

Local 472, International Laborers Union, Heavy and General Construction, AFL-CIO; Local 147, Compressed Air and Free Air Tunnels Workers Union, AFL-CIO; Local 825, International Union of Operating Engineers, AFL-CIO; Local 11, International Brotherhood of Bridge, Structural and Ornamental Ironworkers, AFL-CIO¹ and Ernest Renda Contracting Company, Inc.² Case No. 22-CD-19. June 24, 1959

DECISION AND DETERMINATION OF DISPUTE

This proceeding arises under Section 10(k) of the Act, which provides that "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of Section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair practice shall have arisen. . . ."

On December 8 and 22, 1958, Ernest Renda Contracting Company, Inc., filed charges and amended charges with the Regional Director for the Twenty-second Region alleging that Local 472, International Laborers Union, Heavy and General Construction, AFL-CIO; Local 147, Compressed Air and Free Air Tunnels Workers Union, AFL-CIO; Local 825 International Union of Operating Engineers, AFL-CIO; and Local 11, International Brotherhood of Bridge, Structural and Ornamental Ironworkers, AFL-CIO; had engaged in and were engaging in certain unfair labor practices within the meaning of Section 8(b) (4) (D) of the Act. It was charged, in substance, that since on or about November 6, 1958, and thereafter the above labor organizations through their officers, agents, and representatives have induced or encouraged the employees of Renda and its subcontractors, D. J. O'Conner Construction Company, herein called O'Conner, and Renda-Pillon Construction Co., Inc., herein referred to as Renda-Pillon, and employees of other employers to engage in a concerted refusal to handle any goods or materials and to perform any services in the course of their employment with an object of forcing Renda, O'Conner, and Renda-Pillon, to assign particular work to employees who are members of Respondent Unions rather than to employees in another trade, craft, or class, and that by the above acts and other conduct the said labor organizations have violated Section 8(b) (4) (D) of the Act.

Thereafter, pursuant to Section 10(k) of the Act and Sections 102.79 and 102.80 of the Board's Rules and Regulations, Series 7, as amended, the Regional Director investigated the charges and provided for an appropriate hearing upon due notice. Hearings were held at

¹ Herein called Laborers, Tunnels Workers, Engineers, and Ironworkers, respectively.

² Herein referred to as Renda.

Newark, New Jersey, on January 27, and February 9, 10, and 11, 1959, before Oscar Geltman, hearing officer. All parties appeared at the hearings 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 officer made at the hearings are free from prejudicial error and are hereby affirmed.³

Upon the entire record in this case the Board makes the following:

FINDINGS OF FACT

1. Ernest Renda Contracting Company, Inc., a New Jersey corporation, is engaged in the business of general contracting in the heavy construction industry, specializing in the construction and installation of sanitary and storm sewers. During 1958 Renda performed work and supplied materials outside the State of New Jersey valued at more than \$500,000. Accordingly, we find that Renda is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.⁴

2. The Laborers, the Engineers, the Tunnels Workers, and the Ironworkers, are labor organizations within the meaning of the Act.

3. The dispute:

Since November 24, 1958, the Respondents have been picketing the various jobsites of Renda and its two subcontractors. As a result of the picketing, truckdrivers from neutral suppliers have failed to deliver pipe, brick, lumber, and mixed concrete, thus causing the project to be behind schedule although there has been no work stoppage.

The signs carried by the pickets state that the Companies are unfair to the respective unions involved. (E.g., "E. Renda Contracting Company Unfair to Local 825.") They do not contain organizational appeals or any other information. As to the events preceding the establishment of the picket line, the record discloses the following:

³ During the cross-examination of one Fella, witness of the Charging Party, Respondents' attorneys, for the purpose of impeaching the witness, requested production of an affidavit which he had given to the General Counsel. The hearing officer correctly ruled that Section 102.95 of the Board's Rules and Regulations does not apply to a hearing conducted pursuant to Section 10(k) of the Act. Section 102.95 provides in pertinent part as follows: ". . . after a witness called by the general counsel has testified in a hearing upon a complaint under Section 10(c) of the Act the respondent may move for the production of any statement of such witness in possession of the general counsel. . . ."

In this case the witness was called by the Charging Party rather than by the General Counsel who does not take part in a 10(k) proceeding. Moreover, Section 102.80 of the Rules and Regulations provides that 10(k) proceedings shall "be conducted by a hearing officer and the procedure shall conform, insofar as applicable, to the procedure set forth in Sections 102.64 to 102.67 inclusive." The latter sections refer to the conduct of representation proceedings.

Since a 10(k) hearing is conducted like a representation hearing and is of an investigatory nature, the Board, in determining whether there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, does not resolve conflicts in testimony. *International Brotherhood of Electrical Workers, Local No. 90, AFL-CIO (The Southern New England Telephone Company)*, 121 NLRB 1061.

⁴ *Siemons Mailing Service*, 122 NLRB 81 (Member Jenkins concurring specially).

On or about April 21, 1958, the Somerset Raritan Valley Sewage Authority awarded a contract to Renda to construct an interceptor sewer to serve the boroughs of Somerville and Raritan, New Jersey, and the township of Bridgewater, New Jersey.

On or about June 9, 1958, Renda assigned the work to its own non-union employees and began construction. Thereafter, representatives of the Respondent Unions came to the various jobsites and inquired about the work being done, and the work to be done. Thus, in early July, Feeney of the Tunnels Workers asked about the two tunnels to be constructed under the contract and said he would like to see his men do the work. A few weeks later, Feeney returned with McCann, also a business agent of the Tunnels Workers, and again asked whether a decision had been made with regard to the tunnels, and said that he would like to see his men go ahead and do the work.

About July 15, William Smith, business agent of the Engineers, and Leonard Masse, an officer of the Laborers, together visited Renda's office. Smith asked if there was a bulldozer and shovel on the job and declared that he would like to put some of his men on that equipment. Masse said that they wanted to get the job straightened out.

In late September, Robert Wallace, business representative of the Ironworkers, approached Renda's president at the Raritan Disposal Plant jobsite, and inquired about iron work. Wallace testified that he was inquiring about the extent of the work to be performed on the Raritan Disposal and that he understood there was some reinforced steel to go into the chambers.

Notwithstanding the aforementioned visits by union representatives, Renda subcontracted the construction of meter and siphon chambers to Renda-Pillon Construction Co., Inc.; and in September subcontracted the construction of two tunnels to D. J. O'Conner Construction Company. Renda reserved for itself the performance of all other work involved in the construction of the Somerset-Raritan sewer. Like Renda, the two subcontractors assigned their work to their own employees, without regard to whether or not they were members of any labor organization. The work being performed by Renda and its two subcontractors involved about seven or eight jobsites all of which are approximately one-half mile from each other.

On about October 14, 1958, O'Conner began tunnel work at the Route 31 jobsite with four employees and one superintendent. The first stage of this work was completed on October 29. On November 1, O'Conner began working at the Route 206 jobsite with about nine men. On November 6, three representatives of the Tunnels Workers, McCann, Boyce, and McDonald, contacted Mr. O'Conner at the Route 206 jobsite and informed him that "it was their jurisdiction, and it was their job" and that he should have only members of the Tunnels Workers on the job. O'Conner answered that he could not do this

because it was a nonunion contract, and besides he already had two members of the Tunnels Workers on the job. Later the same day these two union members quit the job saying that they had talked with their business agents and had to leave the job. The following day several members of the Tunnels Workers appeared near the job-site but they were not bearing picket signs.

On November 24, a large number of pickets from all four Respondent Unions appeared at the Raritan Disposal jobsite. With them were Robert Wallace of the Ironworkers and Larry Ventura of the Laborers. Wallace explained his presence at the jobsite to Ernest Renda by saying that he understood reinforced steel was being installed and that he came to see Mr. Renda to find out "just what was going on." Ventura told Mr. Renda that they would like to see Renda put some of our men to work. When Mr. Renda asked Ventura to take the pickets off the job, he replied: "Well, we take [sic] the pickets out of here when you get yourself straightened out." As of the date of the instant hearing, the picketing was still being conducted.

CONTENTIONS OF THE PARTIES

The Charging Party asserts that by the above conduct the Respondents violated Section 8(b)(4)(D) of the amended Act. The Respondents advance a number of contentions in support of their assertion that this is not a jurisdictional dispute within the meaning of Section 8(b)(4)(D). Primarily, the Respondents contend that the object of the picketing was to organize the employees. They assert that an additional object was to publicize the fact that Renda was nonunion, paid wages below the union wage rates, and was in competition with employers who hired members of the Respondents, thereby threatening job opportunities of Respondents' members. The Respondents further contend that the most adverse inference that could be drawn from the evidence is that they were seeking to put additional employees on the job. Finally, the Respondents contend that by custom and practice their members are entitled to the jobs here involved. No defense is urged on the basis of any Board order or certification, or any contract covering the disputed work.

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 by the Respondents.

There is no dispute that the Respondents established the picket line. The Board has held that, apart from the literal appeal of picket signs, the picket line itself constitutes an act of inducement or en-

couragement of employees not to perform services for the picketed employer, and that such picketing for unlawful purposes, whether or not successful in bringing about a strike or refusal to perform services for the employer, is within the proscription of Section 8(b) (4) (D) of the Act.⁵

As previously noted, the Respondents deny that the picketing was for purposes violative of Section 8(b) (4) (D) and contend that the primary reasons for picketing were to organize the Companies' employees and to publicize the fact that the project was nonunion. While there is some evidence that one of the objects may have been organizational,⁶ there is no evidence that an object of the picketing was to publicize the nonunion nature of Renda's work project.⁷ In any event, the Board must still consider the Charging Party's allegation that *an* object of the picketing was to force or require Renda and its subcontractors to reassign work from their own employees to members of the Respondents.⁸ For the Board has held that where multiple objects are sought by a union, the presence among them of but one proscribed object is sufficient to bring the union's conduct within the statutory language of Section 8(b) (4) (D).⁹ And in a proceeding under Section 10(k) of the Act, the Board is only required to find that there is *reasonable cause* to believe that Section 8(b) (4) (D) has been violated before proceeding with a determination of the dispute out of which the unfair labor practice has arisen.¹⁰

In this regard, the evidence adduced by the Charging Party establishes that during the summer of 1958 the Respondents were aware that Renda had the contract for the sewer job and that it was using its own nonunion employees. During the course of several visits by the agents of the Respondents, it was made clear that the Respondents were not only interested in the work being performed at that time, but that they were also interested in the work to be performed on the two tunnels and the meter and siphon chambers. Thus, Wallace of the Ironworkers testified that he understood that there was some reinforced steel to go into the chambers and he asked Mr. Renda in September whether he intended to do the job himself or subcontract

⁵ *United Brotherhood of Carpenters & Joiners of America, Local Union No. 978, AFL-CIO, et al. (Markwell & Hartz Contractors)*, 120 NLRB 610, 618.

⁶ Witness Putek testified that he solicited employees to join the Laborers. All other Respondent witnesses admit that they did not talk to employees in order to solicit their membership. It is admitted that the picket signs did not contain the customary organizational appeals.

⁷ None of the Respondents' witnesses testified that an object of the picketing was to publicize a nonunion job, and the picket signs merely said "Unfair." Cf. *Ship Scaling Contractors Association*, 87 NLRB 92.

⁸ *N.L.R.B. v. Denver Building and Construction Trades Council, et al.*, 341 U.S. 675, 689.

⁹ *International Longshoremen's Association Local 1294 (Independent), (Cargill, Inc.)*, 108 NLRB 313, 317.

¹⁰ *Local 26, International Fur and Leather Workers Union of the United States and Canada (Winslow Bros. & Smith Co.)*, 90 NLRB 1379; *Truck Drivers and Chauffeurs Union, Oil Drivers, et al. (Direct Transit Lines, Inc.)*, 92 NLRB 1715.

it to someone else. There is uncontradicted evidence that after learning that Renda had hired a nonunion subcontractor to perform the work on the two tunnels, representatives of the Tunnels Workers protested to Mr. O'Conner on November 6, 1958, that the work being performed by his employees belonged to members of their union because it was "their work" and it was "their jurisdiction."

On November 24, 1958, representatives of the Ironworkers and the Laborers demanded that Renda put members of their unions on the same jobs already being performed by Renda's own employees. Renda refused to accede to this demand and on the same day all Respondents began picketing.

Without definitely resolving the conflicts of testimony,¹¹ we are persuaded on the basis of the foregoing evidence and upon the entire record, that there is reasonable cause to believe that an object of the Respondents' picketing was the reassignment of work from employees of Renda and its subcontractors to members of the Respondents.¹²

The Respondents contend that, at best, the only inference that can be drawn from the evidence adduced by the Charging Party is that the Respondents were seeking to put *additional* employees on the job. Assuming that this was in fact their objective, the Board has held that Sections 10(k) and 8(b)(4)(D) apply to a primary dispute between an employer and a union, involving the hiring of additional employees.¹³

We find, accordingly, that the dispute is properly before us for determination under Section 10(k) of the Act.

THE MERITS OF THE DISPUTE

The record shows that the dispute was over the Companies' assignment of work on the sewer project to its own employees rather than to members of the Respondents. It is well established that an employer is free to make work assignments without being subject to strike pressure by a labor organization seeking the work for its members, unless the employer is thereby failing to conform to an order or

¹¹ Witnesses of the Respondents gave different versions of some of the conversations with representatives of the companies. It is unnecessary in this proceeding for us to resolve such conflicts in testimony. *International Brotherhood of Electrical Workers, Local No. 90, AFL-CIO, et al. (The Southern New England Telephone Company)*, *supra*, footnote 3, and cases cited therein.

¹² *International Longshoremen's & Warehousemen's Union, Local 48 (Upper Columbia River Towing Company and River Terminals Company)*, 107 NLRB 1637; *Pile Drivers, Bridge, Wharf and Dock Builders, et al. (Klamath Cedar Company)*, 105 NLRB 562; *Markwell & Hartz Contractors*, *supra*, footnote 5; *Direct Transit Lines, Inc.*, *supra*, footnote 10.

¹³ *Local 450, International Union of Operating Engineers, AFL-CIO (Industrial Painters and Sand Blasters)*, 115 NLRB 964, 968; *I.L.A. No. 1351, Steamship Clerks and Checkers Independent (Rothermel Brothers)*, 108 NLRB 712, 715.

certification of the Board, determining the bargaining representative for employees performing such work, or unless an employer is bound by an agreement to assign the work in dispute to the claiming union.¹⁴ As the Respondents are not the beneficiaries of such order, certification, or contract claim to the disputed work, we find that they are not lawfully entitled by means proscribed by Section 8(b) (4) (D) to force or require Ernest Renda Contracting Company and its subcontractors, D. J. O'Conner Contracting Company and Renda-Pillon Construction Co., Inc., to reassign work being performed by their own employees to members of the Respondents.¹⁵

DETERMINATION OF DISPUTE

On the basis of the foregoing findings, and upon the entire record in this case, the Board makes the following determination of dispute, pursuant to Section 10(k) of the Act:

1. Local 472, International Laborers Union, Heavy and General Construction, AFL-CIO; Local 147, Compressed Air and Free Air Tunnels Workers Union, AFL-CIO; Local 825, International Union of Operating Engineers, AFL-CIO; Local 11, International Brotherhood of Bridge, Structural and Ornamental Ironworkers, AFL-CIO; and their agents are not, and have not been lawfully entitled to force or require Ernest Renda Contracting Company, Inc., and its subcontractors D. J. O'Conner Contracting Company and Renda-Pillon Construction Co., Inc., to assign the disputed work to members of the Respondents rather than to employees already assigned to that work by the aforementioned Companies, who are not members of the said Respondents.

2. Within 10 days from the date of this Decision and Determination of Dispute, the Respondents shall notify the Regional Director for the Twenty-second Region, in writing, whether or not they will refrain from forcing or requiring Ernest Renda Contracting Company and its subcontractors D. J. O'Conner Contracting Company and Renda-Pillon Construction Co., Inc., to assign the disputed work on the Somerset-Raritan sewer project to members of the Respondents rather than to the employees already assigned to the work by the aforementioned Companies, who are not members of the Respondents.

¹⁴ *Markwell & Hartz Contractors*, 120 NLRB 610, 623.

¹⁵ By this action, however, we are not to be deemed as making an "assignment" of the disputed work. Nor do we find merit in the Respondents' contention that the Board must make an affirmative work award based upon custom and practice in the industry. In declining to make such an affirmative work award, we respectfully disagree with the decision of the United States Court of Appeals for the Third Circuit in *N.L.R.B. v. United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry, etc. (Frank Hake)*, 242 F. 2d 722. See: *Local 173, Wood, Wire and Metal Lathers' International Union, AFL-CIO, et al. (Newark & Essex Plastering Co.)*, 121 NLRB 1094.