Laborers International Union of North America, Local No. 1184, AFL–CIO *and* Golden State Boring & Pipejacking, Inc. and International Union of Operating Engineers, Local Union No. 12, AFL–CIO. Case 21–CD–638

December 20, 2001

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

The charge in this Section 10(k) proceeding was filed on December 11, 2000, by Golden State Boring & Pipejacking, Inc. (Golden State or the Employer), alleging that the Respondent, Laborers International Union of North America, Local No. 1184, AFL–CIO (Laborers), 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 International Union of Operating Engineers, Local Union No. 12, AFL–CIO (Operating Engineers). The hearing was held on June 4 and 6, 2001, before Hearing Officer Liz Valtierra.

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, a California corporation with its principal place of business located in Ontario, California, is engaged in the business of underground pipeline subcontracting. Within the 12 months preceding the hearing, which is a representative period, the Employer has purchased and received goods and materials valued in excess of $50,000 directly from suppliers located in the State of California, which suppliers, in turn, purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of California. We accordingly find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find, based upon the stipulation of the parties, that Laborers and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer is a subcontractor in the underground pipeline industry. Its projects require the use of a directional drilling machine, which is used in areas that cannot be opened up for drilling due to environmental or traffic reasons. The directional drilling machine drills an underground pilot stem from one point to another, pipe is pulled through the opening, and fiber optic cable is installed beneath the ground. The use of the directional drilling machine requires three individuals: one to operate the machine; one to make changes to the steering of the locator; and a third to perform supporting labor work such as mixing fluids for the drill stem.

The Employer bid on and was awarded a project known as "Level 3" from general contractor Kiewit for the installation of a fiber optic distribution system. The Employer conducted the project as a subcontractor to R.V. Directional, who in turn was a subcontractor to Kiewit. The project was located in an area extending from a point about 50 miles east of San Diego, California, to Yuma, Arizona. The Employer commenced this project about November 2000, and completed it about March 2001.

Upon the Employer's commencement of the project, R.V. Directional Project Coordinator Greg West suggested to the Employer's president, Jeff Johnson, that the Employer use employees represented by Laborers to operate the directional drilling machine, because other employers on the Level 3 project were using Laborers-represented employees for that work. West suggested that Johnson speak with Laborers' business manager, John Smith. Smith advised Johnson that general contractor Kiewit had agreed that Kiewit would not be involved in any way in the assignment by subcontractors of the directional drilling and related work, and that subcontractors such as Golden State were free to assign such work to employees represented by Laborers. Thereafter, Golden State exclusively assigned the directional drilling work on the Level 3 project to employees represented by Laborers.

About December 4, 2000, Operating Engineers visited the Level 3 jobsite and asked the Employer why it was using Laborers-represented employees to operate the directional drilling machine. The Employer responded that Laborers were claiming control over the directional drilling work. Operating Engineers responded that they had control over that trade, and were going to file a grievance against the Employer for not using Operating Engineers-represented employees on the drilling machines. Operating Engineers' business representative, Richard Pinnell, testified that he filed a grievance against Golden State for assigning directional drilling work on the Level 3 project to an employee who was not represented by Operating Engineers.

Thereafter, Laborers sent a letter to the Employer dated December 4, 2000. The letter stated:

> It has come to our attention that you are performing directional drilling and related work on the Level 3 project in Southern California, and specifically in San Diego County at this time. We also understand that you have assigned this work to Laborers; but that the Operating Engineers Union may have threatened action against your company unless you reassign this work to Operating Engineers.
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> We demand that you maintain assignment of directional drilling and related work to Laborers. If you reassign this work to the Operating Engineers, or any other craft, this Local Union will take immediate action, including economic action and withholding of labor, to ensure the proper assignment of work to Laborers.

B. The Work in Dispute

The work in dispute concerns the assignment of the following work: operation of the directional drilling machine, which includes the operator, locator, and labor work performed in connection with the Level 3 (Kiewit) project in San Diego County, California.

C. Contentions of the Parties

1. Operating Engineers

Operating Engineers argue that the notice of 10(k) hearing should be quashed because there is an agreed-upon method for the adjustment of this dispute: the AFL–CIO Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Plan). Operating Engineers assert that all three parties to the dispute—the Employer, Laborers, and Operating Engineers—are stipulated to participation in the Plan. Operating Engineers explain that the plan administrator declined to decide this dispute solely because at the time of submission to the Plan the work in dispute had been completed. Operating Engineers' reason that if the dispute recurs in the future, it will be subject to resolution by the Plan. Operating Engineers further argue that there is not reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated, because the threat to picket by the Laborers "was not a real threat at all, but rather just a sham to permit the Employer to seek the Board's assistance" under Section 10(k) of the Act.

If the Board should decide that the dispute is properly before the Board for determination, Operating Engineers contend that the work in dispute should be awarded to employees represented by Operating Engineers based on the factors of Employer past practice, area practice, and skills. Operating Engineers also contend that the jurisdictional award should be limited to the work in dispute, which is the completed San Diego County portion of the Level 3 project.[1]

2. Employer and Laborers

The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated based on the letter sent by Laborers to the Employer threatening economic action and the withholding of labor if the work in dispute is assigned to employees represented by Operating Engineers. Laborers argue that even if all three parties had agreed to make use of the Plan, the Plan in fact declined to process the dispute, and accordingly the Plan's procedures have failed to provide a method for resolving the instant dispute.

The Employer and Laborers argue that the work in dispute should be awarded to Laborers-represented employees based on the following factors: the Employer's collective-bargaining agreement with Laborers, the Employer's preference and past practice, the skills of employees represented by Laborers, and the economy and efficiency of the Employer's operations. Laborers additionally argue that, because it is likely that the instant dispute will recur, a broad award covering the Level 3 project at all future jobsites is appropriate.

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) of the Act has been violated. It requires a finding that there is reasonable cause to believe that a party has used proscribed means to enforce its claim to the work in dispute, that there are competing claims to the disputed work between rival groups of employees, and that no method for the voluntary adjustment of the dispute has been agreed on.

These jurisdictional prerequisites have been met in this case. Both Laborers and Operating Engineers claim the work in dispute.[2] Further, Laborers threatened the Employer that it would take immediate action, including economic action and the withholding of labor, if the directional drilling and related work was reassigned to Operating Engineers. We accordingly find reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated.[3]

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[1] We deny Operating Engineers' request that the Board take administrative notice of its position statement, dated Dec. 18, 2000, submitted to the Board's Regional Office. Operating Engineers failed to enter that document into evidence at the hearing.

[2] Operating Engineers' disclaimer of interest in the work in dispute, made only after the work had been completed, is ineffective. See, e.g., *Laborers Local 910 (Brockway Glass Co.)*, 226 NLRB 142, 143 (1976).

[3] There is no record evidence to support Operating Engineers' contention that the threat of unlawful activity was a sham.

Operating Engineers contend, as set forth above, that there is an agreed-upon method to adjust the dispute: that all parties in this proceeding are bound to submit the instant dispute to the Plan. Operating Engineers acknowledge, however, that the plan administrator refused to decide the dispute because the work had been completed. Thus, assuming arguendo that the parties are bound to participation in the Plan, the refusal of the plan administrator to act is not an affirmative determination of the merits of the dispute, but rather precludes the Plan from being an available agreed-upon method for voluntary resolution of the dispute.[4] We consequently conclude that we may appropriately proceed to determine this dispute.[5]

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); *Asplundh Construction Corp.*, 318 NLRB 633 (1995).

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

1. Certifications and collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute.

The Employer and Laborers are parties to a collective-bargaining agreement, entitled Laborers' Master Horizontal Directional Drilling Agreement, effective from July 1, 2000, to June 30, 2003. Article III of that agreement, entitled Coverage and Description, provides at paragraph E:

> E. This Agreement shall apply to and cover all horizontal directional drilling and related work performed on jobsites or projects as part of the drilling operation by the Contractor or the subcontractor of the Contractor, which includes but [is] not limited to:
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> 1. All work in connection with horizontal directional drilling crews, mucker, operation of electronic tracking device (locator), drilling crew foreman and leadman, operation of horizontal directional drills without regard to motive [sic] power, size of drill bit, or self-contained nature of the machine, carrier unit driver, bentonite material handler, ground drilling hand driver controller for loading and unloading the horizontal directional drill rig, pipe service installer, pneumatic tool operator including suction pump, oiler, pipe luber, backhoe, recycler, vac truck, suction truck, water truck and any other similar services.

We find, based on the above-quoted provision, that the work in dispute is explicitly covered by the Employer's collective-bargaining agreement with Laborers.

The Employer and Operating Engineers are parties to a collective-bargaining agreement effective from June 16, 1998, to June 15, 2001, which continues in effect from year to year thereafter unless contrary written notice is given to the other party.[6] Article I, paragraph B of that agreement, entitled Coverage, provides at subparagraph 2:

> 2. This agreement shall cover and apply to all work falling within the recognized jurisdiction of the Union.
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> a. It shall cover work on building, heavy highway and engineering construction . . . the assembly, operation, maintenance and repair of all equipment, vehicles and other facilities . . . including without limitation the following types of classes of work.
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> b. Street and highway work . . . electric transmission line and conduit projects . . . .

Operating Engineers additionally point out that Appendix A to their agreement, entitled Wages—Classifications, contains the classification "Drilling Machine Operator[.]"

"In interpreting collective-bargaining agreements, the specific is favored over the general." *Steelworkers Local 392 (BP Minerals)*, 293 NLRB 913, 914–915 (1989). Here, the Laborers' contract specifically refers to the disputed directional drilling work and related work, while the Operating Engineers' contract is worded in more general terms. The factor of collective-bargaining agreements accordingly favors an award of the disputed work to employees represented by Laborers.

2. Employer preference and current assignment

The Employer currently has assigned the disputed work to employees represented by Laborers, and prefers that the work in dispute continue to be performed by em-

[4] See *Iron Workers Local 383 (J.P. Cullen & Son)*, 235 NLRB 463, 465 (1978); *Sheet Metal Workers Local 418 (Young Plumbing & Supply)*, 224 NLRB 993, 996 (1976).

[5] We thus deny as moot the joint motion of Laborers and Golden State to reopen the record to accept a posthearing letter relating to Operating Engineers' withdrawal of claim from the Plan.

[6] The record does not show that such notice has been given.

ployees represented by Laborers. Accordingly, this factor favors awarding the work in dispute to the employees represented by Laborers.

3. Employer's past practice

The record shows that, on projects previous to the Level 3 project, the Employer assigned the directional drilling and related labor work to a composite crew composed of employees represented by Laborers and employees represented by Operating Engineers. The Employer further assigned the directional drilling and related labor work to such composite crews in the initial phase of the Level 3 project. For the remainder of the Level 3 project, however, the Employer assigned the directional drilling and related labor work exclusively to employees represented by Laborers. Because the Employer's past practice shows assignment of the directional drilling and related labor work to both Laborers-represented employees and Operating Engineers-represented employees, we find that this factor does not favor awarding the work in dispute to employees represented by either Union.

4. Area practice

Operating Engineers presented evidence of numerous dispatches from their hiring hall of employees they represent to operate directional drilling machines for various employers in San Diego County, California. Laborers likewise presented evidence showing that numerous Laborers-represented employees have performed directional drilling and related work on Level 3 jobsites in San Diego County, California. Laborers further assert that the Employer's key competitors and many other area contractors are moving toward assigning all directional drilling work to employees represented by Laborers. Laborers acknowledge, however, that "the record evidence fails to establish a consistent current areawide assignment pattern[.]" In light of the evidence that directional drilling work in the relevant area has been assigned to both Laborers-represented employees and Operating Engineers-represented employees, we find that the factor of area practice does not favor awarding the work in dispute to employees represented by either Union.[7]

5. Relative skills

Laborers acknowledge that the "record contains no evidence that either employees represented by Local 12 [Operating Engineers] or employees represented by Laborers have any materially greater ability to perform the work in question safely." Operating Engineers acknowledge that both employees that it represents and employees represented by Laborers have performed directional drilling work, and argue that there is no evidence that any employees represented by Operating Engineers have failed to perform the work satisfactorily. We accordingly find that this factor does not favor an award of the disputed work to employees represented by either Union.

6. Economy and efficiency of operations

Laborers argue that it is necessary for employees to move from function to function throughout the workday performing a variety of tasks, including operation of the directional drilling machine, operation of the locator, and related labor work. Laborers argue that employees it represents are more versatile in moving from task to task, particularly the related labor work, and therefore it is more efficient and economical to assign the work in dispute to Laborers-represented employees. However, Kurt Glass, the district representative for Operating Engineers, testified that employees it represents are permitted to likewise perform multiple tasks on the jobsite, and that Operating Engineers has no objection to that procedure. We accordingly find that the factor of economy and efficiency of operations does not favor an award of the disputed work to either group of employees.

Conclusions

After considering all the relevant factors, we conclude that Golden State's employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, Employer preference, and current assignment.

In making this determination, we are awarding the disputed work to employees represented by Laborers International Union of North America, Local No. 1184, AFL–CIO, not to that Union or to its members.

Scope of the Award

Laborers request that the Board issue a broad award to employees represented by it covering all future jobsites on the Level 3 project. The Board customarily declines to grant a broad or areawide award in cases in which the *charged party* represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See *Pipefitters Local 562 (Systemaire, Inc.)*, 321 NLRB 428, 431 (1996); *Laborers Local 243 (A. Amorello & Sons)*, 314 NLRB 501, 503 (1994). Accordingly, we shall limit the present determination to the particular controversy that gave rise to this proceeding.

[7] The evidence presented at the hearing focused on the factor of area practice. Insufficient evidence was adduced to establish a general practice in the industry.

DETERMINATION OF DISPUTE

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

Employees of Golden State Boring & Pipejacking, Inc., represented by Laborers International Union of North America, Local No. 1184, AFL–CIO, are entitled to perform the operation of the directional drilling machine, which includes the operator, locator, and labor work performed in connection with the Level 3 (Kiewit) project in San Diego County, California.