

Painters Local Union No. 8, International Brotherhood of Painters and Allied Trades, AFL-CIO, CLC and G. C. Zarnas & Co., Inc. and Local 150, International Union of Operating Engineers, AFL-CIO. Case 13-CD-507

May 25, 1995

DECISION AND DETERMINATION OF
DISPUTE

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

The charge in this Section 10(k) proceeding was filed on November 4, 1994, by G. C. Zarnas & Co., Inc. (Employer), alleging that the Respondent, Painters Local Union No. 8, International Brotherhood of Painters and Allied Trades, AFL-CIO, CLC (Painters or Local 8) 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 Local 150, International Union of Operating Engineers, AFL-CIO (Operating Engineers). The hearing was held on January 10 and 11, 1995, before Hearing Officer Mary Ellen Larson. Thereafter, all parties filed 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

The Employer is a Pennsylvania corporation with a facility in Chesterton, Indiana, where it is engaged in business as a painting contractor. The Employer annually purchases and receives goods valued in excess of \$50,000 from employers located outside the State of Indiana. We find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Painters and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer provides sandblasting and painting services, which include the use of air compressors, to Bethlehem Steel Company and to various contractors who themselves provide services to Bethlehem Steel. The Employer has contracts with both Painters and Operating Engineers.

The Employer's sandblasting and painting work falls into two categories: "time and material" work and

"lump sum" work.¹ Until 1993, when performing time and material work, the Employer employed at least one employee represented by the Operating Engineers to operate the air compressor, while employees represented by the Painters performed the sandblasting and painting. For lump sum work, employees represented by the Painters operated the air compressors as well as performing the sandblasting and painting work.

In June 1993, Bethlehem Steel requested that the Employer reduce its labor rates. The Employer thereupon decided not to use an Operating Engineers-represented employee to operate the air compressor on time and material jobs, but to use Painters-represented employees who were already on the job.

The Operating Engineers disputed the Employer's decision no longer to use employees represented by them. Because of that ongoing dispute, on November 2, 1994, Stephen Smith, business manager for the Painters, informed the Employer:

that if it changes its assignment in reaction to the Operating Engineers' lawsuit or otherwise, this Local Union reserves the right to take such picketing, handbilling or other lawful economic action as permitted by federal and state laws to maintain its right to this work.

B. Work in Dispute

The disputed work is the operation of diesel fueled air compressors which are used for sandblasting and the application of special coatings on prepared surfaces at the Bethlehem Steel Company Burns Harbor facility located at 247 Steel Drive, Chesterton, Indiana.

C. Contentions of the Parties

The Employer asserts that there is reasonable cause to believe that the Respondent has violated Section 8(b)(4)(D) and that the dispute is properly before the Board for determination. The Employer further urges that, based on the relevant criteria, the work in dispute should be assigned to its employees represented by the Painters. The Painters agrees with the Employer's contentions.

The Operating Engineers claims the Painters' threat was a sham and is therefore inadequate to invoke the Board's 10(k) authority. The Operating Engineers further claims that there is a voluntary method for the adjustment of the dispute. Finally, the Operating Engineers argues that, if the Board finds a jurisdictional dispute exists, the work should be awarded to employees represented by the Operating Engineers.

¹ Work performed under a time and material agreement is paid for when the employer submits an invoice for work rendered to the general contractor. The price for work done under a lump sum contract is negotiated in advance of the work being done.

D. Applicability of the Statute

On November 2, 1994, the Painters threatened the Employer with “picketing, handbilling or other lawful economic action” if the Employer changed the assignment of the disputed work from employees represented by the Painters to employees represented by the Operating Engineers.

The Operating Engineers’ claim that the threat was a sham is based on Painters Business Manager Smith’s testimony that he sent the letter to initiate 10(k) proceedings. Smith, however, also testified that he was aware of Operating Engineers’ grievances and a potential lawsuit against the Employer regarding the compressor work. When asked at the 10(k) hearing what the Painters’ position would be “if the work were re-assigned tomorrow to the Operators,” Smith responded:

The Painters position is that it’s our work. It’s covered in our collective bargaining agreement, and I would exert any pressure possible for Local 8 to retain the work, including picket.

The November 2, 1994 letter on its face constitutes a threat of prohibited activity, Smith’s testimony at the hearing reiterated the threat, and there is insufficient evidence to conclude that the threat was not made seriously. See *Operating Engineers Local 3 (Levin-Richmond Terminal)*, 299 NLRB 449, 451 (1990). Therefore, we find that the Painters threatened prohibited activity and that an object of the Painters’ action was to force the Employer to assign the disputed work to employees represented by the Painters. *Stage Employees IATSE (Metromedia, Inc.)*, 260 NLRB 424, 426 (1982). Accordingly, we find reasonable cause to believe that Section 8(b)(4)(D) has been violated.

The Operating Engineers’ claim that there is a voluntary method for the adjustment of this dispute relies on the terms of the Painters’ International Union’s National Maintenance Agreement² to which the Employer is a signatory. However, the Operating Engineers is not a party to that agreement. Accordingly, there is no voluntary method of resolving the jurisdictional dispute that would be binding on all the parties.

Having found that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act, we conclude that the dispute is properly before the Board for determination.

²The National Maintenance Agreement is a standardized contract provided by each of 14 construction trades through their respective International unions. It covers maintenance work on certain enumerated projects. It is an employer’s responsibility to apply for coverage under a National Maintenance Agreement with a particular construction trade.

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

Neither Union has been certified by the Board as the bargaining representative of any of the employees performing the disputed work.

The Employer is signatory to contracts with the Painters through the Painters’ International Union’s National Maintenance Agreement and through a local agreement. The most recent local agreement is effective July 1, 1992, through June 30, 1995. The local agreement covers the operation of air compressors.

In June 1973, the Employer signed a memorandum of agreement agreeing to be bound by the agreement between the Operating Engineers and the Calumet Builders Association. The most recent agreement, which is effective June 1, 1994, through May 31, 1997, covers the operation of air compressors.

Because both Unions’ contracts with the Employer arguably cover the disputed work, we find that this factor does not favor awarding the work in dispute to either group of employees.

2. Employer preference

The Employer prefers that the disputed work be performed by employees represented by the Painters. We find that this factor favors awarding the work in dispute to employees represented by the Painters.

3. Area and industry practice

The Painters presented testimony that it is signatory to contracts with 67 painting contractors in 5 counties in northwest Indiana which provide that employees represented by the Painters shall operate air compressors. The Operating Engineers presented testimony that employees it represents operate air compressors at a variety of businesses in northwest Indiana. Based on the evidence presented, we find that this factor is inconclusive and does not favor an award of the disputed work to either group of employees.

4. Relative skills

Employees represented by the Painters and by the Operating Engineers are both experienced and quali-

fied to operate an air compressor. We find this factor does not favor assignment of the disputed work to either group of employees.

5. Economy and efficiency of operations

The record shows that the operation of an air compressor does not require an employee's full-time attention. An air compressor is considered to be a tool of a painter's trade, and employees represented by the Painters are able to operate and monitor the air compressor in conjunction with their normal job duties of sandblasting and painting. Consequently, the Employer is able to assign other tasks, as well as the disputed work, to employees represented by the Painters.

Employees represented by the Operating Engineers could not perform these additional tasks. If the Employer were required to hire an employee represented by the Operating Engineers solely to operate the air compressor, his job duties would consume only a few minutes of an 8-hour workday.

Accordingly, we find that the factor of economy and efficiency of operations favors an award of the disputed work to employees represented by the Painters.

Conclusions

After considering all the relevant factors, we conclude that employees of G. C. Zarnas & Co., Inc., represented by Painters Local Union No. 8, International Brotherhood of Painters and Allied Trades, AFL-CIO, CLC are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's preference and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Local 8, 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.

Employees of G. C. Zarnas & Co., Inc., represented by Painters Local Union No. 8, International Brotherhood of Painters and Allied Trades, AFL-CIO, CLC, are entitled to operate diesel fueled air compressors which are used for sandblasting and the application of special coatings on prepared surfaces at the Bethlehem Steel Company Burns Harbor facility located at 247 Steel Drive, Chesterton, Indiana.