

**Laborers' International Union of North America  
Local 113 and Joseph Lorenz, Inc. and Inter-  
national Union of Operating Engineers, Local  
139, AFL-CIO. Case 30-CD-135**

June 13, 1991

DECISION AND DETERMINATION OF  
DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed on November 21, 1990, by the Employer, alleging that the Respondent Laborers' International Union of North America Local 113 (Laborers Local 113) 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 International Union of Operating Engineers, Local 139 (Operating Engineers Local 139). The hearing was held on February 1, 1991, before Hearing Officer Gerald McKinney. The Employer, Laborers Local 113, and Operating Engineers Local 139 filed posthearing briefs.

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 Employer, Joseph Lorenz, Inc., a Wisconsin corporation, is a general contracting firm engaged in building construction. Its principal office is located in Hartland, Wisconsin, where it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside the State of Wisconsin. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers Local 113 and Operating Engineers Local 139 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

In June 1990,<sup>1</sup> the Employer began work as the general contractor in the construction of an addition to a building which housed the cooling equipment for the Milwaukee County Medical Center. This job was known as the Chiller Project. Work on the Chiller Project required occasional use of one or two forklifts and skid steer loaders (also known as Bobcats). The

<sup>1</sup> All dates are in 1990, unless otherwise indicated.

Employer assigned this work to its employees represented by Laborers.

Sometime in August or September, Thomas Lorenz, the Employer's president, met with William Smeaton, a business agent for Operating Engineers. Smeaton objected to the Employer's assignment of the forklift and Bobcat work to the employees represented by Laborers. Following this meeting, Smeaton sent a letter to Lorenz requesting reassignment of the disputed work to employees represented by Operating Engineers.

Lorenz informed William Johnson, a Laborers' business representative, that Operating Engineers wanted the work in dispute and Lorenz was considering whether to make the requested reassignment. Johnson told Lorenz that the Laborers was having problems with the Operating Engineers about the forklift and Bobcat work and "were not going to give this up without a struggle." Johnson asserted that there would be some kind of concerted action if the work were re-assigned. By a letter to Lorenz dated September 18, Johnson reasserted the Laborers' jurisdictional claim and stated that if the forklift and Bobcat work were re-assigned "to members of Operating Engineers, this Union has no other alternative but to take some concerted action in this matter."

On September 19, Lorenz sent a letter to Smeaton informing him that the Employer considered the matter to be a jurisdictional dispute and did not agree to assign the work to employees represented by the Operating Engineers. Thereafter, Operating Engineers filed a grievance alleging that the Employer's failure to assign employees represented by Operating Engineers to operate forklifts and Bobcats on the Chiller Project violated the parties' collective-bargaining agreement. This grievance remained pending at the time of the hearing. By December 31, work on the Chiller Project was substantially complete.

B. *Work in Dispute*

The disputed work involves the operation of forklifts and skid steer loaders (Bobcats) for the Employer at the Milwaukee County Chiller Plant Project located in Wauwatosa, Wisconsin.

C. *Contentions of the Parties*

The Employer and Laborers Local 113 contend that: there is reasonable cause to believe that Laborers Local 113 violated Section 8(b)(4)(D) of the Act; no voluntary means exists for adjustment of the jurisdictional dispute; and the work in dispute should be awarded to employees represented by Laborers Local 113 based on the factors of its collective-bargaining agreement with the Employer, the Employer's preference and past practice, area practice, skills, and economy and efficiency.

Operating Engineers Local 139 claims that this dispute is not properly before the Board since the work in dispute has been completed and no picketing or strike activity ever occurred, Operating Engineers Local 139 sought only damages for the Employer's alleged breach of contract, and the procedure used by the Employer and Laborers Local 113 to get this matter heard was collusive. Assuming the existence of a genuine jurisdictional dispute, Operating Engineers Local 139 asserts that the work in dispute should be awarded to it based on its collective-bargaining agreement with the Employer, area practice, and its safety and training programs.

#### D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k), 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 on a method for voluntary adjustment of the dispute. As discussed above, there is evidence that representatives for Laborers Local 113 and Operating Engineers Local 139 made competing claims to the work in dispute on behalf of each Union's represented employees. It is also uncontroverted that Laborers Local 113's business representative Johnson twice threatened to engage in some concerted action if the Employer reassigned the work in dispute to employees represented by Operating Engineers. There is no evidence to support Operating Engineers Local 139's claim that Laborers Local 113 was not serious in making the threat or had in any way colluded with the Employer in this matter. We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.<sup>2</sup> Absent any contention or evidence to the contrary, we further find that there exists no agreed-on 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.

#### D. 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 in-

<sup>2</sup>There is no merit in Operating Engineers Local 139's claim that no jurisdictional dispute exists because the work in dispute at the Chiller Project was completed without any actual picketing or strike action. It is well-established that "the mere fact that disputed work has been completed does not render a jurisdictional dispute moot where nothing indicates that similar disputes are unlikely to recur." *Operating Engineers Local 150 (Martin Cement)*, 284 NLRB 858, 860 fn. 4 (1987).

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. Collective-bargaining agreements<sup>3</sup>

The Employer has collective-bargaining agreements with both Unions. Each agreement contains references to the operation of forklifts and steer loaders by unit employees represented by the signatory union. Inasmuch as both contracts provide some basis for claiming the work in dispute, we find that the factor of collective-bargaining agreements does not favor an award of the work in dispute to either group of employees.

#### 2. Company preference and past practice

The Employer prefers that the work in dispute be performed by employees represented by Laborers. The Employer has consistently assigned forklift work to employees represented by Laborers since 1961, and skid steer loader work to employees represented by Laborers since 1979. We find that this factor favors an award to employees represented by Laborers.

#### 3. Area practice

There is conflicting testimony in the record about the practice of area employers in assigning the work in dispute. Johnson testified that employees represented by Laborers operated forklifts and Bobcats in the Milwaukee, Washington, and Ozaukee counties of Wisconsin 99 percent of the time. He also testified that he asked several contractors in the area about their assignment practices. Their uniform response was that the work was assigned to employees represented by Laborers. Smeaton testified, however, that he observed employees represented by Operating Engineers operate Bobcats and forklifts 50-75 percent of the time on construction jobsites throughout the area. We find that the factor of area practice does not favor an award of the work in dispute to either group of employees.

#### 4. Relative skills

Although only the Operating Engineers appears to have a formal training school where its members have the opportunity to learn skills and safety procedures involved in the operation of machines including forklifts and Bobcats, the record indicates that employees represented by either Union have the necessary skills and training to perform the work in dispute. Therefore, we find that this factor does not favor either group of employees.

<sup>3</sup>No party claims there are Board certifications relevant to the work in dispute.

### 5. Economy and efficiency of operations

According to uncontradicted evidence, it is more economical and efficient to use employees represented by Laborers. Witnesses for the Employer testified that to hire two extra employees represented by Operating Engineers to operate a forklift and a Bobcat on the Chiller Project would amount to an additional \$60,000 and would not result in any increase in productivity. These witnesses further testified that both forklifts and skid steer loaders were actually in operation only one-half to 3 hours per day on the Chiller Project. An operating engineer assigned to operate only this specific machinery would not have work to perform for the remainder of each workday. On the other hand, laborers assigned to perform the work in dispute can perform a variety of other tasks within their jurisdiction at times when forklifts and Bobcats were not in use. Accordingly, we find that this factor favors awarding the work in dispute to employees represented by Laborers.

### Conclusions

After considering all the relevant factors, we conclude that employees represented by Laborers Local 113 are entitled to perform the work in dispute. We reach this conclusion by relying on the factors of employer preference and past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Laborers Local 113, 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 Joseph Lorenz, Inc., represented by Laborers' International Union of North America Local 113, are entitled to perform the work of operating forklifts and skid steer loaders (a/k/a Bobcats) for Joseph Lorenz, Inc. at the Milwaukee County Chiller Plant Project located in Wauwatosa, Wisconsin.