

**Local 30, United Slate, Tile, and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO and Gundle Lining Construction Corp.** Case 4-CD-765

July 20, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On August 9, 1991, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Charging Party and the General Counsel filed exceptions and supporting briefs. The Respondent filed a brief in opposition to the exceptions. The General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that Local 30, United Slate, Tile, and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO (the Respondent or Roofers) did not violate Section 8(b)(4)(i) and (ii)(D) of the Act by picketing the jobsite of Gundle Lining Construction Corp. (the Employer or Gundle) or maintaining a lawsuit against Gundle in district court with an object of coercing Gundle to reassign disputed work<sup>1</sup> to employees it represents rather than to employees represented by Local 172, Laborers International Union of North America, AFL-CIO (Laborers). Accordingly, he dismissed the complaint. For the reasons set forth below, we reverse.

1. On November 8, 1989, the Roofers picketed the landfill site carrying signs stating that Gundle did not pay union and area wages. According to testimony credited by the judge, the Union believed Gundle was using its own unrepresented employees, and the Union removed the pickets as soon as it learned that Gundle was using Laborers-represented employees.

Two days before the picketing, Roofers President Thomas Pedrick protested Gundle's failure to hire Roofers-represented employees. Pedrick told Sullivan, "[W]ell, we have a contract with you," and continued that he thought the Roofers contract applied to the landfill work in dispute. Sometime between November 8 and 17, 1989, in a telephone conversation with Gundle Vice President Tony Priesol, Pedrick stated

that the work in dispute "basically . . . was his [Roofers'] work."

On November 14, 1989, the Respondent sent Gundle a letter "constitut[ing] a grievance protesting Gundle's violations [sic] of our Collective Bargaining Agreement on the Ocean County landfill job site." Specifically, the Respondent claimed that Gundle should have hired journeymen roofers through the Respondent's hiring hall. As a remedy for Gundle's alleged breach of contract, the Respondent sought backpay for those individuals not hired at the landfill site.

Based on the above facts, the judge made the following findings: the Respondent picketed to protest the Employer's paying its own employees substandard wages; the Respondent was aggrieved that it was not given the job and its workers were deprived of employment; and the Respondent picketed only to cure the violation of its contract. The judge concluded that the Union did not seek through its picketing to claim the disputed work.

Contrary to the judge's conclusion, the findings he made compel the conclusion that the Respondent was claiming the work in dispute and that an object of the picketing was to coerce Gundle to reassign the work. The judge implied that one object of the picketing was to protest Gundle's failure to pay area standard wages. The judge's other findings, however, indicate that the Respondent's picketing also had another object, and that this object was unlawful. We refer specifically to the findings that the Respondent picketed because employees it represented were not assigned the disputed work and in order to advance its contractual claim to wages for employees not hired to perform the disputed work.

We stated in the 10(k) proceeding that there was reasonable cause to believe that the Respondent's "area-standards message was designed to mask an unlawful object of obtaining the work in dispute for employees it represents." We need not decide in this proceeding, however, that area standards was not in fact an object of the Respondent's picketing in order to find a violation. It is well settled that picketing falls within the scope of Section 8(b)(4)(D) so long as one object is to coerce an employer to assign work to employees represented by a particular union rather than to employees in another union.<sup>2</sup>

Because an object of the Respondent's picketing was to coerce the Employer to reassign the disputed work to employees the Roofers represent, we find that the picketing violated Section 8(b)(4)(i) and (ii)(D).

2. The judge stated that, even if the Respondent were trying to recover the disputed work, the Respondent's maintenance of its lawsuit against Gundle did not violate the Act because Section 8(b)(4)(D) was not in-

<sup>1</sup> The disputed work involves the placement of high density polyethylene panels, which includes removal from rolls and securing panels with sandbags, onto the ground on subgrade surfaces at the Ocean County Landfill in Lakehurst, New Jersey.

<sup>2</sup> See, e.g., *Teamsters Local 50 (Schnabel Foundation)*, 295 NLRB 68, 69 (1989).

tended to resolve jurisdictional disputes “that [are] of the employer’s own making.” The judge found that the Employer “manufactured the dispute by ignoring its obligations under the existing [Roofing and Sheet Metal Contractors’ Association of Philadelphia and Vicinity] agreement and assigning the work to the Laborers.” We disagree.

First, to the extent that the judge’s conclusion rests on the notion that a union is always free to pursue lawsuits to enforce arguably meritorious contractual claims for work even after the Board has issued a 10(k) award finding that the work should be awarded to employees represented by a different union, his reasoning is contrary to the Board’s decisions in *Laborers Local 261 (Skinner, Inc.)*, 292 NLRB 1035 (1989); *Longshoremen ILWU Local 13 (Sea-Land)*, 290 NLRB 616 (1988), enfd. 884 F.2d 1407, 1413–1414 (D.C. Cir. 1989); and *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, 271 NLRB 759 (1984), enfd. sub nom. *Longshoremen ILWU Local 32 (Weyerhaeuser) v. Pacific Maritime Assn.*, 773 F.2d 1012 (9th Cir. 1985), cert. denied 476 U.S. 1158 (1986). In those cases the Board held that, even assuming that a union has arguably meritorious contractual claims to particular work,<sup>3</sup> it violates Section 8(b)(4)(D) of the Act if it engages in coercive acts (such as the picketing here) sufficient to trigger a Section 10(k) proceeding and then, after the Board issues a 10(k) award under which the work is awarded to employees represented by a different union, continues to pursue its contractual claims. Such post-award conduct is properly prohibited under Section 8(b)(4)(D) because it directly undermines the 10(k) award, which, under the congressional scheme, is supposed to provide a final resolution to the dispute over which group of employees are entitled to the work at issue. *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, supra at 759. Accord: *Longshoremen ILWU Local 13 v. NLRB*, supra at 1414 (if such conduct were permitted, “the very purpose of Section 10(k)—to authorize the Board to resolve the jurisdictional dispute—would be totally frustrated”).<sup>4</sup>

<sup>3</sup> Whether the Respondent has a meritorious contract claim is thus irrelevant to the question here. It is not at all uncommon in 10(k) disputes for both competing unions to have broad jurisdictional clauses arguably covering the work in question. In any event, the Board did not, in the underlying 10(k) proceeding, resolve the issue whether the Respondent’s collective-bargaining agreement clearly covered work at the Ocean County Landfill after the completion of the work that was under contract at the time the agreement was signed. Rather, the Board found that the Laborers agreement with Gundle was “effective November 6, 1989, through completion, covering the disputed work,” and that the Roofers’ agreement was “effective November 18, through completion, covering work at the Ocean County Landfill.” The Board found that the respective agreements favored neither union with respect to the assignment of the disputed work. 298 NLRB 951, 953 (1990).

<sup>4</sup> Pursuit of such contract claims is not a violation, however, during the period prior to the issuance of a 10(k) award. *Longshoremen ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 89, 92–93 (1988).

The Respondent engaged in picketing that clearly invoked the Board’s 10(k) jurisdiction. We see no reason to allow the Respondent to escape the consequences of that action simply by filing a contract grievance after it was faced with an unfair labor practice charge and the threat of a 10(l) injunction that might shut down the picketing in any event.<sup>5</sup>

The danger of our dissenting colleague’s position as we see it is that it gives unions little incentive to resolve jurisdictional disputes peacefully. A union can picket and, if that coercion succeeds in quickly obtaining the work for the employee group represented by the union, the union will have achieved its objective in short order. If the affected employer files an 8(b)(4)(D) charge with the Board, however, the union may then, as the Respondent did here, purport to “disclaim” the work by announcing that it no longer seeks to have its members assigned to the job. It will merely seek to have them paid for the job through the lawsuit. Under our dissenting colleague’s view, such a tactic would be successful. Unions with any kind of contract claim to the work—and often in our 10(k) cases both competing unions have an arguable contractual claim to it—would be free to try picketing or other coercion first and use grievances and lawsuits as a fallback.

In sum, we conclude that under Board precedent that is justified by considerations of policy, the Respondent violated Section 8(b)(4)(D) by refusing to withdraw its lawsuit to enforce an arbitration award requiring Gundle to compensate workers represented by the Roofers for work performed by the Laborers after the Board issued its 10(k) decision. As noted by the judge, the Board on June 28, 1990, issued a decision<sup>6</sup> under Section 10(k) of the Act awarding the disputed work to employees who were represented by the Laborers, rather than to employees represented by the Respondent. The Respondent, which participated in the 10(k) hearing, was on notice that there was no longer any reasonable basis for continuing to prosecute the lawsuit, which was filed prior to the 10(k) award, to confirm a contrary arbitration award. We find that by

Similarly, court action to remedy a breach of a union signatory subcontracting clause against a general contractor does not violate the Act when there have been no coercive actions such as picketing and when no action has been taken or threatened against the employer of the employees to whom the work was awarded. *Carpenters Local 33 (AGC of Massachusetts)*, 289 NLRB 1482 (1988). Such a contract enforcement action is not necessarily inconsistent with a work award to the subcontractor’s employees. *Id.* at 1484. The present case is distinguishable from *Carpenters Local 33*, however, because Gundle itself is the employer of the employees to whom the work was awarded. The court action is therefore a collateral attack on the award itself.

<sup>5</sup> Chairman Stephens notes that this would be a different case had the Respondent never picketed for the work but merely filed a contract grievance. Had it resorted *solely* to peaceful legal channels, it would have been privileged under *Georgia-Pacific*, supra, to maintain its lawsuit.

<sup>6</sup> 298 NLRB 951.

maintaining the suit subsequent to the Board's 10(k) determination, the Respondent sought to undermine the Board's 10(k) award and coerce the Employer into re-assigning to its members the work that the Board found had been properly assigned to employees represented by the Laborers. Therefore, the Respondent's conduct in maintaining the suit after the 10(k) determination issued violated Section 8(b)(4)(ii)(D) of the Act.<sup>7</sup>

We further find the judge's reliance on *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320 (1961), to be misplaced. In *Safeway*, the Board concluded that Sections 8(b)(4)(D) and 10(k) were not intended to reach economic action by a union seeking to regain work for a specific group of employees who were displaced by another group of employees. There, a union had represented the drivers at a Safeway plant for about 10 years. Safeway discharged all the drivers in the unit and transferred the work to its drivers at its other plants. The union picketed Safeway in protest. The Board, in those narrow circumstances, found that no jurisdictional dispute existed within the meaning of Section 10(k). In the instant case, by contrast, Gundle, a construction industry employer, had no employees performing lining work at the jobsite at the time it made the work assignment to workers represented by the Laborers and there was no evidence that Gundle employed a stable work force of employees represented by the Roofers. The Respondent's only interest was to secure work for hiring hall applicants on Gundle's new cell project. It cannot be said that the Respondent under these circumstances was attempting to preserve work for a specific group of displaced employees whom it represented. See *Longshoremen ILA Local 799 (Atlantic Cement)*, 280 NLRB 239, 241 (1986).

#### CONCLUSIONS OF LAW

The Respondent has engaged in unfair labor practices proscribed by Section 8(b)(4)(i) and (ii)(D) of the Act by picketing and Section 8(b)(4)(ii)(D) of the Act

<sup>7</sup>The Board, under Sec. 10(l) of the Act, filed a petition in district court seeking to enjoin the Roofers from pursuing its lawsuit. The Court of Appeals for the Third Circuit affirmed the district court's order denying the Board's 10(l) petition, and expressed views arguably contrary to the law regarding post-10(k) in-lieu claims that we are applying here. *Hoeber v. Roofers Local 30*, 939 F.2d 118 (3d Cir. 1991). The court, however, expressly stated that it was not ruling on the merits of the question whether the Respondent violated Sec. 8(b)(4)(D) of the Act. *Id.* at 123. Moreover, its decision to affirm the denial of the 10(l) injunction was apparently predicated in part on a district court finding that the Respondent's conduct was at no time aimed at seeking to have those performing the work replaced with employees represented by the Respondent. *Id.* As indicated above, we have made contrary factual findings in this unfair labor practice proceeding. We are therefore not bound under the law-of-the-case doctrine to decline to apply our precedents and find a violation here. See generally *Squillacote v. Graphic Arts Local 27*, 513 F.2d 1017, 1021 (7th Cir. 1975).

by refusing to withdraw after June 28, 1990, its petition in *Roofers Local 30 v. Gundle Lining Construction Corp.*, Civil No. 90-2105, in the United States District Court for the Eastern District of Pennsylvania, both with an object of forcing or requiring Gundle to assign the work described below to employees represented by Local 30, United Slate, Tile, and Waterproof Workers Association, AFL-CIO rather than to employees represented by Laborers Local 172. The work of:

The placement of high density polyethylene panels, which includes removal from rolls and securing panels with sandbags, onto the ground on subgrade surfaces at the Ocean County Landfill in Lakehurst, New Jersey.

#### ORDER

The National Labor Relations Board orders that the Respondent, Local 30, United Slate, Tile, and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, Philadelphia, Pennsylvania, its officers, agents, and representatives, shall

1. Cease and desist from picketing and refusing to withdraw after June 28, 1990, its petition in *Roofers Local 30 v. Gundle Lining Construction Corp.*, Civil No. 90-2105, in the United States District Court for the Eastern District of Pennsylvania, with an object of forcing or requiring Gundle Lining Construction Corp. to assign, contrary to the Board's Decision and Determination of Dispute reported at 298 NLRB 951 by the work described below to employees represented by Local 30, United Slate, Tile, and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO rather than to employees represented by the Laborers Local 172, Laborers International Union of North America, AFL-CIO. The work consists of:

The placement of high density polyethylene panels, which includes removal from rolls and securing panels with sandbags, onto the ground on subgrade surfaces at the Ocean County Landfill in Lakehurst, New Jersey.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw its petition in *Roofers Local 30 v. Gundle Lining Construction Corp.*, Civil No. 90-2105, in the United States District Court for the Eastern District of Pennsylvania, for work performed by members of Laborers Local 172 at the Ocean County Landfill in Lakehurst, New Jersey, for Gundle Lining Construction Corp.

(b) Reimburse, with interest, Gundle Lining Construction Corp. for any payments it may have made to the Respondent for the above-described work following the Board's Decision and Determination of Dispute. Interest shall be computed in the manner pre-

scribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Post at its business offices, meeting halls, and all other places where notices to members are customarily posted copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and mail sufficient copies of the notice to the Regional Director for Region 4 for posting by Gundle Lining Construction Corp., where notices to their employees are usually posted, if the Employer is willing.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER DEVANEY, dissenting.

I disagree with my colleagues. I would not find that the Respondent violated Section 8(b)(4)(D) of the Act.

A brief chronology follows. During November 1988 through February 1989 and again in July 1989, Gundle employed employees represented by the Respondent to perform cell lining work at the Ocean County Landfill, pursuant to an agreement between Gundle and the Respondent executed on November 18, 1988, and effective from that date "through completion." The Respondent picketed the landfill for 2 to 3 hours on November 8, 1989, upon learning that Gundle had resumed work at the landfill and was not using employees represented by the Respondent. Five days later, Gundle filed an unfair labor practice charge contending that the Respondent, by picketing, violated Section 8(b)(4)(D) of the Act.

The next day, November 14, 1989, the Respondent filed a grievance contending that Gundle violated the contract by failing to use employees represented by the Respondent to perform work at the landfill. By letter dated January 4, 1990, the Respondent notified the National Labor Relations Board's Regional Office that it was disclaiming the work at the landfill but would continue to pursue monetary damages for breach of the agreement.

On January 17, 1990, following a hearing, a joint conference board issued a fully articulated seven-page decision sustaining the Respondent's grievance, finding

that Gundle violated its contract with the Respondent by failing to use employees represented by the Respondent for certain cell liner installation work at the landfill. To remedy this contract violation, the joint conference board ordered Gundle to "make whole those individuals who were deprived of work opportunities, including payment of dues, wage and benefit fund contributions required by the labor contract." The award did not order Gundle to employ employees represented by the Respondent.

The Respondent filed a lawsuit to enforce the joint conference board's award on March 26, 1990. On June 28, 1990, the National Labor Relations Board issued a 10(k) decision awarding the disputed work at the landfill to employees represented by Laborers Local 172, rather than employees represented by the Respondent.

The Board has recognized that a union's filing of an arguably meritorious work assignment grievance prior to issuance of a 10(k) determination concerning the same disputed work is not coercive and, thus, does not violate Section 8(b)(4)(D) of the Act. See *Longshoremen ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 89 (1988). In so holding, the Board relied on the strong statutory policy of encouraging resolution of disputes through grievance-arbitration machinery and the important First Amendment right of preserving access to the courts, finding that preserving access to grievance machinery implicated analogous considerations.

Consistent with the rationale underlying that holding, I would likewise find no 8(b)(4)(D) violation here. The Respondent's contract grievance concerning work at the landfill was arguably meritorious on its face and its merit was further reflected in the joint conference board's favorable decision. Additionally, there was no showing that Gundle's work at the landfill was still ongoing after the 10(k) decision issued. Thus, the Respondent's lawsuit to enforce the award for Gundle's contract breach concerned work that, as far as the record shows, was over by the time the 10(k) decision issued. Therefore, the Respondent's lawsuit was not shown to have imposed monetary liability on Gundle in connection with work to be done after issuance of the 10(k) decision. Moreover, the Board's ultimate assignment of the disputed work to employees represented by a union other than the Respondent did not negate the Respondent's contract claim against Gundle, at least as to work done before the 10(k) award, and the Respondent had a right to pursue its legitimate contract claim. Cf. *Hutter Construction Co. v. Operating Engineers Local 139*, 862 F.2d 641, 645-646 (7th Cir. 1988) (Board's 10(k) award to one union held not to conflict with arbitrator's contractual backpay award to other union). Consequently, I do not find that, even after the 10(k) decision, the Respondent's effort to enforce the arbitration award concerning work done *be-*

<sup>8</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

fore the 10(k) decision could have coerced Gundle to assign work contrary to the 10(k) decision.

I believe that *Laborers Local 261 (W. B. Skinner)*, 292 NLRB 1035 (1989), on which my colleagues rely, is distinguishable. There, the Board found that a union's maintenance of a lawsuit seeking to enforce an arbitration award for payments in lieu of work violated Section 8(b)(4)(D) of the Act. The Board found that by continuing the lawsuit the union sought to undermine the 10(k) award and coerce the employer into reassigning the work contrary to the award. In that case, however, it was shown that the work in dispute continued beyond the date of the 10(k) award and the arbitration award was applicable to the post-10(k) work; the union's pursuit of its lawsuit brought economic pressure on the employer to assign the work contrary to the 10(k) award. In my view, that rationale is inapplicable here, where it has not been shown that the work was still ongoing after the 10(k) award issued.<sup>1</sup>

In finding a violation, my colleagues exaggerate the legal significance of the Respondent's 3 hours of picketing. If Gundle's assignment of work to employees not represented by the Respondent arguably violated Gundle's contract with the Respondent, the Respondent had a right to file a grievance over this matter regardless of whether the Respondent engaged in picketing. The sequence in which the Respondent engaged in picketing and filed its grievance has little significance. Moreover, contrary to my colleagues, the Respondent's "tactic" of seeking only damages for Gundle's alleged contract breach would not guarantee success. Rather, the Respondent's success in obtaining relief for Gundle's alleged contract breach presumably would depend on the merits of the Respondent's contract claim.

Further, even if the Respondent had refrained from picketing, and thus not engaged in a coercive act that could trigger a 10(k) proceeding, the Respondent, contrary to Chairman Stephens' view, would not necessarily have been privileged to maintain its contract-enforcement lawsuit. Absent the Respondent's picketing, Laborers Local 172, which represented the employees to whom Gundle had assigned the work, might well have responded to the Respondent's work assignment grievance by threatening to picket Gundle if the work were reassigned. Such a threat in itself may serve as an adequate predicate to a 10(k) proceeding and may result in a 10(k) award in favor of the union that made the threat. Further, if the union that did *not* make the threat pursues its grievance or maintains its lawsuit to enforce any resulting arbitration award subsequent to the 10(k) decision, it may, at least under my col-

<sup>1</sup> I find it unnecessary to pass on circumstances, such as those in *Skinner*, where it was shown that the work in dispute continued after issuance of the Board's 10(k) decision and the arbitration award applied to such work.

leagues' view of the law, be held to violate Section 8(b)(4)(D). See, e.g., *Electrical Workers IBEW Local 202 (W. B. Skinner)*, 271 NLRB 171 (1984) (10(k) proceeding stemming from IBEW's threat to picket following Laborers' filing of work-assignment grievance resulted in 10(k) award favoring IBEW); *Laborers Local 261 (W. B. Skinner)*, 292 NLRB 1035 (1989) (Laborers maintenance of arbitration enforcement lawsuit after issuance of 10(k) award favoring IBEW held to violate Section 8(b)(4)(D)). Thus, even if the Respondent had pursued solely the course of grievance, arbitration, and court enforcement and refrained from picketing, it still might well have been the subject of an 8(b)(4)(D) proceeding.

Accordingly, I would dismiss the complaint.

## APPENDIX

### NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT picket and refuse to withdraw after June 28, 1990, our petition in *Roofers Local 30 v. Gundle Lining Construction Corp.*, Civil No. 90-2105, in the United States District Court for the Eastern District of Pennsylvania, with an object of forcing or requiring Gundle Lining Construction Corp. to assign, contrary to the Board's Decision and Determination of Dispute reported at 298 NLRB 951 (1990), the work described below to employees represented by Local 30, United Slate, Tile, and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO rather than to employees represented by Local 172, Laborers International Union of North America, AFL-CIO. The work consists of:

The placement of high density polyethylene panels, which includes removal from rolls and securing panels with sandbags, onto the ground on subgrade surfaces at the Ocean County Landfill in Lakehurst, New Jersey.

WE WILL withdraw our petition in *Roofers Local 30 v. Gundle Lining Construction Corp.*, Civil No. 90-2105, in the United States District Court for the Eastern District of Pennsylvania, for work performed by members of Laborers Local 172 at the Ocean County Landfill in Lakehurst, New Jersey, for Gundle Lining Construction Corp.

WE WILL reimburse, with interest, Gundle Lining Construction Corp. for any payments it may have made to our labor organization for the above-described

work following the Board's Decision and Determination of Dispute.

LOCAL 30, UNITED SLATE, TILE, AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO

*Scott C. Thompson, Esq.*, for the General Counsel.  
*William Josem, Esq.* and *Richard Markowitz, Esq.* (*Markowitz & Richman*), of Philadelphia, Pennsylvania, for the Respondent.  
*Lawrence Baccini, Esq.* and *Gary Tocci, Esq.* (*Schnader, Harrison, Segal & Lewis*), for the Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. The complaint, dated December 14, 1990, alleges that Respondent Local 30, United Slate, Tile, and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO (Respondent or Roofers) violated Section 8(b)(4)(i) and (ii)(D) of the National Labor Relations Act (the Act) by continuing to maintain and refusing to withdraw a civil action it brought against Charging Party Gundle Lining Construction Corp. (Gundle) in the United States District Court for the Eastern District of Pennsylvania. Respondent denied that it violated the Act in any manner, and the hearing in this proceeding took place on February 26, 1991, in Philadelphia, Pennsylvania.

Jurisdiction is conceded. Gundle is a Texas corporation engaged in the manufacture and installation of high density polyethylene linings throughout the United States, including the installation of linings at the Ocean County Landfill in Lakehurst, New Jersey (Landfill). During the year ending December 14, 1990, it purchased and received goods and materials valued in excess of \$50,000 directly from points outside New Jersey. At all times material, Gundle has been engaged in the placement of high density polyethelene panels, which includes removal from rolls and securing panels with sand bags, onto the ground or subgrade surfaces at the Landfill. I conclude, as Respondent admits, that Gundle is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that the Roofers and Laborers Local 172, Laborers International Union of North America, AFL-CIO (Laborers) are each labor organizations within the meaning of Section 2(5) of the Act.

Gundle installs cell liners at landfills throughout the United States. Cells are particular areas of a landfill into which garbage is placed. When the cell is filled, a liner is placed over the cell, the process being called "capping." Gundle lined cells at the Landfill prior to September 1988 and from September 1988 through February 1989. On November 18, 1988, Gundle executed an agreement with the Roofers for work at the Landfill, agreeing in part "to abide by all terms and conditions of collective bargaining agree-

ments in effect as of 11/18/88 through COMPLETION"<sup>1</sup> between Respondent and the Roofing and Sheet Metal Contractors' Association of Philadelphia and Vicinity (RSMCA).<sup>2</sup> Subsequently, for about a week in July 1989,<sup>3</sup> Gundle capped one of the cells that it had lined earlier that year and did some repair work. Gundle employed workers referred by the Roofers for that work and otherwise complied with the RSMCA agreement.

Within the next 2 months, according to Gundle, the developer of the Landfill became disenchanted with the work performed by the employees referred by Respondent, and Gundle decided not to use the Roofers should it receive any more jobs on the Landfill. When Mike McCann, Respondent's business agent, made inquiry about when Gundle would be doing more work at the Landfill, Mike Sullivan, Gundle's project manager, answered that he had no idea when the job was going to begin, but Sullivan did not tell him that Gundle was not going to use Respondent.

Gundle made its bid to perform the lining work on cell 4 on September 5, and it was accepted on September 22. Gundle assigned the disputed work to employees represented by the Laborers by letter dated October 24. Thereafter, Gundle and the Laborers executed a project agreement on November 6, according to which Gundle agreed to be bound by the modified term of the 1986-1989 Associated General Contractors of New Jersey contract; and work began that day.

That same day, Gundle representatives attended a hearing at the RSMCA in Philadelphia of the Roofers' grievance which claimed that Gundle employed its own unrepresented employees to line work at a Tullytown, Pennsylvania landfill, rather than employees referred by Respondent. During that hearing, Respondent learned that Gundle had started its work at the Landfill, also without employees referred by Respondent. The Roofers' president, Tom Pedrick, asked Sullivan whether it was true that Gundle was on site at the Landfill. According to Pedrick, Sullivan said yes and that Laborers represented employees were performing the work. But Pedrick testified that Sullivan never advised him that employees referred by another union were performing the work. Pedrick thus assumed that Gundle was again using its own unrepresented employees, as it had at the Tullytown project.

On November 8, four individuals wearing Roofers' jackets picketed the Landfill carrying signs stating that Gundle did not pay union and area wages. After working approximately 2 to 3 hours, Gundle's employees, who included those referred by the Laborers, left the job at the request of the owner of the Landfill. The picketing, which had lasted approximately 3 hours, then ceased and has not recurred. According to Pedrick, the picketing ended immediately when Respondent discovered that employees represented by the Laborers were on the job.

<sup>1</sup> The agreement was a form agreement, and the underlining signified where material had to be filled in. The underlining has no other significance, and the only reason why the word "completion" is capitalized is that a different typewriter was used to insert that word, as well as others, on the form.

<sup>2</sup> The term of this agreement was from May 1, 1986, to April 30, 1989. According to documents filed in the civil action, a new agreement became effective as of May 1, 1989.

<sup>3</sup> All dates hereafter refer to the year 1989, unless otherwise indicated.

Between November 8 and 17, Gundle's vice president for construction, Tony Priesol, talked by telephone to Pedrick. According to Priesol, Pedrick asked why Gundle was using Laborers represented employees on the Ocean County job. Pedrick added that he knew of only one instance in which the Laborers performed liner installations in New Jersey and that basically it was his work. Priesol sent a letter dated November 17 to the Roofers stating, among other things, that Gundle no longer had an agreement with it covering the work at Ocean County. The previous agreement, dated November 18, 1988, expired on January 27, 1989, upon completion of the job which was being performed when the contract was signed. The letter stated that the work at cell 4 had been assigned to employees represented by the Laborers.

In the meantime, on November 14, McCann sent Gundle a letter "constitut[ing] a grievance protesting Gundle's vioaltions [sic] of our Collective Bargaining Agreement on the Ocean County landfill job site. If a meeting would not be fruitful, the Union would submit a grievance directly to the Joint Conference Board." On December 5, McCann requested a joint conference board meeting to consider the Roofers' grievance against Gundle that it had violated its collective-bargaining agreement and, more specifically:

It has refused to hire journeymen roofers through the Union's hiring hall and has refused to pay those journeymen roofers in its employ the wage rates and fringe benefit contributions required by the collective bargaining agreement. The Union is claiming backpay for those individuals not hired on this job together with delinquent fringe benefit contributions, interest and liquidated damages.

The RSMCA, by letter dated December 6, advised Gundle that Respondent's grievance had been scheduled for January 3, 1990. On December 28 Priesol responded that the joint conference board lacked jurisdiction over Gundle for the dispute at the Landfill because Gundle's November 18, 1988 agreement with Respondent expired upon completion of its then-current contract with the landfill. The letter added that the disputed work was the subject of an entirely separate contract with the Landfill. Thus, Priesol advised RSMCA that it would not participate in the joint conference board hearing and would not be bound by the board's decision in the matter. The joint conference board met as scheduled on January 3, 1990, without representatives of Gundle present. On January 17, the board sustained Respondent's grievance and directed Gundle to make whole those individuals deprived of work opportunities, by paying contractually required dues, wages, and benefit funds contributions.

By letter dated January 4, 1990, Respondent informed the Board's Regional Office, among other things, that it was not claiming the work at the Landfill and that it was specifically disclaiming such work. The letter also stated that Respondent would continue to pursue monetary damages from Gundle for breach of its collective-bargaining agreement. Respondent did. On March 26, 1990, it instituted a proceeding in the United States District Court for the Eastern District of Pennsylvania in *Roofers Local 30 v. Gundle Lining Construction Corp.*,<sup>4</sup> Civil Action No. 90-2105, for an order requiring

Gundle to comply with the terms of the award of the joint conference board.

I conclude that Respondent has not violated the Act, for two reasons. The first relates directly to the conversation between Sullivan and Pedrick on November 6. Sullivan claimed that he had specifically mentioned that Gundle had assigned the work to the Laborers, and Pedrick denied it. I credit Pedrick, because the Roofers' actions thereafter are consistent with his claim that he thought that Gundle was again violating the collective-bargaining agreement by using its own employees on the job, the same violation that the parties were arbitrating that very day. Consistent with that notion, Respondent picketed the Landfill with signs protesting the rates and wages being paid, having knowledge that Respondent paid its employees far less at the Tullytown job than the contract required. When Respondent ascertained that the Laborers were now involved, it withdrew its pickets and has not picketed again. Obviously, Respondent felt aggrieved that it was not given the job and that its workers were deprived of employment, so it filed a grievance to cure what it thought was a violation. Under these circumstances, because it never sought through its picketing to claim the work from the Laborers but only to cure the violation of its contract, I conclude that Respondent has not violated the Act.<sup>5</sup>

In any event, even if I found that it was trying to recover this work, either from the Laborers or from Gundle's unrepresented employees, I would still conclude that there was no violation of the Act. On November 13, 1989, Gundle filed its unfair labor practice charge in this proceeding, and the 10(k) hearing was held on March 13 and 21, 1990. The Board issued its Decision and Determination of Dispute on June 26, 1990, 298 NLRB 951, in which it determined that the Laborers was entitled to the work in dispute and that Respondent was not, and found reasonable cause to believe that Respondent had violated Section 8(b)(4)(D) of the Act. It defined the work in dispute as "the placement of high density polyethylene panels, which includes removal from rolls and securing panels with sandbags, onto the ground on subgrade surfaces for Gundle Lining Construction Corp. at the Landfill in Lakehurst, New Jersey." However, even after the Board issued that Decision, Respondent continued to litigate and prosecute its civil action. Its Motion for Summary Judgment was denied on January 10, 1991, because the court found a triable issue of fact in the parties' dispute about what the word "completion" referred to in the collective-bargaining agreement.

The Board, in its 10(k) determination, had no similar problem. It found that Respondent's contract covered the disputed work, and none of the parties in this proceeding directly attacks that finding. Under *Longshoremen ILWU Local 6 (Golden Grain)*, 289 NLRB 1 (1988), the Board's 10(k) holding is not res judicata for all purposes. However, it would appear that the Board reviewed all the testimony in the 10(k) hearing and was unimpressed with Gundle's contention that its contract ended when the work that was ongoing at its execution date had been completed. That was in February. Rather, the Board must have known that Gundle worked on the Landfill on a new job in July and yet continued to comply with the agreement, not only to employ workers referred to it by Respondent but also to contribute to Re-

<sup>4</sup> Respondent's name in the action it instituted is different from the one it admitted was its name in this proceeding.

<sup>5</sup> See 2 Morris, *The Developing Labor Law* § 1252 (2d ed. 1983).

spondent's health and welfare and retirement plans, which it would not have done otherwise, knowing that such contributions would have violated Section 302 of the Act if no contract existed. See *Nelson Electric v. NLRB*, 638 F.2d 965, 968 (1981); *Vin James Plastering Co.*, 226 NLRB 125, 129-130 (1976). Thus, Gundle must have been aware that "completion" meant something other than what it now contends in this proceeding, perhaps until completion of the Landfill.

In light of these facts, I am loathe to upset the Board's factual finding, which is based on the same record before me, that Respondent's contract, entered into by Gundle on November 8, 1988, covered the disputed work. A year after that, a year in which Gundle had complied with the agreement and had employed employees referred to by Respondent, Gundle decided to renounce its binding agreement. The day it started working on cell 4, it signed an agreement with the Laborers. If it had not entered into a new agreement with the Laborers and had not simultaneously disavowed the RSMCA contract, it clearly would have been required to employ workers referred by the Roofers.

This is what Respondent now argues (it did not raise this contention to the Board), contending that Section 8(b)(4)(D) is not aimed at resolving a jurisdictional dispute that is of the employer's own making and is not between two employee groups, citing *Longshoremen ILWU v. NLRB*, 781 F.2d 919 (D.C. Cir. 1986); and *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320, 1322 (1961).<sup>6</sup> In *Safeway*, Local 107 had for some 10 years represented the drivers at Safeway's Wilmington, Delaware plant. Safeway discharged its three Wilmington drivers, the entire Local 107 bargaining unit, and arranged for the driving to be done by drivers at its Maryland and New Jersey plants. The Board refused to find the existence of a jurisdictional dispute, noting that: "[I]t was not intended that every time an employer elected to reallocate work among his employees or supplant one group of employees with another, a 'jurisdictional dispute' exist within the meaning of" Section 8(b)(4)(D).

<sup>6</sup> Accord: *Maritime Union (Puerto Rico Marine)*, 227 NLRB 1081 (1977); *Seattle Building Trades Council (Seattle Olympic Hotel)*, 204 NLRB 1126, 1127 (1973).

Like *Safeway*, Gundle effectively transferred its work away from the Roofers and attempted to evade a contract under which it had been bound for a year by the simple expedient of entering into a new collective-bargaining agreement with another union, and at cheaper rates. Even if the Roofers attempted to apply economic pressure to regain the jobs, its protest is not the kind of dispute that Sections 8(b)(4)(D) and 10(k) were intended to resolve. That typically involves a situation where two competing employee groups are vying for the work, and the employer is willing to assign the work to either if the other will let him alone. Here, however, Gundle manufactured the dispute by ignoring its obligations under its existing RSMCA agreement and assigning work to the Laborers, allegedly because the owner of the Landfill did not like the employees referred by the Roofers. The Laborers would never have had any claim to the work in dispute had Gundle not signed an agreement with it the very day that work began on cell 4. If the Board were to bar the Roofers' activities and apply 10(k) standards to what is essentially a breach of contract, including the Board's primary reliance on the Employer's preference, the Board would permit any employer to evade its collective-bargaining agreement by merely signing an agreement with another union and then assigning its work to that other union. Surely, that is not what the Act intended.

The counsel for the General Counsel contends, however, that Gundle was an innocent employer, as was the employer in *Safeway*, because Gundle "reasonably believed that it was no longer a party to a contract with" Respondent when it entered into an agreement with the Laborers. His brief cites no support for the proposition that an employer must merely have a reasonable belief to avoid the consequences of its own actions. Here, the Board's 10(k) determination held that Gundle had a contract with Respondent covering the work in dispute. The facts show that Gundle honored that agreement after the alleged "completion" of the work it was performing when the contract was entered into. Respondent's belief was, by consequence, unreasonable (as shown by its own actions) and incorrect (as demonstrated by the Board's Determination of Dispute.)

[Recommended Order for dismissal omitted from publication.]