

**Bakery, Confectionery, Tobacco and Grain Millers International Union, Local 334, AFL-CIO and Interstate Brands Corporation and Teamsters Union Local 340, a/w International Brotherhood of Teamsters, AFL-CIO.** Case 1-CD-1017

August 17, 2001

DECISION AND DETERMINATION OF DISPUTE  
BY CHAIRMAN HURTGEN AND MEMBERS  
TRUESDALE AND WALSH

The charge in this Section 10(k) proceeding was filed January 31, 2001, by Interstate Brands Corporation (Interstate or the Employer), alleging that the Respondent, Bakery, Confectionery, Tobacco and Grain Millers International Union, Local 334, AFL-CIO (BCT Local 334), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer not to reassign certain work from employees represented by BCT Local 334 to employees represented by Teamsters Union Local 340, affiliated with International Brotherhood of Teamsters, AFL-CIO (Teamsters Local 340). The hearing was held on March 14 and 15, 2001, before Hearing Officer Gene Switzer.

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 Delaware corporation engaged in the operation of a bakery in Biddeford, Maine. During the 12 months preceding the hearing, it purchased and received goods valued in excess of \$50,000 that were shipped directly from points located outside the State of Maine. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find, based on the stipulation of the parties, that BCT Local 334 and Teamsters Local 340 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

*A. Background and Facts of Dispute*

In the late 1990s, the Employer purchased J.J. Nissen Baking Company (Nissen), which operated a bakery in Portland, Maine. At the time, Nissen had begun building a new bakery in Biddeford, Maine, to replace the Portland facility. After the purchase, the Employer completed the Biddeford plant, transferred the Portland employees to Biddeford, and closed the Portland bakery. When the Employer acquired Nissen, it also adopted a

collective-bargaining agreement terminating May 4, 2002, with BCT Local 334 (the BCT contract). Although the BCT contract originally covered a unit of production employees at the old Portland bakery, the Employer and BCT Local 334 continued to apply the BCT contract at the new Biddeford facility.

The BCT contract refers to the position of "Yardman-Shipper." Yardmen-shippers performed the yard work at Portland and perform the yard work at Biddeford. Yard work involves backing empty trailers up to the loading dock, pulling loaded trailers away from it, and otherwise moving trailers around the yard as necessary. After the yardman-shipper moves a loaded trailer away from the dock to the "staging area" or "the line," an over-the-road transport driver hooks it up and hauls it away. Transport drivers operating out of the Biddeford facility are represented by Teamsters Local 340. When not needed for yard work, the yardmen-shippers do shipping work inside the plant, which involves readying goods for loading as indicated on the applicable shipping documents, and then helping to load the goods onto trailers. Unlike the employees represented by BCT Local 334, Biddeford's Teamsters-represented employees do not perform any inside work.

During the transition from Portland to Biddeford, Teamsters-represented employees were occasionally asked to move a trailer within the Biddeford yard. BCT Local 334 filed a grievance protesting this practice in July 1999. In response, Biddeford's human resources manager, Richard Morgano,<sup>1</sup> undertook on the Employer's behalf to "discontinue this practice" and to "take further steps to avoid reoccurrence." No Teamsters-represented employee has ever been regularly assigned to perform yard work at Biddeford.

At roughly the same time that the Employer was moving its Portland operation to Biddeford, it was also closing down another bakery, this one located in Natick, Massachusetts. While Natick was still operational, its tractor-trailer transport drivers were represented by Teamsters Local 494. The collective-bargaining agreement between Interstate and Local 494 (the Local 494 contract) contained the following yard-work provision: "The Company agrees to continue its practice of having a minimum of three (3) tractor trailer drivers available for yard work." Consistent with this provision, Local 494-represented transport drivers did the yard work at Natick. When Natick closed, some of its transport drivers transferred to Biddeford; but there is no evidence that

<sup>1</sup> The Employer has moved to correct the misspelling, throughout the transcript, of the name of Richard Morgano, the human resources manager at Biddeford. We grant the Employer's motion.

any Natick production, or Natick production employees, likewise moved to the Biddeford facility.

In 2000, the Employer engaged in negotiations for a collective-bargaining agreement with the New England Bakery Drivers Council (NEBDC), which comprises a number of Teamsters locals. Teamsters Local 340 is a member of the NEBDC, so an Interstate-NEBDC agreement would cover the transport drivers operating out of Biddeford. The negotiators used the Local 494 contract as a model. Although there was no discussion of yardmen or yard work during negotiations, the above-quoted provision from the Local 494 contract assigning yard work to Teamsters-represented employees found its way into a draft Interstate-NEBDC agreement. Truman Holman, Interstate's senior manager of labor relations, sent a copy of the draft agreement to Human Resources Manager Morgano for review. Morgano told Holman that the yard-work provision needed to be removed from the draft because yard work at Biddeford is not performed by Teamsters-represented workers. The NEBDC membership ratified the draft agreement in late September 2000, but the Employer has never executed it.

On November 2, 2000, Teamsters Local 340 presented the Employer with a grievance asserting that the Employer was failing to honor the "contract" because it had not assigned three Local 340-represented transport drivers to perform yard work at Biddeford pursuant to the yard-work provision in the Interstate-NEBDC draft agreement.<sup>2</sup> On December 6, 2000, Local 340 demanded arbitration of this grievance. On January 12, 2001, BCT International Vice President Arthur Montminy wrote as follows to the general manager of the Biddeford plant:

It has come to my attention that your company is considering the assigning of hostler yardwork, currently being done in Biddeford by [BCT] Local #334 members, to workers represented by the IBT. I also understand that you are considering the IBT demand of arbitration in order to resolve this dispute.

At this time I must inform you that if these jobs are assigned to workers represented by the Teamsters, or if

<sup>2</sup> During the hearing, William Turkewitz, the representative of Teamsters Local 340, took the position that a collective-bargaining agreement is in place between Local 340 and the Employer, and that the yard-work provision from the Local 494 contract constitutes part of that agreement. Leonard Singer, the Employer's representative, consistently disagreed with Turkewitz' position concerning the yard-work provision. On p. 141 of the transcript, a statement advocating Turkewitz' position is attributed to Singer. The Employer moves to correct this apparent misattribution; Teamsters Local 340 does not oppose the motion. Accordingly, we grant the Employer's motion to substitute "Mr. Turkewitz" for "Mr. Singer" at p. 141, L. 9 of the transcript.

the company agrees to arbitrate this case with the IBT, the [BCT] Local #334 members who are your employees in Biddeford will engage in strike action against your company.

The Employer continued to assign yard work at Biddeford to employees represented by BCT Local 334.

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

By stipulation of the parties, the work in dispute is yard work performed at the Employer's facility located in Biddeford, Maine. "Yard work" involves using a type of tractor known as a "yard tractor" or "yard horse" to back empty trailers up to the loading dock, to pull loaded trailers away from the dock, and otherwise to move trailers around the yard area as necessary.

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

The Employer contends that BCT Local 334's threat to "engage in strike action" if the Employer either assigns the Biddeford yard work to Teamsters-represented employees or agrees to arbitrate the assignment of that work with Teamsters Local 340 creates reasonable cause to believe that Section 8(b)(4)(D) has been violated. The Employer further contends that all the factors relevant to determining the assignment of the disputed work favor assigning it to employees represented by BCT Local 334. BCT Local 334 contends that the relevant factors are all either neutral or favor assigning the work to employees it represents.

At the outset of the hearing, Teamsters Local 340 joined in stipulating that both itself and BCT Local 334 claim the work in dispute. In its opening statement, however, Local 340 asserted that the Board should "quash this hearing" because Local 340 was not claiming the disputed work after all. In response to questioning by the hearing officer, Local 340 explained that it *was* claiming yard work at Biddeford, but it was not seeking to have any yard work taken away from employees represented by BCT Local 334.<sup>3</sup> In its posthearing brief, Teamsters Local 340 now contends that no Section 10(k) dispute exists here because "the Teamsters have not at this time made a claim for the three (3) yard jobs." Accordingly, Local 340 advances no reasons why the work in dispute should be assigned to employees it represents.

<sup>3</sup> In its brief, the Employer characterizes Local 340's demand to be assigned three yard-work positions over and above the positions currently filled by BCT-represented yardmen-shippers as amounting to the contention that the Employer ought to be required to assign Teamsters-represented employees to perform yard work even if there is nothing for them to do.

#### D. Applicability of the Statute

Before the Board may proceed to determine a dispute under Section 10(k) of the Act, it must be satisfied that (1) there are competing claims to the work, (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and (3) the parties have not agreed on a method for the voluntary adjustment of their dispute.

Contrary to what Teamsters Local 340 now contends, there are competing claims to the work in dispute. Local 340 asserted a claim to the work when it filed a grievance over, and demanded arbitration of, the Employer's failure to assign three Teamsters-represented employees to do yard work at Biddeford. Moreover, Teamsters Local 340 stipulated at the hearing that it claimed the work in dispute. A union may, of course, disclaim its interest in previously disputed work; but "a disclaimer eliminating the existence of a jurisdictional dispute must be clear, unequivocal, and unqualified and disclaim all interest in the work in dispute." *Machinists Local 724 (ATSL, Inc.)*, 317 NLRB 781, 782 (1995). In Local 340's opening statement at the hearing, it purported to disclaim the disputed work by stating that although it still claimed the yard work at Biddeford it was not seeking to have yard work taken from employees that BCT Local 334 represents. This statement is self-contradictory because the yard work performed by BCT Local 334 members and the Biddeford yard work are one and the same given that BCT Local 334 members perform all of the Biddeford yard work. Thus, the statement does not represent a clear, unequivocal and unqualified disclaimer of all interest in the Biddeford yard work. So also, Local 340's purported disclaimer in its posthearing brief—that it is not "at this time" claiming any yard jobs—is ineffective because it is not unqualified and does not disclaim all interest in the disputed work.

We find that BCT Local 334's letter of January 12, 2001, constituted a threat of strike action if the disputed work were reassigned to Teamsters-represented workers. Thus, reasonable cause exists to believe that a violation of Section 8(b)(4)(D) has occurred. The parties have stipulated, and we find, that there is no agreed-upon method for voluntary adjustment of the dispute. Accordingly, we find that this jurisdictional 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, 1410–1411 (1962). The following factors are relevant in making the determination of this dispute.

##### 1. Certifications and collective-bargaining agreements

No evidence was introduced that either Union has been certified to represent employees performing the disputed work. As indicated, the Employer adopted the collective-bargaining agreement between BCT Local 334 and Nissen, the Employer's predecessor, covering production employees at the Portland bakery; and the Employer and BCT Local 334 continued to apply the BCT contract after the Portland employees transferred to the new Biddeford facility. The BCT contract refers to the job classification "Yardman-Shipper," and there is no dispute that the "Yardman" part of this classification designates one who performs yard work. Thus, we find that the BCT contract encompasses the work in dispute.

The draft agreement between the Employer and the NEBDC, of which Teamsters Local 340 is a member, also refers to yard work. The evidence demonstrates, however, that the negotiators of the draft agreement used the Local 494 contract formerly in place at the Employer's Natick facility as a model, that the Local 494 contract contained a yard-work provision assigning Natick's yard work to Teamsters-represented employees, that Biddeford's human resources manager immediately recognized that the yard-work provision would have to be removed before the Employer could execute the draft agreement, and that the Employer has never signed off on the draft agreement. Moreover, Teamsters Local 340 admits in its posthearing brief that the Employer and the NEBDC have yet to reach a meeting of minds on at least 14 separate issues. Accordingly, we find that there is no collective-bargaining agreement between the Employer and Teamsters Local 340 that encompasses the work in dispute. Based on the foregoing, we conclude that the collective-bargaining agreement factor favors awarding the disputed work to employees represented by BCT Local 334.

##### 2. Employer preference and assignment

The Employer prefers to assign, and has assigned, the yard work at Biddeford to employees represented by BCT Local 334. Although employees represented by Teamsters Local 340 have been asked on rare occasions to move trucks within the yard, Teamsters-represented employees have never been assigned to do yard work at Biddeford. The Employer prefers to assign the disputed work to BCT-represented yardmen-shippers because they are available to work inside the bakery when there is no

yard work to do. Teamsters Local 340, on the other hand, expressly disclaims any interest in performing inside work. Accordingly, we find that the factor of employer preference and assignment favors awarding the disputed work to employees represented by BCT Local 334.

### 3. Employer past practice

According to BCT International Vice President Arthur Montminy, with the exception of Biddeford and the now-closed Portland bakery, Interstate assigns the yard work at its other New England facilities and elsewhere to Teamsters-represented employees. At Biddeford, Interstate has assigned BCT-represented yardmen-shippers to perform the yard work, following the continuous practice of its predecessor, Nissen, at Portland since 1952.<sup>4</sup> Based on the practice at Biddeford and Portland, Interstate contends that the factor of the Employer's past practice favors assigning the disputed work to BCT-represented workers. We disagree. Although the past practice at Portland and Biddeford is significant, the Employer's practice at other facilities—particularly those located in the same area as the site of the disputed work<sup>5</sup>—is also relevant. Because the past practice at Biddeford, although well established, does not fit the pattern of the Employer's practice elsewhere in New England, we find that the Employer's past practice is mixed and does not favor employees represented by either Union.

### 4. Area and industry practice

Again according to Montminy, BCT-represented employees perform yard work at "many" non-Interstate facilities throughout New England. Further questioning revealed, however, that out of several hundred such facilities, BCT-represented employees do the yard work at roughly 50, and Teamsters-represented employees perform the yard work at the rest. Because a considerable majority of area facilities assign yard work to Teamsters-represented employees, we find that the factor of area and industry practice favors awarding the disputed work to employees represented by Teamsters Local 340.

<sup>4</sup> An employer's past practice encompasses the relevant past practice of the employer's predecessor, see *Machinists Local 1363 (Consolidated Freightways)*, 223 NLRB 1074 (1976), and past practice at a particular facility includes the past practice at that facility's predecessor, *Teamsters Local 470 (Philco-Ford Corp.)*, 203 NLRB 592, 594-595 (1973). Thus, Interstate's past practice at Biddeford includes Nissen's past practice at Biddeford's predecessor facility, the Portland bakery.

<sup>5</sup> See, e.g., *Teamsters Local 578 (Rockwell International)*, 226 NLRB 657, 659 (1976); *Carpenters Local 1026 (McKinney Drilling Co.)*, 264 NLRB 261, 264 (1982).

### 5. Relative skills

Operating a "yard tractor" at the Biddeford plant requires a Maine CDL driver's license, which BCT Local 334 yardmen-shippers and Teamsters Local 340 transport drivers alike possess. Evidence was introduced at the hearing that the shipping work performed by yardmen-shippers requires training that Biddeford's Teamsters-represented employees lack. This evidence is irrelevant: the work in dispute is limited to just the "yard work" part of what yardmen-shippers do. We find that the relative skills factor does not favor employees represented by either Union.

### 6. Economy and efficiency of operations

Yard work is not necessarily a full-time job at the Biddeford plant, particularly during the evening and night shifts. When there is no yard work to be done, the yardmen-shippers load trucks and perform a number of other necessary tasks. Of the five yardmen-shippers currently employed at Biddeford, one devotes an average of 20 hours per week, and a second an average of 15 hours per week, to tasks other than yard work. Teamsters Local 340 expressly disclaims any interest in doing these non-yard work tasks, and the record contains no evidence that Teamsters-represented employees assigned to yard work at Biddeford would have other useful work to perform when there is no yard work to be done.<sup>6</sup> Thus, we find that having yardmen-shippers perform Biddeford's yard work makes for a more efficient use of manpower, and accordingly we further find that the factor of economy and efficiency of operations favors awarding the disputed work to employees represented by BCT Local 334.

### Conclusion

After considering all the relevant factors, we conclude that employees represented by BCT Local 334 are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement between the Employer and BCT Local 334, the Employer's preference and assignment, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by BCT Local 334, 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:

<sup>6</sup> Indeed, according to the testimony of a former Natick manager, the Teamsters-represented workers who were assigned to yard work at that facility had no work to do at least half the time.

Employees of Interstate Brands Corporation, Kansas City, Missouri, represented by Bakery, Confectionery, Tobacco and Grain Millers International Union, Local

334, AFL-CIO are entitled to perform the yard work at the Employer's facility located in Biddeford, Maine.