

International Union of Operating Engineers, Local Union No. 181¹ and its Agent James Simpson and E. C. Ernst, Inc.² and John McGuin, an Individual for and on behalf of Kentucky Power Company³ and Local Union No. 317, International Brotherhood of Electrical Workers, AFL-CIO⁴ Party to the Dispute. Cases 9-CD-128 and 9-CD-130

January 28, 1969

DECISION AND DETERMINATION OF DISPUTE

CHAIRMAN McCULLOCH AND MEMBERS
FANNING AND ZAGORIA

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by E. C. Ernst, Inc., and Kentucky Power Company, alleging that International Union of Operating Engineers, Local Union No. 181, and its agent, James Simpson, violated Section 8(b)(4)(D) of the Act. After these cases were consolidated, a duly scheduled hearing was held before Edward C. Verst, Hearing Officer, on July 23 and 24, and August 6, 1968. All parties appearing were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing upon the issues. Thereafter, the Company and Local 317 of the International Brotherhood of Electrical Workers, AFL-CIO, filed briefs, and the IBEW filed a brief in reply to that of the Company.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings made by the Hearing Officer at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in these cases, including the aforementioned briefs, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

E. C. Ernst, Inc. is a District of Columbia corporation, with principal offices located at Decatur, Alabama, engaged in the building and construction industry as an electrical contractor. During the past 12 months Ernst's gross revenues exceeded \$1,000,000, and during that time it received material and supplies valued in excess of \$50,000 which it caused to be shipped from within the State of Alabama directly to construction sites located outside the State of Alabama. The parties stipulated, and we find, that the Employer is

engaged in commerce within the meaning of the Act. We find that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Operating Engineers, Local No. 181, and Local Union No. 317, IBEW, are labor organizations within the meaning of the Act.

III. THE DISPUTE

The Employer is an electrical contractor in the building and construction industry. It is a member of the American Line Builders Chapter of the National Electrical Contractors Association (NECA), and through that organization has a contract with the IBEW. Ernst employs no members of the Operating Engineers.

The Company produces and distributes electricity. In 1966 it began construction of an electric generating station known as "Big Sandy 2" at Louisa, Kentucky. Thereafter work was begun on the Baker Substation, approximately one half mile away, where the instant dispute arose. On April 18, 1968, a railroad spur was completed at the substation, so that materials to be used in building the substation could be unloaded there rather than at Big Sandy 2. The Employer was scheduled to begin its work of erecting steel towers to support insulators at the substation on April 22, 1968.

A prejob conference was held on or about April 16. Present were representatives of all parties, in addition to the president of the Ashland Building and Construction Trades Council. It became apparent at this meeting that there was disagreement as to assignment of certain work. The National Joint Board for the Settlement of Jurisdictional Disputes had made an award to members of the Operating Engineers to operate hydrocranes⁵ at Big Sandy 2 shortly before. Ernst was not involved in that dispute. James Simpson, business agent for the Operating Engineers, asserted that that award was controlling here, and if members of his Union were not assigned the work of operating hydrocranes at the substation, the Company would have trouble getting other equipment that would be needed.⁶ The IBEW argued that the Joint Board award for work at the main station did not control, since the substation was a different job and a different employer was involved,

⁵At the hearing the terms "hydrolift" and "cherry picker" were also used to describe this equipment. From the record it appears that although these terms might refer to slight differences in the equipment, the parties used them interchangeably.

⁶Simpson testified that his Union had an agreement with the companies in the area that owned the equipment, and that at the conference he said he "did not think any of these companies would rent them and let an electrician run it."

¹Also referred to herein as IUOE and Operating Engineers.

²Also referred to herein as the Employer.

³Also referred to herein as the Company.

⁴Also referred to herein as IBEW.

and that the work at the substation belonged to members of the IBEW since the job was on an off-plant site, or "outside" work, which traditionally is performed by IBEW members. Robert Keenan, representing Ernst, told the representatives of the Union to see if they could agree, and to report back to him. No assignment was made at the time. According to Bernard O. Henninger, resident engineer on the job for the Company, on April 18 Simpson said he did not know how many men he would have on the job if the IBEW members began to work. Several days later, no agreement having been reached, Ernst assigned the work of operating the hydrocranes to its own employees, represented by the IBEW, as was its custom.

On April 22, employees of Ernst, members of the IBEW, attempted to commence unloading steel from railroad cars with the hydrocranes. Several job stewards of the Operating Engineers for various other subcontractors, accompanied by other employees wearing insignia identifying them as members of the Engineers, approached the employees of Ernst, told them not to operate the equipment, and said if they did they would be stopped. According to W. R. Painter, Ernst's electrical superintendent, John Humble was one of the stewards involved. When asked if he was "officially stopping me or my work," Humble replied, "Yes, as long as you try to operate this equipment." Later a member of the Engineers, in the presence of a steward, removed wires from the distributor cap of one of the hydrocranes.

On the same date IBEW members were prevented from operating the holedigger when, according to the testimony of IBEW steward Roy Adkins, men with Operating Engineers' badges approached the machine. Later, "they said that if we went on the hill to start up the digger, 100 of them on the site would run us out."

Later that day the approximately 62 members of the Operating Engineers on the job walked out. Only about half the 900 workers at the substation were able to continue work.

Adkins further testified that on April 25, members of the Engineers also told IBEW members not to operate the bulldozer. On April 29, after "some tall begging" by Simpson, to use his own words, the Operating Engineers returned to work. On May 16 the Operating Engineers again refused to work after the Joint Board ruled that its prior decision did not apply to work at the substation. Pursuant to Section 10(1) of the Act, the Regional Director filed a petition for an injunction in the United States District Court for the Eastern District of Kentucky. The parties thereafter entered a stipulation rendering hearing unnecessary, and on June 3, members of the Operating Engineers returned to work.

A. Contentions of the Parties

The IUOE contends that (1) the Board lacks jurisdiction herein since there is not reasonable cause to believe that a violation of Section 8(b)(4)(D) of the Act has occurred, (2) the Joint Board decision awarding to it the work of operating the hydrocranes at Big Sandy 2 is binding here, (3) it has made no claim respecting assignment of work for equipment other than the hydrocranes, and (4) the work in dispute is "inside" work, and industry and area practice thus favor assignment of the work to IUOE members.

The IBEW, Ernst and the Company contend that Section 8(b)(4)(D) was violated, and that assignment to operate all four types of equipment discussed above is in dispute.

The IBEW argues that the earlier Joint Board decision does not apply, first because the substation is a different jobsite, and second because a different employer was involved. Further, the IBEW considers the site here to be such that "outside" work is involved, and as a matter of long-standing policy it does not recognize Joint Board authority where outside work is involved. Finally, the IBEW contends that the work historically has been done by its members, and that the practice of the Employer consistently has been to award this work to members of the IBEW.

The Employer urges an award of the work to IBEW members because it has always assigned such work to IBEW members in the past, because of its contractual relationship with that Union, and because matters of economy and efficiency make assignment to IBEW members most desirable.

The Company takes no position as to the merits of the dispute. However, it does request that the Board specify which work at the station and substation is "inside" work and which is "outside."

B. The Work in Dispute

The parties agree that the work of operating the Employer's hydrocranes is in dispute. The Company, the Employer and the IBEW contend that also in dispute are assignments to operate a bulldozer,⁷ a holedigger and a ditchwitch. The Operating Engineers assert that they have made no claim upon the Employer for this work.

At the hearing, Keenan, the Employer's manager, testified that at the prejob conference all mechanical equipment to be operated by Ernst was in dispute. Further, counsel for the Operating Engineers refused at the hearing to disclaim interest in this equipment. As appears above, there is testimony that members of the IBEW attempted to operate the holedigger on April 22 and were stopped from doing so by

⁷At the hearing, the Operating Engineers stated that as long as the bulldozer — or tractor, the terms were used interchangeably — were used only to carry materials, they "probably would not claim" it. There is no evidence this equipment was to be used for another purpose.

members of the Operating Engineers, and on April 25 members of the Operating Engineers told members of the IBEW not to run the bulldozer. With regard to the ditchwitch, we find it immaterial that this piece of equipment was not put in operation until July or August, somewhat after the Operating Engineers had agreed to return to work pursuant to a stipulation before the District Court. A dispute over work assignment within Section 8(b)(4)(D) of the Act can exist whether work is in progress or not.

In view of the foregoing, we find that the work in dispute involves the four types of equipment discussed herein, and any similar equipment.

C. *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 Section 8(b)(4)(D) has been violated.

The charges herein allege violations of Section 8(b)(4)(i) and (ii)(D) of the Act. The facts show that Ernst assigned the disputed work to its employees. These employees are members of the IBEW. The record gives reasonable cause to believe⁸ that the Respondent, by its agent James Simpson, and by its job stewards and others, as described above, sought to induce and encourage employees of Ernst and other employers to engage in a strike, and threatened and coerced various persons engaged in an industry affecting commerce with work stoppages, all for the purpose of causing the Employer to assign the disputed work to the Respondent's members. We therefore find reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated, and that the dispute is properly before the Board for determination under Section 10(k) of the Act.

D. *The Merits of the Dispute*

As we stated in *J. A. Jones Construction Company*,⁹ we shall determine the appropriate assignment of disputed work in each case presented for resolution under Section 10(k) of the Act only after taking into account and balancing all relevant factors. In our judgment, the following factors are relevant here.¹⁰

⁸While some of the evidence relied on in this proceeding to show threats or coercion under Section 8(b)(4)(D) is hearsay hearings under Section 10(k) are nonadversary in character and the technical rules of evidence are not controlling *Local 501, International Brotherhood of Electrical Workers, AFL-CIO (New York Telephone Company)*, 172 NLRB No. 184. Much of this evidence was uncontradicted.

⁹*International Association of Machinists, Lodge No 1743 (J A Jones Construction Company)*, 135 NLRB 1402

¹⁰Other factors normally considered as relevant, such as skills involved, certifications, and Joint Board awards, are of no aid in the resolution of the instant dispute. So far as appears, members of both unions are equally skilled in the performance of the work, and neither union supports its claim in whole or in part on any Board certification. The Joint Board

1. Industry, area, and employer Practice

At least five witnesses presented testimony which tends to support the IBEW's claim to the work on the basis of industry, area and employer practice. Ernst's utilities division manager, Keenan, and its electrical superintendent, Painter, testified that they had worked on numerous substations for the Employer in and out of Kentucky, and that IBEW members had operated hydrocranes on all the jobs which were geographically separated from the main stations. IBEW business manager Berry gave several examples of substation jobs in the area where IBEW members operated equipment like that in dispute here. Charles Pritchard, president of Pritchard Electric Company, testified that his firm assigns IBEW members to operate equipment similar to that in dispute here on substation jobs. Finally, Roy Adkins, an IBEW steward, gave testimony about jobs he had worked on where IBEW members operated a holedigger, bulldozer, and equipment similar to a ditchwitch.

Simpson testified for the Operating Engineers that area practice is for IUOE members to perform such work on "inside" jobs; his union does not claim work on a "line" job, or where "outside" work is involved. Henry Ison, vice president of the Operating Engineers, gave testimony regarding work on substation construction in Kentucky where IUOE members operated the equipment. However, it appears that such work was done under "heavy construction" agreements. William Ross of Ross Brothers Construction Company testified that his company has done work in the area with its own equipment. Operating Engineers ran the equipment on jobs Ross' company performed, but it appears that this work was done inside plants, distinguishing that work from the instant case. It appears that for the most part Ross' company did not furnish operators when it rented its equipment. Ross did testify that IUOE members manned hydrocranes which his company rented to Pritchard Electric Company. There is no explanation for the apparent conflict between this testimony and that of Charles Pritchard, whose testimony as discussed above was that his company assigns IBEW members to operate this type of equipment.

Substantial evidence shows that electricians often perform work in circumstances like those present here, in the relevant geographical area, both for the Employer and for other employers. With the exception of the conflicting evidence regarding Pritchard Electric Company, the evidence purporting to favor an award to IUOE members is conditioned upon facts which are distinguishable from those before us here. Thus industry, area and

award urged by the Operating Engineers as support for their claim involved a different employer and a different jobsite, and the record shows that the Joint Board itself was of the opinion that its award does not apply to the instant dispute.

Employer practice, as shown by this record, favor an assignment to members of the IBEW.

2. Contracts between the parties

As has been noted above, Ernst, as a member of the NECA, is a party to the contract between that association and the IBEW. This is by reason of a letter of assent signed by Ernst which is in evidence. Ernst bid the contract for work at the substation pursuant to this contract.

The IUOE does not have an agreement with the NECA, nor did it have a contract with Ernst up to the time of the hearing. The employees of Ernst who were assigned the disputed work are IBEW members. Ernst employs no members of the Operating Engineers.

These are factors favoring award of the work to the IBEW.

3. Employer's preference

The Company takes no position as to the merits. Ernst, however, assigned the work to, and favors an award to employees represented by the IBEW. This preference is another factor favoring an award to the electricians.

4. Efficiency and economy

Ernst and the IBEW contend that considerations of efficiency and economy require an award to members of the IBEW. Robert S. Keenan, manager of Ernst's utilities division, testified that hydrocranes are required to be on the job 70-80 percent of the time, during most of which time they are in constant use. The ditchwitch would be needed on the job for approximately one month and would be in continuous operation.

Keenan and Bernard Henninger, resident engineer for the Company, testified that it would be more efficient for members of the IBEW to operate the equipment because the entire crew would then be under the same supervision. Moreover, if IBEW members operate the various pieces of equipment, they could perform other electricians' duties when the equipment is idle, thus increasing the economy of the operation. Finally, Simpson testified that the standard agreement used by the IUOE requires that two men be employed to operate each hydrocrane. In view of all the foregoing, efficiency and economy of operation are factors which favor an award to the IBEW.

5. Conclusions as to the merits

On the basis of the foregoing, it is clear that the relevant factors favor award of the disputed work to the electricians. Industry, area and employer practice, contracts between the parties, the Employer's preference, and efficiency and economy of operation all lead to such a result. Accordingly, we shall determine the dispute by confirming the Employer's assignment to its employees who are represented by the IBEW.

We do not find it necessary or appropriate to pass upon the Company's request that we designate which portions of the work at the station and substation are "inside" work, and which are "outside" work. This determination does, however, apply to the four types of equipment discussed, and to any similar equipment operated by the Employer at Baker Substation.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in these cases, the National Labor Relations Board hereby makes the following determination of dispute.

1. Employees employed by E. C. Ernst, Inc., as electricians and currently represented by Local Union No. 317, International Brotherhood of Electrical Workers, AFL-CIO, are entitled to operate hydrocranes, holediggers, ditchwitches, bulldozers, and any similar equipment in connection with the installation of steel towers at the Baker Substation at Louisa, Kentucky.

2. International Union of Operating Engineers, Local Union No. 181, AFL-CIO, and its agent, James Simpson, are not entitled, by means proscribed by Section 8(b)(4)(D) of the Act, to force or require the Employer to assign the above work to operating engineers who are represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Union of Operating Engineers, Local Union No. 181, AFL-CIO, shall notify the Regional Director for Region 9, in writing, whether it will refrain from forcing or requiring the Employer, by means proscribed in Section 8(b)(4)(D), to assign the work in dispute to employees represented by Operating Engineers Local 181 rather than to those represented by Electricians Local 317.