Operating Engineers, Local Union 478, a/w International Union of Operating Engineers, AFL-CIO *and* Stone & Webster Engineering Corporation. Case 39-CD-17

30 March 1984

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

The charge in this Section 10(k) proceeding was filed 12 July 1983 by the Employer, and an amended charge was filed 22 July 1983, alleging that the Respondent (Local 478) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to unrepresented employees in the Employer's Site Engineering Group (SEG). The hearing was held 6 and 7 September 1983 before Hearing Officer Michael A. Marcionese.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer is a Massachusetts corporation[1] engaged in the construction of a nuclear power plant known as Millstone III in Waterford, Connecticut. During the past year the Employer purchased at the Waterford construction site materials such as piping, cement supports, and other like goods valued in excess of $50,000 and received these goods directly from points located outside Connecticut. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties also stipulate, and we find, that Local 478 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

An essential part of the Employer's Millstone III project is the fabrication and installation of the pipe which comprises the plant's cooling system. In the safety analysis report filed with the Nuclear Regulatory Commission the Employer has warranted that it will adhere to the American Society of Mechanical Engineers' Nuclear Piping Code (ASME Code). The ASME Code requires the performance of stress tests on various systems in the plant. Accordingly, prior to construction a pipe designer prepares a drawing which shows the planned piping configuration to scale. This piping drawing is given to a stress analyst who uses it to draw a model of the piping system. This model is subjected to computer analysis to determine whether the piping system as designed will be able to withstand various kinds of stresses.

After a piping system is constructed, the Employer's surveyors—who are represented by Local 478—take measurements of the piping. The surveyors use these measurements to draw sketches—called as builts—showing the dimensions and location of the plant's piping systems. John Carty, the Employer's superintendent of engineering, testified that the primary purpose of the "as builts" is to record where underground pipes are buried in the event of future excavation activities. The production of "as builts" require the surveyors to measure angles by protractors and by triangulation, which involves a geometric computation.

In addition, measurements of completed piping systems are taken for the purpose of performing a computer analysis to determine the systems' stress capabilities, similar to the stress analysis done during the preconstruction design phase. This stress reconciliation analysis is a new procedure made necessary because the systems are not always built exactly as designed. The stress reconciliation process begins with measurements of the actual configuration of the pipe and identification of the types of pipefittings that were used in the system. These measurements form the basis of the model which, through depiction of the piping as a series of node points and mass points, is subjected to computer analysis. In May or June 1983[2] the Employer assigned this measuring work to piping designers and stress analysts employed in its SEG. No union represents these employees at the Millstone III jobsite.[3] David Hovey, one of the Employer's labor relations supervisors, stated that the taking of stress reconciliation measurements would not diminish the need for, or otherwise affect, the production of "as builts" by the Local 478-represented surveyors.

Hovey testified that during a telephone conversation on 14 June James McParland, Local 478's

[1] At the hearing, the parties stipulated that the Employer is a Delaware corporation. The Employer's parent, Stone & Webster, Inc., is a Delaware corporation, not the Employer. We grant the Employer's unopposed motion to correct the record to reflect the proper State of the Employer's incorporation.

[2] All dates are in 1983 unless otherwise stated.

[3] Local 105 of the Association of Engineers, Architects and Draftsmen, represents some of these employees when they work in the Employer's Boston headquarters office.

business agent, questioned the Employer's assignment of SEG personnel to take measurements for stress reconciliation. According to Hovey, McParland characterized the work as the taking of "as built" measurements and insisted that it should be done by the surveyors. Kenneth Stevens, another labor relations supervisor for the Employer, testified that on 16 June Darwin Forde, Local 478's chief of parties on the jobsite, claimed that SEG employees improperly were performing "as built" measurements. Subsequently, at a 22 June meeting between Employer and Local 478 representatives, McParland reiterated the Union's position that the taking of stress reconciliation measurements was identical to the "as built" work, and surveyor-members of Local 478 should perform both. McParland asserted that surveyors were doing stress reconciliation measurements at other locations where the Employer was engaged in nuclear plant construction, but cited no specific examples. The Employer's representatives agreed to check into the matter and get back to the Union. On 29 June Labor Relations Supervisor Stevens informed McParland that the Employer had decided to adhere to its assignment to the SEG employees.

Pursuant to McParland's request, officials of Local 478 and the Employer met to discuss the subject again on 12 July. At the meeting McParland presented three examples of other locations where he claimed the disputed work was performed by surveyors rather than by members of the engineering force. Two of those sites, Mantaup and Brayton Point, were fossil fuel plants being converted from oil-fired to coal-fired facilities. Because they were nonnuclear projects, these two were not subject to the Nuclear Regulatory Commission regulations requiring stress reconciliations. The third site to which McParland referred was a nuclear facility which had been engineered by the Employer but was being built by a different company. Accordingly, the Employer had no control over any crafts working at the third site.

The Employer's Millstone III project manager, Art Dasenbrock, asked for more time to investigate the examples presented by Local 478. McParland responded that the Employer could have all the time it wanted, but that he would have to do what he had to do, and he did not need very long to make up his mind. As the meeting came to an end McParland said he would be on the site until 12:30 p.m., and then after that would be "near by."

Patrick Travers, the Employer's chief supervisor of surveyors at the jobsite, testified that in early July Forde, Local 478's chief of parties, told him that the surveyors wanted the stress reconciliation measurements work and that they probably would engage in a walkout to get it. Travers added that Forde allegedly said that the surveyors probably would not set up a picket line until after the ironworkers—who were then on strike—returned to work, so that the surveyors' action would have full impact. Forde denied making such a statement. The ironworkers had returned to work by 12 July.

The surveyor-members of Local 478 walked off the job at 12:30 p.m. on 12 July and established a picket line on the main access road to the site. The work stoppage lasted 2-1/2 days, ending on 14 July when the Employer and Local 478 executed a successor collective-bargaining agreement to one which had expired on 31 March. Forde testified that at a surveyors' meeting held immediately before the walkout both the taking of stress reconciliation measurements and the absence of a signed contract were discussed before the strike vote.

The Employer has had two separate collective-bargaining agreements with Local 478. One, generally referred to as the AGC standard agreement, is negotiated by the Associated General Contractors of Connecticut (AGC) and covers those employees who perform the traditional functions of operating engineers. The other contract, an independent agreement between the Employer and Local 478, sets forth terms of employment for surveyors. This second contract is based on the multiemployer agreement negotiated by the Connecticut Construction Industries Association, Inc. (CCIA). Each of these contracts expired on 31 March.

In April Labor Relations Supervisor Hovey learned that the CCIA had bargained a new contract. When the CCIA failed to notify him of that contract's terms, Hovey asked McParland to supply that information, and McParland did so. On 12 May Local 478 sent to Hovey a two-page document headed "Standard Agreement," which had been signed by the Union's business manager and its president. After stating that the "standard agreement" was extended for the period 4 April 1983 to 31 March 1984, the document set forth five modifications in the CCIA-negotiated agreement. Local 478 asked the Employer to sign and return the document. This demand came several weeks after the Employer's independent agreement with Local 478 for the surveyors would have renewed automatically. The Employer did not respond to Local 478's 12 May demand concerning the execution of the "standard agreement."

Sometime before 15 June the Employer voluntarily implemented all the economic terms of the new CCIA contract covering the Local 478-represented surveyors. In a 15 June letter the Union reminded Hovey that the standard agreement had not been executed. Hovey called the Employer's Boston

headquarters office for guidance, and was told to ask McParland to clarify whether the agreement in question applied to surveyors and whether the Union wanted that specific agreement signed.

McParland testified that at the above-mentioned 22 June meeting he told Stevens that Local 478 had not received a signed contract for the surveyors, even though an agreement was sent about 20 May. Stevens replied that the agreement was in Boston for review, and he could not explain the month's delay. According to McParland, he told Stevens that he wanted the contract back in 2 weeks. Stevens called McParland on 29 June and asked him which agreement he wanted signed. Stevens testified that McParland answered that the Union wanted the AGC standard agreement.

Hovey stated at the hearing that in early July the Boston office directed him to sign the CCIA agreement, as modified, and mail it to Local 478. McParland claimed that, at the 12 July meeting with the Employer's officials before the strike, he stated that he still had not received a signed contract from the Employer as promised by Stevens. In contrast, Hovey and Stevens testified that McParland said nothing about the collective-bargaining agreement at the 12 July meeting. McParland admitted that he never told the Employer that the absence of a signed contract would cause a strike. He asserted, however, that at the 12 July meeting the surveyors expressed much dissatisfaction with the Employer's failure to sign the contract. McParland said that he made it clear to the surveyors that if they walked off the job it was solely to obtain a contract, and that once the Employer signed an agreement, they would have to return to work.

The signs used on the first day of picketing simply read, "Local 478 I.U.O.E. Operating Engineers Are on Strike." The only sign referring to an alleged contract dispute was a handwritten sign which appeared on the second day of the picketing. It stated, "Local 478 E Surveyors. No Contract. No Work." On 13 July McParland sent a telegram to Hovey which stated that the picketing was solely "for the purpose of securing a signed contract covering your surveyors." Hovey replied by telegram on the same day that the Employer believed that the true reason for the job action was to secure the performance of stress reconciliations for Local 478's members. At a meeting held on 14 July the Employer presented the Union with a signed contract. The Union promptly ceased its picketing and the surveyors returned to work. At that time McParland asked for a meeting in the near future to discuss stress reconciliation measurements. Such a meeting was held about a week later, but the Employer continues to assign the disputed work to the SEG employees.

B. *Work in Dispute*

The work in dispute is the taking of the measurements used in the Employer's stress reconciliation analysis of completed work at the Millstone III nuclear power plant construction project in Waterford, Connecticut.

C. *Contentions of the Parties*

Local 478 contends that the Board should quash the notice of hearing on the ground that the work dispute is governed by the parties' contractual grievance-arbitration provision. In addition Local 478 asserts that there is no jurisdictional dispute within the meaning of Section 10(k) of the Act inasmuch as the dispute is between only it and the Employer, and there is no other recognizable group or class of employees making a competing claim for the work. Further, Local 478 argues that there is no reasonable cause to believe that it violated Section 8(b)(4)(D) because there is no probative evidence that the work stoppage was for the purpose of forcing the assignment of the disputed work to the surveyors. Instead, Local 478 contends that the record shows that its strike and picketing was undertaken solely to secure a signed contract. The Union adds that at no time did it make any threat with respect to the work assignment.

If the Board determines that there is reasonable cause to believe that it violated Section 8(b)(4)(D), Local 478 takes the alternative position that the Board's traditional standards require assignment of the work to the surveyors represented by Local 478. In this regard, the Union argues that the disputed work is "as built" work which the surveyors historically have performed for the Employer.

The Employer contends that the record clearly demonstrates that an object of Local 478's strike and picketing was to force the Employer to assign the disputed work to surveyor-members of the Union. Further, the Employer asserts that there is no voluntary means for the resolution of the dispute, either contractual or interunion. Accordingly, the Employer urges the Board to proceed to the merits of the dispute and to award the work to the SEG personnel on the basis of the Board's traditional criteria, specifically the factors of relative skills, efficiency and economy of operation, and employer preference.

D. *Applicability of the Statute*

It is undisputed that Local 478 engaged in a strike and picketing at the Employer's Millstone III construction project from 12 July until 14 July, and

that Local 478 consistently has demanded that the Employer assign the disputed work to employees represented by the Union, rather than to the SEG employees. It is also undisputed that the aforementioned picketing began within several hours after the Employer's officials informed the Union that the Employer would adhere to its assignment of the disputed work to SEG personnel. Local 478 Business Manager McParland responded that he would have to do what he had to do, and he did not need very long to make up his mind. Further, Local 478 concedes that the issue of the disputed work was discussed at the 12 July meeting at which the Union-represented surveyors decided to picket the jobsite.

Local 478 contends, however, that the picketing was solely for the purpose of obtaining the Employer's signature on a collective-bargaining agreement. Even assuming that the picketing had this permissible object,[4] Local 478's repeated demands for the disputed work, McParland's remarks at the 12 July meeting with the Employer's representatives, and the fact that the work assignment was discussed just before the strike vote constitute sufficient proof for reasonable cause to believe that the picketing also had an object of forcing the Employer to reassign the work to Local 478-represented surveyors. Further evidence of that unlawful object is found in Patrick Travers' testimony that Darwin Forde told him that the surveyors probably would picket to obtain the disputed work. Forde may not have been a union officer, but he was Local 478's chief of parties at the jobsite and was one of the Union's representatives at the June and July meetings with Employer officials concerning the assignment of the disputed work.

In addition, we reject Local 478's contention that this case does not present a jurisdictional dispute as contemplated by Section 10(k) inasmuch as there is only one recognizable group of employees demanding the work. The unrepresented employees who are performing, and who desire to retain, the work are considered claimants to the work,[5] and it is well settled that Section 8(b)(4)(D) encompasses competing claims of a labor organization and a group of unrepresented employees.[6] 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.

The Employer and Local 478 disagree as to whether there is a method for the voluntary adjustment of the dispute to which all parties are bound. We find no merit to the Union's contention that this dispute is governed by the parties' contractual grievance-arbitration procedure. That procedure does not apply when, as here, unrepresented employees have been assigned the disputed work. Accordingly, we conclude that there is no voluntary binding method for the adjustment of this dispute, and therefore the 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 considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Collective-bargaining agreements

Local 478's CCIA contract with the Employer generally covers employees who are engaged in field survey work as party chiefs, instrument men, and rodmen. The contract excludes from coverage other persons who temporarily and sporadically use surveying instruments and Local 478 agrees not to interfere with such practice and custom.

Surveyors represented by Local 478 have traditionally made "as built" measurements as part of field survey work within the scope of the collective-bargaining agreement. There is no such tradition with the new stress reconciliation analysis and the contract does not specifically cover performance of this analysis. Contrary to Local 478's contention, the details of stress reconciliation field measurements and their integration with computer analysis procedures sharply distinguish the work in dispute from "as built" contract work. In light of this distinction and the contractual exception from coverage of nonsurveyors who occasionally use surveying instruments for other work, we find that Local 478's collective-bargaining agreement has no weight in deciding which group of employees is entitled to perform the work in dispute.

[4] While the evidence on this and other matters is conflicting, for the purpose of finding reasonable cause to believe that Sec. 8(b)(4)(D) has been violated we need not conclusively resolve conflicts in testimony. *Electrical Workers IBEW Local 103 (Maki Electrical, Inc.)*, 227 NLRB 1745, 1746 (1977).

[5] See *Longshoremen ILWU Local 29 (Van Camp Sea Food Co.)*, 225 NLRB 624 (1976); *Sheet Metal Workers Local 54 (Goodyear Tire & Rubber Co.)*, 203 NLRB 74 (1973).

[6] See *Laborers Local 334 (Dynamic Construction Co.)*, 236 NLRB 1131 (1978).

2. Employer practice and preference

The Employer has only recently—in May or June—begun the taking of measurements of completed construction work for purposes of stress reconciliation analysis. As an established practice, however, the Employer has subjected the designs of piping systems to stress analysis prior to construction. The measurements needed for such computer analysis have always been performed by piping designers and stress analysts, not by surveyors.

The Employer started performing stress analysis of completed work in response to an NRC bulletin issued in 1979 requiring a comparison of a piping system's original design to that which is ultimately constructed. Of the five nuclear power plants currently being built by the Employer, Millstone III is the first one where the stress reconciliation procedure has been implemented. John Carty, the Employer's superintendent of engineering and head of the SEG at Millstone III, stated that the Employer plans to assign the stress reconciliation measurements at the other plants to engineering personnel, rather than surveyors. Nevertheless, inasmuch as the work assignment at issue here is the first of its kind, we find that the factor of employer practice favors neither the unrepresented SEG employees nor employees represented by Local 478 in making our determination.

With respect to employer preference, the Employer prefers the unrepresented SEG employees over the surveyors represented by Local 478 for performance of the work in dispute. Accordingly, we find that the factor of employer preference favors awarding the disputed work to the SEG employees.

3. Relative skills

Pursuant to the Employer's assignment, the stress reconciliation measurements are performed by a team composed of a stress analyst and two piping designers. The stress analyst has a Bachelor of Science degree in engineering and extensive work experience in the Employer's Boston headquarters, including using the computer program for stress analysis in the preconstruction stage. The piping designers have 2-year degrees and at least 10 years' experience in piping design, including the making of piping configuration models for computer programs. Both the stress analysts and the piping designers use their independent judgment to make certain engineering assumptions as to what dimensions are required to ensure that the pipe configurations are compatible with the computer program for stress reconciliation.

Local 478-represented surveyors generally do not have college degrees, and there is no evidence that they have taken measurements specifically for the purpose of fashioning a computer program. On occasion, the surveyors assist the analysts and designers in the taking of stress reconciliation measurements by giving starting points and measurements of penetrations through walls and slabs. The record shows that, unlike pipe designers, surveyors are not familiar with piping fittings and cannot normally distinguish between a short radius and long radius elbow, cannot identify a reducer on a pipe, and are not acquainted with unusual kinds of pipefittings such as washolets and threadolets. Knowledge of the aforementioned fittings is needed to take measurements for stress reconciliation analysis. Further, Travers, the Employer's chief supervisor of surveyors, testified that the surveyors could not adequately perform the disputed work, particularly since they could not identify mass points—necessary information for the computer program.

Nevertheless, Local 478 contends that the surveyors have demonstrated, at least on another nuclear power plant project, that they are fully capable of performing the work. Specifically, Local 478 cites stress reconciliation measurement work done by surveyors at the Shoreham nuclear facility in Long Island, New York, which was engineered by the Employer, but was being built by a different construction company. Contrary to Local 478's contention, John Carty, the Employer's superintendent of engineering at Millstone III, testified that he had been told by the head of engineering at Shoreham that the stress reconciliation measurements taken by surveyors there were insufficient, and had to be done a second time by stress analysts. Accordingly, we find the evidence insufficient to support Local 478's assertion that surveyors have shown that they can adequately perform the disputed work.

From the foregoing, we conclude that the factor of relative skills favors awarding the disputed work to the unrepresented SEG employees who currently are performing the work satisfactorily, rather than to the Local 478-represented surveyors.

4. Economy and efficiency of operations

The two competing groups of employees here are engaged in numerous other jobsite functions, which will be unaffected by the assignment of the work in dispute. The Employer asserts that it is more efficient to assign the work to the SEG employees rather than surveyors, because only the analysts and designers possess the requisite skills and experience. On the basis of the above-mentioned situation at the Shoreham project, the Employer

argues that if the work is awarded to the surveyors, a duplication of work will result because the Employer will find it necessary to have the SEG employees check the surveyors' measurements. According to the Employer, "efficiency" in this case means getting the information correctly the first time.

Likewise, Local 478's contention that the factor of efficiency warrants awarding the work to the surveyors is premised on the Union's assertion that the surveyors have shown that they are fully capable of performing the work. We have rejected this assertion above and found instead that only the SEG employees have demonstrated the skills to do the work. Thus, we find that the factor of economy and efficiency of operations favors the unrepresented SEG employees in making our determination.

Conclusions

After considering all the relevant factors, we conclude that the unrepresented Site Engineering Group employees are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, job skills, and economy and efficiency of operations. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Stone & Webster Engineering Corporation who are employed in the Employer's Site Engineering Group are entitled to perform the taking of the measurements used in the Employer's stress reconciliation analysis of completed work at the Millstone III nuclear power plant construction project in Waterford, Connecticut.

2. Operating Engineers, Local Union 478, affiliated with the International Union of Operating Engineers, AFL–CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Stone & Webster Engineering Corporation to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Operating Engineers, Local Union 478, affiliated with the International Union of Operating Engineers, AFL–CIO, shall notify the Officer-in-Charge for Subregion 39 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.