

Consequently, as the record shows that the requested quarry workers are engaged in work, basically dissimilar, and at locations separate, from the mill employees and in view of the existence over a long period of separate units limited to quarry workers, we find that the requested units are appropriate.¹⁰

In view of the foregoing, we find that the following employees of Bennett Stone Company, Bloomington, Indiana, McNeeley Quarries, Inc., Ellettsville, Indiana, and Mid-West Quarries Co., Inc., Bloomington, Indiana, constitute separate appropriate units for purposes of collective bargaining within the meaning of Section 9(b) of the Act: All employees of each employer engaged in and about its quarry, excluding office clerical employees, foremen, professional employees, all employees represented by other labor organizations, guards, and supervisors as defined in the Act.¹¹

[Text of Direction of Elections omitted from publication.]

¹⁰ See, *Monon Stone Company, supra*

¹¹ In Case No. 25-RC-2152 the Petitioner requests that employees "who have been," as well as those who are, represented by other unions be excluded from its proposed unit. We have not included such language in the unit description because past representation of employees in some other unit does not warrant their exclusion at this time from the requested unit if they otherwise come within its coverage. Also in Case No. 25-RC-2152, the supervisory status of the quarry foreman and head hooker was questioned. As for the quarry foreman, the record shows he is responsible for the quarry operations and for the work of the employees there employed. Accordingly, we find he is a supervisor. However, there is no evidence showing that the head hooker has authority to hire, discharge, discipline, or responsibly direct the work of, employees or to make effective recommendations affecting the status of employees. Accordingly, we find the head hooker is not a supervisor.

**Local Union 825, International Union of Operating Engineers,
AFL-CIO and Schwerman Co. of Pa., Inc. Case No. 22-CD-54.
November 29, 1962**

DECISION AND DETERMINATION OF DISPUTE

This is a proceeding pursuant to Section 10(k) of the Act following a charge filed by Schwerman Co. of Pa., Inc., herein called Schwerman, alleging a violation of Section 8(b)(4)(D) by Local Union 825, International Union of Operating Engineers, AFL-CIO, herein called Respondent or Operating Engineers. Pursuant to notice a regularly scheduled hearing was held on July 24, 25, 26, 28, 31, and on August 1, 2, 7, and 8, 1961, before Alvin Lieberman 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 Schwerman, Operating Engineers,

and Local 773, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Teamsters.

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

I. THE BUSINESS OF THE EMPLOYER

Schwerman is a Pennsylvania corporation engaged in the transportation of bulk and bag cement. During 1960 it received revenue in excess of \$100,000 for transporting cement from its terminals in Nazareth, Universal, and West Winfield, Pennsylvania, to points outside the State of Pennsylvania. Accordingly, we find that Schwerman 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

Operating Engineers and Teamsters are labor organizations within the meaning of the Act.

III. THE DISPUTE

A. *The work at issue*

As previously stated, Schwerman is engaged in the transportation of bulk and bag cement. The dispute herein involves only bulk cement. The vehicle used to transport the cement is a tractor-drawn semitrailer. The trailer is of a tank-type and is specifically designed for the transportation of dry, bulk products. Unloading is accomplished by aerating the cement in the tank and blowing it into a silo or storage bin. More specifically, the tractor engine, through a power takeoff, powers a blower which is mounted on the tractor. The blower transmits air through a hose into the tank trailer causing the cement to be forced through another hose into the storage bin. All equipment necessary to the unloading process, including the hoses, is attached to or carried upon Schwerman's tractor-trailer rig.

Once the trailer is placed in position beside the silo for unloading, the precise work functions, all of which are in dispute, include coupling the hose from blower to trailer and the hose from trailer to silo, engaging the power takeoff in the tractor cab and setting the tractor engine at the revolutions per minute prescribed by the blower manufacturer, observing pressure gauges on the trailer, and manipulating a valve which controls the flow of cement.

The Operating Engineers claims that operation of the above-described equipment, whenever it is used for unloading at the construc-

¹ Respondent's request for oral argument is hereby denied since the record and briefs adequately present the issues and the positions of the parties.

tion site, comes within its work jurisdiction. Schwerman and the Teamsters Union, which represents Schwerman's drivers, contend that the drivers have been assigned and should perform the unloading.

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

The Operating Engineers has a collective-bargaining agreement with Selby Drilling Corporation, a subcontractor at the Spruce Run Dam project near Clinton, New Jersey. Schwerman, whose drivers are represented by the Teamsters, contracted with Universal Atlas Cement Division of U.S. Steel Corporation to deliver cement to Selby at the Spruce Run project and delivery began in early May 1961.

On June 8, 1961, Schwerman's driver delivered a load of cement to the project and was told by a member of Operating Engineers that the truck could only be unloaded by an operating engineer. The driver acquiesced. On June 9 another Schwerman truck hauled cement to the site but the driver, acting pursuant to his superior's instructions,² refused to accede to the request of the Operating Engineers job steward to allow operating engineers employed by Selby to unload. Consequently, the loaded trailer was returned to Schwerman's terminal. On June 12 an operating engineer again insisted upon unloading a delivery, but the driver was ultimately allowed to unload that load and two loads delivered on the following day.³ On June 14 another load was dispatched to the jobsite and the operating engineers again insisted upon unloading. The driver refused to permit this and returned the loaded truck to Schwerman's terminal.

On June 19 several Schwerman officials, including its vice president in charge of operations, accompanied two loaded trucks to the Spruce Run Dam site. As the drivers began to prepare the equipment for unloading, several operating engineers approached. The Operating Engineers job steward and two other engineers physically obstructed the intake to Selby's silo so that the driver could not couple the hose and effect the discharge of cement. Through its job steward the Operating Engineers claimed the work of unloading the trucks, whereas Schwerman's vice president and the driver insisted that unloading was the driver's function. After considerable discussion and more thwarted attempts to couple the discharge hose, Schwerman's vice president, "under protest" and over the protests of the driver, allowed the operating engineers to unload.

C. The contentions of the parties

Schwerman and the Teamsters contend that unloading bulk cement from tank trailers through truck-mounted power equipment has tradi-

² The June 8 incident had been reported to Schwerman officials

³ The details of this arrangement are not reflected in the record

tionally, throughout the United States, been performed by truck-drivers and that the specific, disputed unloading has been assigned to Schwerman's drivers by their collective-bargaining contract.

The Operating Engineers basically contend that, in the State of New Jersey, such work has traditionally been performed by operating engineers represented by it, as has the operation of all power equipment on construction sites. Further it contends that its "dual-purpose truck agreement" with the Teamsters places the power-unloading of cement within its jurisdiction. Finally, it contends that the disputed work has been assigned to operating engineers by virtue of its collective-bargaining contract with Selby Drilling Corporation.

D. Applicability of the statute

The Operating Engineers contend that the dispute herein is not properly before the Board inasmuch as its "dual-purpose truck agreement" with the Teamsters constitutes a method for voluntary adjustment of the dispute. Apart, however, from questions as to the present vitality of this agreement, it does not preclude our consideration of the dispute as Schwerman was not a party thereto and has not adopted the agreement.

Turning then to the events out of which the alleged violation of 8(b) (4) (D) stemmed, the record discloses that members of the Operating Engineers, in the presence of and with the assistance of the job steward, asserted on several occasions the right of operating engineers to unload Schwerman's trucks. These attempts to acquire the unloading functions culminated on June 19 in the Operating Engineers members and job stewards physically preventing the unloading of Schwerman's trucks. Considering together the claims to the work and the physical interference by the Operating Engineers agent, it is reasonable to conclude that the objects of such action were to cause Schwerman's driver to refuse to perform the unloading and to cause Schwerman to use operating engineers to unload its trucks. Undeniably the actions of the Operating Engineers had these effects. In the circumstances 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 are no Board orders or certifications of representatives applicable to this dispute. In determining the merits of the dispute, the following factors deserve attention :

1. Contract provisions

As previously stated, the Teamsters represent Schwerman's drivers under a collective-bargaining contract. Also the Operating Engineers

has a contract with Selby Drilling Corporation. In sum, the Operating Engineers contend that, as this agreement by its terms covers all subcontractors of Selby and requires that all work be sublet subject to the terms of the agreement, the unloading of Schwerman's trucks is necessarily within its coverage, such unloading involving the operation of power equipment on the construction site. Inherent in such reasoning is the conclusion that Schwerman is a subcontractor of Selby and further that Schwerman acquired the work subject to the terms and conditions set forth in the Operating Engineers contract with Selby. The evidence, however, does not support these conclusions. Thus, it is not shown that Schwerman in any manner adopted any of the terms or conditions of the Operating Engineers collective-bargaining contract. Indeed, it is not shown that any contractual relationship exists between Schwerman and Selby. In addition, Schwerman does not have and has never had a collective-bargaining contract with the Operating Engineers. In these circumstances we find that the Operating Engineers has no contractual claim against Schwerman respecting the work in dispute.⁴ On the other hand, the Teamsters contract with Schwerman provides wage rates for unloading by drivers and sanctions for careless loading and unloading. It therefore appears that driver-unloading was contemplated⁵ even though, as the Operating Engineers points out, no specific assignment of the disputed work is made by the contract.

2. Union constitutions

Little, if any, aid is provided by the constitutions of either the Operating Engineers or the Teamsters since each, by rather specific provisions, lays claim to the general operations of loading and unloading materials. Thus, the Operating Engineers constitution provides that that organization has jurisdiction over "all other engines and machines, . . . used on building and construction work, or in the loading, unloading or storage of commodities, at or in terminals." Similarly, the Teamsters constitution frames its jurisdiction as encompassing "all workers loading or unloading freight, merchandise or other material on to or from any type of vehicle . . ."

⁴The record shows, rather, that Selby contracted with Universal Atlas Cement for the purchase of cement, and Universal independently contracted with Schwerman to transport the cement. Thus, Schwerman was not a subcontractor of Selby, and would not be bound even under the terms of the Operating Engineers contract with Selby, absent an express assumption of the contract's provisions by Schwerman. Accord: *Local 825, International Union of Operating Engineers, AFL-CIO (Fluoro Electric Corporation)*, 128 NLRB 725. However, even assuming Schwerman to be bound by the Operating Engineers collective-bargaining contract, that document, though extensively enumerating devices whose operation "belongs" to operating engineers, by no means lays explicit claim to the operation of the equipment in question.

⁵The uncontradicted testimony of the Teamsters negotiating committee chairman substantiates this finding.

3. Determinations of the Joint Board

The Operating Engineers submitted some 15 decisions of the Joint Board for the Settlement of Jurisdictional Disputes as having a bearing on the disposition of the disputed work. Nine of these decisions related to the operation of forklifts while the remainder were concerned with various devices such as a "dinky locomotive," a "hydraulic crane," and a "sand blasting compressor." Though most of these decisions involved disputes between the Operating Engineers and the Teamsters, none sheds light upon the dispute before us.

The Teamsters, on the other hand, point to a decision by an Arbitration Committee appointed by the Executive Council of, and adopted by, the Convention of the American Federation of Labor held in Portland, Oregon, in October 1923. This decision resolved in favor of the Teamsters their dispute with the Bridge and Structural Iron Workers' International Union over the loading and unloading of trucks, etc. The minutes of the 72d meeting of the Joint Board for the Settlement of Jurisdictional Disputes dated May 19, 1950, contain letters exchanged between Richard Gray, then president of the Building and Construction Trades Department, and William Green, then president of the A.F. of L., by which Gray asked Green to render a decision as to whether the above-mentioned 1923 decision related to the handling of all materials or only to materials used by ironworkers. President Green's interpretation, as reflected in his reply, was that ". . . loading, handling and unloading of materials on and off . . . trucks . . . comes under the exclusive jurisdiction of the . . . Teamsters . . ." We note in this regard, however, that while this decision is persuasive in the general area of the work in dispute, it apparently has not operated to quell disputes as to *specific* methods of loading and unloading. In fact, within the 1923 decision a distinction is made where material is "hoisted" from the carrier, such hoisting remaining within the jurisdiction of ironworkers.

No decision of the Joint Board has been presented which deals with the specific machinery in question possibly because of its newness,⁶ and the fact that the Teamsters withdrew from the jurisdiction of the Joint Board in March 1961.

4. Custom and practice

The evidence concerning custom and practice relating to the *specific* equipment, owned by the *specific* employer involved, and in use at the *specific* situs of the dispute herein, is in conflict. Thus, there is testimony that Schwerman assigned the work of unloading its trucks to

⁶ The record indicates that the equipment, the operation of which is in dispute, came into use in 1959

its own drivers and that the drivers performed this work. There is other testimony, however, that operating engineers actually unloaded Schwerman's trucks at the Spruce Run project. Broadening the scope of inquiry to include the State of New Jersey, the same conflict exists. Thus, there is testimony that operating engineers unload all cement delivered to construction sites in the State, while there is other testimony by both trucking company officials and drivers that all cement hauled by truck is unloaded by drivers. In short, the record does not permit a determination as to local practice with respect to the specific work in dispute.

With respect to other relevant custom and practice, the record rather firmly establishes that operating engineers operate the great part of all power equipment used on construction sites, both at Spruce Run and elsewhere. It is also apparent from the record that drivers unload the type of cement trucks in question at delivery points other than construction sites in New Jersey and at certain construction sites in the State, though it is not shown that operating engineers were employed on those sites. There is further evidence from officials of trucking companies other than Schwerman that all unloading of the type of dispute is assigned to drivers and any unloading by nonemployees of the trucking companies has not been brought to their attention or to the attention of Teamsters officials. There is evidence that drivers are assigned the disputed work under the Teamsters Eastern Cement-Haul Agreement which, the record shows, covers all major cement-hauling companies in the Eastern United States, including New Jersey. The Operating Engineers do not have a collective-bargaining agreement with any signatory to this agreement. Similarly, under the Teamsters agreement covering some 25 Central and Southern States, unloading the equipment in dispute is assigned to drivers. There is also direct testimony that in a number of these States drivers actually perform the work which is the subject of the dispute herein. The Operating Engineers submitted no *specific*⁷ evidence to show performance of the disputed work by operating engineers outside New Jersey.

With regard to the specific custom and practice of hauling cement by other means to construction sites, the record shows that operating engineers have performed the unloading when cement was carried in railroad cars. Operating engineers have also unloaded tank trucks where the device used to develop the air for unloading was not mounted on the truck. Also, operating engineers have unloaded, with forklifts, bagged cement situated on pallets on truck beds. On the other hand, when cement has in the past been hauled by dump-trucks, the driver has customarily been responsible for unloading.

⁷ The Operating Engineers maintains, however, that its members operate *all* power equipment on construction sites in the United States

The Operating Engineers contends that the equipment in question is a "dual-purpose" truck, the operation of which *on the construction site* has traditionally been within the jurisdiction of that organization. Apart from the disputed question of whether Schwerman's cement truck is a dual-purpose truck, the record indicates that there are exceptions to the rule that operating engineers operate such vehicles on the construction site, and the exceptions involve vehicles in a sense similar to the cement trucks. Thus, drivers unload ready-mix cement trucks at construction sites. They also unload oil which is trucked onto the construction site and off-loaded by a pump which is mounted on the vehicle. These exceptions to the "general rule" are recognized in New Jersey.

CONCLUSION

After consideration of the entire record, we are persuaded that drivers employed by Schwerman are entitled to perform the disputed work. Schwerman, consistent with its contract with the Teamsters, assigned the unloading of its trucks to its drivers. While the Operating Engineers contends that the work was assigned by Selby to operating engineers, we note that no official of that company was called to testify in this regard. Moreover, the work wasn't Selby's to assign. The record shows that Schwerman's assignment to its drivers was consistent with the practice of other cement-hauling companies within the general area and over a large number of States.

While the Operating Engineers developed considerable evidence to prove that its members operated various types of power equipment on construction sites, the utility of such evidence in resolving the instant dispute has been limited. Thus, accepting the argument that the device used to develop air for unloading the trucks is a "compressor" rather than a "blower," proof that operating engineers operate compressors on construction sites does not settle the dispute, for this case does not involve the operation of equipment customarily found on construction sites. We are impressed by the fact that the equipment customarily operated by operating engineers at construction sites is more directly involved with actual construction work than is the equipment in question. Thus, operating engineers may operate stationary compressors to provide air for jackhammers or sandblasters. Similarly they may operate such a compressor even if it is mounted on a truck, but the compressor is again being used in direct connection with construction. Operating engineers may operate stationary compressors for the purpose of pressurizing railroad cars or tank trucks to effect the off-loading of bulk cement. Again however, the equipment is located on the site and generally may be used for other purposes more directly concerned with construction. A different situation exists with regard to the equipment whose operation is disputed.

Thus, the sole function of the trucks involved herein is to transport cement and other dry, bulk material. An integral part of the vehicle is the device used to unload the cargo. It is a special device used *only* for this purpose. As such it is inextricably tied to the primary function of the truck, which is transportation. The operation of such a vehicle, including unloading, is more nearly analogous to the operation of the ready-mix truck or oil truck discussed previously.

Accordingly, we shall determine the dispute by deciding that drivers employed by Schwerman are entitled to operate the truck-mounted equipment for the purpose of unloading cargo from Schwerman's trucks at construction sites. Our decision extends also to the coupling of hoses, manipulation of valves, and all other functions necessary to the discharge of cargo in the manner here in dispute. Our determination is limited to the particular controversy giving rise to this proceeding. By our determination we are assigning the disputed work to drivers, who happen at the present time to be represented by the Teamsters but not to the Teamsters or its members.

In view of our determination, we find that Operating Engineers was not and is not entitled, by means proscribed by Section 8(b) (4) (D), to force or require Schwerman to assign the work to its members or employees represented by it.

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 drivers, currently represented by Local 773, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are entitled to operate the truck-mounted equipment used in unloading Schwerman's trucks 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 Schwerman Co. of Pa., Inc., to assign the aforesaid work to employees engaged as operating engineers, who are currently represented by Local 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 Schwerman Co. of Pa., Inc., by means proscribed by Section 8(b) (4) (D) to assign the work in dispute to operating engineers rather than to drivers employed by Schwerman.