International Union of Operating Engineers, Local 825, AFL–CIO *and* Charles Simkin & Sons, Inc. *and* Mechanical Contractors Association of New Jersey, Inc. *Cases Nos. 22–CD–5 and 22–CD–6. May 7, 1958*

DECISION AND DETERMINATION OF DISPUTE

On April 23, 1957, Charles Simkin & Sons, Inc., filed a charge, and on April 26, 1957, Mechanical Contractors Association of New Jersey, Inc., filed a charge, alleging that International Union of Operating Engineers, Local 825, AFL–CIO, was engaging in unfair labor practices within the meaning of Section 8 (b) (4) (D) of the Act.[1]

Thereafter, pursuant to Section 10 (k) of the Act and Sections 102.71 and 102.72 of the Board's Rules and Regulations, the Regional Director provided for an appropriate hearing upon due notice. The hearing was held at New York, New York, and Newark, New Jersey, on various dates from July 29, 1957, to January 8, 1958, before I. L. Broadwin and Oscar Geltman, hearing officers. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. The rulings of the hearing officers made at the hearing were free from prejudicial error and are hereby affirmed. All parties filed briefs with the Board.

Upon the entire record in the case, the Board [2] makes the following:

FINDINGS OF FACT

1. The Association and its members are engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. The record shows that in December 1956 Peter Weber, the Union's business manager, advised the Association, a statewide organization of employers in the mechanical contracting business, that the work of starting and stopping electric welding machines was within the Union's jurisdiction and that an appropriate agreement should be signed. The employer-members of the Association were doing this work with other employees, and pursuant to their instructions the Association refused the Union's demands.[3]

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[1] The charges were originally filed in the Second Region, but were thereafter transferred to the Twenty-second Region.

[2] Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Bean, and Fanning].

[3] The Union repeated its demands in July 1957 and again in September or October 1957, and threatened that otherwise no Operating Engineers would work for the particular employer Under instruction from its members, the Association again refused the demands. The Union also made similar demands on individual employers, and received similar refusals.

In December 1956 and on several subsequent occasions, the Union made similar demands on Simkin, a member of the Association. Simkin refused. In March or April 1957, according to the credible testimony of 1 of the 2 employees of J. Pardunn Sons who were engaged in certain operations at the Heyden Chemical Company construction site pursuant to a subcontract from Simkin, Union Business Agent Reardon told them that Simkin had not signed up with the Union and that it was advisable for them to go home until the matter was straightened out. (The Union had neither a contract assigning the work of starting and stopping Simkin's electric welding machines, nor a Board order or certification determining that it was the bargaining representative for employees performing such work.) Pardunn's employees telephoned their employer, who said there was nothing he could do about it. The employees accordingly quit. We do not credit Reardon's testimony that he did not advise the employees to get off the job, particularly in view of his admission that he did tell the employees they would be in a very bad position because Simkin was not paying into the Union's fund for welfare and pension benefits, and further because of his initial denial, later retracted, that he went to the job to "check" on Pardunn's employees.

In June 1957 The Johansen Company, another Association member resisting the Union's demands, was engaged in certain welding operations at the General Chemical Company construction site. Upon installing electric welding machines started and stopped by employees who were not members of the Union, Johansen was informed by its master mechanic, Malley, a member of the Union in charge of assigning work to union members, that the Union claimed the starting and stopping of these machines. Johansen refused to assign the work to the Union. Near the end of the workday on July 16, two men approached and said they were sent by the Union for employment to start and stop the machines. When Johansen refused to employ them, they went with Malley to the electric welding machines then operating and pushed the "off" buttons, shutting the machines off and effectively causing the employees operating the machines to stop work. At the start of the following workday Johansen turned the machines on. Again the two men cut them off. Seeing his work thus tied up, Johansen then capitulated and offered employment to the two men. One of them declined, stating that he was an organizer for the Union. The other accepted, and started the maximum number of machines which the Union permitted a member to handle. To start the remaining machines, Johansen transferred a union member from another operation. Johansen has had no further pressure from the Union in this respect.

Before October 21, 1957, Rowland Tompkins & Son, Inc., another Association member resisting the Union's demands, was engaged in

operating electric welding machines at the Public Service Electric and Gas Company plant. In disregard of the Union's claim to the work of starting and stopping such machines, and in further disregard of the Union's threat to deny Tompkins the services of union members for other operations at the Public Service plant, Tompkins had assigned the work of starting and stopping these machines to nonmembers of the Union. Beginning on October 21 the Union accordingly picketed the plant, effectively stopping all construction operations by other employers as well, until enjoined a few weeks later by order of the United States District Court for the District of New Jersey.

Prior to November 14, 1957, the Union had demanded on several occasions that Associated Engineers Inc., another Association member, assign the starting and stopping of its electric welding machines to operating engineers. Associated refused. On November 14, employees of Hoffman Crane Company were engaged in certain crane operations on the Union (New Jersey) Junior High School, pursuant to a subcontract from Associated. Suddenly these employees quit work, explaining to Associated's superintendent that Sleeper, a union steward, had advised them not to do any more work until they cleared with their employer; their employer had advised them to clear with the Union; and upon checking with the Union by telephone, they concluded that they did not want to work. When Associated checked with the Union, Business Representative Edward Weber said, in the presence of Hoffman's employees, "I could tell the boys to go to work, but they wouldn't, because there is no contract" between Associated and the Union. Weber then told the men to go back to work, but added that they would not work for Associated because there was no contract. The employees accordingly refused to resume work. Associated then subcontracted the work to John Ochs, who furnished a crane and employees to operate it. As these employees were starting to work, Union Shop Steward Sleeper talked to them. After telephoning the Union and conferring with Union Business Representative Weber separately, they refused to continue working, explaining that the Union told them to tell Associated that they did not want to work for Associated because Associated did not have a contract with the Union. As on prior occasions, the Union's representative stated loudly to Associated, in the presence of the employees, "The men won't work because you haven't a contract [with the Union]. It is up to them."

CONTENTIONS OF THE PARTIES

The Charging Parties contend in effect that the Union is not legally entitled to assignment of the disputed work to operating engineers or

members of the Union rather than to the other employees performing such work, and that the Union engaged in conduct proscribed by Section 8 (b) (4) with an object of forcing such reassignment of the work.

The Union contends that it engaged only in lawful conduct, and not in appeals to *employees* or other conduct proscribed by Section 8 (b) (4) (D); and that the Board therefore has no jurisdiction under Section 10 (k) of the Act. The Union also contends, in the alternative, that if the Board finds otherwise, the Board should determine that the Union is legally entitled to reassignment of the work because of area practice and agreements with other employers and decisions of record (which the hearing officer precluded the Union from proving). The Union concedes that it has not been certified by the Board as the bargaining representative of the employees performing such work for the employers here involved, and that it has no contract covering the assignment of such work.[4]

Applicability of Section 10 (k)

The evidence set forth above satisfies us that there is reasonable cause to believe that the Union engaged in or induced and encouraged employees to engage in a strike, with an object of forcing or requiring employers to assign the work of starting and stopping electric welding machines to operating engineers or members of the Union, rather than to their other employees performing such work. We find such factual circumstances sufficient to invoke the Board's jurisdiction to hear and determine the work-assignment dispute within the meaning of Section 10 (k) of the Act.[5]

Merits of the Dispute

We regard the underlying dispute as between the Union and those employers who operate electric welding machines within the Union's geographical jurisdiction but do not employ operating engineers or members of the Union to start and stop them. As the Union states in its brief, no other labor organization claims the work of starting and stopping the machines.

The Union strenuously contends that the Board should adopt the decision of the Court of Appeals for the Third Circuit in *N. L. R. B.* v. *United Association of Journeymen, etc.* (*Frank Hake*), 242 F. 2d

[4] Other contentions made by the Union at the hearing, principally that the parties to the dispute had adjusted it or agreed upon methods for its adjustment, are ignored in the Union's brief to the Board, and in any event are without merit.

[5] *Local No. 48, Sheet Metal Workers International Association, AFL–CIO* (*Gadsden Heating and Sheet Metal Company*), 119 NLRB 287.

722, and arbitrate the present dispute. However, that case, distinguishably, involved a work dispute between *rival* labor oragnizations representing different trades, crafts, or classes of employees, and the court disagreed with the Board's refusal to arbitrate such an inter-union dispute. Here the work dispute is admittedly not between rival labor organizations. As we have frequently stated, an employer who has no contract or Board order or certification to the contrary is free to assign his work to whomever he pleases;[6] and Section 8 (b) (4) (D) does not entitle a labor organization to engage in prohibited conduct to force such an employer to transfer his work assignment to it. To the extent that our decision herein may be in conflict with that of the Court of Appeals for the Third Circuit in the *Hake* case, however, we must respectfully disagree with the decision of that court.[7]

Accordingly, we find that the Union is not legally entitled to force or require any employer, in the absence of a contract or a Board order or certification to the contrary, to assign the disputed work to operating engineers or members of the Union rather than to the other employees performing such work.[8]

DETERMINATION OF DISPUTE

Upon the basis of the foregoing findings of fact and the entire record in the case, the Board makes the following Determination of Dispute pursuant to Section 10 (k) of the Act:

1. The Respondent, International Union of Operating Engineers, Local 825, AFL–CIO, is not and has not been lawfully entitled, by means proscribed by Section 8 (b) (4) (D) of the Act, to force or require any employer, in the absence of a contract or a Board order or certification to the contrary, to assign the work of starting and stopping electric welding machines to operating engineers or members of the Union rather than to other employees performing such work.

2. The Respondent shall, within ten (10) days from the date of this Decision and Determination of Dispute, notify the Regional Director for the Twenty-second Region, in writing, whether or not it accepts the Board's determination of this dispute, and whether or not it will refrain from forcing or requiring any such employer, by means proscribed by Section 8 (b) (4) (D) of the Act, to assign the disputed work to operating engineers or members of the Union rather than to other employees.

[6] See, for example, *Local 16, International Longshoremen's and Warehousemen's Union (Denali-McCray Construction Company)*, 118 NLRB 109, and cases there cited in footnote 5.

[7] *Local 16, etc (Denali-McCray Construction Company), supra*, footnote 4.

[8] See *Local 450, Interantional Union of Operating Engineers, AFL (Industrial Painters and Sand Blasters)*, 115 NLRB 964.