

him so as to obligate him to pay dues for periods when he was thus unemployed.

The principle that it is unlawful to demand, as a pre-hiring condition, the payment of dues accrued while the job applicant is unemployed, or the payment of a reinstatement fee in lieu thereof, is not novel but, rather, is accepted, traditional Board law. Thus, in *Spector Freight System, Inc.*,¹¹ the Board held that it is unlawful to charge a reinstatement fee of an employee if his loss of good standing in the union was based on his failure to pay dues during a period when he had no obligation to maintain membership as a condition of employment. This is precisely the situation presented here. Therefore, the union-security provision in question could not lawfully be enforced against Mitchell who, during the periods of his unemployment, had no job the retention of which was conditioned upon union membership in good standing.

Accordingly, I would find that the reinstatement fee was a penalty which the Respondents unlawfully attempted to exact from Mitchell in lieu of unpaid dues for a period during which he was not obligated to pay dues pursuant to the union-security provision of the contract. In short, my colleagues, in holding that Mitchell must pay dues or reinstatement fee in lieu thereof for the periods during which he was unemployed are, in effect, holding that Mitchell and other casual employees in like situations, are required to pay dues perpetually for those times which, as casual employees, they do not work.

¹¹ 123 NLRB 43. See also *Local 140, Bedding, Curtain & Drapery Workers Union, United Furniture Workers of America, CIO (The Englander Company, Inc.)*, 109 NLRB 326.

**Local Union 825, International Union of Operating Engineers,
AFL-CIO and Nichols Electric Company. Case No. 22-CD-52.
July 18, 1962**

DECISION AND DETERMINATION OF DISPUTE

This is a proceeding pursuant to Section 10(k) of the statute following a charge filed by Nichols Electric Company, herein called Nichols, alleging a violation of Section 8(b) (4) (D) by Local Union 825, International Union of Operating Engineers, AFL-CIO, herein called Operating Engineers. Pursuant to notice, a regularly scheduled hearing was held on June 22, 23, and 27 and on August 15, 1961, before James T. Youngblood, hearing officer. 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 officer made at the hearing

are free from prejudicial error and are hereby affirmed. Thereafter, briefs were filed by Nichols, by the Operating Engineers, and by Local Union No. 262, International Brotherhood of Electrical Workers, herein called Local 262 and IBEW.

Upon the entire record in the case, the Board ¹ makes the following findings: ²

I. THE BUSINESS OF THE EMPLOYER

Nichols Electric Company is an electrical contractor with its principal place of business in Chester, New Jersey. Annually it receives materials for its work from points outside the State of New Jersey in an amount in excess of \$50,000. We find that Nichols is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

Local No. 262, IBEW, and Operating Engineers are labor organizations within the meaning of the Act.

III. THE DISPUTE

A. *The work at issue*

Nichols, an electrical contractor, is engaged primarily in erecting and wiring electrical pole lines. The standard operation requires digging a hole in the ground, standing the pole firmly in it, and, on cross bars, stringing electrical transmission wires the length of the lines. At times the holes are dug and the poles planted entirely by manual labor. At others, and apparently for the most part by this Company, mechanical means are utilized. In that event, a comprehensive line truck is used as follows:

A power-driven auger is attached to the rear of the truck. In order to operate it, the truck backs up to where the hole is to be bored. The auger is then set in position and by means of power supplied by the truck or by separate motor attached to the truck the auger is operated, thus boring a hole. Excess dirt remaining in the hole is removed by hand shovel. A power-driven A-frame or derrick is then set in position on the back of the truck and used to hoist the electric line pole into the hole. After the pole is set in position, loose dirt around its bottom is tramped down. Cross frames are attached to the pole while it is lying on the ground or after it is raised into the air. Wires are strung on the pole after it has been erected.

¹ 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 [Chairman McCulloch and Members Rodgers and Leedom].

² Respondent's request for oral argument is hereby denied since the record and briefs adequately state the positions of the parties.

On behalf of its members, the Operating Engineers claims the work of operating the auger and the derrick. Nichols and IBEW, Local 262, insist that the work may properly be performed by the Company's present complement of employees who are represented by Local 262 and to whom Nichols has been assigning the work. Whenever hole digging and pole planting were performed by hand labor on this project, the Operating Engineers conceded Nichols' right to use IBEW members, as it also makes no claim to the work of driving the trucks or stringing the wires.

B. Evidence of conduct violative of Section 8(b)(4)(D)

The State of New Jersey awarded to Elmhurst Contracting Co., herein called Elmhurst, a contract to build a dam known as the Spruce Run Dam near Clinton, New Jersey. Elmhurst subcontracted a portion of this work to Selby Drilling Corporation, which in turn on or about May 1, 1961, orally subcontracted to Nichols the erection of power transmission lines to Selby's concrete batching bins at this project. Elmhurst and Selby both have collective-bargaining agreements with the Operating Engineers. In its home territory, and general field of operations, Nichols has a collective-bargaining agreement with IBEW, Local 358, of Perth Amboy, New Jersey. As the Spruce Run Dam project is located in the territorial jurisdiction of IBEW, Local 262, Nichols, as part of its efforts to obtain electricians, signed an assent contract with Local 262, whereby it agreed to be bound by the contract between Local 262 and the Electrical Contractors of Plainfield, New Jersey.

On or about May 3, 1961, Albert O'Brien, general supervisor for Nichols, arrived at the Spruce Run site with a crew of six men, four of whom were from Local 262. The Nichols crew had with them a line truck, whose equipment included an auger for the drilling of pole holes. There were a number of operating engineers working nearby who were employed by Selby and Elmhurst. As O'Brien's crew was about to commence digging operations with the auger, Joseph Lepore, an operating engineer employed by Selby, approached them and asked to see the union cards of the auger operator. The operator had no Operating Engineers card and Lepore reported the fact to Gatti, the steward on the job for the Operating Engineers. Gatti, with a few other operating engineers, walked over to the auger truck and told O'Brien that he must have Operating Engineers to operate the truck. O'Brien and Gatti then spoke with Yanuzzi, also known as Bates, the head engineer on the job. In this conversation, O'Brien was informed that the auger could not operate without Operating Engineers. Gatti stated at the hearing that he then spoke with Kangas, superintendent of Selby, and informed Kangas that the hole-drilling was the work of

Operating Engineers. O'Brien then returned to the line truck about noon and removed it for the day.

On May 9, 1961, O'Brien returned with the line truck and his crew and again commenced to dig a hole with the auger. Gatti and a number of operating engineers then left their work stations with Elmhurst and Selby, and they approached and stood around in such close proximity to Nichols' line truck, as to interfere with the operation of the truck. O'Brien then went again to see Kangas. Kangas came down to the site where Nichols' line truck was operating and seeing some 10 or 15 Selby and Elmhurst engineers standing around the truck, he attempted to contact Gatti in an effort to resolve the difficulty. Gatti avoided Kangas.

Apparently seeing no other alternative, Kangas discussed with O'Brien the possibility of completing the work by hand. O'Brien then returned to his crew and, as it had become rather late in the afternoon, 3 or 3:30 p.m., he removed his truck and his men. He returned with his crew during the next few days when, instead of using power equipment, he had them accomplish the digging and pole hoisting by hand. There was no interference from the engineers while Nichols' crew completed the job in this manner.

C. The contentions of the parties

The Operating Engineers denies that it engaged in any illegal conduct and affirmatively contends that its members are entitled to the disputed work on the basis of tradition and custom in the industry and because IBEW, Local 262, is bound by a decision of the Joint Board for Settlement of Jurisdictional Disputes in this very case. It also argues that its contracts with Elmhurst and Selby require an award in its favor.

The IBEW rests its claim upon the contract between Nichols and IBEW, Local 262, and upon the assertion that the record in its entirety proves that this work has historically and regularly been performed by Electricians and not by Operating Engineers. It also argues that the Joint Board lacks authority to settle disputes relating to transmission line installations such as this one.

Nichols says that it has always assigned this work to Electricians, that it is in no way subject to the authority of the Joint Board, and that on the entire record the Board can only determine the dispute in favor of the Company's established practice.

D. Applicability of the statute

Implicit in the Operating Engineers' argument that the Joint Board's decision finally put this dispute at rest is the further contention that that entire proceeding and award reveals an agreed-upon method for voluntary adjustment between the parties which, under

the statute, precludes any further consideration of the issue by this Board now.³ On the record before us we cannot view that decision as having such effect.

By letter dated June 6, 1961, the Operating Engineers submitted this dispute to the Joint Board for the Settlement of Jurisdictional Disputes in Washington, D.C. On June 16, the Joint Board awarded the work in dispute to the Operating Engineers. The IBEW for many years has consistently taken the position that it will not be bound by any Joint Board determination involving line work. The National Electrical Contractors Association, of which Nichols is a member, has also refused to be bound by any Joint Board determination dealing with line work. Nichols did not participate in that Joint Board proceeding. Lastly, the contract between Nichols and Local 262, directly applicable to this dispute, makes no provision for the referral of any such dispute to the Joint Board. In these circumstances, we do not believe it can be said that the parties have submitted to us "satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute."⁴

As to the Operating Engineers' assertion that it did no more than voice its request that the work in question be assigned to its members instead of to Electricians, there is much in the record indicating that it exerted improper pressure upon Nichols to force immediate hiring of Operating Engineers if the Company wished to continue using the auger and a derrick. Steward Gatti told Nichols' supervisor he would be required to use engineers; and some days later Gatti with a large group of engineers impeded the safe operation of the line truck as described above.

In any event, in order to pass upon the merits of the dispute here, we are not required to find that the Respondent Operating Engineers in fact engaged in conduct proscribed by Section 8(b)(4)(D). All we need determine in this proceeding is that there is reasonable cause to believe that the Respondent engaged in such conduct. We are satisfied that the record in its entirety warrants such a conclusion and we so find. Accordingly, on the basis of the entire record, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. The merits of the dispute

There is no certification of bargaining representatives issued by the Board that can be said to apply to any of the employees involved in

³ Section 10(k) of the Act provides that the Board "... is empowered ... to ... determine the dispute ... unless ... the parties ... have adjusted or agreed upon voluntary adjustment of the dispute. Upon such voluntary adjustment ... the charge shall be dismissed." [Emphasis supplied.]

⁴ *International Union of Operating Engineers, Local 66, AFL-CIO (Frank P. Badolato & Son)*, 135 NLRB 1392.

this dispute. There are a number of other pertinent facts which are urged upon us either as in themselves determinative of the issue or as persuasive reason for an affirmative assignment one way or the other.

1. Contract provisions

The only collective-bargaining agreement directly applicable here is between Nichols and IBEW, Local 262, covering the employees to whom the Company has assigned the work. The only contract language that could shed light on the precise issue presented to us is that the Employer recognizes IBEW, Local 262, as representative of "employees performing work in the jurisdiction of this Union," and that ". . . work of installing . . . all wiring for . . . electrical equipment . . . shall be performed by workmen employed under the terms of this agreement."⁵

The fact that this is the only contract Nichols appears to have with any union covering his employees, plus the fact it has never recognized or dealt with the Operating Engineers, is strong indication that the agreement was intended to cover all the work which this company, as an electrical contractor, undertakes. Beyond that, the language of the agreement helps us little, for "wiring" can be "installation" on poles already erected, and the "jurisdiction" of the Union is nowhere defined or explained in the contract itself. We cannot find, therefore, that this contract expressly covers the disputed work.

The Operating Engineers contend that the work involved is covered by its agreements with Selby and Elmhurst and that these employers have violated these agreements by subcontracting work to Nichols, which has no contract with the Operating Engineers. Even assuming that the breach, if any, of the Selby or Elmhurst agreements were relevant here, it is by no means clear that these contracts were intended to apply to the precise work of digging holes and planting poles for electrical transmission wires. Although the agreements recognize the Operating Engineers as the exclusive bargaining representative of employees who operate power equipment, such as "winch trucks" and "post holes diggers," such recognition is limited to those situations where such equipment is used in the construction of ". . . bridge approaches, viaducts, shafts, tunnels, subways . . . piers, docks, dams, dredging, port works. . . ." The listed construction uses, however, do not necessarily include the erection of poles for power transmission lines.

⁵ More fully the agreement details the contract work coverage as:

The work of installing, maintaining, connecting, and shifting of all wiring for temporary lightening [sic], heat or power and the maintenance of pumps, fans or blowers, welding machines, and other electrical equipment in new buildings in the course of construction, old building equipment undergoing alterations, subways, bridges and highways under construction and/or repair shall be performed by workmen employed under the terms of this agreement.

2. Union constitutions

To the extent that they may related to the work here involved, the jurisdictional declarations set out in the respective constitutions of the Internationals of the two competing union groups differ only to the extent that the IBEW one seems more nearly to describe the work. As is to be expected, of course, neither refers specifically to digging holes and planting poles exactly for transmission lines, for constitutional provisions by their very nature must treat with general concepts. Among the many duties and responsibilities spelled out in the Operating Engineers' constitution is the work of operating ". . . hoisting and portable machines and engines, used in or upon wrecking, digging, boring, building and erecting foundations, buildings, tunnels and subways, dams, reservoirs, . . ." "all derricks, boom hoists (of all descriptions and capacities) and automatic hoists . . . used for hoisting building material or lowering debris. . . ." The IBEW constitution covers, among other things, ". . . all line work consisting of wood, concrete or metal (or substitute therefor) poles or towers, including wires, cables or other apparatus supported therefrom."

3. Determinations of the Joint Board

Operating Engineers placed in the record some 130 recent decisions of the National Joint Board for Settlement of Jurisdictional Disputes in the Building and Construction Industry which awarded the work of operating power-driven hoists and diggers to Operating Engineers where disputes over the assignment of this work had arisen in various parts of the United States. Although they dealt with the construction industry and in many instances were adverse to the claims of electricians, these decisions seem to paraphrase the generalities of the Operating Engineers' constitution and speak of the machines as such; none of them reflects an award to the Operating Engineers for the operation of such machines where used, specifically, to dig holes for, and set in place, electrical transmission poles. Further, a fair reading of them all shows that they do not stand for the proposition that hoists and derricks must be operated by engineers without regard to the use to which the machine is put. Rather, some award the work of "unloading or hoisting materials" by operation of an A-frame truck to operating engineers, while others award this same work to electricians when these machines were used to "pull cables or handle reels."⁶

Even assuming that these Joint Board awards were intended, like that Board's decision on June 16, 1961, relating to this very dispute,

⁶ See, e.g., Joint Board decision of June 6, 1957, "Air Reduction job La Puente, California, Bechtel Corporation contractor"; decision of October 30, 1958, "Powerhouse job Indian River City, Florida"; decision of November 6, 1958, "Jackson Lock & Dam job, Jackson, Alabama."

to assign the operation of power-driven equipment used in electrical pole line work to Operating Engineers, there is no indication that the IBEW joined in submitting any of these disputes, including the instant one, to the Joint Board. On the contrary, John Parker, assistant to the president of the IBEW, testified at the 10(k) hearing that the IBEW takes the position that pole line work is not construction work and that it has, therefore, consistently protested Joint Board action in such cases for many years. He testified that the IBEW withdrew from the Joint Board for the period 1952 to 1956 because of this very disagreement with that body. He further testified that a condition of the IBEW's reaffiliation with the Joint Board in 1957 was that the Joint Board would make no determinations regarding pole line work. However, the Joint Board continues to make awards in such matters against the IBEW and IBEW is continuing its protests and, in fact, refuses to honor the awards. Accordingly, from the record as a whole, we are unable to conclude that any stipulation of the IBEW to the Joint Board for construction work includes the work in issue here. Therefore, we cannot accord to the Joint Board's award of June 16, 1961, or to its prior decisions, sufficient weight to offset the other relevant considerations appearing in the record.

4. Custom and practice

Apart from what limited value the Joint Board decisions can have as reflecting industrywide practices, none of the parties produced evidence supporting their conflicting assertions that broad national patterns support their respective positions. Evidence was introduced, however, respecting the practices in the State of New Jersey, where the parties here involved generally operate.

The Operating Engineers also point to a number of decisions of the Joint Board and its predecessor, the Executive Council of the Building and Construction Trades Department, dealing with disputes in the New Jersey area, where awards were made to the Operating Engineers for the operation of power-driven equipment for digging holes and hoisting materials. These decisions concern projects at the Hercules Powder Plant, Parlin, New Jersey, McGuire Air Force Base, Fort Dix, the so-called Del Balse job at Linden, New Jersey, and Camp Kilmer. However, only the Hercules Powder Plant award (1946) specifies "the operation of a line truck with a boom to be used to erect power and light poles." There are also the 1954 and 1959 agreements between the Operating Engineers and Associated General Contractors of the State of New Jersey, in which the Operating Engineers were recognized for operation of "heavy boring machines" and power unit trucks used for the hoisting of material. In addition, several individual employer witnesses testified that they themselves had employed Operating Engineers to perform the work in question here

on construction jobs. In these cases, however, it appeared that the general contractor frequently accomplished both the normal construction work and the electrical pole line work with his own employees, instead of using electrical subcontractors.

On the other hand, representatives of various locals of the IBEW, with jurisdiction in different parts of the State of New Jersey, testified that this work has traditionally been done by members of the IBEW equipped with line trucks carrying power-driven digging or hoisting equipment. John Countryman, the president of Nichols, testified that from approximately 1946 to 1955 while he was employed by the New Jersey Power and Light Company, the pole line work for that company was accomplished by utility employees represented by the IBEW. Floyd Taylor, the president of Schoonover Company, Inc., electrical contractors of Mountainside, New Jersey, who was also president of the New Jersey Chapter of the National Electrical Contractors Association, testified that since 1954 the work of digging poles and placing poles for wires either manually or by use of power-driven equipment has been done by electrical contractors whose employees, wherever organized, are represented by the IBEW local of the area.

There is little in the foregoing evidence on the pertinent consideration of custom or practice to lend effective weight to the Operating Engineers' claim. Apart from its conflicting character, the evidence of past assignments to operating engineers, as in the case of the Joint Board awards, is more in terms of general operation of digging and hoisting machinery or engines in the construction industry than in precise terms of digging holes for and planting poles in connection with electrical power lines. The proof of such assignment by electrical contractors throughout the State to electricians, on the other hand, whatever the real extent may have been, is direct and unequivocal.

As to the past practice of the Nichols Company, its president's testimony is clear and uncontradicted. He said that since 1955, when he joined the Company, its principal work has been to set up poles and string electrical wires, that the work has consistently been done with power augers and hoists, and that its employees have always been electricians represented by an IBEW local.

Conclusion

As we stated recently in the *J. A. Jones* case,⁷ we will, pursuant to the Supreme Court's *CBS* decision,⁸ determine, in each case presented for resolution under Section 10(k) of the Act, the appropriate assign-

⁷ *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402.

⁸ *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.

ment of disputed work only after taking into account and balancing all relevant factors.

On the entire record, we believe the electricians employed by Nichols are entitled to the work in dispute. As it is doing now, Nichols has assigned this work to them consistently for a number of years and it appears clearly that its practice conforms with that of a number of other electrical contractors in the State of New Jersey. Certainly the record would not warrant a finding that Nichols' practice is contrary to statewide or industry practice. The assignment is also bottomed on a proper collective-bargaining agreement and there is no Board certification calling for any different work assignment.

It may well be, indeed it is highly probable, that engineers represented by the Operating Engineers would bring more skill and experience to the operation of power-driven augers and A-form hoists or derricks. It does not follow, however, that these line truck electricians, who have used this same machinery for the precise work here involved, are not qualified to perform the work competently and to the satisfaction of both the subcontractor and the general contractor.

Essentially, the Operating Engineers' position here is that whenever an auger drill or A-frame derrick is used, no matter for what purpose and no matter by what employer, its members must be hired for that work. We view this as the breadth of its argument because its constitution speaks of these machines and does not specify their use for setting up electrical poles by electrical contractors. The contention is weakened by the fact that the Joint Board, upon which the Operating Engineers relies heavily, itself awarded the operation of these machines to IBEW electricians when use in ancillary aspects of the electrical craft. Moreover, the constitutional claim of the Operating Engineers is directly offset by the more precise claim to this very work appearing in the IBEW constitution.

Accordingly, we shall determine the jurisdictional dispute by deciding that electricians rather than operating engineers are entitled to operate the power-driven auger and power-driven hoist where used by Nichols in the digging of holes for, and the setting of, electric poles. Our present determination is limited to the particular controversy which gave rise to this proceeding. In making this determination, we are assigning the disputed work to electricians, who are represented by the IBEW, but not to Local 262 or its members.

In view of the above, we find that Operating Engineers was not and is not entitled by means proscribed by Section 8(b)(4)(D) to force or require Nichols to assign the work of operating power-driven drilling and hoisting equipment to its members rather than to members of Local 262.

DETERMINATION OF DISPUTE

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

1. Employees engaged as electricians, currently represented by Local Union No. 262, International Brotherhood of Electrical Workers, are entitled to operate power-driven drilling and hoisting equipment for Nichols Electric Company at the Spruce Run Dam project, Clinton, New Jersey.

2. Local Union 825, International Union of Operating Engineers, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D), to force or require Nichols Electric Company to assign the work of operating such power-driven drilling and hoisting equipment to employees engaged as operating engineers, who are currently represented by Local Union 825, International Union of Operating Engineers, AFL-CIO.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local Union 825, International Union of Operating Engineers, AFL-CIO, shall notify the Regional Director for the Twenty-second Region, in writing, whether or not it will refrain from forcing or requiring Nichols Electric Company by means proscribed by Section 8(b)(4)(D) to assign the work in dispute to Operating Engineers rather than Electricians.

**Newspaper and Mail Deliverers' Union of New York and Vicinity,
Independent and The New York Times Company**

**New York Mailers' Union No. 6, International Typographical
Union, AFL-CIO and The New York Times Company. Cases
Nos. 2-CD-196 and 2-CD-197. July 18, 1962**

DECISION AND DETERMINATION OF DISPUTE

This is a consolidated proceeding under Section 10(k) of the Act following charges filed by The New York Times Company, herein called the Company. One of the charges is against Newspaper and Mail Deliverers' Union of New York and Vicinity, Independent, herein called the Deliverers, and alleges that that Union engaged in illegal conduct with respect to the Company and its employees in order to force a change in work assignment as between members of the Deliverers and members of New York Mailers' Union No. 6, International Typographical Union, AFL-CIO, herein called the Mailers. The other charge, against the Mailers, involves the same work dispute and alleges that the Mailers engaged in like illegal conduct for the purpose