District 30, United Mine Workers of America *and* Samoyed Energy Company, Inc.

Local 1834, United Mine Workers of America *and* Samoyed Energy Company, Inc. Cases 9-CD-425-1 and 9-CD-425-2

13 July 1984

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

The charges in this Section 10(k) proceeding were filed 20 July 1983 by the Employer, Samoyed Energy Company, Inc., alleging that the Respondents, District 30 and Local 1834 of the United Mine Workers of America, 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 they represent rather than to certain employees employed by the Employer. The hearing was held 7 February 1984 before Hearing Officer Andrew Schmidt.[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. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Company, a Kentucky corporation, is engaged in the business of mining and selling bituminous coal at its facility at Greasy Creek, Pike County, Kentucky. Based on a projection of its operations since about 14 June 1983, the Employer will annually sell and ship goods valued in excess of $50,000 from its Pike County, Kentucky facility to firms which will, in turn, sell and ship these goods to points directly outside the State of Kentucky. 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 District 30 and Local 1834 of the United Mine Workers of America are labor organizations within the meaning of Section 2(5) of the Act.

[1] No representative for Local 1834 appeared at the hearing. Counsel for District 30 stated at the hearing that Local 1834's counsel was then appearing in a criminal trial in Federal District Court, and entered an objection by Local 1834's counsel to the holding of the hearing in his absence. Notice of hearing was served 26 January 1984, and the record does not contain a request for continuance or rescheduling by any party.

II. THE DISPUTE

A. *Background and Facts of Dispute*

In late May 1983,[2] the Employer started preliminary coal mining operations at a mine site at Greasy Creek in Pike County, Kentucky. From May through June, the Employer's work force consisted of four employees who had previously worked for the Employer at other locations. The Employer's president, Clifford Marenko, testified without contradiction that none of the four employees was a union member, that none had ever indicated to him that they had authorized union representation, and that no union had ever been certified as the employees' collective-bargaining representative. Three successive companies had operated the Greasy Creek mine before the Employer, and all had been signatory to contracts with the United Mine Workers. The employees of these previous employers (referred to as "Greasy Creek employees" in this decision) believed that they were entitled to the work at the Greasy Creek mine because they had "panel rights" to the work under prior Mine Workers contracts.

On two occasions in June, District 30 Field Representative Eddie Ratliff told Marenko that he was going to have problems unless he signed a union contract. Marenko refused to talk to Ratliff, and the Employer's nonunion mining operation continued. On 11 July, several individuals entered the Employer's property, blocked the mine entrance with logs and rocks, and threatened the Employer's employees. At the mine site, Local 1834 Committeeman Chester Burke angrily accused Marenko of running a scab operation and told Marenko that he was going to run him out of Greasy Creek.

The mine site picketing and violence continued on the morning of 12 July. Individuals cut telephone lines, threw rocks, threatened employees, and blocked the mine entrance. Marenko then went to District 30's office and discussed the situation with District 30 President Ernie Justice. Justice informed Marenko that he should recall and employ the Greasy Creek employees because they had a legitimate claim to the work at the mine. Justice also told Marenko that the only employees he was interested in were the Greasy Creek employees. Marenko then signed the National Bituminous Coal Wage Agreement of 1981 in District 30's office. Marenko testified that he signed the contract under heavy duress and only because he felt that he had to sign to stay in business. Subsequently, the Em-

[2] All dates are 1983 unless otherwise noted.

ployer did not abide by the contract or replace its employees with Greasy Creek employees.[3]

Mass picketing occurred at the mine site from 13 July through 25 July. On 16 July, Burke told Marenko that the Employer "wasn't going to work unless every man that formerly worked at that operation got his job back" and that the pickets would "bust every man's head here is [sic] not belonged to the union. And we'll run all the employees off." On 18 July, Burke told Marenko that the Employer could not employ its employees, and that he was going to run Marenko out of Greasy Creek unless Marenko hired the Greasy Creek employees. Ratliff, who was standing beside Burke, then referred to the contract and told Marenko that he would have to discharge his employees and put the Greasy Creek employees back to work. Ratliff then presented, and Marenko accepted, a grievance on behalf of the Greasy Creek employees. The Employer has subsequently refused to process the grievance.

The situation at the mine grew more violent throughout the next week, and two of the Employer's employees quit because of the violence. On 26 July, the Employer secured a state court injunction against blocking of public highways near the mine and violence or threats of violence. At the time of the hearing, the injunction was still in effect and the Employer was conducting mining operations with 10 employees.

B. *Work in Dispute*

The disputed work involves the day-to-day production and maintenance activities associated with the Employer's coal mining operation at the Employer's mine located at Greasy Creek in Pike County, Kentucky.

C. *Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated and that the relevant criteria favor assignment of the work to its employees. The Employer also contends that there is no agreed-upon method for voluntary adjustment of this dispute. In this connection, the Employer argues that the 12 July collective-bargaining agreement should be considered null and void, rather than a viable dispute resolution mechanism.

District 30 contends that the 12 July collective-bargaining agreement constitutes a voluntary method for adjusting this dispute that is valid and binding on all parties. District 30 alleges that mandatory provisions in the contract's grievance procedures provide for contractual resolution of this dispute and, further, that Marenko specifically agreed to arbitrate this dispute by accepting the 18 July grievance. District 30 points out that it has filed a civil action in Federal District Court seeking to compel arbitration of the grievance. Accordingly, District 30 has moved to dismiss this proceeding.

D. *Applicability of the Statute*

The undisputed evidence shows that agents of both Respondents attempted to force the Employer to assign the disputed work to the Greasy Creek employees rather than to the Employer's employees. Thus, Local 1834 Committeeman Burke threatened Marenko that he would ruin the Employer's business unless Marenko replaced his employees with Greasy Creek employees, and Local 1834 members supported Burke's demand with violent mass picketing. Further, District 30 Representative Ratliff told Marenko that Marenko would have to discharge his employees and put Greasy Creek employees to work, and he was standing nearby when Burke made similar threats.

We are also not satisfied that District 30 has demonstrated the existence of sufficient evidence in this case to establish that all parties have agreed upon and are bound to a method for voluntarily adjusting this work dispute. In evaluating the evidence about the 12 July collective-bargaining agreement and its grievance procedures, we particularly rely on: the highly charged and potentially coercive circumstances surrounding Marenko's execution of the contract and acceptance of the grievance; the Employer's consistent refusal to abide by the contract or to arbitrate the grievance; the fact that the contract's validity is now being litigated in Federal District Court; and the lack of evidence that any of the Employer's employees has ever authorized union representation.[4] Doubt exists as to the contract's validity and as to whether all parties will be bound to it. Consequently, we find no private means of settlement sufficient to preclude us from proceeding to a determination of the dispute.

In sum, 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

[3] On 31 January 1984 the General Counsel issued a complaint in Cases 9-CB-5676-1, and 9-CB-5676-2 alleging, inter alia, that Local 1834 and District 30 violated Sec. 8(b)(1)(A) and (2) of the Act with regard to the Employer's signing of the contract.

[4] Compare *Paperworkers Local 175 (Westvaco Corp.)*, 224 NLRB 861, 862 (1976) (employer's refusal to arbitrate and resistance to attempt to compel arbitration in Federal court factors in finding no private means of voluntary adjustment); *Carpenters Local 1752 (Pacific Coast Fireproofing)*, 223 NLRB 168, 170–171 (1976) (lack of evidence that contract provisions were enforced and fact that employer did not employ members of respondent union factors in finding insufficient evidence that contract was viable).

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.[5]

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 agreement

Neither the Respondents nor any other unit of the United Mine Workers has ever been certified by the Board as the collective-bargaining representative of the Employer's employees. Marenko did execute the National Bituminous Coal Wage Agreement of 1981 in 1983. Considering the circumstances surrounding the signing of the contract, as discussed above, we find that there is insufficient evidence to establish that the contract is currently binding on the Employer. Accordingly, we find that the contract is not determinative of the dispute.

2. Company preference and past practice

The Employer has expressed a clear preference to employ its employees rather than the Greasy Creek employees. Since the Employer started operations at the Greasy Creek mine, it has consistently assigned the disputed work to its employees. The initial employees employed at the mine had worked several years for the Employer at other locations, and the Employer was familiar with their skills and training. Other than the disputed 12 July agreement, the Employer has never had any type of contractual relationship with the United Mine Workers during the Employer's 8-1/2-year existence. We find that this factor favors an award of the disputed work to the Employer's employees.

3. Efficiency of operation, relative skills, and safety

The Employer introduced a different type of mining operation at the Greasy Creek mine. While previous companies had employed conventional mining operations, the Employer uses a continuous mining operation. A continuous mining operation utilizes some different equipment and mining techniques. The Employer has its own training program, and its employees are highly trained and experienced in the operation and maintenance of all the various types of continuous mining operation equipment. These employees have good production and safety records. Although former Greasy Creek employees can perform some of the jobs in a continuous mining operation, there is no evidence that they have experience with continuous mining or that they are qualified to operate and maintain continuous mining equipment. Accordingly, we find that the factors of efficiency of operation, relative skills, and safety favor assignment of the work to the Employer's employees.

Conclusions

After considering all the relevant factors, we conclude that employees of Samoyed Energy Company, Inc., are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's assignment and preference, the relative skills of the employees, the efficiency of the Employer's operation, and safety. 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 employed by Samoyed Energy Company, Inc., are entitled to perform the day-to-day production and maintenance activities associated with the Employer's coal mining operation at the Employer's mine located at Greasy Creek in Pike County, Kentucky.

2. District 30, United Mine Workers of America and Local 1834, United Mine Workers of America are not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Samoyed Energy Company, Inc., to assign the disputed work to employees represented by them.

[5] For these reasons, we also deny District 30's motion to dismiss this proceeding.

3. Within 10 days from this date, District 30, United Mine Workers of America and Local 1834, United Mine Workers of America shall notify the Regional Director for Region 9 in writing whether they 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.