

**International Union of Operating Engineers, Local 542, AFL–CIO and Caldwell Tanks, Inc. and International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO.** Cases 4–CD–1085 and 4–CD–1089

November 15, 2002

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

This is a work jurisdiction dispute proceeding under Section 10(k) of the Act. A charge was first filed on April 25, 2002,<sup>1</sup> by Caldwell Tanks, Inc. (Caldwell or the Employer). The charge alleged that beginning about April 24, the Respondent, International Union of Operating Engineers, Local 542, AFL–CIO (Local 542), 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 individuals Local 542 represents rather than to employees represented by the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO (Boilermakers). A second charge was filed by the Employer on May 30, alleging that the Respondent had engaged in the same proscribed activity about May 30. The cases were consolidated on June 7, and on June 26, a hearing was held before Hearing Officer Kimberly B. Nerenberg.

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 Kentucky corporation, with offices in Louisville, Kentucky, and an auxiliary production facility in Newnan, Georgia, designs, manufactures, assembles, and installs water tanks throughout the United States and Canada. Within the 12 months preceding the hearing, which is a representative period, the Employer has performed services directly for customers outside the State of Kentucky valued in excess of \$50,000. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find, based upon the stipulation of the parties, that Local 542 and the Boilermakers are labor organizations within the meaning of Section 2(5) of the Act.

<sup>1</sup> All dates are in 2002.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Caldwell’s president, Bernard Fineman, testified that at its Louisville and Newnan design and manufacturing facilities, Caldwell employs approximately 200 employees, about 130 of whom are production employees. Caldwell also employs about 150 field tank employees who assemble and install water tanks at the location where the tanks are used. At the time of the dispute, all Caldwell field tank employees who assembled and installed water tanks were represented by the Boilermakers, pursuant to the “National Transient Lodge” collective-bargaining agreement between the Boilermakers and Caldwell.

Assembly and installation of an elevated water tank typically requires a crew of six Caldwell employees. Two employees of a crew, usually the most experienced, have the necessary certifications and are assigned to operate the heavy equipment, including a rough terrain picker (which is a small crane that moves the tank components around the site), an electric generator, welding equipment, a three drum hoist, and a construction derrick.

On the tank erection project at issue, for the Milford Township Water Authority in Spinnerstown, Pennsylvania, the two crew members certified to operate the heavy equipment were employees Roy Davis and Donnie Barker, who were represented by the Boilermakers. Early on April 24, Local 542’s organizer, Frank Bankard, and seven or eight other individuals picketed and blocked access to the project site. According to Davis and Barker, who witnessed the picketing, Bankard and the other picketers repeatedly shouted at Caldwell employees not to take the picketers’ work and jobs. The picketers’ signs, however, accused Caldwell of violating area standards.

Later on April 24, Fineman called Bankard to determine the reason for the pickets. Bankard told Fineman that the picketing was “for area standards,” but refused to elaborate further when Fineman asked what Bankard meant. Instead, Bankard stated that he wanted Caldwell to hire a member of Local 542 to operate the hoist, the rough terrain picker, the welding machines, and/or the generator. Bankard also wanted Caldwell to sign the Local 542 “tank agreement,” which set forth the manning requirements for operation of heavy equipment in Local 542’s jurisdiction and required that employees perform

ing the work be represented by Local 542. The agreement would bind the parties for a year to 18 months. Fineman responded that he had a collective-bargaining agreement with the Boilermakers, that he had a right to assign heavy equipment work to employees represented by the Boilermakers, and that Local 542's picketing was for an improper jurisdictional purpose. Fineman added, however, that to get his employees back to work, he would consider hiring one operating engineer and signing a "project agreement," but would not sign the longer "tank agreement."<sup>2</sup> Bankard replied that if Caldwell would only agree to a "project agreement," Caldwell would have to hire two operating engineers to perform the heavy equipment work. Fineman replied that he would not do that.

On April 25, Bankard and others continued picketing and blocking access to the Caldwell project. Fineman called Charles Priscopo, assistant business manager of Local 542. Priscopo gave Fineman three options to end the picketing, all of which required that Caldwell immediately employ one or more members of Local 542 to operate the heavy equipment and at some time enter into the "tank agreement." Fineman would not agree to any of the three options. Later on April 25, Caldwell filed the first unfair labor practice charge in this case.

On May 3, the Regional Director filed a petition for an injunction against Local 542 in Federal district court, pursuant to Section 10(l) of the Act. On May 9, the district court approved an order in which Local 542 stipulated that it would refrain from jurisdictional picketing of Caldwell, without admitting that it had done so, pending the Board's resolution of the unfair labor practice charge. About that time, the picketing at the worksite ceased. On May 13, counsel for Local 542 sent a letter to Caldwell disclaiming any interest in the heavy equipment work.

On May 29, Caldwell received a letter on Local 542 letterhead dated May 28 and signed by Bankard. The letter set forth area standards for crew size and wage rates in the operation of a construction derrick, stated that Local 542 had reason to believe that Caldwell was in violation of these standards, and stated that if Caldwell did not respond within 24 hours or comply with these standards, Local 542 would publicize this information through picketing.

The next day, May 30, Bankard and other individuals picketed at the Caldwell project. According to Davis and Barker, Bankard and other picketers attempted to block

access to the site as they had during the April picketing. In addition, Bankard acted as if his foot had been run over by Barker's automobile and lay down in its path. Other picketers broke Barker's automobile mirror and spit in the face of another employee. Further, as in the April picketing, the picketers' signs claimed that Caldwell was violating area standards, but Bankard and the other picketers repeatedly shouted at the Caldwell employees not to take the picketers' work and jobs.

Later on May 30, Fineman telephoned Bankard about the picketing, but Bankard would not discuss it and referred Fineman to the attorney for Local 542. The picketing continued at least 2 more days.

On June 4, the district judge issued an Order to Show Cause why an injunction should not issue against Local 542. On June 10, Local 542 entered into a Consent Decree agreeing not to engage in jurisdictional picketing of Caldwell, without admitting that it had previously done so.

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

The work in dispute is the operation of heavy equipment for Caldwell Tanks, Inc. at the Milford Township Water Authority jobsite in Spinnerstown, Pennsylvania.

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

The Employer argues that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, based on the telephone statements of Local 542's Bankard and Priscopo to Fineman, the picketing beginning on April 24 and resuming on May 30, and the picketers' statements on both occasions. The Employer further contends that, assuming arguendo that one object of the picketing was to protest area standards, the picketing also had a proscribed object of forcing Caldwell to assign the disputed work to employees represented by Local 542.

The Employer further maintains that there are competing claims to the disputed work. The disputed work had been assigned to and claimed by Caldwell's employees represented by the Boilermakers, pursuant to a collective-bargaining agreement between Caldwell and the Boilermakers. Local 542's competing claim to the heavy equipment work was made manifest by organizer Bankard's telephone conversation with Fineman on April 24, by Assistant Business Manager Priscopo's similar April 25 telephone conversation with Fineman, and by the picketers' statements and conduct on April 24 and again on May 30. The Employer additionally contends that Local 542 has not shown that its May 13 letter constituted a clear, unequivocal, and unqualified disclaimer of all interest in the disputed work because after the letter, Local 542 continued to claim the disputed work in a virtually identical manner as it had before the letter.

<sup>2</sup> In about 1 percent of its tank erection projects, Caldwell, and a local union of the International Union of Operating Engineers entered into a "project agreement," applicable only for the duration of the project, pursuant to which Caldwell hired one individual represented by that local union to operate the heavy equipment on the project.

As to the merits of the dispute, the Employer contends that the disputed work should be assigned to employees represented by the Boilermakers rather than to employees represented by Local 542. The Employer relies on the collective-bargaining agreement between the Employer and the Boilermakers, the Employer's preference, the current assignment, the past practice, the greater relative skills of the employees represented by the Boilermakers, and the economy and efficiency of the Employer's operations.

Local 542 contends that it does not have any interest in the disputed work and disclaimed any such interest in its May 13 letter to Caldwell. It further maintains that Fineman's testimony regarding the statements of the May 30 picketers was hearsay and should have been excluded from the record.<sup>3</sup>

#### 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. This standard requires 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 of voluntary adjustment of the dispute has been agreed upon by all the parties. These three prerequisites have been met in this case.

First, Local 542's organizer, Bankard, participated in the picketing of the Employer beginning on April 24, shouting at Caldwell employees that they were taking the picketers' work and jobs.<sup>4</sup> Further, both Bankard and Local 542's assistant business manager, Priscopo, informed Fineman that in order for the picketing to stop, Caldwell would have to hire one or two members of Local 542 to perform the disputed work. In addition, Bankard participated in the picketing of the Respondent on May 30 and again claimed that Caldwell employees were taking the picketers' work and jobs.<sup>5</sup> Thus, even assum-

ing that an object of Local 542's picketing was to protest the Employer's alleged failure to adhere to area standards, "the evidence reasonably establishes that at least another object of the picketing was to force the Employer to assign the disputed work to employees represented by the Respondent." *Longshoremen ILA Local 3033 (Coastal Cargo Co.)*, 323 NLRB 570, 572 (1997). Accordingly, we find that there is reasonable cause to believe that Local 542 has used proscribed means to enforce a claim to the work in dispute.

Second, we find that Boilermakers-represented employees also claim the work in dispute. The Board has "long held that a group of employees performing work is evidence of their claim to that work, even absent an explicit claim." *Longshoremen ILWU Local 14 (Sierra Pacific Industries)*, 314 NLRB 834, 836 (1994), aff'd. 85 F.3d 646, 652 (D.C. Cir. 1996) (citing *Operating Engineers Local 926 (Georgia World)*, 254 NLRB 994, 996 (1981)). Here, employees represented by the Boilermakers have been operating the heavy equipment from the project's inception. Accordingly, we find that there are competing claims to the disputed work.

Local 542 contends, however, that it disclaimed any interest in the disputed work in its May 13 letter to Caldwell. The party alleging such a disclaimer has the burden to show "a clear, unequivocal, and unqualified disclaimer of all interest in the work in dispute." *Teamsters Local 600 (Central Hardware)*, 290 NLRB 612, 613 (1988) (quoting *Operating Engineers Local 77 (C. J. Coakley Co.)*, 257 NLRB 436, 438-439 (1981)). We find that Local 542 has failed to meet that burden here.

As discussed above, on May 30, after the purported May 13 disclaimer, Local 542 picketed the jobsite, and the evidence reasonably establishes that an object of that picketing was to force the Employer to reassign the disputed work to employees Local 542 represents. Thus, because Local 542 subsequently engaged in conduct that was inconsistent with its purported disclaimer, we find that Local 542 has failed to establish a clear, unequivocal, and unqualified disclaimer of all interest in the disputed work. See *Plumbers Local 123 (Florida Mainte-*

<sup>3</sup> Local 542 made these arguments at the hearing, but did not submit a brief to the Board. The Boilermakers appeared at the hearing, but presented no argument and did not file a brief with the Board.

<sup>4</sup> We find, and Local 542 does not dispute, that Bankard is an agent of Local 542. Thus, the record shows that at the hearing he was identified as an organizer for Local 542 and that he signed the May 28 letter to Caldwell that was on Local 542 letterhead and that asserted Local 542's position.

<sup>5</sup> Fineman did not witness the May 30 picketing, but testified that his safety director, Mike Marrs, who did witness it, provided him an oral business report that the picketers told Caldwell employees not to take the picketers' jobs and work. The hearing officer admitted that testimony of Fineman for the truth of the matter asserted under the business records exception to the hearsay rule. Local 542 contends that Fineman's testimony did not fall within the business records exception and was therefore improperly admitted as evidence.

We need not rely on the hearsay testimony of Fineman, however, because Caldwell employees Roy Davis and Donnie Barker witnessed the May 30 picketing and testified that Bankard shouted that Caldwell employees were taking work and jobs from the picketers.

In any event, hearsay evidence is admissible in a 10(k) proceeding where it is probative and corroborative of other evidence. See *Operating Engineers Local 12 (Winegardner Masonry)*, 331 NLRB 1669, 1671 fn. 3 (2000). We find that Fineman's hearsay testimony about the statements of the May 30 picketers is admissible because it is probative and corroborates the testimony of Davis and Barker. Under these circumstances, we find it unnecessary to reach the issue of whether Fineman's testimony is also admissible under the business records exception to the hearsay rule.

nance & Construction), 338 NLRB 429, 431 (2002) (finding that after the respondent's purported disclaimer of the disputed work for individuals it represented, its assistant business manager renewed the claim by stating that an employee represented by the other union was doing the respondent's work and that the other union was taking the respondent's work).

Third, the parties have stipulated, and we find, that there is no agreed-upon method of voluntary adjustment of the work dispute that would bind all the parties. Accordingly, we conclude that we may appropriately determine the merits of this dispute.

#### 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 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 Co.)*, 135 NLRB 1402, 1410–1411 (1962); *Asplundh Construction Corp.*, 318 NLRB 633, 634 (1995).

The following factors are relevant in determining this dispute.

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

There is no evidence of any Board certifications concerning the employees involved in this dispute. Accordingly, we find that the factor of certifications does not favor an award of the disputed work to employees represented by either union.

The parties have stipulated, and we find, that the Employer is not party to a collective-bargaining agreement with Local 542. However, the Employer is party to the "National Transient Lodge" collective-bargaining agreement with the Boilermakers. In addition, for about the past 6 years, the Boilermakers and the Employer have signed and been bound by an "Interpretation/Understanding" of that collective-bargaining agreement that provides as follows:

[O]n certain task erection work, Boilermakers may operate, man, and maintain any equipment used by the Boilermakers and assigned to them by the Contractor. These may include but not be limited to tuggers, power hoists, welding machines, compressors, pumps, cranes less than 20 ton capacity, and other similar type equipment.

It is uncontested that the Employer is a "Contractor" and has assigned to employees represented by the Boilermakers the disputed heavy equipment work, which

includes operation of "power hoists," "welding machines," "cranes less than 20 ton capacity," and other "similar type equipment." Accordingly, the factor of collective-bargaining agreements favors an award of the disputed work to employees represented by the Boilermakers.

##### 2. Employer preference, current assignment, and past practice

The Employer prefers that the disputed work be assigned to employees represented by the Boilermakers. The Employer currently assigns the disputed work to employees represented by the Boilermakers. Further, the Employer's practice of water tank erection for at least the last 16 years has been to assign the heavy equipment operation to employees represented by the Boilermakers. Accordingly, these factors favor awarding the work in dispute to employees represented by the Boilermakers.

##### 3. Area and industry practice

No party has introduced evidence regarding this factor. Accordingly, we find that area and industry practice does not favor an award of the disputed work to employees represented by either union.

##### 4. Relative skills

There is no evidence in the record that individuals represented by Local 542 possess the necessary skills to operate the heavy equipment in dispute. In contrast, the record shows that employees represented by the Boilermakers have received both a nationally recognized training certification in heavy equipment operation and the Employer's educational program related to safety procedures. In addition, the record shows that employees represented by the Boilermakers have substantial experience with the particular heavy equipment of this Employer, the characteristics of the large component parts of the water tanks, and this Employer's particular tank erection techniques, practices, and procedures. In these circumstances, we find that the factor of relative skills favors an award of the disputed work to employees represented by the Boilermakers.

##### 5. Economy and efficiency of operations

The record indicates that performance of the disputed work is not routinely required for the entirety of an 8-hour workday. Consequently, the employees represented by the Boilermakers have performed other work on the project as well, including welding, fitting, raising, hanging, assembling, and installing the steel water tank components. In contrast, the record indicates that individuals represented by Local 542 are seeking only to perform the discrete work of operating certain pieces of heavy equipment on the project. Thus, assigning the disputed

work to employees represented by the Boilermakers would result in greater efficiency and productivity and less idle time and job costs than assigning the disputed work to individuals represented by Local 542. We therefore find that the factor of economy and efficiency of operations favors awarding the disputed work to employees represented by the Boilermakers.

#### CONCLUSIONS

After considering all the relevant factors, we conclude that Caldwell employees represented by the Boilermakers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference, current assignment, past practice, relative skills, and economy and efficiency of operations. In making this determination, we are awarding the disputed work to employees represented by the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, 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 Caldwell Tanks, Inc. represented by the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO are entitled to perform the operation of heavy equipment for Caldwell Tanks, Inc. at the Milford Township Water Authority jobsite in Spinnerstown, Pennsylvania.

2. International Union of Operating Engineers, Local 542, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Caldwell Tanks, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, International Union of Operating Engineers, Local 542, AFL-CIO shall notify the Regional Director for Region 4 in writing whether it will refrain from forcing Caldwell Tanks, Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work to employees represented by it rather than to employees represented by the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO.