

**Construction and General Laborers, District Council of Chicago and Vicinity, affiliated with the Laborers International Union of North America, AFL-CIO and Paul H. Schwendener, Inc. and Albin Masonary and Local Union No. 150, International Union of Operating Engineers, AFL-CIO.** Cases 13-CD-440 and 13-CD-441

August 27, 1991

DECISION AND DETERMINATION OF  
DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND RAUDABAUGH

The charges in this 10(k) proceeding were filed on April 17 and 22, 1991, by Paul H. Schwendener, Inc. (Schwendener) and Albin Masonary (Albin or Employer), respectively, alleging that the Respondent, Construction and General Laborers, District Council of Chicago and Vicinity (Laborers), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing each of them to assign certain work to employees it represents rather than to employees represented by Local Union No. 150, International Union of Operating Engineers, AFL-CIO (Engineers).<sup>1</sup> The cases were consolidated and a hearing was held on May 23, 1991, before Hearing Officer Joan Flynn.

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

Paul H. Schwendener, Inc., an Illinois corporation, is engaged in construction as a general contractor with its principal offices in Westmont, Illinois, where it annually purchases and receives at its Illinois facility in excess of \$50,000 in goods and services directly from outside the State of Illinois.

Albin Masonary, an Illinois corporation, is a masonry contractor with a principal place of business in Chicago Heights, Illinois. During the past calendar year, it purchased and received at its Illinois facility over \$500,000 in goods and services from companies which received those products directly from points outside the State of Illinois.

The parties stipulate<sup>2</sup> and we find that Schwendener and Albin are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and

that the Laborers and Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Schwendener, the general contractor of a nursing home construction project located on Remington Drive in Bolingbrook, Illinois, subcontracted the masonry work on that project to Albin Masonary. Schwendener is signatory to contracts with the Laborers and the Engineers, covering seven or eight counties in the Chicago metropolitan area, through the Mid-America Regional Bargaining Association (MARBA). Albin has a contract with the Laborers only, through the Contractor's Association of Will and Grundy Counties.

On the nursing home job, Albin assigned the work of operating the Highlander II lull, a forklift truck used exclusively for masonry work, to its employees who are represented by the Laborers. Albin President Keith Albin testified that in late March 1991,<sup>3</sup> after 2 or 3 weeks into the job, he was called by Engineers Business Representative Gary Benefield who demanded that Albin recognize and contract for operation of the forklift truck or the Engineers would picket the job-site.<sup>4</sup> Albin replied that he recognized the Laborers as the bargaining agent for the forklift. Albin further testified that in a subsequent conversation Benefield said that he could supply Albin with a first year apprentice engineer at about \$10 or \$12 an hour, which would be under the going rate of a laborer,<sup>5</sup> and also that he "would not be glued to the [forklift truck] seat." Thereafter, on March 26, Benefield sent Albin a telegram which threatened to picket unless Albin complied with the area standards for engineers at the nursing home site.

Likewise, Schwendener Executive Vice President Joseph Chambers testified that Benefield pressed him to have an engineer operating the forklift for Albin, in compliance with the subcontractor memorandum agreement between Schwendener and the Engineers, and thereafter, by letter of March 28, Engineers Vice President James Ness requested a meeting with Schwendener prior to submitting the alleged violation to the joint grievance committee under their contract.<sup>6</sup>

<sup>3</sup> All dates refer to 1991.

<sup>4</sup> Albin testified that Benefield had made similar demands of him and Schwendener in January and February while his company was performing work for Schwendener at a food store construction project. The record does not indicate whether 8(b)(4)(D) charges were filed against the Engineers with respect to these incidents.

<sup>5</sup> Albin testified that current total hourly wages and benefits for Laborers is \$20.35, compared to \$29.45 for Engineers.

<sup>6</sup> The Engineers did submit the matter to the joint grievance committee, which thereafter advised Schwendener by letter that it had met on May 8, but did not vote on the submitted grievance because its management committee concluded that the issue was jurisdictional in nature and thus not eligible for resolution under the grievance procedure.

<sup>1</sup> The Engineers did not appear at the hearing nor submit a brief.

<sup>2</sup> Stipulations by "the parties" refers to stipulations entered into by Schwendener, Albin, and the Laborers.

Finally, on April 5, Laborers Secretary-Treasurer Joseph Lombardo Jr. wrote separately to Schwendener and Albin and threatened to picket their jobsite to preserve the Laborers' work jurisdiction if the forklift was reassigned to the Engineers. These letters triggered the filing of the instant charges against the Laborers.

Counsel for the Engineers wrote a letter on May 21, which was received in the Regional Office on the morning before the scheduled hearing. The letter advises, *inter alia*, that the Engineers "disclaims any interest in having its members perform forklift truck work as employees of Albin Masonry [sic] at the construction site located at Remington Drive, Bolingbrook, Illinois." It further states that the Engineers specifically reserves its right to pursue its subcontracting grievance against Schwendener.

The Regional Director for Region 13 apparently notified the parties that the hearing would proceed as scheduled. The Engineers did not appear at the hearing and has not participated further in this proceeding.

#### B. *Work in Dispute*

The work in dispute involves the operation of the mason-tending forklift on the nursing home construction project on Remington Drive in Bolingbrook, Illinois.

#### C. *Contentions of the Parties*

As noted earlier, the Engineers did not participate in the hearing or submit a brief. The Laborers alone has filed a brief before the Board, contending that the Engineers has successfully applied secondary pressure on Schwendener to change the way it does business with subcontractor Albin,<sup>7</sup> and that the Engineers' eleventh hour statement disclaiming interest in the disputed work, while simultaneously pursuing its grievance, is not an unqualified disclaimer. On the merits, the Laborers asserts that its claim to the work is supported by Albin's preference and past practice, collective-bargaining agreement, the economy and efficiency of its operation, and the area and industry practice of mason contractors. In addition, the Laborers contends that an areawide award is warranted because of the long history of this work dispute and the substantial likelihood of recurrence throughout the overlapping jurisdictions of the Laborers and 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 on a method for the voluntary adjustment of the dispute. Section 8(b)(4)(D)

<sup>7</sup>It points to Keith Albin's testimony showing that Schwendener has ceased to award future projects to Albin.

makes it an unfair labor practice to take coercive action with the object to "for[ce] or requir[e] any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . . ." In order to find reasonable cause to believe that Section 8(b)(4)(D) has been violated, "there must be evidence that one group of employees has exerted improper pressure upon the Employer to compel it to assign certain work to that group of employees rather than to another group which also seeks the work." *Auto Workers (General Motors)*, 239 NLRB 365, 366 (1978).

At the beginning of this dispute, employees represented by the Laborers had been assigned to operate the forklift truck. The Engineers insisted that the work belongs to employees whom it represents and informed both Albin and Schwendener that its members would picket the jobsite for "area standards" or file a formal grievance against Schwendener for not requiring assignment of the work to its members. In response to the Engineers' claim, the Laborers sent letters to Albin and Schwendener which threatened picketing at the jobsite to preserve its work jurisdiction if the forklift work was reassigned to the Engineers. There is no evidence that this threat to picket was not genuine. Accordingly, we find that there were competing claims to the disputed work between two rival groups,<sup>8</sup> and that there is reasonable cause to believe that the Laborers used proscribed means to enforce its claim to the disputed work.

Swendener, Albin, and Laborers have stipulated, and the letter from the joint grievance committee shows that there is no agreed method for voluntary resolution of the dispute to which all parties, including the Engineers, are involved.

Based on our findings above, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred, and that there exists no agreed method of 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.<sup>9</sup>

<sup>8</sup>Because the Engineers did not restrict its conduct to filing a grievance under the signatory clause of its contract with Schwendener but made claims for the work both to Albin and Schwendener, and backed the claims up with threats, Chairman Stephens finds this case to be distinguishable from *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990), in which he dissented from the majority's finding that the mere filing of a grievance under such a clause constitutes a competing claim for the assigned work.

<sup>9</sup>As noted, the Engineers submitted a letter to the Regional Director 1 day before the instant hearing, stating that it disclaims any interest in having its members perform as employees of Albin, but reserves its right to pursue its subcontracting grievance against Schwendener. The Regional Director's response to the letter was to notify the parties that the hearing would be held as scheduled. We find that this letter is ineffective as a disclaimer because it disclaims the work only insofar as the Engineers sought to have employees it represents perform the work as employees of Albin. It does not eschew interest in the work if performed by another employer, including Schwendener. Indeed, in light of the joint grievance committee's informing it that the issue

### E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of the 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. Collective-bargaining agreements

Albin has a current contract with the Laborers covering, inter alia, tending materials, “whether by bucket, hod, wheelbarrow, buggy, or any motorized unit . . . bobcats and unloaders for cement masons and concrete contractors, forklifts for brick masons and/or any other machine which replaces the wheelbarrow or buggy.” Albin, the Employer that controls the assignment of the disputed work, has no collective-bargaining agreement with the Engineers. We therefore find that this factor favors an award of the disputed work to employees represented by the Laborers.

#### 2. Company preference and past practice

The Employer prefers to use employees represented by the Laborers to perform the work in dispute. Keith Albin testified that his company has exclusively used employees represented by the Laborers to operate the lull forklift. Accordingly, we find that employer preference and past practice favors an award to employees represented by the Laborers.

#### 3. Area and industry practice

Keith Albin testified that 80 percent of the mason contractors use laborers to operate forklift trucks for carrying bricks. Schwendener Executive Vice President Chambers’ testimony, however, reveals that Schwendener has customarily had its employees represented by the Engineers operate the lull forklift on construction jobs in which it performed masonry work. No other evidence on this factor was presented by the parties. We find from the foregoing that the factor of area and industry practice is inconclusive and does not favor an award to employees represented by either union.

was not eligible for resolution under the grievance procedure, the Engineers’ reservation of the right to pursue its subcontracting grievance against Schwendener must be deemed to be a continuing claim for the work with respect to Schwendener and any employer other than Albin that Schwendener might contract with to perform the work.

#### 4. Relative skills

The record indicates that operation of the lull forklift requires no license, certification, or particular skill and relatively little training, and that both groups of employees are equally capable of performing the disputed work. We therefore find that this factor does not favor either group of employees.

#### 5. Economy and efficiency of operations

The Employer testified that efficiency is the chief reason that laborers run the forklift. In this regard, the Employer stated that employees represented by the Laborers are more efficient because they work 8 hours a day, including times when the forklift is idle, doing other job tasks such as digging, sweeping, and shoveling. In contrast, employees represented by the Engineers have restrictive work rules that require a full day’s pay even if the equipment is run for only 2 hours, and that prohibit them from engaging in laborers’ work. Accordingly, we find that the factor of economy and efficiency of operations favors an award of the disputed work to employees represented by the Laborers.

### Conclusions

After considering all the relevant factors, we conclude that employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion by relying on the factors of the collective-bargaining agreement, the Employer’s preference and past practice, and the economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by the Laborers, not to that Union or its members.

### Scope of the Award

The Laborers requests, with the concurrence of Albin and Schwendener, that the Board issue a broad work award on behalf of the Laborers proscribing coercive claims by the Engineers in a geographical area equal to the territorial jurisdiction of the two competing labor organizations. It contends that such a broad award is necessary to avoid similar jurisdictional disputes.

The Board has customarily declined to grant an areawide award in cases such as this in which the *charged party* represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work.<sup>10</sup> Accord-

<sup>10</sup>See *Laborers Local 22 (AGC of Massachusetts)*, 283 NLRB 605, 608 (1987), in which the Board restated the standard for issuing such broad awards:

[T]here are two prerequisites for a broad, areawide award. First, there must be evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur. Second, there must be evidence demonstrating that the

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ingly, in the circumstances of this case we find no warrant for granting a broad award. Therefore, the present determination is limited to the particular controversy that gave rise to this proceeding.

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*charged party* has a proclivity to engage in unlawful conduct in order to obtain work similar to the work in dispute. [Emphasis in original, citations omitted.]

In this case, employees represented by the Laborers had been assigned the work from the outset, and their conduct was aimed at retaining the work in the face of the Engineers' demands.

#### DETERMINATION OF DISPUTE

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

Employees of Albin Masonary, represented by Construction and General Laborers, District Council of Chicago and Vicinity, affiliated with Laborers International Union of North America, AFL-CIO, are entitled to operate the lull forklift at the nursing home construction project on Remington Drive in Bolingbrook, Illinois.