

**International Union of Operating Engineers, Local 150, AFL-CIO and Foley Construction Company and Teamsters, Chauffeurs and Helpers, Local Union #371.** Case 33-CD-371

February 17, 1995

DECISION AND DETERMINATION OF  
DISPUTE

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND BROWNING

The charge in this Section 10(k) proceeding was filed July 27, 1994,<sup>1</sup> by the Employer, Foley Construction Company (Foley), alleging that the Respondent, International Union of Operating Engineers, Local 150, 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 Foley to assign certain work to employees represented by the Operating Engineers rather than to employees represented by Teamsters, Chauffeurs and Helpers, Local Union No. 371 (Teamsters). The hearing was held August 18 and 22, 1994, before Hearing Officer Valerie L. Ortique.

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.<sup>2</sup> On the entire record, the Board makes the following findings.

I. JURISDICTION

Foley, an Iowa corporation, is engaged in the business of mass excavation and hauling of dirt, installation of underground pipe, demolition of structures, site work, and general preparation of surfaces for paving. Foley annually ships goods valued in excess of \$1 million from its facility in Clinton, Iowa, to customers located outside the State of Iowa. The parties stipulate, and we find, that Foley is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Operating Engineers, Local 150, and Teamsters, Local No. 371 are labor organizations within the meaning of Section 2(5) of the Act.

<sup>1</sup> All subsequent dates refer to 1994 unless otherwise specified.

<sup>2</sup> The Teamsters except to the hearing officer's refusal to admit evidence showing that the two Unions had agreed to be bound by the decisions of a jurisdictional dispute resolution committee. In affirming the hearing officer's ruling that the evidence the Teamsters attempted to introduce is irrelevant, we note that the Board does not defer to dispute resolution forums unless all the parties, including the employer, have agreed to be bound. We note that all three parties stipulated that there is no agreed-on method for voluntary adjustment of the dispute that binds all three parties to this proceeding.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Foley has for many years used various articulating construction vehicles. An articulating vehicle turns from a central pivot point unlike other vehicles, such as cars and trucks, that turn on a front axle. Foley has always used employees represented by the Operating Engineers to run its articulating vehicles.

In around May 1994, Foley purchased and began using articulating off-road haulers. Foley was aware that another local construction company, Valley Construction, had used Teamsters-represented employees to operate the articulating off-road haulers for 2 weeks at a local jobsite in the fall of 1993. In addition, Foley believed that Operating Engineers would not accept the work for employees it represents. In May 1994, based on a request from Teamsters Business Representative John Thorpe, Foley assigned a 1-day job using an articulating off-road hauler to an employee represented by the Teamsters.

Sometime after the May project referred to above, both the Operating Engineers and the Teamsters claimed the articulating off-road hauler work for employees they represent. On July 14, Foley assigned employees represented by the Operating Engineers to operate the articulating off-road haulers for the work it was performing at the Dial Commercial Development jobsite in Rock Island, Illinois. The parties stipulated that, by letter dated July 26, Jack Schadt, business representative for the Operating Engineers, threatened to strike and picket Foley if Foley reassigned the work to employees other than those it represents.

B. *Work in Dispute*

The disputed work involves the operation of articulating off-road haulers at the Dial Commercial Development jobsite in Rock Island, Illinois.

C. *Contentions of the Parties*

Foley contends that the disputed work should be assigned to employees represented by the Operating Engineers based on its collective-bargaining agreement with the Operating Engineers, its preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations.

The Operating Engineers essentially agrees with Foley, and stresses the skills and training possessed by employees it represents.

The Teamsters contends that the disputed work should be assigned to employees it represents based on its collective-bargaining agreement with Foley, Foley's past practice, and area practice.

#### 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 on a method for the voluntary adjustment of the dispute.

It is undisputed that on July 26, Schadt, the Operating Engineers' business agent, threatened to strike and picket Foley if Foley did not assign the disputed work to employees represented by Operating Engineers. We find, therefore, that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. The parties stipulated that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k).<sup>3</sup> 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. Certifications and collective-bargaining agreements

No party claims that there are certifications applicable to the work in dispute.

Foley's collective-bargaining agreements with both the Operating Engineers and the Teamsters contain jurisdictional language concerning articulating vehicles that is sufficiently broad to cover the disputed work. Therefore, we find that this factor does not favor any group of employees.

##### 2. Company preference and past practice

Foley prefers that the disputed work be assigned to employees represented by the Operating Engineers rather than to employees represented by the Teamsters.

<sup>3</sup>The Teamsters contends that the Board should defer decision in this case until the two International Unions to which the Local Unions involved here are affiliated have exhausted the remedial avenues on which they allegedly agreed. The Board does not defer to agreed-on methods of voluntary dispute resolution unless all parties, including employers, agree to be bound. Even assuming that the two International Unions have agreed on a bilateral procedure for dispute resolution to which the Local Unions are bound, there is no evidence or assertion that Foley has agreed to be bound by that procedure.

Foley has always used employees represented by the Operating Engineers to operate articulating vehicles. On one occasion, however, very shortly after Foley purchased the articulating off-road haulers and based on a request by Teamsters Business Agent John Thorpe, Foley assigned a 1-day job to an employee represented by the Teamsters.

Foley takes the position that its 1-day assignment to an employee represented by the Teamsters was the result of a misunderstanding concerning whether or not the Operating Engineers would accept the work. Foley maintains that the single instance was an aberration from its past practice and that, in the future, it intends to abide by its otherwise consistent practice of using employees represented by the Operating Engineers to operate articulating off-road vehicles, including the new off-road haulers. Further, it is uncontradicted that the particular employee assigned that work was a former member of the Operating Engineers whom Foley knew had experience using articulating vehicles. Consequently, we find that the factor of employer preference and past practice favors an award of the disputed work to employees represented by the Operating Engineers.

##### 3. Area and industry practice

The record reveals that articulating off-road haulers are new to the area. Consequently, evidence as to area practice is minimal. Foley is the first contractor to purchase articulating off-road haulers. Foley used them for the first time in May 1994.

As noted earlier, articulating off-road haulers were used in the fall of 1993 by Valley Construction. The haulers were rented by Valley to perform a 2-week job, and Teamsters-represented employees were assigned to operate the haulers. Prior to this job, Operating Engineers' representative, Schadt, and Teamsters' representative, Thorpe, had a conversation with Valley Part Owner Bill Hass concerning the articulating off-road haulers and whether the Operating Engineers would claim the work of operating them for employees it represents. Schadt testified that he was not familiar with the new vehicles and asked Hass to describe them. Schadt testified that with Thorpe present Hass described the off-road haulers as like a "Mercedes" or "Volvo." Schadt interpreted Hass' description to mean that the vehicles were basically off-road dump trucks and stated that he believed that work would belong to employees represented by the Teamsters.

Schadt testified that, when he saw the vehicles in operation, he realized that he had been mistaken as to the nature of the work and the vehicles. Because he had given his word that he would not claim the work at the Valley jobsites, he did not seek to change the assignment.

Foley was aware of this instance at Valley Construction Company where Teamsters-represented employees were used to perform the articulating off-road hauling work. This was the basis for Foley's belief that the Operating Engineers would not accept the work for employees it represents.

Other than the instances described above, there is no evidence that employees represented by the Teamsters have been assigned to operate articulating off-road haulers or any other articulating heavy equipment in the area. On the contrary, there was considerable testimony showing that the operation of similar articulating equipment in the area has historically been performed by employees represented by the Operating Engineers. Consequently, we find that this factor favors an assignment of the disputed work to employees represented by the Operating Engineers.

#### 4. Relative skills and safety

The record reveals that employees represented by the Operating Engineers have received extensive training in the use of articulating vehicles. The Operating Engineers has a training facility located on 250 to 350 acres in Plainfield, Illinois. The training facility includes classrooms, welding shops, and mechanics' shops. Apprentices are trained extensively in the use of articulating vehicles by OSHA-certified instructors. The training is continuing in nature.

Because employees represented by the Operating Engineers have this extensive training in using articulating vehicles, Foley is satisfied that these employees provide the necessary concern for safety. Because such vehicles steer by articulating rather than turning on an axle, they turn more sharply and more quickly than conventional vehicles. Because the vehicles bend in the middle, the operator must be extremely cautious when working around people or other equipment to avoid crushing them between the two frames of the articulating vehicle. The slightest turn of the steering wheel will begin the articulating process, which will continue until the steering wheel is returned to the straight ahead position. Therefore, an unskilled employee might think that he is turning the vehicle only a little, even though the machines will bend until they are completely articulated.

In addition, the haulers are usually operated on uneven ground. If the hauler is not positioned correctly before it is turned or it is turned too fast, there is great danger that the hauler may turn over and crush people or other equipment.

The Operating Engineers has a procedure which allows employers to report any employee who does not use a piece of machinery in a competent manner. Subsequently, the Operating Engineers has the right to refuse to dispatch that employee until he or she has completed a retraining course.

The record contains no significant evidence concerning training of employees represented by the Teamsters in the safe operation of articulating vehicles. Accordingly, this factor favors an award of the disputed work to employees represented by the Operating Engineers.

#### 5. Economy and efficiency of operations

Foley asserts that it is more economical and efficient to have the disputed work performed by employees represented by the Operating Engineers. Because the articulating off-road haulers are not operated continuously, especially in poor weather, Foley needs to be able to reassign operators to other machines. Switching operators is permitted under Foley's collective-bargaining agreement with the Operating Engineers, but it is prohibited under Foley's agreement with the Teamsters.

The articulating off-road hauler is used in conjunction with other heavy equipment such as backhoes, loaders, and dozers which are used to load the articulating off-road hauler. By using employees represented by the Operating Engineers who are familiar with the operation of the other heavy equipment to operate the off-road hauler, the off-road hauler operator is able to better position the hauler for more efficient loading.

Employees represented by the Operating Engineers are trained to read grade stakes indicating the level of grade required at particular points. Using employees represented by the Operating Engineers eliminates the need for a "spotter" to translate the grade stakes to the operator of the hauler.

Foley's practice is to use Operating Engineers-represented mechanics to service heavy equipment operated by employees represented by the Operating Engineers and the Teamsters-represented mechanics to service equipment operated by employees represented by the Teamsters. The articulating off-road hauler is used during periods when vehicles operated by employees represented by the Teamsters would not be necessary. If Foley assigned an employee represented by the Teamsters to operate the off-road hauler, it would be necessary to assign a Teamsters-represented mechanic to service this one piece of equipment.

Based on the foregoing evidence, we find that the factor of economy and efficiency of operations favors an award of the disputed work to employees represented by the Operating Engineers.

#### Conclusions

After considering all the relevant factors, we conclude that employees represented by the International Union of Operating Engineers, Local 150, AFL-CIO are entitled to perform the disputed work. We reach this conclusion relying on the factors of employer preference and past practice, area and industry practice, relative skills and safety, and economy and efficiency

of operations. In making this determination we are awarding the disputed work to employees represented by the Operating Engineers, not to that Union or its members.

Foley requests that the Board issue a broad award covering all of Foley's future articulating off-road hauling work in the geographical area covering the two Local Unions' jurisdiction. Foley claims that such an award is necessary to avoid the recurrence of similar disputes between the Operating Engineers and the Teamsters.

We conclude that the issuance of a broad award in this case would be inappropriate and we shall limit our determination to the particular controversy that gave rise to this proceeding. In order for a broad award to be granted the Board requires (1) that there be evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur, and (2) that the

charged party has a proclivity to engage in unlawful conduct in order to obtain work similar to the work in dispute. *Bricklayers (Sesco, Inc.)*, 303 NLRB 401 (1991); *Iron Workers Local 433 (Crescent Corp.)*, 277 NLRB 670 (1985). Because no showing has been made in this case concerning either of the above two prerequisites, we find that the evidence provides insufficient grounds to issue a broad award.

#### DETERMINATION OF DISPUTE

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

Employees of Foley Construction Company represented by International Union of Operating Engineers, Local 150, AFL-CIO are entitled to perform the operation of articulating off-road haulers at the Dial Commercial Development jobsite in Rock Island, Illinois.