

Laborers International Union of North America, State of Indiana District Council and Capitol Drilling Supplies, Inc. and Local Union No. 103, International Union of Operating Engineers, Party of Interest. Case 25-CD-265

August 25, 1995

DECISION AND ORDER QUASHING NOTICE
OF HEARING

BY CHAIRMAN GOULD AND MEMBERS STEPHENS,
BROWNING, COHEN, AND TRUESDALE

The charge in this 10(k) proceeding was filed on April 21, 1994, by Capitol Drilling Supplies, Inc. (Capitol) alleging that the Laborers International Union of North America, State of Indiana District Council (Laborers) violated Section 8(b)(4)(ii)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Capitol to assign certain work to employees represented by the Laborers rather than to employees represented by Local Union No. 103, International Union of Operating Engineers (Operating Engineers). A hearing was held on June 13, 1994, before Hearing Officer John J. Brase.

The National Labor Relations Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Capitol, an Indiana corporation, is engaged in the business of concrete sawing and drilling in the construction industry. During the 12 months preceding the hearing, a representative period, Capitol purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of Indiana. The parties stipulated, and we find, that Capitol is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers and the Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Capitol is a concrete sawing and drilling contractor that performs work primarily as a subcontractor on residential, commercial, and highway construction projects in Indiana. E&B Paving, Inc. (E&B) is a general contractor that was awarded a construction project at the Indianapolis Airport. E&B subcontracted the joint control concrete cutting portion of the airport project to Capitol, and Capitol assigned the work to its employees who are represented by the Laborers.

E&B is a signatory to a collective-bargaining agreement with the Operating Engineers. The E&B-Operating Engineers contract has a clause restricting the subcontracting of work coming within the occupational jurisdiction of the Operating Engineers to those willing to become a signatory to the E&B-Operating Engineers contract. The E&B-Operating Engineers contract applies to a classification described as "Power saw-concrete (Power Driven)." In addition, the Operating Engineers have a standing letter of assignment from E&B assigning the operation of power-driven power concrete saws used for concrete cutting to employees represented by the Operating Engineers.

Capitol began performing the joint control cutting for the E&B airport project in April 1994. On April 12, the Operating Engineers filed a grievance against E&B alleging that E&B improperly subcontracted the crack control concrete sawing to Capitol in violation of the E&B-Operating Engineers contract. The grievance seeks monetary damages and injunctive relief. On April 21, the Laborers' business representative called Capitol's vice president and threatened to picket Capitol if Capitol reassigned the joint control cutting work on the airport project.

The Operating Engineers did not engage in any strike or work stoppage or make any threats with regard to the assignment of the work. The only action taken by the Operating Engineers was to file a grievance against E&B alleging breach of the E&B-Operating Engineers contract.

B. Work in Dispute

The disputed work involves the performance of joint control concrete sawing work at the Indianapolis International Airport project. In performing this work, a crack control joint is sawed in a drying concrete slab to control cracking caused by expansion and contraction. Capitol uses a self-propelled, 35 HP, diamond blade saw to cut the joint. The joint is then flushed with water from a 200-foot hose.

C. Contentions of the Parties

Capitol contends that this is a traditional jurisdictional dispute, that there is reasonable cause to believe that the Laborers violated Section 8(b)(4)(D) of the Act, and that no voluntary means exist for adjustment of the dispute. Capitol argues that the work in dispute should be awarded to employees represented by the Laborers based on the factors of the employer's preference and past practice, industry practice, relative skills, the collective-bargaining agreement between Capitol and the Laborers, and economy and efficiency of operations.

The Operating Engineers contends that this is not a jurisdictional dispute, but is a contractual dispute between it and E&B. The Operating Engineers argues

that it never sought the work in question from Capitol, nor has it threatened or coerced Capitol in order to acquire such work, and it urges the Board to overrule its decision in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990). For the reasons set forth herein, we agree with the Operating Engineers and we will quash the notice of hearing, because there is no jurisdictional dispute as contemplated in Sections 8(b)(4)(D) and 10(k) of the Act.

D. Applicability of the Statute

It is well settled that the standard in a 10(k) proceeding is whether there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. It requires a finding that there is reasonable cause to believe (1) that a party has used proscribed means to enforce its claims to the work in dispute and (2) that there are competing claims to the disputed work between rival groups of employees. The first part of the standard is satisfied in this case because it is undisputed that the Laborers threatened to picket Capitol. It is the second prong of the standard that is at issue here.

In *Slattery Associates*, the Board adhered to prior Board precedent¹ and held that a union's effort to enforce a lawful union signatory subcontracting clause against a general contractor,² through a grievance, arbitration, or a court action, constitutes a claim to the work assigned by the subcontractor. Thus, if another union representing employees to whom the work is assigned by the subcontractor threatens coercive action against the subcontractor in the event that the work is reassigned, a 10(k) proceeding may be triggered.

We have reconsidered the decision in *Slattery Associates* and have determined that the policies of the Act will be best effectuated by the principles outlined in then-Chairman Stephens' dissent in that case. Accordingly, for the reasons that follow, we hereby overrule *Slattery Associates* and its progeny³ and adopt the

view that, in the construction industry, a union's action through a grievance procedure, arbitration, or judicial process, to enforce an arguably meritorious claim against a general contractor that work has been subcontracted in breach of a lawful union signatory clause, does not constitute a claim to the subcontractor for the work, provided that the union does not seek to enforce its position by engaging in or encouraging strikes, picketing, or boycotts or by threatening such actions.

This holding proceeds from our recognition that, for purposes of Section 10(k), competing claims must be claims made in the same dispute. In circumstances like those in *Slattery Associates* and in this case, however, there are two entirely separate disputes, even though both ultimately concern the same work. First there is the dispute created by the grievance filed by a union under its agreement with the general contractor protesting that contractor's alleged subcontracting of work in breach of the union signatory subcontracting clause, i.e., the contractor's subcontracting to an employer that declines to be bound by the collective-bargaining agreement with respect to that work. Second, there is the dispute that typically arises when the union representing the employees of the employer to which the work was subcontracted threatens to take coercive action against *that* employer if the work is reassigned to any other group of employees. Although the first union's successful prosecution of its grievance may, as a practical matter, induce the general contractor to withdraw the work from the subcontractor or otherwise bring about the removal of the employees represented by the second union, the fact remains that the first union never engaged in any dispute with the subcontractor. And in such a case the general contractor's actions reflect merely its fulfillment of its union signatory subcontracting obligation under the collective-bargaining agreement with the first union.⁴

¹ E.g., *Sheet Metal Workers Local 107 (Lathrop Co.)*, 276 NLRB 1200, 1202 (1985).

² A union signatory subcontracting clause is generally understood to be a provision in a collective-bargaining agreement in which a contractor agrees that it will not subcontract specified work covered by the agreement to any employers other than those who will become signatories to the collective-bargaining agreement. Although such an agreement would be unlawful under the basic prohibition of Sec. 8(e) of the Act against contracts in which an employer agrees to cease doing business with another employer, it is lawful in the construction industry under the so-called "construction industry proviso" of Sec. 8(e) if it is limited to "the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work." See generally *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 652-653, 662 (1982). E.g., *Sheet Metal Workers Local 107 (Lathrop Co.)*, 276 NLRB 1200, 1202 (1985).

³ We also hereby overrule all cases predating *Slattery Associates*, e.g., *Laborers Massachusetts District Council Local 22 (Turner Construction)*, 296 NLRB 1077 (1989); *Laborers (O'Connell's Sons)*, 288 NLRB 53 (1988); and *Sheet Metal Workers Local 107*

(*Lathrop*), supra, to the extent they are inconsistent with our holding in this case.

⁴ As noted in the *Slattery Associates* dissent, this distinction between two separate disputes was the underpinning of the Board's decision in *Carpenters Local 33 (AGC of Massachusetts)*, 289 NLRB 1482, 1484 (1988). There the Board held that a union's grievance seeking damages against a general contractor for breach of a signatory subcontracting clause was not a coercive undermining of the Board's prior 10(k) award of work to employees of the subcontractor, and therefore did not violate Sec. 8(b)(4)(D) of the Act. The contract action against the general contractor was viewed as having "no effect on [the subcontractor's] assignment of the work." *Id.* Accord: *J. F. White Contracting Co. v. Local 103 IBEW*, 890 F.2d 528, 529-530 (1st Cir. 1989) (Breyer, J.); *Hutter Construction Co. v. Operating Engineers Local 139*, 862 F.2d 641, 645-646 (7th Cir. 1988).

Our dissenting colleagues contend that because the Operating Engineers' grievance is, in a sense, a claim for the subcontracted work, there are therefore competing claims to the disputed work and the standard for a 8(b)(4)(D) violation is met. Our colleagues, however, misinterpret our rationale regarding the two claims. Our holding sim-

As the dissent in *Slattery Associates* points out, the Board's decision in that case allows a union representing the employees of a subcontractor who has benefited from a general contractor's breach of contract to trigger a 10(k) proceeding simply by threatening action against the subcontractor and hoping that the subcontractor will, in turn, file a 8(b)(4)(D) charge against the threatening union. The threatening union thus may be able to secure a Board award of the work despite the fact that the work was subcontracted in breach of other parties' collective-bargaining agreement. Under our holding today, seeking a Board award of the work through a 10(k) proceeding will no longer be an option for the beneficiaries of the contract breach unless the bargaining representative of the employees of the general contractor expands its contractual dispute by making a direct claim to the *subcontractor* for assignment of the work or uses coercion or threats of coercion to enforce its position.

Our view that the contractual dispute between the representative of the employees of the general contractor and the general contractor itself is distinct from the dispute between another union and the subcontractor is supported by the policy considerations underlying both Section 10(k) and the construction industry proviso of Section 8(e). Section 10(k) empowers and directs the Board to hear and determine the dispute out of which has arisen a charge filed under Section 8(b)(4)(D) of the Act. In enacting Section 10(k), Congress created a compulsory method of resolving work stoppages due to jurisdictional disputes and developed a mechanism to "protect employers from being 'the helpless victims of quarrels that do not concern them at all.'" *NLRB v. Radio & T.V. Engineers, Local 1212*, 364 U.S. 573, 580-582 (1961), quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., at 23, 1 Leg. Hist. 314 (LMRA 1947). It is clear that Congress was particularly concerned about protecting an employer who is the target of two competing claims. As the Court noted in *Radio & T.V. Engineers, Local 1212*, 364 U.S. at 582,

in most situations where jurisdictional strikes occur, the employer has contracted with two unions, both of which represent employees capable of doing the particular tasks involved. The result is that the employer has been placed in a situation where he finds it impossible to secure the benefits of stability from either of these contracts, not because he refuses to satisfy the unions, but because the situation is such that he cannot satisfy them.

ply recognizes that the two claims in this case do not conflict, i.e., they are *not* competing claims because they involve two separate disputes. This conclusion flows logically from the Board's holding in *Carpenters Local 33*, supra, a decision that our dissenting colleagues apparently accept.

In *Slattery Associates*, as in the case before us, neither the general contractor, who allegedly breached a lawful union signatory subcontracting clause, nor the subcontractor to whom the work was subcontracted, is an innocent employer caught between the competing claims of two unions.

The policies underlying the construction industry proviso to Section 8(e) provide further support for our interpretation of the term "dispute" as it is used in Section 10(k). Section 8(e) makes it an unfair labor practice for an employer and a union to enter into an agreement whereby the employer agrees to refrain from doing business with any other person. As noted above (fn. 2, supra), however, the construction industry proviso to Section 8(e) exempts from that prohibition agreements between unions and employers in the construction industry relating to contracting or subcontracting of work done at the jobsite. In enacting this proviso, Congress intended affirmatively to preserve the status quo as to the lawfulness of such arrangements in the construction industry.⁵ If we permit Section 10(k) to be used to defeat a collective-bargaining representative's peaceful efforts at enforcing a proviso-protected subcontracting clause through proper arbitral and judicial channels, when that representative has never approached any employer about the work in question other than the one with which it has contracted, and has never engaged in coercion or threats of coercion relating to the work, then we are effectively thwarting the congressional intent underlying the 8(e) construction industry proviso. Under the *Slattery Associates* rule of treating the peaceful pursuit of the subcontracting grievance as a competing claim in a 10(k) dispute, the contracting arrangements that Congress sought to shield from statutory prohibition are too easily subverted by the ability of parties that profit from the breach of the subcontracting provision to initiate 10(k) proceedings. Even if the employer that committed the breach is ultimately unsuccessful in using the 10(k) proceeding as a shield against contractual liability for its breach, the fact remains that the resources of the Board and the parties have been taken up over a dispute that raised none of the concerns that animated Congress in enacting Section 10(k).

Finally, by eliminating this type of case from the coverage of Section 10(k), our decision today will encourage general contractors to abide by lawful signatory clauses in agreements into which they have voluntarily entered. Our 10(k) procedures are available, of course, in the event that a true jurisdictional dispute arises. For example, if a union seeking enforcement of a union signatory clause not only pursues its contractual remedies against the employer with which it has the agreement, but also makes a claim for the work *di-*

⁵ *Waelke & Romero Framing v. NLRB*, supra, 456 U.S. at 657-660.

rectly to the subcontractor that has assigned the work, then we will find truly competing claims; and the use or threat of coercion to enforce a claim by the representative of either group of employees will be sufficient to trigger a 8(b)(4)(D) allegation and consequent 10(k) proceeding. Furthermore, if the union that has been pursuing its contract breach claim against the general contractor fails to confine itself to purely peaceful means, but also communicates an intent to disrupt the assignment of work by coercive means, we will deem this to be a competing claim for the work even if the coercive message was communicated only indirectly to the subcontractor that assigned the work.⁶

Our holding today will effectuate the policies of the Act by recognizing a party's right, and enabling a party to effectively exercise the right, to enforce a lawful union signatory clause in a collective-bargaining agreement, while continuing to provide an avenue for innocent employers, who are subject to competing jurisdictional claims, to obtain relief from the Board through a 10(k) proceeding and award.

ORDER

It is ordered that the notice of hearing issued in this case is quashed.

MEMBERS COHEN AND TRUESDALE, dissenting.

Sections 8(b)(4)(D) and 10(k) are the statutory mechanisms for dealing with jurisdictional disputes. When there is reasonable cause to believe that a union has engaged in 8(b)(4)(D) conduct, the Board seeks to attain two objectives. First, it seeks to stop the conduct, pending a resolution of the dispute. Second, the Board proceeds to hear and resolve the dispute.

As set forth below, there is reasonable cause to believe that all of the elements of a 8(b)(4)(D) violation are present in this case. Notwithstanding this, our colleagues refuse to allow the Board to accomplish the two objectives set forth above. That refusal flies in the face of solid precedent, and our colleagues therefore have to overrule that precedent. We would uphold the precedent, and permit the Board to accomplish its statutory mission.

In brief, the facts are as follows: The general contractor (E&B) is party to an agreement with Operating Engineers. That agreement contains a union-signatory subcontracting clause, i.e., a clause that obligates E&B to subcontract only to employers who have agreements with Operating Engineers. E&B allegedly breached that agreement by subcontracting to Capitol, an employer that has an agreement with Laborers but none with Operating Engineers. Operating Engineers filed a grievance against E&B, protesting the alleged breach, and seeking, inter alia, injunctive relief. The Laborers

threatened Capitol with picketing if the work were taken away from employees represented by Laborers. This 8(b)(4)(D) and 10(k) case followed.

For the reasons set forth in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990), and those set forth here, we would find reasonable cause to believe that there is a violation of Section 8(b)(4)(D). There is a threat uttered by Laborers. There is no evidence that the threat was a sham. An object of the threat was to retain the work assignment to the Laborers.

Our colleagues argue that the Operating Engineers Union has not made a claim for the work. The facts are to the contrary. The Operating Engineers filed a grievance to require E&B to honor their union-signatory subcontracting clause. Thus, the grievance seeks to force E&B to subcontract to an employer with an agreement with Operating Engineers, or to assign the work to its own employees represented by Operating Engineers. In sum, a purpose of the grievance was to obtain the work for Operating Engineers. To say that the Operating Engineers Union was not making a claim is to contradict the evidence and the very meaning of the word "claim." The fact that the claim is made in a grievance does not make it any the less a claim. At the very least, there is reasonable cause to believe that the Operating Engineers Union was making a claim.¹

Indeed, our colleagues concede that a claim would exist if Operating Engineers had addressed the claim to the subcontractor (Capitol). We fail to understand how a claim for the work is somehow not a claim simply because of the identity of the employer to whom the claim is addressed. The language of Section 8(b)(4)(D) ("any employer") is directly contrary to the position of our colleagues. Further, the claim was made to an employer who had the power to take away the work from Laborers and give it to Operating Engineers.

Our colleagues also say that they would reach a different result if Operating Engineers had threatened economic action. They fail to take into account the fact, however, that the Laborers uttered such a threat. The Act proscribes 8(b)(4)(D) conduct by any union. Further, the Laborers' threat was vis-a-vis an employer who is wholly innocent of contract breaches or unlawful conduct.

Our colleagues also assert that there are two disputes, one involving E&B's alleged breach of the union-signatory clause, and the other involving the threat to Capitol. Assuming arguendo that there are

⁶We are therefore not overruling *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 941 fn. 15 (1989).

¹Our colleagues contend that the Operating Engineers' claim did not *compete* with the Laborers' claim. Both claims, however, were directed to the identical work. We therefore view the claims as being in competition with each other. *Carpenters Local 33 (AGC Massachusetts)*, 289 NLRB 1482 (1988), is not to the contrary. That case held only that the grievance there was not coercive conduct.

two disputes, the fact is that one of the disputes is cognizable by Sections 8(b)(4)(D) and 10(k) of the Act. Our approach permits a resolution of both disputes. As to the statutory matter, the 8(b)(4)(D) conduct would be stopped, and the jurisdictional dispute would be resolved. As to the alleged breach of contract, the Oper-

ating Engineers would be free, under extant law, to pursue the damage claim against E&B. See *Carpenters Local 33 (AGC of Massachusetts)*, 289 NLRB 1482.

In sum, we would permit the Board to carry out its statutory mission under Section 8(b)(4)(D). Our colleagues would not. We therefore dissent.