

Laborers Local Union No. 1197 and Congress of Independent Unions**Southern Illinois Laborers District Council and Congress of Independent Unions****Laborers Local Union No. 529 and Congress of Independent Unions****Laborers Local Union No. 1260 (J & K Enterprises) and Congress of Independent Unions.** Cases 14-CD-860, 14-CD-862, 14-CD-863, and 14-CD-864

November 6, 1992

DECISION AND DETERMINATION OF DISPUTEBY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The charges in this Section 10(k) proceeding were filed on July 10 and August 10, 1992, by the Congress of Independent Unions (CIU), alleging that the Respondents, Laborers Locals 529, 1197, and 1260 and Southern Illinois Laborers District Council (collectively Laborers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing J & K Enterprises (J & K) to require Kinney Contractors, Inc. (Kinney) to assign certain work to employees represented by the Laborers rather than to employees represented by CIU. The hearing was held on August 24 and 25, 1992, before Hearing Officer Caryn L. Fine. The Laborers, CIU, and Kinney and J & K, jointly, 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

J & K Enterprises, a sole proprietorship with a principal office and place of business in Pawnee, Illinois, is engaged in the construction industry as a concrete pavement patching contractor. Since commencing operations in June 1992, J & K has purchased and received at its Pawnee facility goods valued in excess of \$25,000 directly from points outside the State of Illinois. Projected for a full 12-month period, J & K will purchase and receive at its Pawnee facility goods valued in excess of \$50,000 directly from points outside the State of Illinois.

Kinney Contractors, an Illinois corporation with a principal office and place of business in Raymond, Illinois, is engaged in the construction industry as a concrete pavement patching contractor. During the 12 months preceding the hearing, Kinney purchased and

received at its Raymond facility and at various Illinois jobsites goods valued in excess of \$50,000 and shipped directly from points outside the State of Illinois. We find that J & K and Kinney are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that CIU 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**

Kinney is a general contractor engaged in concrete patching work on highways in the State of Illinois. James Kinney is president and an owner of the Company. In September 1988, CIU was certified as the exclusive bargaining representative of Kinney's employees. The most recent collective-bargaining agreement of record between CIU and Kinney was effective from October 3, 1991, through October 2, 1992.

J & K began operations as a concrete repair sub-contractor in early June 1992.¹ The Company is owned by Jennifer Kinney, James Kinney's daughter-in-law. On June 10, J & K entered into a collective-bargaining agreement with Southern Illinois Laborers District Council, on behalf of affiliated locals including Locals 529, 695, 1197, and 1260. The contract, effective through March 31, 1995, has exclusive hiring hall referral provisions.

Kinney had contracts to perform concrete repair work on highways in central and southern Illinois during the summer of 1992. Kinney assigned the work which it performed directly to its employees represented by CIU. Kinney also subcontracted a portion of the road repair work to J & K. In mid-June, J & K employees referred and represented by Laborers Local 695 worked side by side with Kinney's CIU-represented employees while performing highway repair work in the area of Effingham and Vandalia.

In late June, Kinney subcontracted to J & K a portion of highway repair work on Interstate 64 in White and Wayne Counties and on Interstate 57 in Jefferson County. The work began within the jurisdiction of Laborers Local 1197. On or about July 8, Jennifer Kinney telephoned Local 1197 Business Agent John Taylor to request additional laborers. According to her, Taylor replied that he wanted all the road pavement patching work to be given to the employees represented by Laborers. He also requested that the employees represented by CIU be removed from performing repair work at the jobsite. He told Jennifer Kinney that he would rather see his laborers sitting at home than working beside CIU-represented employees. Taylor further stated that he would stop furnishing employees to J & K if the Laborers did not get all the work on the project. He advised her to speak to James

¹ All dates are in 1992, unless otherwise stated.

Kinney to arrange the subcontracting of all “laborers” work to J & K employees represented by Laborers.

Jennifer Kinney informed James Kinney of Taylor’s demand for all the repair work on the project. He responded that if the Laborers wanted all or nothing, they were going to get nothing. James Kinney later spoke with both Taylor and Ed Smith, the district representative for the Southern Illinois Laborers District Council. Smith reiterated Taylor’s demand for all the laborers’ work. When James Kinney asked if the Laborers were going to refer workers to J & K on the following day, Smith said that he did not know. In fact, no employees reported to J & K from Local 1197 after that date.

Kinney’s operations next moved into the jurisdiction of Laborers Local 1260 and thereafter into the jurisdiction of Local 529. Agents for each Local refused Jennifer Kinney’s requests for the referral of employees to perform work subcontracted by Kinney. Because of the refusals of Laborers to refer employees to J & K after June 10, all work originally subcontracted to J & K had to be performed by Kinney’s CIU-represented employees. Laborers Locals 529, 1197, and 1260 filed contractual grievances against J & K contesting the scope of work covered by the Kinney subcontracts.

B. Work in Dispute

The disputed work consists of road patching projects involving concrete removal using jackhammers, picks, and shovels; replacing of new reinforcing steel; assisting cement finishers by shoveling concrete and operating the concrete chute on Interstate 64 in White County and Wayne County, Illinois, and on Interstate 57, in Jefferson County, Illinois.

C. Contention of the Parties

Kinney, J & K, and CIU contend that the work in dispute should be assigned to employees represented by CIU on the basis of certification, the collective-bargaining agreement, past practice, employer preference, and economy and efficiency of operation.

The Laborers contends that the dispute is a contractual dispute between J & K and the Laborers and should be resolved by an arbitrator pursuant to the grievances which have been filed.

D. Applicability of the Statute

The record shows that on and after July 8, representatives for each of the Respondents told Jennifer and/or James Kinney that employees represented by Laborers should perform all the road repair work at jobsites where J & K was engaged as a subcontractor, that Kinney employees represented by CIU should be removed from such sites, and that the Laborers would not refer individuals to J & K if they had to work

alongside the CIU-represented employees. Thereafter, the Laborers refused to refer employees to J & K.

It is clear from the foregoing that Respondent Laborers threatened to and did cease referring employees under their exclusive hiring hall agreement with J & K in order to force J & K to require Kinney to assign the work in dispute to employees represented by the Laborers rather than to employees represented by CIU. We therefore find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.² The parties stipulated that there is no voluntary method of resolving the jurisdictional dispute which would be binding on all the parties. 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. Board certifications and collective-bargaining agreements

On September 19, 1988, the Board certified CIU as the exclusive representative of Kinney’s employees. Subsequently, Kinney and CIU entered into a collective-bargaining agreement which was effective from October 3, 1991, through October 2, 1992. Neither the unit description in the certification nor the parties’ contract make any specific reference to the work in dispute.

Kinney does not have a collective-bargaining agreement with the Laborers. The Laborers has a contract with J & K, but the dispute here concerns the assignment of work in the control of Kinney. We find that this factor does not favor awarding the disputed work to employees represented either by CIU or the Laborers.

2. Employer preference and past practice

Even when it has contracted out a portion of the assigned work, Kinney has consistently assigned part of the disputed work to its own employees represented by CIU. Kinney’s president testified that he preferred that the work in dispute be assigned to employees represented by CIU. We find that Kinney’s preference and

² *Sheet Metal Workers (Young Plumbing)*, 209 NLRB 1177 (1974); *Iron Workers Local 10 (Vincent Metal)*, 215 NLRB 153 (1974).

past practice favor awarding the work to employees represented by CIU.

3. Relative skills and economy and efficiency of operation

The record discloses that CIU-represented employees are more productive than employees represented by the Laborers in performing the disputed work. At times when both Kinney's CIU-represented employees and J & K's Laborers-represented employees worked together on road repairs, the J & K employees produced two to two-and-a-half road patches daily, while the Kinney employees produced six to eight road patches daily. James Kinney testified, without contradiction by other witnesses, that employees represented by CIU were more experienced and versatile in performing a wide variety of different tasks associated with the work in dispute. The Laborers did not present evidence with respect to the skills and efficiency of employees they represent. We find that this factor favors the assignment of the work to employees represented by CIU.

Conclusions

After considering all the relevant factors, we conclude that employees represented by CIU are entitled to perform the work in dispute. We reach this conclusion relying on Kinney's past practice and preference,

relative skills, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by CIU, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

1. The employees of Kinney Contractors, Inc., who are represented by Congress of Independent Unions, are entitled to perform road patching projects on Interstate 64 in White and Wayne Counties, Illinois, and on Interstate 57 in Jefferson County, Illinois.

2. Southern Illinois Laborers District Council, Laborers Local Union No. 529, Laborers Local Union No. 1197, and Laborers Local Union No. 1260 are not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Kinney Contractors, Inc. or J & K Enterprises to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Southern Illinois Laborers District Council, Laborers Local Union No. 529, Laborers Local Union No. 1197, and Laborers Local Union 1260, shall notify the Regional Director for Region 14 in writing whether they will refrain from forcing Kinney or J & K, by means proscribed by Section 8(b)(4)(D), to assign the disputed work inconsistent with this determination.