

**Oil, Chemical and Atomic Workers International Union, AFL-CIO and its Local 8-575 and Merck & Co., Inc.**

**Local Union No. 715, United Brotherhood of Carpenters and Joiners of America and Oil, Chemical and Atomic Workers International Union, AFL-CIO and Its Local 8-575.** *Cases Nos. 22-CD-97 and 22-CD-98. March 2, 1965*

### DECISION AND DETERMINATION OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Merck & Co., hereinafter called Merck, and Oil, Chemical and Atomic Workers International Union, AFL-CIO and its Local 8-575 alleging, in substance, that Respondent Unions threatened to engage in a strike or refusal to work, with an object of forcing or requiring Merck to assign particular work to employees represented by their respective Unions.<sup>1</sup> A consolidated hearing was held before Hearing Officer Earl S. Aronson, on September 28, 29, and 30, and October 8, 20, and 21, 1964. Merck, O.C.A.W., and the Carpenters appeared at the hearing and were afforded full opportunity to be heard, to 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, O.C.A.W., Merck, Carpenters, Sheet Metal Workers, I.B.E.W., Steamfitters, and Plumbers filed briefs.

Upon the entire record in this case, the Board<sup>2</sup> makes the following findings:

#### 1. The business of the Employers

Merck & Co., Inc., is a New Jersey corporation with its principal place of business located at Rahway, New Jersey, with branches located in various other States of the United States. It is engaged in the manufacture and sale of pharmaceutical specialties at its

<sup>1</sup> Merck filed a charge against the O.C.A.W. O.C.A.W. then filed a charge against the various building trades unions. Only the charge filed by Merck against the O.C.A.W. and O.C.A.W.'s charge against the Carpenters survives. At the hearing, the following parties intervened: Local Union No. 245, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (herein called Plumbers); International Association of Sheet Metal Workers, AFL-CIO, Local Union No. 22 (herein called Sheet Metal Workers); Local Union No. 675, International Brotherhood of Electrical Workers, AFL-CIO (herein called I.B.E.W.); International Association of Heat & Frost Insulators and Asbestos Workers, Local No. 32, AFL-CIO (herein called Asbestos Workers); Steamfitters, Pipefitters & Apprentices Local Union 475, AFL-CIO (herein called Steamfitters); Metal Lab Equipment Company (herein called Metal Lab).

<sup>2</sup> 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 Fanning, Brown, and Jenkins].

Rahway, New Jersey, plant. During the past 12 months, its gross revenue from the sale of said products delivered directly to points outside the State of New Jersey was in excess of \$50,000.

Frank Briscoe is a New Jersey corporation engaged in the building and construction industry. During the past 12 months, its gross revenue from the sale of services performed outside the State of New Jersey was in excess of \$50,000.

We find that the Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

## 2. The labor organizations involved

The O.C.A.W., Carpenters, Plumbers, Sheet Metal Workers, I.B.E.W., Asbestos Workers, and Steamfitters are labor organizations within the meaning of Section 2(5) of the Act.

## 3. The dispute

### a. *The basic facts*

This dispute arises out of the construction of a new research center at the Rahway, New Jersey, plant of Merck. In May 1964 Frank Briscoe Company was awarded the contract by Merck for the erection of the shell. The agreement between Merck and Briscoe left open the assignment of certain work, including that in dispute herein, with respect to which Merck retained an option to have Briscoe perform the work or have it done by its own employees. Thereafter, by supplemental agreement, Merck awarded the optional work, including that in dispute, to Briscoe.

The disputed work involves the installation of the laboratory furniture, including the connection of the laboratory furniture to the various service outlets, such as electricity and plumbing in the erected building. In addition, the disputed work also involves the building of a steam line from Merck's powerhouse plant to a point near or connected to the new building.

Merck and the O.C.A.W. have been parties to collective-bargaining agreements covering Merck's production and maintenance employees since 1954. Briscoe is a member of the Building Contractors Association of New Jersey, which is party to collective-bargaining agreements with the building trades unions in New Jersey, including an agreement between the Association and the Central Jersey District Council of Carpenters. Briscoe has subcontracts with various companies to perform work, and has subcontracted the disputed work.

The evidence discloses that on or about May 20, 1964, during the period the disputed work was in option, William Kelly, president of Briscoe, called a preconstruction job conference with the business agents of the building trades. Kelly informed them of the scope of the work to be performed. At the meeting, a union representative stated that he wanted to know who was going to perform the installation of the laboratory furniture. Representatives from several unions stated that they would not furnish men to do the job unless they were to build the whole job. Kelly testified, however, this was an expression of opinion and not an official statement from the building trades that they would not furnish men to do the job if the O.C.A.W. performed any of the work.

On May 27, 1964, Kelly wrote Merck that he had been informed by the Carpenters Union that it would not furnish men until such time as Merck agreed that the installation of laboratory furniture would be performed by its members. However, Kelly testified that the letter was in error because the Union had in fact furnished carpenters for the project and that he mentioned the Carpenters because he knew that they were the next trade to be hired in the sequence of construction.<sup>3</sup> In this connection, the record shows that on May 22 Briscoe requested two carpenters who arrived on May 25 and 26.

In the first week of June 1964, Briscoe's project manager at the worksite, Frank Hlavenka, called the Carpenters office and spoke to Carpenters Representative Knudsen. During this conversation, Hlavenka asked if Knudsen would supply him with three or four additional carpenters. According to Hlavenka, Knudsen said that before he would commit himself he wanted to know the disposition of the laboratory furniture problem. Hlavenka replied that he had no knowledge and could not answer his question. He testified, "I put my order in for men like I do many other times, and concluded the conversation." Also, Hlavenka testified that Knudsen did not say that men would not be furnished until the option was exercised.

On June 10 Kelly met with the building trades and asked them to proceed with the job before the 90-day option in Merck's contract with Briscoe expired, expressing the hope that the question as to the assignment of the optional work would be resolved within the next 80 days. At first, Business Agent Knudsen said he would do so but changed his mind and withheld committing himself when other union representatives objected and said they wanted to know now what Merck intended to do. Kelly testified that no one at the meeting ever stated positively whether he would or would

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<sup>3</sup> The letter was received into evidence merely to show that such letter was sent, but not as to the truth of its contents.

not furnish men. Following the meeting, Kelly informed Merck that he could not get an assurance from the unions that the work would proceed without interruption.

On June 11, Merck notified Briscoe that it would exercise the option and award the work to Briscoe. On the same day, Kelly told Hlavenka to request three carpenters. Hlavenka did so, but at the time of the request he had no actual knowledge of this award and only assumed that the dispute was settled. The carpenters arrived on June 12. Also on June 12, Merck informed O.C.A.W. that it had decided to contract out the entire project to Briscoe. O.C.A.W. wanted Merck to change its decision and threatened a shutdown if it did not. On July 9 the O.C.A.W. local officers told Merck there might be a strike unless Merck assigned the disputed work to Merck employees represented by O.C.A.W.

#### *b. Contentions of the parties*

O.C.A.W. contends that the Carpenters by its refusal to furnish additional carpenters coerced Merck into exercising the option so that the work in dispute would be assigned to the building trades rather than to employees of Merck represented by the O.C.A.W. As to the merits of the dispute, it lays claim to the disputed work on the basis of contractual relations and past practice thereunder, as well as its certification.

Although Merck assigned the disputed work to the building trades unions by exercising the option in favor of Briscoe, its position is that it initially intended and would still prefer to have the disputed work performed by its own employees represented by the O.C.A.W.

The Carpenters and other building trade unions contend that there is insufficient evidence for the Board to find probable cause that the Carpenters engaged in conduct violative of Section 8(b) (4) (D). As to the work in dispute, the Carpenters and the building trades take the position that the subcontracting clause in Merck's contract with O.C.A.W. does not give O.C.A.W. any clearly defined contractual right to the work. They also assert that in awarding the disputed work to the building trades, Merck's work assignment should be accorded great weight and, moreover, that the assignment is supported by Merck's past practice, as well as the custom and practice in the area.

#### *c. Applicability of the statute*

Before the Board may proceed with a determination of 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.

The evidence shows that on June 12, Merck representatives met with O.C.A.W. local officers and told them that: Merck had decided to contract out the entire project; the O.C.A.W. exhibited distress at the decision; on June 24 O.C.A.W. representatives told Merck representatives that it wanted Merck to change its decision and threatened a shutdown if it did not; around July 7 Merck's attorney indicated there might be a strike over the dispute; and on July 9 the O.C.A.W. local officers admitted to Merck that they planned a work stoppage at the plant because they felt the work belonged to their members. We therefore find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. Accordingly, we also find that the dispute is properly before the Board determination under Section 10(k) of the Act.

Local 715 of the Carpenters was also charged with a violation. However, we have already found probable cause to believe that Section 8(b)(4)(D) has been violated. Therefore it is unnecessary for us to decide whether there is sufficient evidence of probable cause to believe that the Carpenters engaged in conduct violative of Section 8(b)(4)(D).

#### d. *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 relevant factors, and the Board has held that its determination in dispute cases is an act of judgment based upon commonsense and experience in balancing such factors.<sup>4</sup> Certain of the usual factors considered by the Board in these cases, such as certifications, skills, and efficiency of operation, provide little basis for determining the instant dispute. Although the O.C.A.W. was certified to represent the mechanical force, the certification does not define the work actually performed by the skilled employees. Carpenters has never been certified. The requisite skills to perform the work in question are possessed by members of both unions. Neither of the rival claiming groups has advanced any persuasive evidence that the other is less qualified to perform it.

Significant factors remain, however. They are the Employer's preference, contract interpretation, and past practice thereunder.

In the instant dispute, O.C.A.W.'s contract<sup>5</sup> with Merck provides that the Company will not subcontract work "normally performed"

<sup>4</sup> *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Co.)*, 135 NLRB 1402.

<sup>5</sup> The contract provides:

The Company will not contract out work to individuals or to other companies which is normally performed by bargaining unit employees where the necessary equipment is at hand, qualified employees available, project completion dates can be met and the results would be consistent with efficient and economic operations.

by bargaining unit employees. Pursuant to this provision, Merck has had a mixed practice. It has contracted out most of the installation of laboratory furniture and steam lines in connection with new construction work to companies in the construction industry and assigned all of the installation of laboratory furniture and steam lines in renovated projects to its own employees represented by the O.C.A.W. However, on one occasion Merck had O.C.A.W. employees install laboratory furniture in a newly constructed building. Merck employees classified as pipefitters, carpenters, electricians, tinsmiths, pipe coverers, and welders were used on this project.

Since 1958 Merck employees have installed and hooked up laboratory furniture in approximately 23 renovated projects and have installed many steam lines in connection with such projects. The evidence also shows that so far as the work in dispute is involved, the work is the same whether done in connection with a building which had been newly constructed or in an old building which had been renovated. Thus new construction and renovation is not a meaningful distinction in this case. Therefore, Merck's preference in assigning the work to its own employees is consistent with the subcontracting clause in its agreement with O.C.A.W.

*e. Conclusions as to the merits of the dispute*

On the basis of the record as a whole, and on appraisal of the relevant considerations, including the Employer's preference, the skill and experience of the Employer's mechanical force in performing the work, and the collective-bargaining agreement between O.C.A.W. and Merck, we shall determine the jurisdictional dispute by awarding the work in dispute to employees represented by the O.C.A.W. rather than to employees represented by the Carpenters. Our present determination is limited to the particular controversy which gave rise to this proceeding.

#### DETERMINATION OF DISPUTE

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

Mechanical force employees employed by Merck & Co., Inc., who are represented by Local 8-575, Oil, Chemical and Atomic Workers International Union, AFL-CIO, are entitled to perform the installation of the laboratory furniture, including the connection of the laboratory furniture to the various service outlets in the erected building such as electricity and plumbing. In addition, the disputed work involves the building of a steam line from Merck's powerhouse plant to a point near or connected to the new building.

MEMBER FANNING, dissenting:

I cannot agree with the majority's conclusion that the facts in this case give rise to jurisdictional dispute within the meaning of Section 10(k) and 8(b)(4)(D).

Here the Oil and Chemical Workers is the Board-certified bargaining representative for a unit of production and maintenance employees employed by Merck & Co. at its Rahway, New Jersey, plant. This Union and the Company have a collective-bargaining agreement which provides, in relevant part, that the Company will not "contract out work to individuals or to other companies which is *normally* performed by bargaining unit employees. . . ." [Emphasis supplied.] The record shows that maintenance employees included in the Union's certified unit "normally" install furniture in renovated projects. However, such work is "normally" performed by employees of outside contractors in new construction. The instant dispute arose as a consequence of a contract between Merck & Co. and Frank Briscoe, a construction firm, to erect a new research center at the Rahway site. At issue is the work of installing laboratory furniture in this new center. Under the Merck-Briscoe contract this work could be performed by employees either of Merck or Briscoe at the option of Merck. After protests were received from spokesmen for various building trades unions under contract to Briscoe and his subcontractors, Merck decided to exercise its option by assigning this work to Briscoe. The Oil and Chemical Workers threatened to strike on the ground that the Company had thereby breached its aforementioned contract.

On these facts the majority finds that: (1) There is reasonable cause to believe that O.C.A.W. is in violation of Section 8(b)(4)(D); (2) under its interpretation of the above contract "new construction and renovation is not a meaningful distinction in this case"; and (3) assigning the installation of laboratory furniture in new construction to employees represented by O.C.A.W. is "consistent with the subcontracting clause in [Merck's] agreement with O.C.A.W."

I believe the majority is wrong in attempting to resolve this dispute under the provisions of Sections 10(k) and 8(b)(4)(D) for several reasons. First, accepting the majority's critical finding of fact, i.e., that Merck's assignment of this work to Briscoe would be inconsistent with O.C.A.W.'s contract and thus deprive employees represented by O.C.A.W. of work rightfully theirs, the literal language of Section 8(b)(4)(D) requires a dismissal of the charge against O.C.A.W. This section provides that it is an unfair labor practice for a labor organization to threaten

or coerce any person where an object is to force or require any employer to assign work to employees in one rather than another trade, craft, or class "unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." If, as the majority finds, the work of installing laboratory furniture in new construction is work covered by O.C.A.W.'s contract and within the certified unit, I cannot understand how the majority can find reasonable cause to believe that O.C.A.W.'s efforts to obtain this work puts it in violation of Section 8(b)(4)(D). Indeed, as I read this section of the Act, there can be no jurisdictional dispute over work that comes within a particular unit for which there is a Board-certified bargaining representative. An employer cannot justify a failure to conform to a Board certification on the ground that another group of employees by skill, history, tradition, custom, and all the various criteria by which jurisdictional awards are made is more entitled to the work. While it would be possible theoretically to find a violation of this section where an employer was conforming to a Board certification and an outside union committed the offense, no award of the work could be made except one that conformed with the certification. For the certified union could not be precluded under this section from threatening to strike or striking to secure the disputed work. An award to the outside union would mean only that the employer could secure no relief from the strike of either union, contrary to the express purpose of this section of the Act. I must therefore conclude that under the majority's statement of the facts in this case a jurisdictional dispute in the statutory sense has not been established.

However, I need not and do not decide at this time the difficult factual questions presented in this record. For I am satisfied that the rights and obligations of these parties do not hinge upon an analysis of the historic jurisdictional criteria whereby the Board through the exercise, in large part, of equity and commonsense determines which group is more entitled to perform the disputed work. The basic issues involved in this alleged unfair labor practice are: (1) the right of a union and an employer to make a contract forbidding the contracting out of unit work, and (2) the right of such a union to strike or threaten to strike as a means of enforcing its contract. The first of these issues has been dealt with specifically by Congress under Section 8(e) and 8(b)(4)(A). The second is involved in the interpretation of Section 8(b)(4)(B). A corollary issue of perhaps equal significance is the obligation

of an employer under Section 8(a)(5) of the Act to bargain with the representative of its employees with respect to the subcontracting of unit work, whether or not this subject is covered in a collective-bargaining agreement. The Board and the courts have considered the "primary" and "secondary" aspects of clauses relating to subcontracting in a long line of cases.<sup>6</sup> As the pattern of the law evolves the legality or illegality of attempts by unions to obtain or retain work for employees in particular units becomes more firmly established and reasonably predictable. It is also now clear that some, but not all, forms of subcontracting are subject to the mandatory obligation to bargain contained in Section 8(a)(5).<sup>7</sup> These decisions of the Board and the courts represent a painstaking effort to accommodate the complex and sometimes conflicting objectives of Congress. Hopefully, they provide guidance to employers, unions, and employees in the field of labor relations. To that extent the Board may look forward to a diminution rather than an increase in cases litigated in this difficult area of the law. If, however, the Board is prepared in case after case to issue a "quickie" decision under the unique provisions of Sections 10(k) and 8(b)(4)(D), carefully established rules of law may be bypassed or affirmed as a jurisdictional award when the issue is not who is entitled to the work, but who, if anyone, has committed an unfair labor practice. I firmly believe that Sections 10(k) and 8(b)(4)(D) can be accommodated and given effect within the framework of the statute. I do not believe, however, that those sections should supplant or be substitute for other provisions of the Act. To do so is to enjoin what may be a lawful primary strike with unseemly haste, to encourage litigation in similar cases that could be resolved by reference to an established rule, and to replace statutory and decisional guidelines with jurisdictional "criteria" sometimes conflicting and often evenly balanced with respect to the right of either group to perform the disputed work.

Accordingly, I would not pass in this proceeding on the legality of O.C.A.W.'s threat to strike unless it obtained the work of installing laboratory furniture in the newly constructed research center at Merck's Rahway, New Jersey, plant. I would quash this notice of hearing.

<sup>6</sup> See, among others, *District No. 9, International Association of Machinists AFL-CIO (Greater St Louis Automotive Trimmers, etc.)*, 134 NLRB 1354, enfd 315 F 2d 33 (C.A.D.C.); *Truck Drivers Union Local No 413, etc (Patton Warehouse, Inc)*, 140 NLRB 1474, enfd as modified 334 F 2d 539 (C.A.D.C.), *Meat and Highway Drivers, etc Local Union No. 710, etc. (Wilson & Co.)*, 143 NLRB 1221, enfd as modified 335 F 2d 709 (C.A.D.C.).

<sup>7</sup> *Fibreboard Paper Products Corp.*, 138 NLRB 550, enfd. *sub nom East Bay Union of Machinists, Local 1304 etc. v. NLRB*, 322 F. 2d 411 (C.A.D.C.), affd 379 U.S. 203.