electrical Workers, and thus that Section 8(b)(4)(D) has been violated.

In reaching this conclusion, we have carefully considered the Laborers' disclaimer of interest in the work in dispute. The Board has held that a jurisdictional dispute no longer exists when one of the competing unions or parties effectively renounces its claim to the work at issue.² The party raising such an issue, however, has the burden to satisfy the Board's requirements of a clear, unequivocal, and unqualified disclaimer of all interest in the work in dispute.³

Laborers argues that since 30 January 1984, it has effectively disclaimed any interest in the work described in the notice of hearing, and that it has done nothing inconsistent with its disclaimer. Laborers points out that the Superior Court's order confirming the arbitration award was granted on 29 August 1983 and dealt with damages for the breach of a collective-bargaining agreement which expired 16 June 1983. The Employer's efforts to have the Superior Court's order set aside are, the Laborers claims, not any action which it has instituted, and thus the Laborers is not actively engaging in any conduct apparently inconsistent with its disclaimer of the work.

We note that the arbitration award confirmed by the Superior Court provides, *inter alia*, as follows:

3. The Employer be directed to pay the 15 laborers listed in the grievance from August 19, 1982 forward to the completion of the

² *Laborers Local 66 (Georgia-Pacific Corp.)*, 209 NLRB 611 (1974), and cases cited therein.

³ *Operating Engineers Local 77 (C. J. Coakley Co.)*, 257 NLRB 436 (1981).

project and fringe benefits to be paid to the Trust Fund.

We further note that the project to which the arbitration award relates is scheduled to continue into 1988. While Laborers emphasizes that the alleged contract pursuant to which it obtained the arbitration award has expired, it does not aver that it does not seek enforcement of the award, as written, extending beyond the contract term. Under these circumstances, where it is arguable that Laborers continues to seek payment from the Employer for the work in dispute, we cannot conclude that it has effectively disclaimed interest in that work. Thus, we shall not honor the disclaimer, and we deny Laborers' motion to quash contained in its brief.

No party contends and there is no evidence showing that there exists an agreed-upon method for the voluntary adjustment of this dispute binding on all the parties.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the 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. Certifications and collective-bargaining agreements

There are no known certifications concerning the employees of the Employer engaged in the disputed work. The Employer has, since August 1982, been party to a collective-bargaining agreement with the Electrical Workers covering its employees who perform the work involved in the underground construction, excavation, and laying of cable and other conduits throughout the city and county of San Francisco.⁴

⁴ The Employer's contract with the Electrical Workers expired by its terms 15 January 1984, but at the time of the hearing had been extended while the parties negotiated for a new agreement.

Laborers contends that the Employer was signatory to the Laborers Master Agreement for 1980-1983, which expired 16 June 1983. The board of adjustment's arbitration award directing the Employer to pay 15 laborers until the completion of the project tends to support this assertion. However, the Employer in its motion to set aside the Superior Court's order confirming the arbitration award asserts, inter alia, that it had no valid contract with the Laborers, and there is insufficient evidence in the record to resolve whether the Employer in fact was a party to a valid collective-bargaining agreement with the Laborers. Resolution of that issue is not, in any case, critical to our determination here. If the Laborers had a contract with the Employer covering the work in dispute, that contract would at most offset the Electrical Workers contract with the Employer so that this factor would favor neither group of employees. On the other hand, if the Laborers did not have a valid contract with the Employer, this factor would tend to favor the Electrical Workers. Such a result would only add weight to our determination herein, since, as discussed below, we find that the other factors, to the extent they favor either group of employees, all favor the Electrical Workers. Therefore, we find it unnecessary to rely on this factor in resolving the dispute.

2. Company preference and past practice

The Employer has assigned the work in dispute to employees represented by Electrical Workers from the time it commenced operation pursuant to its subcontracting agreement with Viacom. Bill Skinner, the Employer's representative, also testified at the hearing that the Employer preferred to continue to assign the work to its employees represented by Electrical Workers. We conclude, therefore, that consideration of this factor favors assignment of the work to employees represented by Electrical Workers.

3. Area and industry practice

Employees of Viacom and its subcontractors are the only employees engaged in performing the underground construction, excavation, and other work related to providing cable services in San Francisco, since Viacom has the exclusive franchise to provide cable television service in that area. All employees engaged in this work, whether employed by Viacom or its subcontractors, are represented by Electrical Workers. Electrical Workers also represents employees performing the same type of work in Marin County. There is no evidence that employees represented by Laborers have ever performed work involving the under-

ground construction, excavation, and laying of cable and other conduits carrying television signals in San Francisco or its neighboring areas. Accordingly, we find that area practice favors awarding the work to the Employer's employees represented by Electrical Workers.⁵

4. Relative Skills

Employees of the Employer who are represented by Electrical Workers possess the necessary skills, training, and expertise to perform every aspect of the work in dispute. Some of these employees have performed the disputed work as employees of Viacom, and subsequently of W. B. Skinner, and have acquired the skills and expertise essential to efficiently and safely perform the work. The work includes operation of the T-600 and M-475 Vermeer Rockwheels, air compressors, various sized dump trucks, backhoe loaders, asphalt rollers, and all other specialized and generalized equipment used in underground construction work. These employees also participate in regular safety and training meetings held by the Employer.

The record contains no evidence with respect to the relative skills of individuals represented by the Laborers. Accordingly, we find the evidence with respect to this factor favors assignment of the disputed work to employees represented by the Electrical Workers.

5. Economy and efficiency of operations

Employees represented by the Electrical Workers perform all tasks connected with the disputed work, from the erection of street barricades at the beginning of the job, through the actual construction, excavation, and laying of cables, to the removal of the barricades at the end of the job. Small

crews working one after the other in a highly coordinated manner perform the various stages of the underground construction work. Currently, all tasks, including the operation of heavy equipment, are performed by employees of the Employer represented by Electrical Workers. The Laborers introduced no evidence with respect to which tasks, if any, of the work in dispute employees they represent can perform.

We find that the factors of efficiency and economy of operations support assignment of the work to the Employer's employees represented by Electrical Workers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Electrical Workers are entitled to perform the work in dispute. We reach this conclusion on the basis of the Employer's assignment and preference, the area practice with which such assignment is consistent, and the fact that the Employer's assignment will tend to result in greater efficiency and economy of operations. In making this determination, we are awarding the work to employees represented by Electrical Workers, 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.

Employees of W. B. Skinner, Inc. represented by International Brotherhood of Electrical Workers, Local Union 202 are entitled to perform all work involving the excavation and laying of underground cable and related conduits carrying television signals throughout the city and county of San Francisco.

⁵ There is no evidence as to industry practice outside the San Francisco-Marín County area.