

International Longshoremen's and Warehousemen's Union, Local 8 and Hall-Buck Marine, Inc. and International Brotherhood of Painters and Tapers, District Council 55. Case 36-CD-208

October 9, 1997

DECISION AND DETERMINATION
OF DISPUTE

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

The charge in this Section 10(k) proceeding was filed April 21, 1997, alleging that the Respondent, International Longshoremen's and Warehousemen's Union, Local 8 (Longshoremen Local 8) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Hall-Buck, Inc. (the Employer) to assign certain work to employees it represents rather than using West Coast Marine Cleaning (West Coast Marine) whose employees are represented by International Brotherhood of Painters and Tapers, District Council 55 (Painters District Council 55). The hearing was held July 1, 1997, before Hearing Officer Linda L. Davidson.

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.

I. JURISDICTION

The parties stipulated that the Employer, a Louisiana corporation, is engaged in loading and reloading of materials from ships docked in Portland, Oregon, including Terminals 4 and 5, and that the Employer annually has gross revenues in excess of \$1 million and performs services valued in excess of \$50,000 at its Portland, Oregon facility for firms located directly outside the State of Oregon who are themselves directly engaged in interstate commerce. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Longshoremen Local 8 and Painters District Council 55 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 operates Terminal 4 and Terminal 5 at the port of Portland. The Employer is engaged primarily in unloading material from railroad cars into storage or ships.¹

¹The Employer has operated Terminal 4 since 1988. Operation at Terminal 5, the construction of which was still continuing at the time of the hearing, began in March 1997.

The Employer had agreements with Longshoremen Local 8 between 1988 and 1996. In 1996 the Employer became a member of the Pacific Maritime Association (PMA) and has since negotiated with Longshoremen Local 8 through the PMA.

Employees represented by Longshoremen Local 8 perform the loading work at Terminal 4, including, according to Terminal 4 Manager Brad Clinefelter, cleaning up spills occurring during loading operations. Longshoremen Local 8-represented employees, however, do not do specialty cleaning work and other cleaning work performed when employees represented by Longshoremen Local 8 are not performing loading work. Until 1990 that cleaning work was performed by port of Portland maintenance employees.

In 1990 the port of Portland decided its maintenance employees would no longer perform the cleaning work it had been doing for the Employer at Terminal 4. Thereafter, the Employer used West Coast Marine, whose employees are represented by Painters District Council 55, to perform such cleaning work at Terminal 4.

In 1997, in preparation for starting operations at Terminal 5, the Employer and Longshoremen Local 8 could not agree on how loading operations would be manned. As a result, the matter was arbitrated. The arbitrator agreed with the Employer's proposed manning level.

At about the same time, bids were solicited from companies interested in providing security services at Terminal 5. Although an entity affiliated with ILWU submitted a bid, the work was awarded to a security firm whose employees were not represented by the ILWU.

When the Employer commenced operations at Terminal 5, employees represented by Longshoremen Local 8 performed cleaning work before arrival of the first shift several times on a trial basis. Eventually, however, the Employer decided to use West Coast Marine whose employees are represented by Painters District Council 55 to perform this work.

On April 9, 1997, employees represented by Longshoremen Local 8 began what arbitrators found to be a slowdown in processing railroad cars at Terminal 4. A few days later the Employer's northwest Regional Manager Kevin Jones and Longshoremen Local 8's Vice President Will Luch had a conversation.

According to Jones, Luch was upset about the Employer's manning of Terminal 5, the use of a non-ILWU employer to provide security services at Terminal 5, and about the cleaning issue at both terminals. Jones testified that Luch told him that if the manning, security, and cleaning issues could be resolved, the productivity problem would be corrected. In his testimony at the hearing, Luch admitted he stated that cleanup issues were an area of concern. However, he

denied “mention[ing] anything related to cleanup at Terminal 5” and “anything specific about cleanup [at] Terminal 4” during this conversation.

B. *Work in Dispute*

The notice of 10(k) hearing defines the disputed work as “The cleaning and clean-up work at Terminal 4 and Terminal 5.” The Employer and Longshoremen Local 8 were unable to agree that this description was accurate.

The Employer argues that the notice’s description is accurate. It is clear, however, from the record and its brief that the Employer concedes the work in dispute does not include routine cleaning work that is incidental to loading work performed by Longshoremen Local 8-represented employees. Longshoremen Local 8 argues that the description should be limited to work at Terminal 4 that was formerly performed by employees of the port of Portland. However, there is evidence—specifically, based on Jones’ testimony described above—that the dispute encompasses work at Terminal 5.

Accordingly, we find that the disputed work involves the cleaning and clean-up work at Terminal 4 and Terminal 5 at the port of Portland in Portland, Oregon, except routine cleaning work that is incidental to loading work performed by employees represented by Longshoremen Local 8.

C. *Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that employees of West Coast Marine who are represented by Painters District Council 55 should be awarded the disputed work. Longshoremen Local 8 contends that the 10(k) notice should be quashed because there is no reasonable cause to believe the Act has been violated. Alternatively, Longshoremen Local 8 contends that the disputed work should be awarded to employees it represents. Neither West Coast Marine nor Painters District Council 55 were formally represented at the hearing.

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 established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that a party has used proscribed means to enforce its claim and that there are competing claims to the disputed work.

As explained above, the Employer is using West Coast Marine whose employees are represented by Painters District Council 55 to perform the disputed work. The Employer’s testimony and documentary evi-

dence in the form of arbitration decisions indicate that beginning April 9, 1997, employees represented by Longshoremen Local 8 commenced a slowdown causing economic loss. As noted above, the Employer also presented testimony that Longshoremen Local 8 suggested to the Employer the slowdown would cease if the disputed work was assigned to employees it represents.² Thus, we find that there is reasonable cause to believe that Longshoremen Local 8 engaged in an economic slowdown to force the Employer to assign the disputed work to employees it represents rather than use West Coast Marine employees to perform the work.

The Employer and Longshoremen Local 8 agree that there is no method for voluntary adjustment of the work dispute which would bind all the parties.

Based on the above, 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. Board certifications

In 1938 the Board certified International Longshoremen’s and Warehousemen’s Union to represent a multiemployer unit of all employees engaged in “longshore work in the Pacific Coast ports of the United States” for the employer-members of associations which were the predecessors of PMA. As noted above, the Employer is a member of the PMA. Longshoremen Local 8, relying on this certification, contends that this factor favors an award of the disputed work to employees it represents.

The Board has previously noted that this certification predates many developments in the shipping in-

²Longshoremen Local 8 disputes the accuracy of Jones’ testimony about what Luch said during their conversation. Longshoremen Local 8 also contends that the evidence fails to prove there was a slowdown. Alternatively, Longshoremen Local 8 contends that the slowdown occurred because employees were adhering to maritime safety requirements.

Sec. 10(k) does not require the Board to find that a violation of the Act occurred, but only that there is reasonable cause to believe a violation occurred. A conflict in testimony does not prevent the Board from proceeding with a determination of the 10(k) dispute. *Laborers Local 334 (C. H. Heist Corp.)*, 175 NLRB 608, 609 (1969).

dustry. See *Longshoremen ILWU Local 19 (West Coast Container Service)*, 266 NLRB 193, 196 (1983), and cases cited therein. As in *West Coast Container Service*, with respect to the cleaning work at dispute in this case, we find the certification for “longshore work” is vague and of relatively minor significance. Accordingly, we find that, although this certification favors an award of the disputed work to employees represented by Longshoremen Local 8, it is a factor entitled to relatively little weight.

2. Collective-bargaining agreements

Longshoremen Local 8 introduced an agreement with the Employer effective from 1993 through June 30, 1996. It contends that this agreement is still in effect and argues that language in the agreement covers the work in dispute. The Employer, however, introduced evidence showing that it timely terminated the 1993 agreement and that it now negotiates through the PMA. Because of the conflict in the evidence, we cannot find that the agreement on which Longshoremen Local 8 relies was in effect at the time of the dispute in this case.

Although other contracts were alluded to during the hearing, neither the Employer nor Longshoremen Local 8 argues that those contracts cover the work in dispute.

Accordingly, we find that this factor favors neither group of employees.

3. Employer preference

The Employer prefers that the work in dispute be done by West Coast Marine whose employees are represented by Painters District Council 55. This factor favors awarding the work in dispute to West Coast Marine employees represented by Painters District Council 55.

4. Employer past practice

We find that the record supports the Employer’s claim that its practice has been to use West Coast Marine whose employees are represented by Painters District Council 55 to perform the disputed work. This factor favors awarding the work in dispute to West Coast Marine employees represented by Painters District Council 55.

5. Area and industry practice

Regarding area practice, there is evidence that employees represented by both unions perform work similar to the disputed work. Accordingly, we find that the factor of area practice is inconclusive.

Although Longshoremen Local 8 relies on the factor of industry practice as supporting an award to the employees it represents, the testimony it presented at the hearing relates primarily to the practice of other employers on the West Coast and does not extend to the

practice throughout the industry. We find that there is insufficient evidence in the record to determine if there is a prevailing industry practice with respect to work similar to the disputed work. Accordingly, we conclude that the factor of industry practice is also inconclusive.

6. Relative skills

There is insufficient evidence to determine whether employees represented by Longshoremen Local 8 or West Coast Marine employees represented by Painters District Council 55 are better qualified to perform the disputed work. Accordingly, we find that this factor is neutral.

7. Economy and efficiency of operations

West Coast Marine provides its employees with a vacuum truck to perform the disputed work, while the Employer would need to purchase such equipment if the disputed work were assigned to employees represented by Longshoremen Local 8. Thus, it is clearly more economical for the Employer to utilize West Coast Marine employees to perform the disputed work.

Accordingly, we find that this factor favors awarding the work in dispute to West Coast Marine employees represented by Painters District Council 55.

Conclusions

After considering all the relevant factors, we conclude that employees of West Coast Marine Cleaning represented by Painters District Council 55 are entitled to perform the work in dispute. We reach this conclusion relying on employer preference, past practice, and economy and efficiency of operations, which we find outweigh the factor of Board certifications. In making this determination, we are awarding the work to employees of West Coast Marine Cleaning represented by Painters District Council 55, 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 of West Coast Marine Cleaning represented by International Brotherhood of Painters and Tapers, District Council 55 are entitled to perform the cleaning and clean-up work at Terminal 4 and Terminal 5 at the port of Portland in Portland, Oregon, except the routine cleaning work that is incidental to loading work performed by employees represented by International Longshoremen’s and Warehousemen’s Union, Local 8.

2. International Longshoremen’s and Warehousemen’s Union, Local 8 is not entitled by means prescribed by Section 8(b)(4)(D) of the Act to force Hall-

Buck, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this decision, International Longshoremen's and Warehousemen's Union, Local 8 shall notify the Regional Director 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 the determination here.