

Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union and Napko Corporation and Paint Makers and Allied Trades Union Local 1975, AFL-CIO. Case 32-CD-33

January 15, 1980

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND TRUESDALE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Napko Corporation, herein called the Employer, alleging that Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union, herein called Local 6, 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 its members rather than to employees represented by Paint Makers and Allied Trades Union Local 1975, AFL-CIO, herein called Paint Makers.

Pursuant to notice, a hearing was held before Hearing Officer Paul Supton on August 7, 1979. 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. Thereafter, the Employer and Local 6 filed briefs.

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 California corporation with its principal place of business in Fremont, California, is engaged in the business of manufacturing paint. During the past year, the Employer purchased from outside the State goods and supplies having a value in excess of \$50,000.¹ 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.

¹ The Employer's unopposed motion to correct the record by inserting the phrase "in excess of \$50,000 a year" at the conclusion of each of the sentences which end on 1.19 and on 1.22 of p. 9 of the transcript is hereby granted.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Local 6 and Paint Makers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. Background and Facts of the Dispute

Napko Corporation is engaged in the business of manufacturing and selling paint and paint-related products at its facility in Fremont, California. Until January 1979, the paint and paint-related products, after being manufactured, were stored in indoor storage tanks from which they were transferred to small containers for shipment to customers. This transfer from the indoor storage tanks to shipping containers has in the past been performed by the Employer's employees who are represented by Paint Makers. Once the materials were in the shipping containers, the transfer of the containers to shipping conveyances has been performed by employees of the Employer who are represented by Local 6.

In December 1978, the Employer entered into an agreement with a customer to supply paint and paint-related materials in bulk rather than in containers. To accommodate this new operation, the Employer began using an outdoor area where large holding tanks are located.

The new procedure adopted by the Employer involves transferring paint and paint-related materials directly from the holding tanks to tank trucks furnished by its customer. The materials involved are therefore not first packaged in cans or drums.

During January 1979, the Employer assigned the work in question to employees represented by Paint Makers and commenced the transfer and sale of the bulk material from the outside storage tanks to the tank trucks provided by the customer. The parties stipulated that, on or about June 21, 1979, and continuing thereafter, an agent of Local 6 informed the Employer that it claimed the work in dispute for its members. On or about August 2, 1979, an agent of Local 6 threatened the Employer that if the disputed work were not assigned to its members the Employer would be "in trouble" and that Local 6 would "pull its men."

B. The Work in Dispute

The work in dispute involves the transfer of bulk supplies of paint and paint-related materials to and

from an outdoor storage tank at the Employer's facility in Fremont, California.

C. *The Contentions of the Parties*

The Employer and Paint Makers contend that because of the change in the Employer's operation—which added supplying a customer with materials in bulk rather than in containers—the transfer of the bulk materials from a holding tank in an outdoor area directly to the customer's tank trucks can best be performed by Paint Makers-represented employees now doing the work. The Employer specifically alleges that the collective-bargaining agreements, area practice, employee skills, efficiency of operations, and employer assignment favor the work being performed by employees represented by Paint Makers.

Local 6 contends that the disputed work should have been assigned to its members based on its work jurisdiction as defined in its collective-bargaining agreement with the Employer.

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 upon a method for the voluntary adjustment of the dispute.

As to the former, it is clear that both Unions are claiming the assignment of the work of transferring bulk supplies of paint and paint-related materials to and from an outdoor storage tank.

The parties stipulated that in the past 6 months, and more particularly on or about August 2, 1979, an agent of Local 6 threatened the Employer that if the disputed work were not assigned to its members the Employer would be "in trouble" and that Local 6 would "pull its men." Accordingly, we are satisfied that there is reasonable cause to believe that an 8(b)(4)(D) violation has occurred in this case.

As to the latter, the parties have stipulated, and there is no evidence to the contrary, that there is no agreed-upon method for the voluntary settlement of the dispute. 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.¹ The Board has held

¹ *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).

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.¹

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

1. Collective-bargaining agreements

The Employer has current collective-bargaining agreements with both local 6 and Paint Makers. These contracts are in evidence, but we find that they are not useful in making our determination. Though both Local 6 and Paint Makers can cite contract language that arguably supports their respective positions, it is clear that neither contract specifically mentions the work in dispute. Thus, the collective-bargaining agreements favor neither Local 6 nor Paint Makers in this dispute.

2. Employer assignment and practice

Howard Metzner, manufacturing manager of Napko Corporation, testified that the Employer's practice has been to have employees represented by Paint Makers transfer the bulk materials from the outside tanks to the customer's tank trucks since the Employer began utilizing this process in January 1979. The Employer is satisfied with the results of its assignment. Thus, the factor of employer assignment and practice clearly weighs in favor of awarding the work in dispute to employees represented by Paint Makers.

3. Area practice

Kenneth Reeves, president and business manager of Paint Makers, testified that, within his Local's jurisdiction, 40 paint manufacturing facilities have current contracts with Paint Makers. In all 40 of these situations, the transfer of paint into bulk-carrying facilities such as trains or trucks is done by the paintmakers. However, at none of these facilities were any of the employees represented by any union other than Paint Makers.

Avelineo Ramos, business agent for Local 6, testified that in other industries Local 6 bargaining unit members perform the pumping and loading of bulk materials onto tank trucks. No evidence was presented of Local 6 members performing this function in connection with paint and paint-related materials.

In light of this evidence the area practice favors awarding the work in dispute to employees represented by Paint Makers.

¹ *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

4. Employee skills and efficiency of operation

The record indicates that both groups of employees possess the necessary skills to perform the actual transfer of paint and paint-related materials from the outdoor storage tanks to the customer's tank trucks. However, it appears that, at some point during this transfer operation, there is spillage of a certain amount of paint. The record indicates that employees represented by Local 6 do not possess the requisite skills to clean up the spillage while employees represented by Paint Makers do have the necessary skills to handle this part of the operation. Since the cleanup operation appears to be one aspect of the process of transferring the materials from the storage tanks to the tank trucks and not a separate process, the operation is more efficient and economical with paintmakers performing the disputed work.

Accordingly, the factors of skills and efficiency of operation favor having the work performed by employees represented by Paint Makers.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by Paint Makers are entitled to perform the work in dispute. We reach this conclusion relying on employer assignment and practice, area practice, and employee skills and efficiency of operation. In making this determination, we are awarding the work in question to employees who are represented by Paint Makers but not to that Union or

its members. The present determination is limited to the particular controversy which gave rise 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:

1. Employees of Napko Corporation, who are represented by Paint Makers and Allied Trades Union Local 1975, AFL-CIO, are entitled to perform the transfer of bulk supplies of paint and paint-related materials to and from an outdoor storage tank at the Employer's facility in Fremont, California.

2. Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Napko Corporation to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union, shall notify the Regional Director for Region 32, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.