

International Union of Operating Engineers, Local 150 and International Union of Elevator Constructors, Local 2 and United Drilling, Inc. Case 13-CD-623

June 6, 2002

DECISION AND DETERMINATION
OF DISPUTE

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND COWEN

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. The charge was filed on August 3, 2001 by United Drilling, Inc. (the Employer). The charge alleges that the Respondent, International Union of Operating Engineers, Local 150 (the Operating Engineers), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by the Operating Engineers rather than to employees represented by the International Union of Elevator Constructors, Local 2 (the Elevator Constructors). The hearing was held on August 20, 2001, before Hearing Officer Vivian Robles.

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, a corporation headquartered in Philadelphia, Pennsylvania, is engaged in the drilling of holes for the installation of hydraulic elevators on construction projects throughout the East Coast. It annually ships goods, valued in excess of \$50,000, to places outside of Pennsylvania. 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 and that the Operating Engineers and the Elevator Constructors are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts*

Marriott Hotel is building a hotel on a parcel of land in Hoffman Estates, Illinois. The general contractor on the project, Winegardner and Hammonds, hired Otis Elevator to build a hydraulic elevator on the construction site. Because a hydraulic elevator runs on hydraulic lift, its installation involves the use of a massive drill rig to dig a hole in the ground approximately 70-feet deep and 24 inches in diameter that accommodates the hydraulic piston. Otis Elevator subcontracted the drilling work to the Employer.

On the morning of July 31, 2001, while two of the Employer's employees were engaged in setting up the drill rig, they were approached by Operating Engineers' business representative, Bob Darling, who asked to see their union cards. Both were members of the International Union of Elevator Constructors.¹ Darling informed the workers that "the Operating Engineers has . . . jurisdiction on this [drilling] work in the Chicago metropolitan area."

Later that morning, Darling met with the Winegardner and Hammonds jobsite superintendent, Jim Johnston, to discuss the assignment of the drilling work. At that meeting, Darling notified Johnston that unless the Elevator Constructors ceased drilling, he would post a notification to the public that a "non-signatory contractor utilizing heavy equipment" was on the job and was performing the work with two men rather than three, contrary to "area standards."² Johnston responded by contacting Otis Elevator's business representative, Jeff Sullivan, who confirmed that Otis Elevator had a contract with the Employer to perform the drilling. Darling then informed the Operating Engineers workers at the site of the dispute and gave them the option of walking off the job.

The next morning, Darling met with Elevator Constructors' business representative, John Sena, the Employer's regional manager, David O'Brien, Otis Elevator's construction superintendent, Sullivan, and Winegardner and Hammonds' jobsite superintendent, Johnston, to discuss the work dispute. Darling stated again that the drilling work belonged to the Operating Engineers. In the meantime, the Operating Engineers members on the jobsite had decided not to start work. Johnston requested that the Elevator Constructors cease drilling, and Sena consented. Sena stated, however, that "[i]f the hole gets drilled [by the Operating Engineers], an elevator ain't going in . . . because [the Elevator Constructors] is not going to put the elevator in." Two days after this meeting, the Employer filed this 8(b)(4)(D) charge against the Operating Engineers with Region 13 of the National Labor Relations Board.

B. *Work in Dispute*

The disputed work involves the drilling of the cylinder well for a hydraulic elevator at the Marriott Hotel jobsite in Hoffman Estates, Illinois.

¹ Neither of the workers who were setting up the drill was, in fact, a member of Local 2, the party-in-interest here. One of the two presented Darling with his union card, identifying him as a member of the International Union of Elevator Constructors, Local 84.

² In his hearing testimony, Darling explains that by "non-signatory" he means that the Employer was not signed on to the Illinois Building Agreement with the Operating Engineers and Districts 1, 2, and 3 as were the principal elevator constructor companies in the Chicago area.

C. Contentions of the Parties

The Employer has not submitted a brief in this case. However, at the hearing, the Employer's midwest regional manager, O'Brien, who is in charge of the field operations at the Marriott Hotel site, described the work dispute as concerning "the Elevator Constructors . . . work, meaning my men, our work, the Elevator Constructors' work." In describing the August 1 meeting, O'Brien testified that "I said it was the Elevator Constructors' work . . . [and Darling] basically told us if the rig wasn't torn down and off the jobsite by 7:00 a.m. . . . the Operating Engineers would walk off the site." O'Brien further stated that, subsequent to this meeting, the Elevator Constructors "did not leave the jobsite" and "were there for approximately two weeks."

In its brief, the Elevator Constructors asserts the existence of a dispute and states, in conclusory fashion, that the Employer's assignment, industry practice, and considerations of economy and efficiency favor an award of work to the Elevator Constructors.

In its brief, the Operating Engineers contends that the Board cannot engage in a 10(k) "award of work" analysis because the charging party has failed to make the preliminary showing that there is "reasonable cause" to believe a 8(b)(4)(D) violation has occurred, and the parties have an agreed-upon method of voluntary adjustment available to them. Alternatively, the Operating Engineers contends that it should be awarded the work assignment, because (1) the Operating Engineers' Building Agreement with local Builders' Associations entitles it to perform all heavy-equipment work for Cook, DuPage, Grundy, Kane, Kankakee, Kendall, Lake, McHenry, and Will Counties in Illinois, (2) area practice is to use "a crew consisting of one [Operating Engineers] Class 1 operator, one [Operating Engineers] oiler, and one [Elevator Constructors] member to dig holes on elevator projects," (3) employer preference has "no bearing on this case," and (4) the Operating Engineers' superior skills and training justify an award of the work in its favor as the most economical and efficient outcome of the dispute.

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 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.

We find that there is reasonable cause to believe that by failing to start work on August 1 the Operating Engineers members at the work site, acting at Darling's urg-

ing, were attempting to force the Employer to reassign the drilling of the hydraulic cylinder well to members of the Operating Engineers. The day before, as Darling testified, he warned the Winegardner and Hammonds superintendent that "[he] had a non-signatory contractor utilizing our heavy equipment . . . and there could be a notification set up in front of the jobsite as a result of that." Darling also testified that he told "two representatives from [the Elevator Constructors] that came to the project and made the claim that their Elevator Constructors were going to proceed with the work . . . okay, fine if you want to take [the Operating Engineers'] work, then you . . . might as well claim all the work." Darling further testified that he notified the Operating Engineers on site of the dispute and "left it up to [them] . . . whether or not they wanted to work with . . . a non-signatory contractor."

The Board has stated that "[v]ague or guarded threats which are broad enough to encompass the possibility of illegal secondary action are unlawful where the words used are given meaning and colored by subsequent unlawful conduct attributable to the respondent." *Laborers Local 1030 (Exxon Chemical)*, 308 NLRB 706, 708 (1992) (finding reasonable cause to believe Section 8(b)(4)(D) had been violated where union representative's statement to employer that "there would be problems" was followed immediately by allegedly informational picket). We find that the events of August 1 make clear that Darling's statements on July 31 constituted a veiled threat to stop work because the drilling work had been assigned to the Elevator Constructors. Darling testified that when he met with representatives from the Employer, Otis Elevator, Winegardner and Hammonds, and the Elevator Constructors on August 1 to discuss the work dispute, "all [of the Operating Engineers' workers] decided not to start up their equipment that morning." Winegardner and Hammonds' superintendent, Johnston, then requested that the Elevator Constructors stop drilling, and the Elevator Constructors' business representative consented to do so. Each of the meeting participants testified that he understood this situation as an Operating Engineers work stoppage.

We also find that there is no agreed-upon method for voluntary adjustment of the dispute. The Operating Engineers contends that, as AFL-CIO Building and Construction Trades Department affiliates, it and the Elevator Constructors are bound by the voluntary adjustment mechanism established by the "Plan for the Settlement of Jurisdictional Disputes in the Construction Industry Including Procedural Rules and Regulations" (hereinafter "the Plan"), and that Otis Elevator has also adopted "the Plan" under the terms of its agreement with the Elevator

Constructors. However, no party contends, nor does the record indicate, that the Employer agreed to be bound by this voluntary adjustment mechanism.³

Because we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k), we conclude 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 Local 112 (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 to the determination of this dispute:

1. Certifications and collective-bargaining agreements

There is no Board certification of either union covering the work in dispute. In addition, although the Elevator Constructors' brief states that "the assignment was made to the IUEC-represented employees" and Otis Elevator Construction Superintendent Sullivan stated that the Employer was "signatory with the Elevator Constructors," there is no contract between the Employer and either of the unions in evidence.⁴

³ For this reason, the only case cited by the Operating Engineers, *Heavy Construction Laborers Local 60 (Mergentime Corp.)*, 305 NLRB 762, 763 (1991), is inapposite. There, the Board held that "the Plan" provided a voluntary adjustment mechanism because all parties, including the Employer, had conceded that they were bound by it. Here, the fact that Otis Elevator has agreed in its contract with the Elevator Constructors to be bound by "the Plan" may give rise to a contract claim by the Operating Engineers, as a third-party beneficiary, against Otis Elevator. However, it does not alter the fact that the Employer has not agreed to be bound by "the Plan."

⁴ The only contracts supplied by the parties are the collective-bargaining agreement between Otis Elevator and the Elevator Constructors and a "Building Agreement" between the Operating Engineers and several local and regional Builders' Associations. The contract between Otis Elevator and the Elevator Constructors clearly covers the drilling work at issue, although it also anticipates that such work may be subcontracted out to non-Elevator Constructors workers under certain conditions. The Operating Engineers' Building Agreement assigns to the Operating Engineers all heavy-equipment work for Cook, DuPage, Grundy, Kane, Kankakee, Kendall, Lake, McHenry, and Will Counties in Illinois.

The Operating Engineers contends that Otis Elevator violated the Building Agreement by subcontracting the drilling work to the Employer, who, in turn, assigned the work entirely to the Elevator Constructors. Because there is no evidence to indicate that either Otis Elevator or the Employer is signatory to the Building Agreement or a

Accordingly, we find that this factor does not favor awarding the work to workers represented by either union.

2. Employer assignment, preference, and past practice

It is clear from the record and, in particular, from the testimony of the Employer's regional manager, O'Brien, that the Employer assigned the disputed work to the Elevator Constructors. Moreover, with regard to past practice, the Employer's regional manager, O'Brien, testified that the Employer drills "probably over 220 [holes] a month" along the East Coast and employs exclusively Elevator Constructors to perform this work.

With regard to employer preference, we disagree with the Operating Engineers' contention that, because the Employer failed to expressly state a preference, "the employer preference factor has no bearing in this case." The Board has so found where an employer expressly stated that it did not have a preference. *Sign Painters Local 756 (Heritage Display)*, 306 NLRB 818, 820 (1992) (finding no "clear-cut" preference where employer testified in case brought by displaced union that it "does not really have [a] preference"). However, the Employer here has made no such statement. Further, we find that the Employer's preference to assign the work to the Elevator Constructors may be inferred from: (1) the Employer's assignment and past practice described above; (2) the Employer's refusal to reassign the work to the Operating Engineers after Darling's threat;⁵ and (3) the testimony of Otis Elevator representative Sullivan that his employer had been dissatisfied with hydraulic wells drilled by the Operating Engineers on prior projects.⁶

Accordingly, we find that the Employer's assignment, preference, and past practice favor awarding the work to workers represented by the Elevator Constructors.

3. Area and industry practice

Neither party disputes that the practice for the Chicago metropolitan area is for heavy-equipment drilling work to be done by the Operating Engineers, with an Elevator Constructors member on site to oversee the work. Hence, area practice is to employ a mixed group.

member of any of the signing Building Associations, however, the Operating Engineers' argument is unavailing. Moreover, the Employer's assignment is consistent with the contract between Otis Elevator and the Elevator Constructors.

⁵ Compare *Sign Painters Local 756 (Heritage Display)*, 306 NLRB 818, 820 (1992), in which the employer's assignment was contrary to past practice and the employer abandoned its original assignment within 1 hour of objection by the challenging union.

⁶ See *Laborers Local 1030 (Exxon Chemical)*, 308 NLRB 706, 709 (1992), in which the Board relied on the contractor's as well as the subcontractor's preference in a 10(k) analysis.

Industry practice is more difficult to ascertain on the record before us. Neither party presents any evidence beyond its own practice. *See Electrical Workers IBEW Local 103 (Sylvania Lighting)*, 301 NLRB 213, 215 (1991) (evidence that an employer employs a particular union for all jobs does not establish an industry practice).

Because area practice favors a mixed group and industry practice does not clearly favor one union over the other on this record, we find that this factor does not favor workers represented by either union.

4. Relative skills and training

Both the Operating Engineers and the Elevator Constructors appear to have the necessary skills and training to perform the disputed work. Darling testified that Operating Engineers members go through a 4-year training program and a 6000-hour apprenticeship, including heavy-equipment field training and safety instruction. In addition, the Operating Engineers performs most of the drilling work in the Chicago metropolitan area. As described above, however, Otis Elevator Construction Superintendent Sullivan testified that he had been dissatisfied with the precision and depth of holes drilled by the Operating Engineers on past projects.

Aside from the work in dispute, the record does not indicate that the Elevator Constructors has any experience drilling holes in the Chicago metropolitan area. However, based on O'Brien's testimony described above, it appears to have extensive experience drilling holes for elevator installation throughout the East Coast. Moreover, Sullivan testified that he had encountered no problems in working with the Elevator Constructors on similar projects.

Accordingly, we find that this factor does not favor workers represented by either union.

5. Economy and efficiency of operations

The record evidence with regard to economy and efficiency is sparse. However, because the Elevator Constructors performs the work in dispute with only two

workers rather than three, as required by the Operating Engineers, we conclude that this factor favors the Elevator Constructors. *See Electrical Workers IBEW Local 1220 (CBS Inc.)*, 303 NLRB 559, 561 (1991) (finding that economy and efficiency favored union that could use only one worker rather than two to perform all of the disputed work).

CONCLUSIONS

After considering all the relevant factors, we conclude that employees represented by the Elevator Constructors are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, past practice and assignment, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by the Elevator Constructors, 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 United Drilling represented by the International Union of Elevator Constructors, Local 2, are entitled to perform the drilling of the cylinder well for a hydraulic elevator at the Marriott Hotel construction site in Hoffman Estates, Illinois.

2. The International Union of Operating Engineers, Local 150, is not entitled by means proscribed by Section 8(b)(4)(D) to force United Drilling to assign the disputed work to employees represented by it.

3. Within 14 days from this date, Local 150 shall notify the Regional Director from Region 13 in writing whether it will refrain from forcing United Drilling by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.