

**International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO and its Local No. 4 and John W. Cowper, Inc. and Carpenters District Council of Buffalo and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.**<sup>1</sup> Case 3-CD-407

April 3, 1973

**DECISION AND DETERMINATION OF DISPUTE**

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND KENNEDY

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by John W. Cowper, Inc., herein called Cowper, alleging that International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO and its Local No. 4, herein called Respondents or Asbestos Workers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring Cowper to assign certain work to employees represented by Respondents rather than to employees represented by Carpenters District Council of Buffalo and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Carpenters.

A hearing was held before Hearing Officer Barry Kearney on September 21, 1972, in Buffalo, New York. 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 upon the issues. Thereafter, briefs were filed by Cowper and Respondents.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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

Upon the entire record in this proceeding, the Board makes the following findings:

**I. THE EMPLOYER**

Cowper is a New York corporation having its main place of business in Tonawanda, New York, where it is engaged in the general contracting business. During the past year it had gross revenue in excess of \$1 million, and received goods and materials valued

<sup>1</sup> Carpenters District Council of Buffalo and Vicinity was permitted to intervene in this proceeding on the basis of a current contract with The Mader Corporation

<sup>2</sup> Although the Asbestos Workers had demanded of Cowper that its

in excess of \$50,000 from sources outside the State of New York.

The parties have stipulated, and we find, that Cowper is engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

**II. THE LABOR ORGANIZATIONS**

The parties stipulated, and we find, that Respondents and Carpenters are labor organizations within the meaning of the Act.

**III. THE DISPUTE**

*A. Background and Facts of the Dispute*

Cowper has a contract for the construction of certain buildings at the Buffalo, Amherst campus of the State University of New York. Cowper awarded a subcontract to The Mader Corporation, herein called Mader, for the purchase and installation of drywall, insulation, studs, partitions, doorbacks, and all interior partitions other than masonry. Mader has a collective-bargaining agreement with the Carpenters. It does not have any such agreement with the Asbestos Workers. In accordance with its practice, Mader assigned the work under its subcontract, including insulation work, to its employees, who were members of the Carpenters. On July 31, 1972, a representative of the Asbestos Workers demanded of Cowper, under threat of picketing the jobsite, that the work of installing all insulation be assigned to members of that labor organization. Cowper rejected the demand.

*B. The Work in Dispute*

The work in dispute involves the installation of insulation on the inside surface of exterior walls behind convactor units in A and D dormitory buildings at the Cowper jobsite at the State University of New York at Buffalo, Amherst, New York, campus.<sup>2</sup>

*C. The Contentions of the Parties*

Respondents contend that the present dispute involves work identical with that in *Asbestos Workers Local Union No. 4 (The Mader Corporation)*, 196 NLRB No. 130, where the Board awarded the disputed work to members of the Asbestos Workers, and that a similar determination should therefore be made in the present case.

Cowper asserts that the work involved in the cited members perform all the insulation work, that demand has apparently been withdrawn. The present dispute involves only the installation of insulation behind convactor units

case is not identical with that in this case. It argues that in the prior case the insulation was attached to the wall with adhesives and did not require any particular skill, whereas in the present case the work of installing the insulation is more complicated and requires the skills of carpenters. It also asserts that the cited case is different from the present case in that all the insulation work there was behind convectors, whereas here the similar insulation work is only a small part of the entire job and a small part of the insulation work being performed by Mader.

The Carpenters participated in the hearing, but did not file a brief. Apparently its position is the same as that of Cowper.

#### D. *Applicability of the Statute*

Before the Board may proceed to the determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that (1) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and (2) the parties have not agreed upon a method for the voluntary adjustment of the dispute.

The parties stipulated that on July 31, 1972, an agent of the Respondents demanded the disputed work for Asbestos Workers and threatened to picket Cowper's jobsite unless the demand was complied with. The parties also stipulated, and we find, that the foregoing constitutes reasonable cause to believe that Section 8(b)(4)(D) has been violated.

The parties further stipulated that there is no effective method for the determination of the dispute within the meaning of Section 10(k) of the Act.

Accordingly, we find that the dispute is properly before the Board for determination.

#### E. *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 factors.<sup>3</sup> The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.<sup>4</sup>

##### 1. *Collective-bargaining agreement*

Mader employs members of the Carpenters, but no members of the Asbestos Workers. It has a collective-bargaining agreement with the Carpenters, but none with the Asbestos Workers.

<sup>3</sup> *NLRB v Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573

##### 2. *Company and industry practices*

According to Robert F. Peck, project coordinator for Mader at the A and D buildings, the insulation at these buildings runs from floor to ceiling and is installed with a metal furring strip that is placed on the masonry backup on the exterior walls. A drywall application is then applied for a finished product. According to Mr. Peck: "It is a very involved process where the metal furring strip and the insulation have to be installed in a single plane so that the drywall that is applied thereto . . . provides a smooth surface that can be ready for painting." The same type of insulation and method of application is used behind convector units.

Peck testified that the practice of Mader is to assign this particular kind of work to carpenters. He also testified that he had talked with the superintendents of two other construction companies in the area and they had told him that they had never seen asbestos workers engaged in this type of installation. This testimony of Peck was indirectly corroborated by John W. Kelleher, business representative of Respondent Local 4, who testified that members of his organization do not apply metal furring strips in connection with insulation work, the technique used by Mader on the job in question.

##### 3. *Economy and efficiency*

Mader's subcontract calls for considerably more work than the installation of insulation. It includes such tasks as setting studs, door frames, attaching drywall, and insulation. Less than 5 percent of its subcontract calls for the installation of insulation, of which only a very small amount involves installation behind convector units. All Mader's work under the subcontract is performed by carpenters. It is therefore more economical and efficient for Mader to be able to move its carpenters from one part of the job to another. It would certainly be less efficient if Mader were required to employ asbestos workers to install insulation behind convector units, while carpenters performed the same type of installation on the rest of the project. Moreover, it appears that carpenters are more skilled than asbestos workers in the application of the technique here used.

#### Conclusion

The foregoing factors, including specifically company and area practice, economy, and efficiency, justify the award of the disputed work to members of the Carpenters. However, Respondents contend that

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

the work involved in this case is the same as that which was the subject of the earlier cited case involving essentially the same parties where the award was to asbestos workers, and that therefore a similar award should be made in the present case. (*Asbestos Workers Local Union No. 4, supra*, involved Mader, Respondents, and the Carpenters at another project in the same general area.) That dispute related to the "complete installation of insulation on the inside surface of exterior walls behind convector units" on certain college dormitories. The Board awarded the work to asbestos workers on the ground that the assignment would be "consistent with area practice, Joint Board decisions,<sup>5</sup> agreements between Respondent Local 4 and Carpenters and their Internationals, and the criteria set forth in Mader's contract with Carpenters for assignment of work."

Although the two cases involve the installation of insulation behind convector units there are certain important differences between them. The technique of application is different. In the earlier case, application of the insulation was by the use of adhesives; in the present case metal furring strips are used for attachment purposes. Greater skill is required in the application of the latter technique than in the former. In the earlier case, the evidence indicated that industry practice favored assignment to asbestos workers. In the present case, the evidence of industry practice is all the other way. In the earlier case, the only insulation work being performed by Mader under its subcontract involved that behind convector units. The assignment therefore was dispositive of all Mader's insulation work. In the present case, the work behind convector units is only a small part of the overall insulation work being performed by Mader. If the Board were to make the same determination in this case as in the prior case, it would be assigning parts of identical work to two different groups of employees. Finally, it is not apparent from the evidence that the decisions of the Joint Board or the agreement between the two Internationals relate to the technique used in this case for the application of insulation behind convector units. For all the foregoing reasons we find that *Asbestos Workers Local Union No. 4, supra*, is distinguishable from, and not dispositive of, this case. We shall assign the work in dispute to carpenters.<sup>6</sup>

Having considered all pertinent factors herein, we conclude that employees represented by the Carpen-

ters are entitled to perform the work in dispute. In making this determination, we are assigning the disputed work to employees of The Mader Corporation who are represented by Carpenters District Council of Buffalo and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, but not to that Union or its members. Our present determination is limited to the particular controversy which gave rise to this proceeding.

#### 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 this proceeding, the National Labor Relations Board hereby makes the following Determination of Dispute:

1. Employees of The Mader Corporation, who currently are represented by Carpenters District Council of Buffalo and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, are entitled to perform the work of installing insulation on the inside surface of exterior walls behind convector units in A and D dormitory buildings at the Cowper jobsite at the State University of New York at Buffalo, Amherst, New York, campus.

2. International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO and its Local No. 4, are not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require John W. Cowper, Inc., to assign the above-described insulation work to employees represented by it.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO and its Local No. 4, AFL-CIO, shall notify the Regional Director for Region 3, in writing, whether or not it will refrain from forcing or requiring John W. Cowper, Inc., by means proscribed by Section 8(b)(4)(D) of the Act, to assign the work in dispute to employees represented by International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO and its Local No. 4, rather than to employees represented by Carpenters District Council of Buffalo and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

of application between the use of metal furring strips and adhesive, and the higher degree of skill to affix metal furring strips which the carpenters purportedly possess. In his view, the facts do not establish a sufficient difference in skill as between the two methods of application to be worthy of the reliance placed on them by his colleagues

<sup>5</sup> The National Joint Board for the Settlement of Jurisdictional Dispute

<sup>6</sup> Chairman Miller agrees with this result, but relies only on the factors showing company and area practice, economy, and efficiency in awarding the work in dispute to carpenters. He does not attach significant weight to the additional factors relied on above concerning the difference in method