

International Union of Operating Engineers, Local 318, AFL-CIO and Kenneth E. Foeste Masonry, Inc.

Construction and General Laborers' Local 773, Laborers' International Union of North America, AFL-CIO America, AFL-CIO and Kenneth E. Foeste Masonry, Inc. Cases 14-CD-933-1 and 14-CD-933-2

December 12, 1996

DECISION AND DETERMINATION OF
DISPUTE

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HIGGINS

The charges in this Section 10(k) proceeding were filed on June 17, 1996, by the Employer and were amended on June 24, 1996. The charges allege that each of the Respondent Unions 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 the other Respondent Union. The hearing was held on July 18, 1996, before Hearing Officer Leonard J. Perez.

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, Kenneth E. Foeste Masonry, Inc., is a Missouri corporation engaged as a contractor providing nonretail masonry and related construction services from its facility in Cape Girardeau, Missouri. Since it commenced operations at its jobsite at Tamms, Illinois, on May 15, 1996, the Employer has purchased and received goods valued in excess of \$50,000, which were shipped directly to the Tamms construction site from points located outside the State of Illinois. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that International Union of Operating Engineers, Local 318, AFL-CIO (Operating Engineers Local 318) and Construction and General Laborers' Local 773, Laborers' International Union of North America, AFL-CIO (Laborers Local 773) are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer principally acts as a masonry subcontractor in Missouri, Illinois, and Kentucky. Its business began in approximately 1976. The Employer is the masonry subcontractor for all masonry work on the State of Illinois' Closed Maximum Security Correctional Center, Closed Maximum Security Unit, located at Tamms, Illinois. At the time of the hearing, the Employer employed approximately 10 to 12 masons and 6 laborers, or mason tenders, on the Tamms project. Three of the mason tenders were engaged in performing the disputed work, which is the operation of a particular type of forklift, called a lull,¹ to carry materials to the masons and to perform other tasks.

In 1979, the Employer became a member of the Mason Contractors Association of America, Inc. (MCAA) and assigned its collective-bargaining rights to that organization. As a result of that assignment, the Employer has continuously maintained a collective-bargaining relationship with Laborers' International Union of North America, AFL-CIO (LIUNA) through an International Agreement between LIUNA and MCAA. The International Agreement arguably asserts jurisdiction over operation of the lulls on behalf of employees represented by the Laborers.² Article V of the Agreement also provides that:

Any dispute over work jurisdiction not resolved at the jobsite will be referred to the Union and the Association for final resolution. Any decision reached by the parties concerning such a dispute shall be final and binding on the parties to the dispute.

It is expressly understood and agreed by all parties that any agreement or intention expressed in any local union collective bargaining agreement which provides any method for settling jurisdictional disputes that differs from the provisions of this Article V is superseded by the provisions of this Article V and is held to be null and void and of no force and effect.

The Employer is also signatory to a collective-bargaining agreement between the Southern Illinois Builders Association³ and the Southern Illinois Laborers' District Council (SILDC), of which Laborers Local 773 is an affiliated local. The Tamms jobsite is located

¹ We shall use "lulls" and "forklifts" interchangeably.

² Thus, the Agreement states that jurisdiction includes, *inter alia*, tending of masons and "conveying of . . . materials by any mode or method."

³ The Employer is not a member of that Association.

within the territorial jurisdiction of Local 773. The Local Agreement, like the International Agreement, arguably claims jurisdiction over the operation of the lulls for employees represented by Local 773.⁴ On the subject of settling jurisdictional disputes, the Local Agreement states that “[jurisdictional] claims are subject to trade agreements and final decisions of the AFL-CIO Building Trades Department.”

The Employer has never had a collective-bargaining relationship with Operating Engineers Local 318.

The Employer was awarded the subcontract for the Tamms project in 1995. On August 16, 1995, the Employer and the Egyptian Building and Construction Trades Council entered into a Project Agreement that applies to all work performed by the Employer at the Tamms jobsite. SILDC and Local 318 are affiliates of the Egyptian Building and Construction Trades Council, and both executed the Project Agreement. The Project Agreement provides that the Employer will be bound by the terms of the collective-bargaining agreements of the affiliates of the Egyptian Building and Construction Trades Council, which agreements are incorporated in the Agreement by reference. It also provides that all jurisdictional disputes will be settled according to the Plan for Settlement of Jurisdictional Disputes in the Construction Industry, and that the Employer is to assign work according to the Plan. The Agreement further provides that if a dispute cannot be settled by those procedures, any party can refer the dispute to a permanent arbitrator, Charles C. Hines, who will decide the issue. The Project Agreement states that its provisions will prevail over any other contrary agreement between the Employer and “the Union.”⁵

The Employer’s president, Kenneth E. Foeste, testified that on February 16, 1996,⁶ Operating Engineers Local 318 Field Representative Dick Hawk approached him on another jobsite and told him that laborers would not be operating the lulls at the Tamms worksite, and that employees represented by Local 318 would be doing that work. According to Foeste, Hawk also said that the Employer had had damage to forklifts in the past, and that it would probably happen again. Foeste inferred that Hawk was speaking of a 1990 incident in which one of the Employer’s lulls had sustained more than \$30,000 in damage at another jobsite in southern Illinois. Despite Hawk’s statements, the Employer advised Laborers Local 773 in a letter dated May 16 that it was assigning all work involved

in the tending of masons to employees represented by Local 773.

On May 20, Foeste and an employee represented by Local 773 arrived at the Tamms jobsite to deliver the first of the three lulls. In the process, they were confronted by three individuals who asserted that operating the lull was Local 318’s work. Two of those individuals blocked the lull with backhoes, preventing it from moving. The third threatened to leave the site if mason tenders operated the lull. One of the backhoe operators threatened to “get even” with Foeste. There is no evidence that those individuals were agents of Local 318; in fact, a fourth individual (probably the steward) told the other three to get back to work, and they did. The work stoppage lasted about 45 minutes.

Local 318 Business Manager Ron Herring arrived at the site soon afterwards and met with Foeste and Local 773 President Bill Tatum. Herring said that the Project Agreement, which Foeste had signed, provided for operating engineers to operate the lulls and gave Local 318 jurisdiction over all heavy equipment at the site. Foeste replied that the Employer was party to an international agreement granting jurisdiction over the lulls to the laborers. All agreed that the work would continue.

In a letter dated May 23, Local 318 asked Foeste to appear before the Union’s executive board to explain why he had not cleared his employee through Local 318 to work on the Tamms project and why he had used a laborer to operate the lull. By letter dated June 7, Local 318 notified the Employer that it was requesting arbitration of the jurisdictional dispute pursuant to the Project Agreement.

By letter dated June 11, the Employer told Local 318 that it would not attend the executive board meeting and that the Union’s request for arbitration was premature for procedural reasons. On June 17, Tatum informed Foeste by telephone that if Foeste were to take the forklift work from the mason tenders Tatum would pull all the laborers off the Tamms job. Foeste replied that he intended to continue using laborers to operate the lulls.

The Employer received notice from Arbitrator Charles C. Hines that the arbitration would take place on June 19, but it sent no representative to the proceeding. Both of the Respondent Unions submitted evidence supporting their claims to the forklift work. On June 24, Arbitrator Hines issued his decision in which he awarded the work to Operating Engineers Local 318. By letter dated June 26, Local 318 demanded that the Employer comply with the arbitrator’s decision, but the Employer has never done so. Instead, it has continued to assign operation of the lulls to employees represented by Laborers Local 773. There have been no further interruptions of work at the Tamms jobsite.

⁴The Local Agreement provides that laborers’ work shall include “[t]ending and helpers for masons . . . handling and conveying of all material used by masons . . . whether done by hand or any other process[.]”

⁵“The Union” apparently refers to affiliates of the Egyptian Building and Construction Trades Council.

⁶Henceforth, unless otherwise indicated, all dates refer to 1996.

On the date of the 10(k) hearing, Operating Engineers Local 318 filed a motion to quash notice of hearing with supporting exhibits. The motion asks the Board to quash this proceeding on the basis that the Project Agreement sets forth a method for determining the dispute to which all parties have agreed and are bound, and that the arbitrator, pursuant to that procedure, has already determined the dispute by awarding the disputed work to employees represented by Local 318.

B. *Work in Dispute*

The disputed work involves the operation of lulls (forklifts) used by the Employer at the Tamms, Illinois prison construction jobsite.

C. *Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) was violated by both of the Respondent Unions. The Employer cites what it contends was a threat by Operating Engineers Local 318 Representative Hawk that damage similar to that previously suffered by one of the Employer's forklifts at another jobsite would recur if laborers rather than operating engineers operated the lulls on the Tamms project. It also cites the 45-minute work stoppage at the Tamms jobsite when Foeste unloaded the first of the lulls, and the threat by an operating engineer to get even with Foeste for assigning the operation of the lulls to mason tenders. The Employer finally notes the threat by Laborers Local 773 Business Agent Tatum to take all laborers off the Tamms job if the Employer took the mason tenders off the forklifts.

The Employer also contends that there is no determinative method for resolving the dispute voluntarily that has been agreed on by all the parties. It argues that, although the parties are bound by the jurisdictional dispute resolution mechanism set forth in the Project Agreement, it is also bound by the conflicting provisions of the LIUNA/MCAA International Agreement. The Employer also argues that, in any event, it would be improper to defer to the dispute resolution mechanism contained in the Project Agreement because certain procedures required under that agreement were not followed.

The Employer contends that the disputed work should be awarded to employees represented by Laborers Local 773. It bases this argument on the existence of collective-bargaining agreements covering the operation of the lulls, Employer and industry practice, relative skills, economy and efficiency of operations, previous Board awards in similar cases, and the Employer's assignment and preference. The Employer also requests that the Board's award cover not only the

Tamms jobsite, but all of its jobsites within the territorial jurisdiction of Operating Engineers Local 318.

Laborers Local 773 contends that there is reasonable cause to believe that it violated Section 8(b)(4)(D) when Tatum threatened to take all laborers off the Tamms job if the Employer took the mason tenders off the forklifts. It joins the Employer in arguing that there is no determinative agreed-on method for voluntarily resolving the dispute. Local 773 also urges that the disputed work should be awarded to employees whom it represents, on the basis of collective-bargaining agreements, Employer preference and past practice, industry practice, relative skills, and economy and efficiency of operations.

Operating Engineers Local 318 contends that its motion to quash should be granted. It argues that all parties are bound by the jurisdictional dispute resolution mechanism embodied in the project agreement, and that therefore there exists an agreed-on method for voluntarily resolving this dispute, regardless of any asserted procedural defects in the arbitration proceeding. Local 318 does not address any of the other issues presented.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the 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.

1. We find that there is reasonable cause to believe that each of the Respondent Unions has threatened the Employer with an object of forcing it to assign the disputed work to employees it represents rather than to employees represented by the other Union. Thus, Laborers Local 773 admits that its business agent threatened to strike if the Employer took the laborers off the forklifts at the Tamms jobsite.

Operating Engineers Local 318 contended at the hearing that Field Representative Hawk's statements to Kenneth Foeste on February 16 regarding damage to company forklifts in the past are ambiguous and do not provide a reasonable basis for concluding that it engaged in unlawful conduct to secure the work of operating the lulls. In a proceeding under Section 10(k), however, the Board is not charged with finding that a violation did in fact occur, but only with determining that reasonable cause exists for finding such a violation.⁷ We find that, in the context of his entire conversation with Foeste on February 16, Operating Engineers Local 318 Representative Hawk's statements could reasonably be construed as an indirect threat that the Employer's forklifts would be damaged if it as-

⁷ *Bricklayers Local 44 (Corbetta Construction)*, 253 NLRB 131, 133 (1980).

signed the work of operating the lulls to laborers rather than to operating engineers.⁸ We therefore find reasonable cause to believe that both the Laborers and the Operating Engineers violated Section 8(b)(4)(d).

2. We also find that no agreed-on method exists for voluntarily resolving the dispute in a definitive manner. It is true, as the Operating Engineers argue, that the Employer and both Respondent Unions are bound by the terms of the Project Agreement, which provides for the determination of jurisdictional disputes by a permanent arbitrator, and which also provides that the Project Agreement will prevail over contrary provisions of any other agreement between the Employer and "the Union." But, as the Employer and the Laborers argue, the Project Agreement is not the only agreement at issue. The Employer is also bound by the terms of the LIUNA/MCAA International Agreement, which provides that jurisdictional disputes be submitted to LIUNA and MCAA, that their resolution of such disputes is to be final and binding on the parties, and that any contrary provision for settling jurisdictional disputes contained in any local union collective-bargaining agreement is superseded by the International Agreement and is null and void and of no force and effect. Thus, the Employer is bound to two agreements, which provide for conflicting methods of resolving jurisdictional disputes. In such circumstances, the Board has held that no *determinative* agreed-on method exists for resolving the dispute, because the Employer is at risk of being subject to conflicting awards.⁹ The possibility of conflicting awards means that if the Board does not resolve the dispute, it may not be resolved definitively. The purposes of Section

10(k) therefore require the Board to address the merits of the dispute.¹⁰

For the foregoing reasons, we find 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.¹¹ 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

There are no Board certifications that are relevant to the resolution of this dispute.

The Employer is signatory to both the LIUNA/MCAA International Agreement and the local collective-bargaining agreement between the Southern Illinois Builders Association and SILDC, of which Laborers Local 773 is an affiliate. Both agreements arguably claim jurisdiction over the operation of the lulls for employees represented by the Laborers. The Employer has no collective-bargaining agreement with Operating Engineers Local 318. However, by becoming a party to the project agreement, the Employer agreed to be bound by terms of the collective-bargaining agreements of the affiliates of the Egyptian Building and Construction Trades Council, one of which is Local 318. Local 318's collective-bargaining agreement arguably claims jurisdiction over forklift operation for the Operating Engineers. We find that this factor does not favor an award to employees represented by either union.

2. Company preference and past practice

The Employer has assigned the disputed work to employees represented by the Laborers and has ex-

⁸In view of this finding, we need not decide whether the events of May 20 would also give reasonable cause to believe that Sec. 8(b)(4)(D) has been violated.

⁹*Laborers Local 118 (D. H. Johnson Co.)*, 262 NLRB 1147, 1149 (1982), 268 NLRB 1339, 1341 (1984), *enfd.* sub nom. *Operating Engineers Local 150 v. NLRB*, 755 F.2d 78 (7th Cir. 1985); *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 941 (1989). We recognize that neither agreement literally states that its method of resolving jurisdictional disputes is to prevail over every other alternative. The International Agreement provides that its method will supersede that contained in any local union collective-bargaining agreement; whether that language was meant to cover project agreements such as the one here is at least open to question. By the same token, the Project Agreement says that it is to prevail over any other agreement between the Employer and "the Union," which seems to mean affiliates of the Egyptian Building and Construction Trades Council; it is not clear whether that language is meant to apply to the International Agreement. But whether those agreements were intended to supersede all others setting forth a mechanism for resolving jurisdictional disputes, the point is that both could be interpreted in that manner, thus placing the Employer at risk of conflicting awards.

Neither the Employer nor the Laborers contend that the Laborers' local agreement contains a third conflicting method for resolving the dispute. We therefore need not reach that issue, the resolution of which would not affect our decision in any event.

¹⁰*Operating Engineers Local 150 (Austin Co.)*, 296 NLRB at 941. In so finding, we do not rely on any of the alleged procedural irregularities in the arbitration proceeding. In 10(k) cases, the Board looks to the existence, not the substance, of voluntary dispute adjustment methods. *Mine Workers Local 1269 (Ritchie Trucking)*, 241 NLRB 231, 232 (1979).

¹¹Local 318's motion to quash is therefore denied.

pressed a preference that they continue to perform the work.

The Employer has performed numerous masonry subcontracting jobs both in southern Illinois and in other jurisdictions. It has always assigned the work of operating forklifts to employees represented by the Laborers, except for three occasions when it was pressured not to do so under threat of labor strife or loss of the subcontract. We find that both the Employer's preference and its past practice favor an award of the work to employees represented by the Laborers.¹²

3. Area and industry practice

The record reveals a mixed practice as regards masonry contractors' assignment of the work of operating lulls in southern Illinois. Foeste testified that, with the exceptions discussed above, the Employer had always assigned the disputed work in the area to mason tenders. He also testified that he had seen both laborers and operating engineers operating lulls for other mason contractors in Illinois. Herring testified that on all projects that he was aware of in Local 318's jurisdiction (except for the Tamms project), masonry contractors assigned the work to operating engineers. However, he seemingly qualified that testimony later when he stated that he was not familiar with several masonry contractors, and that "When [contractors are] on private [i.e., non-prevailing wage] work, we don't interfere. The only time we interfere is whenever there is prevailing wage jobs." That testimony indicates that the area practice with which Herring is familiar may be limited to prevailing wage jobs, and does not necessarily encompass other kinds of projects.

Concerning industry practice, George Miller, former executive vice president of MCAA and currently a consultant to that organization, testified that the practice of MCAA member contractors is to assign the work of operating forklifts to laborers. Miller also testified, however, that there is no such uniform practice among masonry contractors who are not members of MCAA; in some areas, the work is assigned to laborers and in others, to operating engineers. On this mixed record, we find that area and industry practice is a factor that does not favor an award of the work to either group of employees.

4. Relative skills

The operation of forklifts requires skills possessed by both laborers and operating engineers. Foeste testified that laborers are as qualified as operating engineers to perform this work. We therefore find that this factor does not favor an award of the disputed work to employees represented by either Union.

¹² See *Operating Engineers Local 478 (Delucal/Lombardo)*, 314 NLRB 589, 592 (1994).

5. Economy and efficiency of operations

Although both groups of employees are apparently qualified to operate the lulls, Foeste testified that laborers are familiar with the kinds of materials used on masonry jobs, how to handle them, and where and when they should be used. He also testified that if an operating engineer were running a forklift, a mason tender would usually have to show him which material to use and where to put it. Miller testified that he recommends that MCAA member contractors use mason tenders to operate forklifts because they know the materials, their weights, and the quantities to have ready for the bricklayers to use.

In addition, laborers who operate forklifts on masonry jobs normally will be more fully employed than operating engineers. In this regard, when they are not actually driving the lulls, laborers perform other tasks for the Employer such as mixing mortar and building scaffolding, whereas operating engineers do not perform any of those tasks normally performed by mason tenders. And because operating the lulls does not occupy all of an operator's workday, and the Employer has no other work to assign to operating engineers, the operating engineers would be idle for a portion of each day, while laborers normally would not.¹³ Moreover, the parties stipulated that operating engineers are guaranteed 4 hours' pay if they begin work, and 8 hours' pay if they work more than 4 hours. We find, then, that the Employer would have more operational flexibility and efficiency if laborers rather than operating engineers were assigned the disputed work, and therefore that this factor favors awarding the work to employees represented by the Laborers.¹⁴

6. The arbitrator's determination

Arbitrator Hines awarded the disputed work to employees represented by the Operating Engineers. We find, however, that his award is entitled to little, if any, weight, because he did not consider many of the factors taken into account by the Board in such cases. He stated only that his award was based on the provisions of the "local agreement," presumably meaning the Operating Engineers' collective-bargaining agreement; "custom and practice" (otherwise unspecified); and on a 1990 purported disclaimer of jurisdiction over forklift work by SILDC. The arbitrator did not explain why the Laborers' collective-bargaining agreement or

¹³ The record does not clearly establish what portion of the workday is taken up by forklift operation. Foeste estimated that it would be from 1 to 4 hours, depending on the machine. Herring testified that forklift operation was a full-time job except for mixing mortar, but he did not testify regarding what portion of their workday would be required to mix mortar. Under either witness's account, however, laborers would be employed more efficiently than operating engineers.

¹⁴ *Laborers Local 1359 (Krall's Masonry)*, 281 NLRB 1034, 1037 (1986).

the LIUNA/MCAA International Agreement, both of which were in evidence at the arbitration, were less probative than the Operating Engineers' agreement; what "custom and practice" he was relying on or why it favored the Operating Engineers; or why he relied on a 6-year old disclaimer in the face of more recent clear indications by the Laborers that they were, in fact, claiming the work. As we are unable to understand the basis for the arbitrator's decision or to evaluate his award according to our own standards, we find that it does not favor either group of employees.¹⁵

Conclusions

After considering all the relevant factors, we conclude that employees represented by Laborers Local 773 are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference and past practice and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Local 773, not to that Union or its members.

The Employer has requested that the award cover the operation of forklifts not only at the Tamms jobsite, but at all of its jobsites within Local 318's territorial jurisdiction in southern Illinois. The Employer contends that the work in dispute has been a recurring source of controversy and that similar disputes will arise in the future unless the Board issues a broad award.

The Board limits its awards in 10(k) cases to the jobsite involved unless the dispute is likely to recur and the charged union has shown a proclivity to use proscribed means in an attempt to secure similar disputed work.¹⁶ We find neither of those conditions here. The two unions have had rival claims over the operation of forklifts for several years, but the record reveals only one previous incident in which Local 318

even made an arguably unlawful threat to the Employer.¹⁷ There is no indication that Local 318 has threatened to continue to exert unlawful pressure on the Employer, or that there has been any stoppage of work since the brief incident on May 20.¹⁸ Although the Employer has done a number of jobs in southern Illinois in the past, there is no evidence that it currently has any work in Local 318's jurisdiction besides the Tamms project, or that it has bid on or been awarded any contracts for future projects in that area. We therefore find that a broad award is not warranted in these circumstances, and we limit our determination 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 of Kenneth E. Foeste Masonry, Inc. represented by Construction and General Laborers' Local 773, Laborers' International Union of North America, AFL-CIO are entitled to perform the work of operating lulls (forklifts) at the State of Illinois prison being erected at Tamms, Illinois.

2. International Union of Operating Engineers, Local 318, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Kenneth E. Foeste Masonry, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Operating Engineers Local 318 shall notify the Regional Director for Region 14 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

¹⁷ There is no evidence that the damage to one of the Employer's forklifts in 1990 was caused by Local 318.

¹⁸ By contrast, in *Operating Engineers Local 571 (J.E.D. Construction)*, 237 NLRB 1386, 1391 (1978), cited by the Employer, the charged union had threatened to continue its coercive activity.

¹⁵ *Boilermakers Local 72 (AGC)*, 247 NLRB 73, 75 (1980).

¹⁶ *Iron Workers Local 1 (Fabcon)*, 311 NLRB 87, 93 (1993).