

Operating Engineers Local 478, International Union of Operating Engineers, AFL-CIO and Deluca/Lombardo, a Joint Venture. Case 34-CD-49

July 28, 1994

DECISION AND DETERMINATION OF
DISPUTE

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

The charge in this Section 10(k) proceeding was filed on November 8, 1993,¹ by Deluca/Lombardo (the Employer) alleging that the Respondent, Operating Engineers Local 478, International Union of Operating Engineers, AFL-CIO (Operating Engineers), 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 Connecticut Laborers' District Council a/w Laborers' International Union of North America, AFL-CIO (Laborers). The hearing was held on December 14 before Hearing Officer Thomas E. Quigley. Thereafter, all parties filed briefs in support of their positions.

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 and finds them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer is a joint venture of two separate Connecticut corporations, J. Deluca Construction Company, Inc. and Lombardo Brothers Mason Contractors, Inc. Both are employers engaged in the construction industry. In the last 12 months each received gross revenues in excess of \$1 million, and each purchased and received at Connecticut jobsites goods and materials valued in excess of \$50,000 directly from points located outside the State of Connecticut. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The parties stipulated, and we find, that Operating Engineers and Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Joseph Deluca and Sebastian Lombardo are members of the Mason Contractors Association of America (MCA), and in August each executed an "Acceptance of Agreements" on behalf of his respective company

¹Except where otherwise stated, all dates refer to 1993.

to be bound by the collective-bargaining agreement between MCA and the Laborers' International Union. The agreement is binding on the Employer through the assignments of bargaining rights by Deluca and Lombardo.² As MCA members, Deluca and Lombardo were also parties to the collective-bargaining agreement between MCA and the Operating Engineers that expired March 31. During negotiations for a successor contract, it was agreed that the terms of the expired agreement would continue in force until the parties reached a new agreement or impasse. On October 26, MCA declared impasse and announced its intent to implement its final contract offer on November 1. Deluca and Lombardo are also members of the Association of General Contractors of Connecticut, Inc. (AGC), and are bound by the collective-bargaining agreement between the AGC and the Connecticut Laborers' District Council which is effective from April 1 through March 1996. In addition, Fusco Corp., the general contractor on the project in issue, is signatory to the 1993-1996 AGC-Operating Engineers collective-bargaining agreement.

The MCA-Laborers collective-bargaining agreement includes within its Work Jurisdiction provision, a claim for:

that work which has been historically or traditionally or contractually assigned to and performed by members of the Laborers' International Union . . . including, but not limited to, the tending of masons, unloading, mixing and all handling of all material [and] conveyance of such materials by any mode or method

Appendix A of the Coverage and Description of Laborers Work of the AGC-Laborers' District Council collective-bargaining agreement provides that the agreement shall cover:

the supplying and conveying of . . . materials . . . whether by bucket, hod, wheelbarrow, buggy or other motorized unit used for such purpose, including fork lifts when used at levels not in excess of nine feet.³

All parties agree that the expired collective-bargaining agreement between the MCA and the Operating Engineers included the operation of forklifts without restriction, as does the current AGC-Operating Engineers agreement.

On July 1, Fusco awarded the Employer the sub-contract for the performance of masonry work on the construction of a nine-story building known as Ninth Square in New Haven, Connecticut. The masonry work

²The MCA-Laborers collective-bargaining agreement, first effective in 1984, has been automatically renewed.

³It appears that most of the forklift work on the nine-story project is in excess of 9 feet.

involved the use of forklifts. During work on the first phase of the project, from late July or early August to early October, the Employer used both operating engineers and laborers to perform the disputed work. In mid-October, during the second phase of the construction, the Employer assigned laborers to operate the one forklift then on the job. In late October, Deluca testified, he was telephoned by Fusco Superintendent Tom Butler, who complained that a laborer had operated the forklift in an unsafe manner. Deluca testified that he was then told by Fusco's project manager, Pat Centore, to use an operating engineer to perform the forklift work or risk a job shutdown.

Thereafter, on November 3, the Employer received information from Laborers Business Agent Tony "Butch" Inorio that the Operating Engineers was preparing picket signs in anticipation of a job action at noon that day unless its members were assigned to operate the forklift. On the same morning, Deluca and Lombardo met with Operating Engineers Business Agent Ben Cozzi about the forklift work. Cozzi denied threatening the Employer in any manner, but did demand that the Employer sign a project agreement with the Operating Engineers. During this meeting the Employer received a letter by fax from Fusco's Centore, which stated in part that the failure to assign the forklift work to an operating engineer would result in "irreparable delays to the completion of [the] project" and advised that the Employer would be held "responsible for any damages due to this delay." After receipt of Centore's letter, the Employer assigned the forklift to operating engineers, who continue to perform the work. That afternoon, the Employer received a letter by fax from the Laborers, stating that forklift operation was within the jurisdiction of that labor organization.

B. *Work in Dispute*

The work in dispute is the operation of forklifts in connection with the Employer's masonry work at the Ninth Square project.

C. *Contentions of the Parties*

The Employer contends that on November 3 the Operating Engineers threatened to picket the Ninth Square project with an object of forcing it to assign the disputed forklift work to members of the Operating Engineers. It contends that under the threat of the job action and intervention by the general contractor, it assigned the operation of the forklift to an operating engineer. The Laborers contends that the work in dispute was legitimately assigned, prior to the Operating Engineers' threat of a job action, to employees whom the Laborers represented and that it should be returned to those employees. Laborers further contends that the Operating Engineers threatened the Employer with a job action to gain the forklift work after the Operating

Engineers' collective-bargaining agreement lapsed as a "representational sword against a construction contractor with whom it does not have a collective bargaining relationship."

Operating Engineers contends that two of its members operated forklifts during the first phase of the project and that when they were "laid off" the Employer gave assurances that it would recall an operating engineer when phase 2 of the construction commenced.⁴ It contends that Laborers Representative Inorio conceded that the disputed work came within the Operating Engineers' jurisdiction and directed the laborer operating the forklift during phase 2 of the project to cease doing so. Operating Engineers further contends that Fusco legitimately demanded that the Employer remove the laborers from the forklift and award the work to operating engineers based on its subcontracting agreement with the Employer and Fusco's preference and past practice, as well as industry and area practice in Connecticut. More specifically, Operating Engineers argues that Fusco is a party to a current collective-bargaining agreement with Operating Engineers that covers the operation of forklifts without restriction and to the AGC-Laborers agreement that limits the Laborers' operation of forklifts to 9 feet. In this connection, Operating Engineers argues that Fusco's collective-bargaining agreements are determinative of the instant dispute because the Labor/Insurance provision of the subcontracting agreement between Fusco and the Employer provides that:

(a) All labor employed on this project must be union labor in strict accordance with union rules and regulations including any area practice with respect to jurisdiction or agreements binding the general contractor;

(b) Should a jurisdictional dispute involve one or more of the trades, subcontractor will avoid a work-stoppage in any form by withdrawing its workmen and resume as directed by general contractor without delay.

Additionally, Operating Engineers contends that the failure of the MCA-Laborers agreement to specifically mention forklift work, combined with the restrictions on forklifts contained in the AGC-Laborers agreement, and the unrestricted mention of such work in the Operating Engineers agreement to which Fusco is a party, dictate that the disputed work be assigned to its members. Finally, Operating Engineers contends that a memorandum of understanding dated February 3, 1954, between it and the Laborers establishes that the latter ceded forklift operation to Operating Engineers.⁵

⁴ There are four phases of construction on the project, according to the Employer.

⁵ The 1954 agreement provides in pertinent part:

With regard to fork lifts and other similar type of equipment, the operation of same will be by members of the International

On the basis of the foregoing, Operating Engineers argues that its insistence on performing the forklift operations was at all times a lawful attempt to preserve its members' work.

D. Applicability of the Statute

Before the National Labor Relations Board may proceed with a determination of the dispute pursuant to Section 10(k), it must be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary settlement of their dispute.

The record establishes that in October, the Employer assigned the operation of forklift work to Laborers. On November 3, under the threat of picketing by the Operating Engineers that would result in a job shutdown and the threat of being held economically liable therefor by Fusco, and in the face of the Laborers' competing claim for the forklift operation work, the Employer assigned the work to an employee represented by the Operating Engineers.

Accordingly, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred⁶ and that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of the Act and no previously existing, conclusive, and binding settlement governing the dispute.

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.

Union of Operating Engineers; a member or members of the International Hod Carriers', Building and Common Laborers' Union of America will work in connection with said equipment for the purpose of seeing to it that the load is properly on the lift and to do any necessary tending in the event that part of the load spills, etc., in which event the Laborer-Tender will reset the material and will also give the necessary signals to the Engineer when the equipment is at the proper level or position; where necessary a Laborer will be on the scaffold in order to assist in the unloading of the fork lift or loader, in order that the material may be at the proper location for the use of the mechanic that shall install it.

⁶No party in this proceeding disputes that reasonable cause exists that a violation of Sec. 8(b)(4)(D) has occurred.

1. Certifications and collective-bargaining agreements

The record does not reflect, and no party claims, that the Board has certified either of the labor organizations as the representative of employees performing the disputed work. Thus, Board certification does not play a part in our award of the work.

The Employer is party to the collective-bargaining agreement between MCA and the Laborers, by virtue of Lombardo's and Deluca's execution of Acceptance of Agreements forms on August 23 and 28 on behalf of their respective companies.⁷ That collective-bargaining agreement reserves to Laborers the tending of masons, unloading, mixing, and handling of all materials, and the conveyance of such materials by any mode or method. Deluca and Lombardo are also parties to a collective-bargaining agreement between the AGC and the Laborers, effective from April 1 through March 31, 1996, covering the operation of forklifts under 9 feet. The collective-bargaining agreement between MCA and the Operating Engineers, covering the operation of forklifts, expired on November 1, when negotiations for a successor agreement reached impasse; therefore, the Employer does not have a collective-bargaining agreement with the Operating Engineers. Where there are two collective-bargaining agreements which arguably cover the work in dispute, but one has expired, the Board traditionally finds that this factor favors an award of the work to employees represented by the Union with the currently effective agreement. *Stage Employees IATSE Local 41 (Greyhound Exhibitgroup)*, 270 NLRB 369, 370 (1984).

The Board has indicated that it will focus on whether the employer that controls the assignment of the disputed work has a collective-bargaining agreement with the union that seeks to change the assignment of the work. *Plumbers District Council 16 (L & M Plumbing)*, 301 NLRB 1203, 1205 (1991). Operating Engineers contends, however, that its collective-bargaining agreement with Fusco governs the assignment of the disputed work because the subcontracting agreement between Fusco and the Employer requires the subcontractor to withdraw its workmen and resume as directed by the general contractor to avoid a work stoppage. We reject this contention. The Employer and Fusco are at odds about the meaning of these provisions of their subcontracting agreement. That same subcontracting agreement also expressly requires the Employer to furnish and be responsible for the protection of all supervision and labor necessary to complete

⁷MCA does not require a member that is engaged in a joint venture with another member to join in the name of the joint venture in order to obtain the benefits and rights of membership for the joint venture. Nor apparently, does it require a collaborative assignment of bargaining rights by the joint venture.

the masonry work on the project. In this connection, we note that the Employer put laborers and operating engineers on its forklifts during the first phase of construction, without objection from Fusco. Further, the subcontract provisions on which the Operating Engineers rely are reasonably interpreted as requiring the subcontractor to abide by the general contractor's work assignment only when, as here, a work stoppage looms. The Board has consistently held that assignments made under threat of a job action by a labor organization seeking the work will not be considered in determining a jurisdictional dispute. Thus, the subcontracting agreement and Fusco's collective-bargaining agreement with Operating Engineers are inconclusive at best and do not provide a basis for departing from the Board's traditional focus on the subcontractor.⁸ See *Operating Engineers Local 139 (McWad, Inc.)*, 262 NLRB 1300 (1982). Accordingly, we find that the factor of collective-bargaining agreements favors an assignment of the disputed work to employees represented by the Laborers.

2. Employer's preference and past practice

The Employer used both laborers and operating engineers to perform the forklift work during phase 1 of the Ninth Square project. Thereafter, it assigned the work to laborers. Deluca testified on behalf of the Employer that its preference is to use laborers to perform the forklift work.

The Employer has performed one other construction project as a joint venture. From May to September, the period it worked on that project, the Employer used laborers to perform forklift work for approximately 4 weeks and operating engineers the remainder of the time. As a separate company, Deluca's practice is a mixed one, and it has employed laborers to perform forklift work similar to that in issue in the instant case on some projects and operating engineers on other projects. As a separate company, Lombardo's practice has been to assign forklift operation to operating engineers.

On the basis of the foregoing, we find that although the Employer's past practice does not favor an award to employees represented by either labor organization, its preference supports an award to employees represented by the Laborers.

⁸Chairman Stephens has previously expressed the view that it is inappropriate to focus on a subcontractor as the locus of competing claims when one of those alleged claims takes the form merely of a union's pursuit of a grievance against a general contractor for violating a lawful union signatory subcontracting clause and that union exerts no pressure directly against the subcontractor. *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787, 790-792 (1990). He notes, however, that this case does not present that issue because no one asserts a lack of competing claims and both labor organizations aimed threats at the Employer.

3. Area custom and practice

Several witnesses testified on behalf of the Operating Engineers that area custom and practice was to assign forklift work to employees represented by that Union, and several witnesses testified on behalf of the Laborers that area practice was to assign such work to employees represented by that Union. A business representative from another Laborers local union not party to the instant dispute, however, testified that in Connecticut operating engineers perform forklift operation. In view of the varying testimony, however, this factor equally supports the competing claims for the work and consequently favors neither group of employees.

4. Efficiency and economy of operations

Lombardo testified generally that operating engineers assigned to perform forklift work do so for a short time in a given day and then are idle. Operating engineer Gerard Pedneault testified, however, that he was busy operating or maintaining the forklift for most of his 8-hour shift when he was assigned the disputed work during phase 1 and phase 2 of the Ninth Square project. There was similarly conflicting testimony that operating engineers have been prohibited by their collective-bargaining agreement from helping laborers during downtime and that operating engineers do, in fact, work with laborers during lulls in order to remain productive. Laborers asserts that its employees are more efficient at tending masonry workers using the forklift because they customarily work along side masons and readily anticipate the masons' needs and flow of material better than operating engineers, who do not customarily work with masonry workers. In view of the conflicting testimony, we find that this factor does not favor an award to one group of employees over the other.

5. Relative skills and training

The record establishes that no special certifications are required of employees who operate the forklift, and that it is relatively uncomplicated work. In addition, although each Union established that it provides forklift training, there is no evidence that the employees who actually operated the forklift at Ninth Square underwent such training. Consequently, this factor is neutral.

6. Interunion agreements

The parties do not contend, and the record does not establish, the existence of a voluntary dispute resolution mechanism to which all of the parties are bound. Further, although the Operating Engineers contends that the Laborers relinquished the disputed work in the International Unions' 1954 memorandum of understanding, there is no evidence regarding the applicability of the memorandum of understanding to the Employer or the Connecticut District Council. Signifi-

cantly, subsequent collective-bargaining agreements of the Laborers, such as those introduced in this proceeding—and particularly the MCA agreement with Laborers International—include such work in their jurisdictional provisions. Thus, we reject the contention that the 40-year-old memorandum of understanding governs the assignment of the disputed work. See *Operating Engineers Local 150 (All American Decorating Service)*, 296 NLRB 933, 937 (1989). See also *Asbestos Workers Local 12 (National Surface Cleaning)*, 307 NLRB 209, 211 (1992).

Conclusions

After considering the evidence bearing on all the relative factors, we conclude that laborers are entitled to perform the work in dispute. We reach this conclusion on the basis of the applicable and effective collective-bargaining agreements and employer preference. In making this determination, we are awarding the work to employees represented by the Laborers' District Council, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

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

1. Employees represented by Connecticut Laborers' District Council a/w Laborers' International Union of North America, AFL-CIO are entitled to perform the operation of forklifts being used in connection with masonry construction work at the Deluca/Lombardo jobsite at Ninth Square, New Haven, Connecticut.

2. Operating Engineers Local 478, International Union of Operating Engineers, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Deluca/Lombardo, a Joint Venture, to assign the disputed work to employees represented by it.

3. Within 10 days from this date, International Union of Operating Engineers, Local 478 shall notify the Regional Director for Region 34 in writing whether it will refrain from forcing or requiring Deluca/Lombardo, a Joint Venture, by means proscribed in Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.