

**International Union of Operating Engineers, Locals 17, 17A, 17B, 17RA, AFL-CIO and Arby Construction, Inc. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO.** Cases 3-CD-630-2 and 3-CD-630-4

September 26, 1997

DECISION AND DETERMINATION OF  
DISPUTE

BY CHAIRMAN GOULD AND MEMBERS FOX AND  
HIGGINS

The charges in this Section 10(k) proceeding were both filed on February 28, 1997, in Case 3-CD-630-2 by Arby Construction, Inc. (Arby) and in Case 3-CD-630-4 by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (UA). They alleged that the Respondent, International Union of Operating Engineers, Locals 17, 17A, 17B, 17RA, AFL-CIO (Operating Engineers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with the object of forcing Arby to assign certain work to employees represented by Operating Engineers rather than to employees represented by UA Plumbers and Pipefitters Local 36 (Plumbers Local 36). A hearing was held on March 18-20, before Hearing Officer Marjorie J. Murray. Arby and UA filed briefs.

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 Employer (Arby), is a Wisconsin corporation engaged in the installation of underground utilities. In the 12 months preceding the hearing, it purchased goods in New York valued in excess of \$50,000 which were shipped directly to it from points outside the State of New York. We find that Arby is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Further, the parties have stipulated, and we find, that Operating Engineers, UA, and Plumbers Local 36 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Arby is engaged in the business of installing underground facilities including natural gas service lines. Early in 1997,<sup>1</sup> Arby entered into a 3-year "blanket"

contract with National Fuel Gas Company (NFG) to service and repair existing natural gas pipelines and to perform new underground utility pipeline construction work in the western New York State area around Buffalo. About 80 percent of the contract work involves renewal work, i.e., the repair or replacement of gas mains and service pipelines and repositioning of gas meters to building exteriors. The remainder of the work involves the installation of gas distribution pipelines to new buildings. The NFG contract work, generally performed by two-man crews, includes the occasional operation of mechanized excavation equipment.

Arby hired four members of Plumbers Local 36 to perform work under the NFG contract. On about February 27, Arby signed a New York State Addendum to the UA National Distribution collective-bargaining agreement that Arby had already signed. On March 5, pursuant to a card check, Arby voluntarily recognized Plumbers Local 36 as the collective-bargaining representative of "all full-time and part-time employees performing gas distribution work of any nature or kind for Arby pursuant to the terms and conditions of the New York Addendum."

Beginning on February 25, Operating Engineers engaged in numerous acts of protest against Arby at the Employer's yard and jobsites. According to the uncontradicted testimony of Arby Vice President Michael Klumb: (1) On February 25, 40 to 50 individuals, including Operating Engineers Local 17 organizer Chris Hollfelder, picketed Arby's office in Tonawanda with signs stating that "Persons employed by Arby Construction to do Operating Engineers work on this project are not represented by Local 17 AFL-CIO." Klumb related incidents of vandalism and violence associated with the picketers. (2) Operating Engineers also followed Arby crews to various jobsites, displayed their picket signs, made statements including comments that Arby's backhoes were "our [Operating Engineer's] machines," and engaged in further acts of harassment, threats, and violence against Arby employees. (3) On February 27, Operating Engineers President Thomas Hopkins told Klumb that Arby's "problems could go away in minutes that all you have to do is sign." (4) On that same date, after Klumb told International Operating Engineers Representative Joe Giason about Arby's adherence to its contract with UA and Plumbers Local 36, Giason said, "You mean to tell me that the UA is going to be running my machines?"

Operating Engineers continued to picket Arby's operations after the unfair labor practice charges were filed in this case. On March 10, the Board's Regional Office filed a petition with the United States District Court for the Western District of New York for an injunction under Section 10(l). On March 18, Operating Engineers executed a voluntary stipulation that it

<sup>1</sup> All dates are in 1997 unless otherwise indicated.

would cease picketing against Arby at its Tonawanda office, or at any jobsite under the NFG contract for 30 days, and thereafter would engage only in informational picketing. The following day the United States District Court for the Western District of New York approved the stipulation.

#### B. *The Work in Dispute*

The dispute concerns the assignment of the following work:

Any work that Local 17, International Union of Operating Engineers claims falls within its craft jurisdiction or the craft jurisdiction of the International Union of Operating Engineers, which Arby Construction, Inc. is performing and/or will be performing pursuant to its blanket contract with National Fuel Gas and which Arby has assigned to its employees who are represented by Plumbers Local No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

#### C. *Contentions of the Parties*

Arby, UA, and Plumbers Local 36 contend that a jurisdictional work dispute exists within the meaning of Section 10(k) of the Act, that there is reasonable cause to believe that Operating Engineers has violated Section 8(b)(4)(D) of the Act, that no voluntary means for resolving the dispute exists, and that the Board should award the work in dispute to employees represented by Plumbers Local 36 based on the factors of Arby's collective-bargaining relationship with Plumbers Local 36 and UA, employer preference and past practice, and efficiency and economy of operations.

Operating Engineers contends that no jurisdictional dispute exists because its sole objective in the events at issue was to gain Arby's recognition of Operating Engineers as the collective-bargaining representative of the current employees who perform the NFG contract work. It further contends that there is a voluntary means for resolving any jurisdictional dispute that may exist.

#### D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k), it must be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary settlement of the dispute.

As set forth above, the uncontradicted testimony of Arby Vice President Klumb establishes that Operating Engineers engaged in mass picketing, with attendant acts of harassment, threats, and violence at Arby's office site in Tonawanda, New York, and at various

NFG jobsites, that pickets carried signs stating that Arby was using employees not represented by Operating Engineers "to do Operating Engineers work," that some pickets spoke of "our machines," and that Operating Engineers Representative Giason similarly referred to the UA "running my machines."

We find that the record evidence, especially Klumb's testimony, establishes that there are competing claims (between groups of employees represented by Plumbers Local 36 and by Operating Engineers) to the work in dispute and that Operating Engineers has engaged in coercive conduct to force reassignment of this work, in violation of Section 8(b)(4)(D) of the Act.<sup>2</sup>

Operating Engineers also contends that a voluntary means of resolving any jurisdictional disputes exists under a dispute resolution process set forth in the National Distribution Pipeline Agreement. As a member of the Distribution Contractors Association (DCA), Arby is bound to this agreement, as are UA and the International Union of Operating Engineers. The Pipeline Agreement provides a voluntary means of resolving jurisdictional disputes. Operating Engineers Local 17, however, is expressly excluded as a party to the agreement and is therefore not privy to the dispute resolution procedure. Furthermore, even if it were, UA Special Representative Phil Stephenson provided uncontradicted testimony that the dispute procedure is not available when one of the local unions to the dispute does not have a contract with the employer in control of the work or when a local is engaged in picketing and coercive conduct. Operating Engineers would be disqualified on both counts from recourse to the contractual dispute resolution procedure. We therefore find that there exists no agreed-on method of voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. 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).

<sup>2</sup> It is well established that picketing falls within the scope of Sec. 8(b)(4)(D) so long as one object is to coerce an employer to assign work to employees represented by a particular union rather than to assign employees represented by another union. See, e.g., *Teamsters Local 50 (Schnabel Foundation)*, 295 NLRB 68, 70 (1989). Thus, it is irrelevant whether another object of the picketing might have been, as Operating Engineers maintains, to secure Arby's recognition of Operating Engineers as representative of Arby's employees.

The following factors are relevant in making a determination of the dispute.

#### 1. Collective-bargaining agreements

As previously stated, Arby is signatory to the National Distribution Pipeline Agreement with UA and to the New York State Addendum with Plumbers Local 36 and UA. These contracts expressly cover all gas distribution work performed by Arby employees under the NFG contract, including the operation of mechanized equipment, the performance of fitting work, the relighting of the appliances, and the hookups after the gas had been shut off.

The Respondent, Operating Engineers Locals, do not have a collective-bargaining agreement with Arby. We find that the factor of collective-bargaining agreements favors an award to employees represented by Plumbers Local 36.

#### 2. Employer preference and past practice

Testimony established that it was Arby's preference to assign its own employees who are represented by Plumbers Local 36 to perform all aspects of the work in question. Arby Vice President Klumb testified that these employees had completed 50 to 60 renewals under the NFG contract and have "demonstrated they can give me the help I need." We find that this factor favors an award to employees represented by Plumbers Local 36.

#### 3. Area and industry practice

Evidence regarding area and industry practice is mixed. Employees represented by various unions, including Plumbers Local 36, the International Brotherhood of Electrical Workers, the Oil, Chemical and Atomic Workers International Union, and Operating Engineers have been used by various employers to perform all phases of gas distribution work. We therefore find that this factor does not favor either group of employees.

#### 4. Economy and efficiency of operations

Klumb testified that it is more economical to have the work performed by employees represented by Plumbers Local 36 because Arby can obtain all of its employees from the same source. Additionally, an average gas renewal job under the National Fuel contract

takes 4 hours, of which only 20 to 30 minutes requires the operation of mechanized equipment. Klumb further testified that Operating Engineers insisted on a guaranteed 40-hour workweek. The use of Operating Engineers would result in having to use an unnecessary additional full-time employee on the work crew. We find that the factor of economy and efficiency favors the award of the work in dispute to employees represented by Plumbers Local 36.

#### Conclusions

After considering all the relevant factors, we conclude that employees represented by Plumbers Local 36 are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Plumbers Local 36, not to the union or its members.

#### DETERMINATION OF DISPUTE

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

1. Employees of Arby Construction, Inc., who are represented by Local No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, are entitled to perform the gas pipe installation and repair work which Arby is performing and/or will be performing pursuant to its blanket contract with National Fuel Gas.

2. Operating Engineers Locals 17, 17A, 17B, 17RA of the International Union of Operating Engineers, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Arby Construction, Inc., to assign the disputed work to employees represented by it.

3. Within 10 days from the date of this decision, Operating Engineers Locals 17, 17A, 17B, 17RA of the International Union of Operating Engineers, AFL-CIO, shall notify the Regional Director for Region 3 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 consistent with the determination.