

**Laborers Local 172, a/w Laborers International Union of North America, AFL-CIO and Henkels & McCoy, Inc. and International Brotherhood of Electrical Workers, Local Union No. 439, AFL-CIO, Intervenor.** Case 4-CD-854

March 2, 1994

DECISION AND DETERMINATION OF  
DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND TRUESDALE

The charge in this Section 10(k) proceeding was filed on December 9, 1992, by the Employer, Henkels & McCoy, Inc., alleging that the Respondent, Laborers Local 172, a/w Laborers International Union of North America, AFL-CIO (Laborers Local 172) 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 it represents rather than to employees represented by International Brotherhood of Electrical Workers, Local 439 (IBEW Local 439). The hearing was held on January 22 and 28, February 8 and 17, and March 4, 1993, before Hearing Officer Allene McNair-Johnson.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.<sup>1</sup>

I. JURISDICTION

The Employer, a Pennsylvania corporation with its primary location in Blue Bell, Pennsylvania, is engaged in the industrial engineering, construction, and maintenance of overhead and underground electrical, telephone, and other lines. In the 12 months prior to the hearing, it derived gross revenues in excess of \$500,000 and during that same period purchased and received materials and supplies valued in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania. 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 Laborers Local 172 and IBEW Local 439 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

*A. Background and Facts of Dispute*

The Employer is a subcontractor which performs engineering, construction, and maintenance of facilities for electric, telephone and gas companies, and teledata and industrial firms. Its chairman of the board is Paul

<sup>1</sup> We grant the Intervenor's posthearing motion to correct the transcript, but deny its motion to expand the record.

Henkels, who works out of the Employer's Blue Bell, Pennsylvania headquarters' office. Norris Anders is vice president and division manager for the New Jersey Division in which the instant dispute arose. The New Jersey Division is divided into three geographic areas which do primarily underground/conduit work and a separate electrical department which does high line, substation, and some conduit work. Merrill Anders, the New Jersey Division's manager of operations, is responsible for the day-to-day operations of the New Jersey Division underground/conduit work and reports to Norris Anders.

In late September or early October 1992, the New Jersey Division successfully bid on a project being run by general contractor L. F. Driscoll. The subcontract called for the Employer to perform, among other things, the installation of electrical and telephone conduits, manholes, and gas mains at the East Gate Square Project located on private property at the intersection of Routes 38 and 295 in Burlington County, New Jersey. Merrill Anders put together the bid for the work at East Gate, and because it was his standard practice to engage laborers to perform the type of work called for in the subcontract, he based his bid on the pay rates set out in the Employer's contract with Laborers Local 172. Norris Anders signed the contract with L. F. Driscoll on behalf of the Employer's New Jersey Division.

In early December, IBEW Local 439 Business Agent William Youse discovered that the Employer had been awarded the subcontract for the East Gate project.<sup>2</sup> He telephoned Robert Frissela, supervisor of industrial electrical work in the Employer's Industrial Division, which operates from Blue Bell, Pennsylvania, to ask how many people would be needed for the job. Youse testified that Frissela said he knew nothing about the job, but that he would look into it and get back to him.

Thereafter, Henkels, who generally does not become involved in work assignments, was contacted by Norris Anders with regard to the East Gate Project. Henkels testified that Anders told him that there could be a dispute between Laborers Local 172 and IBEW Local 439 concerning the job. Henkels testified that he told Anders that in order to keep labor peace, Anders should give the work to the IBEW. Within 3 days of Youse's initial inquiry, Frissela telephoned Youse requesting two journeymen electricians to report to the East Gate jobsite to start the job. Youse testified that the first day his men were on the job, December 8, 1992, his lead journeyman called him to tell him that the Laborers were claiming the work. In this regard,

<sup>2</sup> Youse testified that he learned that the Employer had been the low bidder on the East Gate project by reading a notice in the "Dodge" report of upcoming work in IBEW Local 439's jurisdiction.

the laborers' foreman on the job, Joseph Klimkowski, testified that Laborers Local 172 Business Agent Joe Jervasi appeared at the jobsite on that date, and that he, Klimkowski, was told that the Laborers local did not want electricians on the job. The testimony of Klimkowski and Merrill Anders reveals that because of Jervasi's visit to the jobsite, Klimkowski called his supervisor and then Anders to report on Jervasi's appearance and actions and that the Employer instructed that work on the East Gate project should cease immediately. The job was shut down until December 16 when the Employer returned to the jobsite and resumed work there. In order to "create labor harmony or peace," the Employer used a composite crew composed of employees represented by IBEW Local 439 and employees represented by Laborers Local 172 to perform the work in dispute. The East Gate job was completed around January 10, 1993.

The parties stipulated at the hearing (1) that both Unions claim the disputed work, and (2) that there is reasonable cause to believe that Laborers Local 172 has violated 8(b)(4)(D) of the Act by a threat which it made on or about December 8, 1992, to the Employer. The stipulation regarding "reasonable cause" does not describe the threat, but there is relevant testimony. Merrill Anders testified that the foreman on the job<sup>3</sup> told him in the second of two telephone conversations between them on December 8, that Jervasi had told the foreman that if the Employer did not quit using the electricians, then not only the East Gate job but all the work in South Jersey on which laborers worked for the Employer would be shut down.

#### B. *Work in Dispute*

The work in dispute, as stipulated to by the parties, is the handling and installing of electrical and telephone pipe and conduit, at the East Gate Square Project located at the intersection of Routes 38 and 295 in Burlington County, New Jersey.

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

The Employer's chairman, Henkels, declined to state a preference for either of the competing Unions, but emphasized the need for Board resolution of this dispute because it has faced several similar jurisdictional disputes involving unions from these two trades.<sup>4</sup> Because, he asserts, the Employer is likely again to face similar disputes in the future, he requests a Board determination outlining the factors appropriately to be

considered by the Employer in making work assignments in the future.

Notwithstanding the Employer's professed stance of neutrality concerning the award of the work, Merrill and Norris Anders testified that the past practice of the Employer's New Jersey Division has been to use laborers rather than electricians or a composite crew to perform the kind of work here in dispute. They stated that they found laborers both skilled and efficient in performing all required tasks associated with the laying of conduit and that the Employer had received no complaints by any general contractor or subcontractor nor from any municipality or municipal inspector about the quality of the conduit work done by laborers. Economies of using laborers were derived, they testified, both from the laborers' ability to perform a variety of tasks necessary to complete the job, thereby decreasing employee downtime, and from their relatively lower wage rate as compared to the electricians' scale. Norris Anders stated that the Employer would have been unable to compete successfully for the East Gate Project had laborers' rates not been the basis for the bid. In addition, Merrill Anders described the inefficiencies of using composite crews, such as occurred here, noting that there were times during which employees from one trade would be idle while those from another performed their segment of the job.<sup>5</sup> This process, he claimed, slowed down the pace of the work, thereby lessening the total number of feet laid per day. Merrill Anders also noted that there had been repeated complaints from the IBEW Local 439 employees assigned to the East Gate Project concerning the muddy conditions at the site. He contrasted this with the attitude of Laborers Local 172 employees, who were accustomed to working in adverse weather conditions and were able to continue with the job regardless of the conditions. He also stated that the Employer had no safety problems during its long practice of using laborers for the type of conduit work here at issue.

Laborers Local 172 contends that through this proceeding it is seeking to preserve work traditionally assigned to employees represented by it and that despite Henkel's direction to Norris Anders assigning the work to employees represented by IBEW, the Employer's true preference for the laborers is revealed in the emerges Anders brothers' testimony concerning the long-established past practice of assigning this type of conduit work to Laborers-represented employees. Laborers Local 172 asserts that laborers have the requisite skills to do the work efficiently and economi-

<sup>3</sup> Apparently Klimkowski, albeit the record has Anders identifying the foreman as "Konolkowski."

<sup>4</sup> For example, Merrill Anders cited to the following: a struck job in Merck and White House Station on Route 22; the Camden Co-Gen generation job, which the general contractor, Utech, took away from the Employer in order to change the assignment; the Camden Aquarium; and the Freehold Mall.

<sup>5</sup> At the East Gate project, the hands-on conduit work was done by the electrician members of the mixed work crew, and the laborers performed the work not associated with the actual handling of the conduit, such as excavating ditches and sanding the bottom in preparation for the conduit, and backfilling the trench once the conduit was in place.

cally, and the financial cost basis on which the Employer has been able to compete for jobs will be impaired if it can no longer use them. It joins with the Employer's opposition to the work being awarded to a composite crew, citing the disjointed and inefficient progress of jobs that are divided into separate operations. Laborers Local 172 also urges the Board to consider the fact that more than half its membership is composed of minorities and that a significant number of females are members. It urges the Board to reconsider its position that race and gender considerations are not relevant to Section 10(k) proceedings.

IBEW Local 439 asserts that its craft has long engaged in construction site conduit installation and that the relatively higher skill and training levels of its members heavily favors the award of the work to them. Citing decisions by impartial construction industry boards, it argues that IBEW-represented employees have traditionally been awarded construction site conduit work, while the laborers have been restricted to heavy highway or utility jobs. It further argues that assigning the laborers to the project is contrary to the Employer's own area practice and runs counter to its own chairman's direction. Acknowledging the rational basis on which the Employer ultimately assigned the work to a composite crew, IBEW Local 439 nevertheless contends that the entire job could have been accomplished with greater efficiency had the assignment been made solely to employees it represents.

#### D. *Applicability of the Statute*

Before the Board may proceed with a determination of a 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 upon a method for the voluntary adjustment of the dispute.

As noted above, Laborers Local 172 was stipulated by the parties to have threatened the Employer on or about December 8, 1992. We find from that stipulation and the record as a whole, that an object of Local 172's threat was to force or require the Employer to assign the disputed work to employees represented by it. We, therefore, find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. In addition, the Employer stated that it would not consent to submit the dispute to resolution before the AFL-CIO Joint Board, and based on that statement the parties stipulated that there is no agreed-upon method for the 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.

#### 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 the dispute.

##### 1. *Certifications and collective-bargaining agreements*

There is no evidence that either Laborers Local 172 or IBEW Local 439 has been certified as the exclusive collective-bargaining representative of any of the Employer's employees. However, the parties stipulated that the Employer was covered at all relevant times by collective-bargaining agreements with both Unions: an agreement between the Camden Division of the Southern New Jersey Chapter, Inc., National Electrical Contractors Association and IBEW Local 439, and an agreement between the Utility and Transportation Contractors Association of New Jersey and Laborers Locals 472 and 172. Article IX, section 9.2 of the IBEW contract provides that the union's jurisdiction extends to the following:

all work involving the "installation . . . of all electrical wiring and equipment, public and private, including" . . . that "used in the construction . . . of buildings . . . all pipelines for electrical wires . . . overhead and underground . . . laying all ducts for electrical wires . . . pipe and conduit installation for electrical wires . . . all excavation and trenching work for electrical installations . . . [including] forming, manhole preparation and conditioning, and pipe cutting and threading . . . all manholes . . . conduits and supports . . . handling and distributing of all related materials . . . digging and back filling all related trenches."

In the Laborers agreement, Local 172 is recognized as the representative of the Employer's employees "concerning the clearing, excavating, filling, back-filling and landscaping of all sites." The unit work is described as including the following:

any work performed in connection with pipe or conduit of all kinds of any description and for whatever purpose including . . . loading, unloading, installation, distribution or handling of pipe or conduit of any kind or description . . . all

labor work . . . for the construction or installation of utility lines . . . and whether such work is inside or outside of property lines on public or private property, on or off streets, on highways, or on or off building or other construction sites.

As the language of these two agreements shows, both Unions have an arguable basis for claiming the work based on the jurisdiction/recognition language set out in their respective agreements. Consequently, we find that the evidence bearing on this factor does not weigh in favor of either group's claim to the work in dispute.

## 2. Employer preference and past practice

The Employer has disclaimed a preference for either group of employees to perform the work in dispute. Notwithstanding the personal preferences of Merrill and Norris Anders for using laborers rather than employees represented the IBEW Local 439, this disclaimer is controlling. Accordingly, employer preference is neutral and thus not a factor favoring either group.

With respect to past practice, however, the record establishes that the Employer's New Jersey Division, in which this dispute arose, has through the years consistently awarded conduit installation and related work to employees represented by the Laborers rather than employees represented by the IBEW. Both Merrill and Norris Anders testified to the division's long-established practice of assigning work similar to the disputed work to laborers, citing in support of such assignments their satisfaction with the skills, efficiency, and safety record of the Laborers-represented employees, the relative competitive advantages of employing Laborers for the work, and the economies gained by having a uniform employee crew working in harmony to complete a project.

Further, the essentially unbroken pattern of the New Jersey Division's employing Laborers-represented employees to perform work of this type is undisputed. Although the Employer's Electrical and Industrial Divisions may have engaged electricians to perform work similar to that involved in the instant dispute, the fact remains that the work was bid by and awarded to the New Jersey Division. The basis on which the job was sought and obtained was on a foundation of using a Laborers-represented work force. Thus, in spite of the Employer's initial assignment of the work in dispute to the IBEW in the interest of preserving "labor peace," the weight of the evidence warrants a finding that Employer past practice clearly favors awarding the disputed work to employees represented by Laborers Local 172.

## 3. Area practice

There was conflicting testimony presented concerning the prevailing area practice for conduit installation. Depending on the trade group being represented, the custom in southern New Jersey was either to employ Laborers-represented employees or IBEW-represented employees. There was not sufficient testimony from disinterested parties to warrant a conclusive finding regarding the manner in which jobs in the area are customarily assigned. The starkly conflicting testimony suggests that had the subcontract been awarded to a different employer or even a different division of the Employer, a different assignment might have been shown. Accordingly, this factor does not favor an award to either group of employees.

## 4. Economy and efficiency of operations

Employer testimony regarding the New Jersey Division's practice of employing laborers to perform conduit and related work emphasized the relative facility of using only laborers on such projects because of their ability to handle the entire job without disruptive shifting of particular responsibilities among various trades. This method eliminates employee downtime and facilitates a smoother workflow. Further, the Employer pointed out that in certain adverse conditions, specifically the extremely muddy terrain in which the East Gate Project was being done, using laborers alone would have resulted in fewer disruptions because they are more experienced in working in less than ideal settings, enabling them to be more likely to carry out the job on schedule regardless of conditions.<sup>6</sup>

The record suggests that certain efficiencies in operation may be attributable more to having a homogeneous group running a job, regardless of trade, rather than from any particular work quality possessed by one of the competing groups of employees over the other. In this regard, the evidence strongly points to the disadvantages of using combined crews of laborers and electricians to perform the work in dispute. Thus, on balance, the weight of the evidence on efficiency and economy of operations favors an award of the disputed work to employees represented by the Laborers.

## 5. Relative skills

Although IBEW Local 439 presented evidence to support its claim that the employees it represents have better training and skills than those represented by the Laborers, and are more proficient at laying conduit than the latter, the record establishes that the Laborers-represented employees have successfully performed the

<sup>6</sup>In considering this factor, we place no reliance on the Employer's position that its ability to compete for jobs like East Gate is largely attributable to its using Laborers' wage rates rather than higher priced trades or a combination cost from using a mixed trades crew.

work in dispute on many jobs similar to East Gate. The record further establishes that the disputed work does not require the use of highly trained and skilled craftsmen. Accordingly, we find that this factor does not favor either employee group.

#### Conclusions

After considering the above-relevant factors, we conclude that employees represented by Laborers Local 172 are entitled to perform the work in dispute. We reach this conclusion relying on the factors of the Employer's past practice in its New Jersey Division and economy and efficiency of operations.<sup>7</sup> In making

---

<sup>7</sup>In making this award we place no reliance on the Respondent Laborers Local 172's argument that the Board should expand the factors it assesses in resolving jurisdictional disputes to include considerations of race and gender and the resulting impact of its awards on minority employment opportunities.

this determination, we are awarding the work to employees represented by the Laborers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.<sup>8</sup>

#### DETERMINATION OF DISPUTE

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

Employees of Henkels & McCoy, Inc. represented by Laborers Local 172, a/w Laborers International Union of North America, AFL-CIO, are entitled to perform the conduit, handling and installation of electrical and telephone pipe and at the East Gate Square Project in Burlington County, New Jersey.

---

<sup>8</sup>At the outset of the hearing the Employer requested a "broad order" so that future disputes between these same Unions would not arise. The Employer subsequently withdrew that request.