Local 3-90, Western States Regional Council No. 3, International Woodworkers of America, AFL-CIO *and* Crown Zellerbach Corporation and Local 175, Association of Western Pulp and Paper Workers. Case 19-CD-383

April 30, 1982

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Crown Zellerbach Corporation, herein called the Employer, alleging that Local 3-90, Western States Regional Council No. 3, International Woodworkers of America, AFL-CIO, herein called the Respondent, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees it represents rather than to employees represented by Local 175, Association of Western Pulp and Paper Workers, herein called the Intervenor.

Pursuant to notice, a hearing was held before Hearing Officer Patti L. Hunter on July 15, 1981. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a lumber corporation with its place of business in Port Townsend, Washington, is engaged in the timber, pulp, and papermill business. During the past year, the Employer realized gross revenue in excess of $500,000, and during the same period sold and caused to be shipped goods valued in excess of $50,000 directly to customers located outside the State of Washington. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Respondent and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background Facts of the Dispute*

The Employer's operation in Glen Cove and Port Townsend, Washington, is divided into a timber division and a pulp and paper division. The former oversees managed forests while the latter operation consists of a mill which provides pulp and paper products from wood chips. Due to a collapse in the housing market in 1979, the mill faced a shortage of wood chips. To ensure a steady supply of chips, the pulp and paper division instituted various measures. One of these measures was for the pulp division to purchase its own logs, store them at the mill, and manufacture its own chips.[2] When the mill's storage space was exhausted, it was determined that logs would be stored at the "borrow area." This area, which previously had been dense forest, was approximately three-fourths of a mile uphill from the mill.[3] In 1976, employees of the timber division had cleared the area in question. Prior to this time the area had not been used for any specific purpose.[4] In September 1980, the timber division moved some of its own logs into in the area.

Concurrent with the storage of logs, the mill borrowed two portable chippers from the timber division and chipped logs within the confines of the millsite. At all times prior to the dispute in

[1] Subsequent to the hearing, each of the parties filed briefs. Thereafter, the Intervenor filed a motion to clarify the Board's Order of September 4, 1981. That Order granting the motion was later rescinded on September 22, 1981, so that the Board could consider motions made by the parties. The Employer, on September 29, 1981, filed a motion to reopen the record along with a request to file a reply brief, which was opposed by the Intervenor. The Respondent filed a motion to strike the reply brief of the Intervenor and a motion to reopen the record. The Employer, on October 8, 1981, again filed a motion to reopen the record for purposes of receiving its reply brief of September 29, 1981; in the alternative, it requested the Board to treat its request to file a reply brief as a reply brief if the Board denied its motion to reopen the record, or to replace those documents in the file identified as rejected documents. The Intervenor filed a response in opposition to the Respondent's motion. As the record made at the hearing and the subsequently filed briefs amply set forth the position of each party, the Employer's initial motion to reopen the record is denied as are all subsequent motions.

[2] Previously the mill had purchased the requisite chips from other concerns, including the timber division. All transactions between the mill and the timber division were recorded in the interjournal vouchers.

[3] This storage took place in the summer of 1980.

[4] The term "borrow area" refers to the borrowing of soil from the clearcut area to construct an adjacent chemical treatment pond.

question, the Employer has assigned chipping operations away from the mill to employees represented by the Respondent. Mill employees, represented by the Intervenor, were trained at the mill by Bud Taylor, a timber division employee.[5] In August 1980, the timber division suspended operations for the 2-week annual vacation. At that time Taylor requested timber division management to defer his vacation and allow him to chip logs at the borrow area during the 2-week period. Management solicited the mill employees requesting that one serve as a terex (log loader) operator to assist Taylor in the chipping operation at the borrow area.[6]

Subsequent to the Employer's further assignment of the chipping operations at the borrow area to employees represented by the Respondent, the Intervenor filed a grievance claiming that the work assignment was in violation of a contract that it had with the Employer. An arbitrator ruled in favor of the Intervenor. The Respondent was not a party to the arbitration proceedings. In May 1981, the timber division resumed moving logs into the borrow area for the purpose of further chipping operations. At that time the Respondent threatened to strike the Employer if the work was reassigned to employees represented by the Intervenor.

B. *The Work in Dispute*

The work in dispute involves all operations associated with the processing of logs into chips and related tasks at the Employer's borrow area of Glen Cove, Port Townsend, Washington.[7]

C. *The Contentions of the Parties*

Both the Employer and the Respondent contend that the work should continue to be assigned to employees represented by the Respondent based on the past practice of the parties; the areawide practice of assigning work involving portable chipping equipment to employees represented by the Respondent; the experience, skills, and training of employees represented by the Respondent in working in the woods with the types of equipment being used by the Employer to do the work at the borrow area; the economics savings realized by having employees represented by the Respondent do the work; and the alleged inconvenience, inefficiency, and potential safety problems incurred in having to assign the work to employees represented by the Intervenor.

The Intevenor asserts that the employees it represents should be awarded the work because they trained on and operated the portable chipping machine in 1980 and 1981 within the millsite; because they are experienced in operating the other equipment used in the chipping operation; because an employee it represents assisted in the chipping operation at the borrow area in August 1980; and because employees it represents have experience in operating stationary chipping equipment at the millsite. The Intervenor takes the position that the borrow area is part of the millsite, because the mill employees have been dumping mill waste and storing the mill's pulp logs at the borrow area. Because the borrow area allegedly became part of the millsite through the dumping and storage operation, the Intervenor contends that the work in that area is within its jurisdiction pursuant to its Board certification.[8]

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the 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 upon a method for the voluntary adjustment of the dispute.

By letters dated May 13 and June 22, 1981, the Respondent threatened to strike the Employer if the disputed work was taken away from its members. These letters are sufficient in nature to disclose reasonable cause to believe that "an object" of the threat to strike by members of the Respondent was to force the Employer to assign the disputed work to employees who are represented by the Respondent.[9]

With respect to the second prerequisite, the Intervenor made four motions at the hearing which have been referred to the Board for consideration. They are: (1) the present proceeding should be dismissed since there is an outstanding arbitrator's decision awarding the disputed work to members of the Intervenor; (2) the Employer should be collaterally estopped from contesting the arbitrator's as-

[5] Timber division employees are represented by the Respondent.

[6] This is apparently the only instance of either direct or indirect involvement by any mill employee in any chipping at the borrow area.

[7] At the hearing, the Employer and the Respondent stipulated that the disputed work was: "All operations associated with the processing of logs into chips, including the operation of a portable chipping machine, stacker and the terex at the Employer's borrow area of Glen Cove, Port Townsend, Washington." The Intervenor refused to comment on the description of the disputed work, claiming that the arbitration award which awarded the work to employees represented by it is dispositive.

[8] The Intervenor has a collective-bargaining agreement with the Employer which recognizes the Intervenor "as the sole collective-bargaining agent of all employees of the company employed in the Port Townsend Mill." The Intervenor maintains that this language covers the disputed work in the current controversy. This argument is dealt with in the section entitled "collective-bargaining agreements," *infra*.

[9] Member Fanning finds the present situation distinguishable from that encountered in *Local 16, National Association of Broadcast Employees and Technicians, AFL–CIO–CLC (American Broadcasting Company)*, 227 NLRB 1462 (1977).

signment of work to the Intervenor because the Employer entered into bilateral arbitration with the Intervenor; (3) the Respondent should be estopped from protesting the assignment of work to the Intervenor because the Respondent failed to participate in the arbitration between the Employer and the Intervenor; and (4) the present proceeding should be stayed pending resolution of the Intervenor's petition in the United States District Court for the Western District of Washington for an order affirming the arbitrator's award. We find no merit in any of these contentions. Unlike the Intervenor, the Respondent did not have an arbitration clause in its contract with the Employer. The Intervenor's reliance on *Carey* v. *Westinghouse Electric Corporation*, 373 U.S. 261 (1964), is misplaced. There the Court expressed approval of arbitration as an alternative to 10(k) proceedings. In a situation similar to the present case, the Court noted that where only one union was bound to arbitration, "unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute." *Id.* at 265. The Court also stated that "[t]he superior authority of the Board may be invoked at any time." *Id.* at 272.

The Supreme Court later had opportunity to pass on this topic in *N.L.R.B.* v. *Plasterers Local Union No. 79, Operative Plasterers' and Cement Masons' International Association, AFL-CIO* [*Texas State Tile & Terrazzo Co.*], 404 U.S. 116, 133 (1971), stating: "Although this Court has frequently approved an expansive role for private arbitration in the settlement of labor disputes, this enforcement of arbitration agreements and settlements has been predicated on the view that the parties have voluntarily bound themselves to such a mechanism at the bargaining table." Such a concession is absent in the present situation. For the Board to find that the parties have agreed upon a method for the voluntary adjustment to a dispute, *all* parties must agree to be bound by the method. *Photo-News Guild (Midwest Radio-Television, Inc., d/b/a WCCP-TV)*, 227 NLRB 1796 (1977). Since the Respondent was not bound to arbitration in the present case, the arbitration award allegedly governing the disputed work has no effect on these proceedings. Therefore, the Intervenor's first motion fails as do—for similar reasons—the other three motions.

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[8] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[11]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

The Respondent maintains that its collective-bargaining agreement with the Employer is determinative since both present and past contracts cover operators of portable chipping equipment and since its contract covers production and maintenance work in the managed forest area, part of which was clearcut to form the borrow area. On the other hand, the Intervenor maintains that a clause in its contract[12] should resolve this dispute since the borrow area is part of the millsite.

The record evidence clearly indicates that the area outside of the mill, including the borrow area, was managed by the Employer's timber division, whose employees are represented by the Respondent. The Intervenor's collective-bargaining agreement covers mill employees only. There is no indication that the Employer treated the borrow area as part of the mill. Also, mill employees assisted in chipping operations at the borrow area for a very limited period of time and only because the timber division had shut down for 2 weeks. Accordingly, this factor favors awarding the work to employees represented by the Respondent.

2. Certification

The Respondent did not introduce its 1937 certification. The Intervenor introduced its 1964 certification which in pertinent part describes the unit as, "All employees of member mills . . ."[13] As correctly pointed out by the Respondent, both certifications predate the introduction of portable chipping equipment into this area.[14] Neither certifica-

[10] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO* [*Columbia Broadcasting System*], 364 U.S. 573 (1961).

[11] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

[12] This clause is set out in fn. 7, *supra*.

[13] In connection with this quoted language, the Intervenor made an offer of proof at the hearing concerning the interpretation of such language. The Intervenor, by offer, attempted to explain the intent of the language through conversations had with various representatives of the Employer. The Hearing Officer rejected the offer. We sustain the Hearing Officer's rejection of the offer of proof.

[14] The Respondent admitted that its certification did not cover the work in question.

tion expressly identifies the particular work in dispute. Therefore the certification factor is a neutral one, favoring award of the work to neither group of employees.

3. Employer and area practice and employer preference

In the past, chipping operations away from the mill have been performed by timber division employees, represented by the Respondent. Chipping operations within the confines of the millsite have historically been performed by pulp and paper division employees, represented by the Intervenor. Mill employees have never engaged in chipping operations away from the millsite with the exception of the one time at the borrow area, detailed previously. Record evidence reveals that employees of other companies similar in nature to the Employer and represented by the Respondent have operated portable chipping equipment in the immediate area. There is no indication that the Employer's employees or other area employees, represented by the Intervenor, ever engaged in chipping operations away from their respective millsites.

It is also readily apparent that the Employer prefers to assign the work to employees represented by the Respondent. Accordingly, the factors of employer and area practice and employer preference favor awarding the disputed work to employees represented by the Respondent.

4. Skills and efficiency of operations

The record reflects that employees represented by the Respondent have historically performed chipping operations away from the millsite while employees represented by the Intervenor have traditionally performed chipping within the mill confines. Evidence adduced at the hearing reveals that the working conditions at the borrow area and the millsite are similar. Both groups of employees perform routine maintenance on the machines. Thus, employees represented by the Respondent and employees represented by the Intervenor possess the requisite skills to operate the machines. Accordingly, this is a neutral factor, favoring award of the work to neither party.

Nor does it appear that the Employer would realize a greater efficiency of operation by using one set of employees rather than the other to perform the disputed work. The Employer introduced evidence purporting to show that employees represented by the Respondent were more efficient. However, the Employer's pulp manager admitted at the hearing that the employees represented by the Intervenor could be assigned many duties other than actual chipping that could impact on their chip production figure. Thus, it does not appear that one group of employees will contribute significantly more to the Employer's efficiency of operations than the other group of employees. Accordingly, efficiency of operations is a neutral factor, favoring award of the work to neither group of employees.

Conclusions

Having considered all pertinent factors present herein, we conclude that employees who are represented by the Respondent are entitled to perform the work in dispute. This assignment is consistent with the initial assignment, the contracts, the Employer's and area practice and the Employer's preference. In making this determination, we are awarding the work in question to employees who are represented by the Respondent, but not to that Union or its members.

The Employer has requested the Board to "enter an award concerning *future* disputes involving *all* operations associated with the processing of logs into chips and related tasks at the borrow area of Glen Cove, Port Townsend, Washington, including operation of portable chippers, stockers and Terex stockers." (Emphasis supplied.) The Employer asserts that there have been repeated threats to strike by the Respondent and that it is probable that these threats will continue unless the dispute is finally and completely resolved. However, we do not find the record evidence herein sufficient to establish a pattern of misconduct suggestive of a likelihood that this dispute will extend to other areas of the Employer's operation or recur in the future.[15] Accordingly, the present determination is limited to the particular controversy which gave use to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

Employees of Crown Zellerbach Corporation, who are represented by Local 3-90, Western States Regional Council No. 3, International Woodworkers of America, AFL-CIO are entitled to perform chipping operations at the Glen Cover, Port Townsend, Washington, borrow area.

[15] See *Local Union No. 12 of the United Association of Plumbers and Gas Fitters (J. F. White Contracting Co., Heavy Construction Division)*, 215 NLRB 363 (1975); *International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 3, AFL-CIO (Spancrete Northeast, Inc.)*, 243 NLRB 467 (1979).