

**United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local Union No. 741 and The Ashton Company, Inc. and Laborers' International Union of North America, Local No. 479. Case 28-CD-195**

July 1, 1981

**DECISION AND DETERMINATION OF DISPUTE**

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by The Ashton Company, Inc., herein called the Employer, alleging that United Association of Journeymen and Apprentices of the plumbing and Pipefitting Industry, Local Union No. 741, herein called the Plumbers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by Laborers' International Union of North America, Local No. 479, herein called the Laborers.

Pursuant to notice, a hearing was held before Hearing Officer Gregory Z. Meyerson on October 15, 16, and 17, November 6, 7, and 12, and December 3, 1980. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer and the Plumbers filed briefs.

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 BUSINESS OF THE EMPLOYER**

The parties stipulated, and we find, that the Employer, an Arizona corporation with its principal place of business in Tucson, Arizona, is engaged in business as a construction contractor. During the past year, the Employer purchased goods from directly outside the State of Arizona having a value in excess of \$50,000. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

**II. THE LABOR ORGANIZATION INVOLVED**

The parties stipulated, and we find, that the Plumbers and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

**III. THE DISPUTE**

*A. Background and Facts of the Dispute*

The American Smelting and Refining Company, herein called ASARCO, operates a copper mine and copper smelting facility, known as the Mission Mine, at Sahuarita, Arizona. ASARCO utilizes a flotation circuit system composed of piping to process mined ore into copper ore concentrate and other byproducts. The process pipe is made of steel, cast iron, copper, or plastic, depending upon what substance it is to carry and whether that substance is under pressure.

The Employer was awarded a contract by ASARCO to construct a replacement flotation circuit at the Mission Mine. At a March 18, 1980,<sup>1</sup> prejob conference with representatives of a number of building trades unions, the Employer announced that it was assigning the process piping work on the project to employees represented by the Laborers rather than to employees represented by the Plumbers. The Plumbers representatives at the prejob conference protested this assignment and claimed the process piping work for employees represented by the Plumbers. The Employer rejected this claim and adhered to its assignment to employees represented by the Laborers.

Subsequently, the Plumbers, through its International Union, filed a claim to the process piping work with the Impartial Jurisdictional Disputes Board, herein called IJDB. Consistent with past practice, the Employer and its collective-bargaining representative, the Arizona Chapter of the Associated General Contractors, herein called AGC, informed the IJDB that neither the AGC, its members, nor the Employer were stipulated to or bound by the IJDB and would not abide by its decision.

At its meeting of April 24, the IJDB awarded the process of piping work in question to employees represented by the Plumbers, and the Employer was so notified on the next day. On May 1, the Plumbers sent a telegram to the Employer demanding that it honor the IJDB decision and reassign the work to employees represented by the Plumbers. The Employer ignored this demand. On May 5, the Plumbers commenced picketing at the Employer's jobsite at the Mission Mine. The picket signs read as follows:

The Ashton Company Unfair to Plumbers and Pipefitters U.A. Local 741. Ashton Company refuses to comply with work assignment awarded by Impartial Jurisdictional Disputes Board, 4/25/80

<sup>1</sup> All dates are in 1980 unless otherwise indicated.

The Plumbers picketing continued until approximately August 7, when it ceased as a result of the filing with the U.S. District Court of a petition for injunction under Section 10(1) of the Act.

#### B. *The Work in Dispute*

The work in dispute involves the installation by the Employer of all process piping, including water, air, slurry, mill water, reagent, and line slurry piping, at the ASARCO Mission Unit Concentration in Sahuarita, Arizona.

#### C. *The Contentions of the Parties*

The Plumbers contends that the Board should quash the notice of hearing in the instant case because all three parties to the proceeding are contractually bound to the procedures and awards of the IJDB for the resolution of the jurisdictional dispute in question. If, however, the Board determines that there is no agreed-upon method for the voluntary resolution of the dispute herein, the Plumbers contends that the employees represented by it are entitled to be awarded the disputed work on the basis of the factors of trade and area practice, skills, and efficiency of operations.

Conversely, the Employer contends that it never has been bound to the awards of the IJDB either in practice or through any of the collective-bargaining agreements entered into on its behalf by the AGC. Thus, the Employer submits that the Board should proceed to the merits of the disputes, and award the work to employees represented by the Laborers on the basis of the Board's traditional criteria, specifically the Employer's collective-bargaining contract with the Laborers, and the factors of skills, employer preference, and efficiency.

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

Before the Board may proceed with a determination of the 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 and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

It is undisputed that from May 5 until approximately August 7 the Plumbers picketed at the ASARCO Mission Mine jobsite with signs stating that the Employer was refusing to comply with the IJDB's work assignment award of April 24. On May 1, the Plumbers had sent a telegram to the Employer demanding that it implement the IJDB award and assign the disputed work to employees represented by the Plumbers. At various times as a result of the picketing, craft employees of the Employer stopped working, and there were interrup-

tions in deliveries to the Employer by third-party suppliers not involved in the dispute.

Lee Ziegler, the Employer's vice president, testified at the hearing in this proceeding that after the picketing commenced he asked the Plumbers business agent, Kenneth Phillips, what it would take to get the pickets removed and that Phillips replied they would be removed if employees represented by the Plumbers were assigned the process piping work. According to Ziegler, when he then asked how such could be accomplished inasmuch as the Employer did not have a collective-bargaining agreement with the Plumbers, Phillips answered that the Employer either could sign a contract with the Plumbers or subcontract the work to a contractor that employed members of the Plumbers.

The evidence shows that an object of the Plumbers picketing was to force or require the Employer to assign the process piping work to employees represented by the Plumbers. In view of the foregoing, we find that reasonable cause exists to believe that Section 8(b)(4)(D) of the Act has been violated. As noted above, however, the Employer and the Laborers disagree with the Plumbers as to whether there is an agreed-upon method for the voluntary adjustment of the dispute to which all parties are bound.

This disagreement centers on the interpretation of a clause in the AGC's Master Labor Agreement, herein called the MLA, with five unions known as the basic crafts. These five unions are the Carpenters, Cement Masons, Laborers, Operating Engineers, and Teamsters. As a member of the AGC, the Employer is a party to the MLA. The clause in question provides, in part, as follows:

1101.1—All jurisdictional disputes with AFL-CIO Building Trades Sub Crafts shall be determined in the manner and by the procedure established by the Building and Construction Trades Department of the AFL-CIO through the National Joint Board for the Settlement of Jurisdiction Disputes in the Building and Construction Industry. Such decisions shall be final and binding upon and put into effect by the Contractor and the Union without delay.

\* \* \* \* \*

1101.3.9—If, and, when the Parties signatory hereto become a part of a National Joint Board for the Settlement of Jurisdictional Disputes or other similar National Plan, said Plan shall supersede the provisions contained in this Article 11, 1101.1 and 1101.2, and the Parties

mutually agree to be bound by and implement said new Plan.

All parties agree that the term "Sub Crafts" in the above language refers to those unions that are not a party to the MLA, such as the Plumbers. The Plumbers contends that the quoted section 1101.1 clearly means that signatory contractors—including the Employer—are bound to the awards of the IJDB when the dispute involves a signatory union, such as the Laborers, and a nonsignatory subcraft, such as the Plumbers. In addition, the Plumbers argues that it and the Laborers are bound to the IJDB by virtue of their respective International Unions' affiliation with the Building and Construction Trades Department of the AFL-CIO.

It is the Employer's position (as well as the AGC's) that the only contractors bound to IJDB procedures and awards under section 1101.1 of the MLA are nonsignatory subcontractors employing members of subcrafts. Thus, two AGC officials testified that section 1101.1 was intended to aid the five signatory basic craft unions in the event of jurisdictional disputes with nonsignatory unions assigned work by subcontractors, and was not meant to bind signatory contractors to the IJDB.

The Laborers takes the same position as the Employer and AGC on the meaning of section 1101.1. In fact, all of the parties to the MLA who testified at the hearing, including a witness called by the Plumbers, stated that the AGC and its members are not stipulated or bound to the IJDB. For example, a former Operating Engineers official, Charles Featherston, who headed the basic craft unions' negotiating teams during the 1979 bargaining on the MLA, explained that the purpose of Section 1101.1 was to protect the five signatory unions from losing work to employees of nonsignatory subcontractors engaged by employers that are parties to the MLA. This view is supported by the language of section 1101.3.9 of the MLA, quoted above, which indicates that the signatories to the agreement are not yet part of the IJDB process.

Sections 1101.2 and 1101.3 of the MLA provide that jurisdictional disputes arising between signatory unions are to be resolved by recourse to local procedures set forth in those sections, with no role played by the IJDB. The MLA thus distinguishes between the methods to be used in deciding jurisdictional disputes involving subcrafts and those involving signatory unions. The mechanism established in the MLA for a binding award by the IJDB only comes into operation when a signatory employer subcontracts to a nonsignatory union work that is claimed by a signatory union.

Subsequent to the IJDB decision awarding the disputed work to employees represented by the

Plumbers, representatives of the AGC and the five unions signatory to the MLA signed a memorandum of understanding regarding the intent of section 1101.1. The memorandum, dated May 27, states that the parties to the MLA do not intend to bind the signatory employers to the IJDB, but rather that section 1101.1 was designed to allow the signatory unions to participate in IJDB proceedings "with respect to subtrades other than the basic crafts only."

Although the Plumbers contends that the memorandum is a self-serving attempt to circumvent IJDB awards, we perceive no legal reason why the signatory parties to the MLA may not voluntarily reform or clarify their collective-bargaining agreement in such a manner.

Even without reference to the memorandum of understanding, however, we would not interpret section 1101.1 as permitting a union that is not an MLA signatory to bind a signatory employer to an IJDB award setting aside a work assignment to employees represented by a union that is party to the agreement. We conclude that only a signatory union may invoke the IJDB procedures set forth in section 1101.1, and then only when a nonsignatory subcontractor has been assigned the work. Neither of those conditions is present in the instant case, inasmuch as the Employer assigned the disputed work to its own employees represented by a signatory union.

We also note the Plumbers argument that the Laborers are bound to the IJDB award as a result of the Laborers International's affiliation with the Building and Construction Trades Department of the AFL-CIO. It is not clear that the Laborers Local involved herein is automatically bound to the IJDB simply because its International apparently is so bound. In any event, any obligation to the IJDB on the part of the Laborers and the Plumbers does not bind the AGC or the Employer to that tribunal's procedures. As discussed above, consistent with both longstanding practice and the current MLA, the AGC gave written notice to the IJDB that the AGC and its members would not participate in the IJDB proceedings, nor be bound by its award.

Accordingly, we find that there is no voluntary method for the adjustment of this dispute, since all parties are not bound to the IJDB procedure. Therefore, we conclude that this dispute is properly before the Board for determination under Section 10(k) of the Act.

#### *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>2</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>3</sup>

### 1. Certification and collective-bargaining agreements

Neither the Laborers nor the Plumbers has been certified by the Board as bargaining agent for the Employer's employees with respect to performance of the work in dispute. Thus, certification is not a factor favoring either group of employees.

The Employer does not have and has never had a contract with the Plumbers. On the other hand, the Employer is party to a current collective-bargaining agreement with the Laborers—namely, the MLA. The MLA contains a specific classification for Laborers performing process piping work, and therefore the disputed work is covered by that collective-bargaining agreement. In addition, the Employer states that the principal basis for its assignment of the work to the Laborers was the existence of the MLA. Accordingly, the factor of collective-bargaining agreements favors an award of the work to employees represented by the Laborers.

### 2. Employer practice and preference

Lee Ziegler, the Employer's vice president, testified that the Employer always has used employees represented by the Laborers to do its process piping work, with the only exceptions being those instances when the work was subcontracted out to another employer. In this regard, the Employer submitted and described a list of its past construction projects on which employees represented by the Laborers have done process piping work similar to, or identical with, the disputed work. Fred Brown, business agent for the Laborers, confirmed the Employer's data with regard to the Laborers past performance of process piping work for the Employer.

The Plumbers presented evidence showing that employees represented by it also have in the past performed process piping work on projects of the Employer. However, in every instance where such was the case, the employees were not employed by the Employer, but rather by a subcontractor engaged by the Employer, and those subcontractors were party to a collective-bargaining agreement with the Plumbers.

Ziegler testified that, on those occasions when the Employer has chosen to subcontract process piping work to employers whose employees are represented by the Plumbers, it has done so either because it was engaged in too many other projects at the same time, or in order to spread the risk on a particular project. He explained that, where, as in the case of the ASARCO Mission Mine job in question, the Employer elected to perform the process piping work with its own employees, the assignment to workers represented by the Laborers was mandated by the MLA.

With respect to employer preference, several officials of the Employer stated unequivocally that they prefer employees represented by the Laborers over employees represented by the Plumbers for performance of the work in dispute. Accordingly, we find that the factors of employer practice and preference favor awarding the disputed work to employees represented by the Laborers.

### 3. Area and industry practice

Fred Brown, the Laborers business agent, testified that in his experience construction contractors in the area consistently had used employees represented by the Laborers for process piping work, and he identified a number of projects on which they performed such work.

On the other hand, the Plumbers introduced much evidence of process piping work done in the area by employees whom it represents. Ken Phillips, business manager for the Plumbers, testified that throughout the State of Arizona the installation of process piping at minesites, as well as most industrial process piping, has been performed by the State's two Plumbers Locals.

The record indicates that the choice of whether to assign process piping work to employees represented by the Plumbers or the Laborers depends upon the relevant collective-bargaining agreement. Employers signatory to contracts with the Plumbers award such work to employees represented by the Plumbers, and those signatory with the Laborers assign the work to employees represented by the Laborers. Thus, we find that the factor of area and industry practice does not favor awarding the work to one group of employees rather than to the other.

### 4. Relative skills

Witnesses for both the Plumbers and the Laborers testified that the skills required to install process piping include the ability to weld, to fabricate pipe connections and fittings, to work with plastic piping, and to install mechanical or victaulic couplings. The work in dispute is part of the appren-

<sup>2</sup> *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 (1961).

<sup>3</sup> *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

ticeship training programs sponsored by each union, and the record shows that both groups of employees have satisfactorily performed the work in dispute or similar work. Accordingly, we conclude that the matter of relative skills is a neutral factor in reaching our determination.

#### 5. Economy and efficiency of operation

The Employer asserted that in terms of its overall operation it is more efficient to use employees represented by the Plumbers instead of those represented by the Laborers. While employees represented by the Laborers are paid for the time spent doing process piping work at the applicable rate under the MLA, the Employer pointed out that they only spend about 60 percent of their worktime actually doing process piping, and can be utilized doing other work under general laborer classifications during the remaining time on the job. James Barber, the project manager for the Employer at the Mission Mine, stated that the ability to use Laborers for other types of work enables the Employer to maintain a nucleus of key personnel when process piping is not being performed.

On the basis of the foregoing, we find that the factor of economy and efficiency of operation favors employees represented by the Laborers.

#### 6. Joint Board awards

As noted above, the IJDB awarded the work in dispute to employees represented by the Plumbers on April 24, 1980. In addition, the Plumbers offered into evidence numerous other IJDB decisions awarding similar work to employees represented by the Plumbers rather than to those represented by the Laborers. Accordingly, this factor favors awarding the disputed work to employees represented by the Plumbers.

#### Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by the

Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, the Employer's preference and past practice, and economy and efficiency of operation. In making this determination, we are awarding the work in question to employees who are represented by the Laborers, but not to that Union or its members. The 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, upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of the Ashton Company, Inc., who are represented by Laborers' International Union of North America, Local No. 479, are entitled to perform the installation of all process piping, including water, air, slurry, mill water, reagent, and line slurry piping, at the ASARCO Mission Unit Concentration in Sahuarita, Arizona.

2. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local Union No. 741, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require The Ashton Company, Inc., to assign the disputed work to employees represented by it.

3. Within 10 days from the date of this Decision and Determination of Dispute, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local Union No. 741, shall notify the Regional Director for Region 28, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.