

**Laborers' International Union of North America, Local 210 and Surianello General Concrete Contractor, Inc. and International Union of Operating Engineers, Local 17.** Case 3-CD-645

September 28, 2007

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Surianello General Concrete Contractor, Inc. (the Employer) filed a charge on January 23, 2007,<sup>1</sup> alleging that the Respondent, Laborers' International Union of North America, Local 210 (Laborers or Local 210), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local 17 (Engineers or Local 17). The hearing was held on April 2 and 3 before Hearing Officer Renee Hutt. Thereafter, the Employer, Local 210, and Local 17 filed posthearing briefs.

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, a New York corporation, is a contractor engaged in highway construction. During the 12 months preceding the hearing, a representative period, the Employer, at its Buffalo, New York location, purchased and received goods and services valued in excess of \$50,000 directly from points outside the State of New York. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers and the Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

*A. Background and Facts of Dispute*

The Employer is a highway concrete contractor. The Employer's work primarily involves replacing old concrete with new concrete. For structural reasons, the new concrete must be joined to the existing concrete using the "doweling" process. This process consists of drilling holes in the concrete, cleaning out the holes with an air hose, filling the holes with epoxy, inserting dowels into the epoxy-filled holes, and then joining the two pieces of

concrete. Until the late 1980s when the EZ Gang Drill was introduced, the drilling part of the doweling process was performed with traditional, handheld rock or dowel drills. The EZ Gang Drill consists of two or more of the traditional rock or dowel drills mounted on one frame and powered pneumatically, making the drilling work faster and easier. As a member of the Associated General Contractors of America, New York State Chapter, Western New York Division, the Employer is a signatory to agreements with Local 210 and Local 17. The Employer has traditionally assigned the doweling process work to Laborers-represented employees.

In August 2006, Local 17 filed a grievance against the Employer, asserting that the EZ Gang Drill work the Employer assigned to Laborers-represented employees on the Blasdell, New York jobsite was covered by the Employer's agreement with Local 17. Local 210 subsequently threatened to strike or picket the Employer if it reassigned the EZ Gang Drill work to Engineers-represented employees. In January, the Employer filed the instant charge, asserting that Local 210 violated Section 8(b)(4)(D) of the Act.

*B. Work in Dispute*

The Notice of Hearing describes the disputed work as: "[t]he operation [of] the EZ Gang Drill, which is work currently being performed by Surianello General Concrete Contractor at its jobsite located on Interstate 90 in Blasdell, New York." As the parties agreed at the hearing that the dispute involves the EZ Gang Drill work, it appears that the notice of hearing accurately describes the work in dispute as the operation of the EZ Gang Drill on the Employer's Blasdell, New York worksite.<sup>2</sup>

*C. Contentions of the Parties*

The Employer asserts that there is reasonable cause to believe that Local 210 violated Section 8(b)(4)(D) because Local 210 and Local 17 both claim the disputed work, Local 210 threatened economic action if the Employer assigned the work to employees represented by Local 17, and there is no agreed-upon voluntary method of adjustment of the dispute. On the merits, the Employer asserts that the factors of collective-bargaining agreements, employer preference, past practice, area practice, relative skills and training, and economy and efficiency of operations favor awarding the disputed work to Laborers-represented employees. Local 210 does not dispute that there is reasonable cause to believe that it violated Section 8(b)(4)(D) and asserts that the

<sup>1</sup> Unless otherwise indicated, all dates refer to 2007.

<sup>2</sup> At the hearing, the Employer and Local 210 contended that the EZ Gang Drill was a rock or dowel drill, while Local 17 contended that it was a core drill. The difference in these drills and the relevance of that difference are discussed below.

factors of collective-bargaining agreements, employer preference, past practice, area practice, relative skills and training, and economy and efficiency of operations favor awarding the disputed work to Laborers-represented employees.

Local 17 asserts that the Board should quash the notice of hearing. According to Local 17, it has not asserted a claim to the disputed work, but instead has requested that the Employer apply the wage provisions of its contract with Local 17 to employees performing the work in dispute, regardless of their union affiliation. Local 17 also asserts that Local 210's threat of economic action was a sham because Local 210 is subject to a no-strike clause, has not previously taken any job actions against any employer with which it has a contract, and did not attempt to resolve the dispute under its agreement with the Employer. Local 17 further asserts that Local 210 is merely seeking to preserve its work jurisdiction, which is not a proper matter for a Section 10(k) hearing.

#### D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work among rival groups of employees and that a party has used proscribed means to enforce its claim to the work in dispute. See *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004). Additionally, the Board will not proceed under Section 10(k) if there is an agreed-upon method for voluntary adjustment of the dispute. *Id.*

##### 1. Competing claims to the work in dispute

At all times, Local 210 has claimed the disputed work for Laborers'-represented employees, and these employees have been performing the disputed work. Local 17 contends that it has not asserted a claim to the disputed work because the grievance it filed against the Employer seeks only to have the Employer apply Local 17's contract terms to employees performing the EZ Gang Drill work, regardless of their union affiliation. Local 17's grievance, however, asserts that the Employer failed to apply the terms and conditions of its collective-bargaining agreement with Local 17 by using "a non-bargaining unit member to perform bargaining unit work." The wording of the grievance thus demonstrates that Local 17 sought to have its unit members perform the disputed work. Moreover, Local 17's business agent erased any ambiguity regarding the actual objective of the grievance when he testified that Local 17's "ambition is to represent the individual while he does the EZ Gang

Drill work." Accordingly, we find that competing claims to the disputed work exist.<sup>3</sup>

##### 2. Use of proscribed means

After learning that Engineers had filed a grievance against the Employer concerning the EZ Gang Drill work, Laborers sent a letter to the Employer threatening to strike or picket if the Employer assigned the EZ Gang Drill work to Engineers-represented employees. Local 17 makes several arguments asserting that Local 210's threat was a sham. None has merit. Regarding the no-strike clause, the Board has rejected the argument that a job action threat was a sham because it involved violating a no-strike clause. See *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1032 (2004). The Board has also rejected the arguments that a threat of job action was a sham because the threatening union had no history of picketing or striking employers with which it had a collective-bargaining relationship and because the threatening union did not attempt to resolve the dispute with the employer prior to threatening job action. See, respectively, *Carpenters Ohio Regional Council (Competitive Interiors)*, 348 NLRB 266, 268 (2006); and *Cretex Construction Services*, supra at 1032. Thus, we find that reasonable cause exists to believe that Local 210 used proscribed means to enforce its claim to the work in dispute.

Local 17 makes the additional claim that, even assuming Local 210's threat of job action was genuine, a 10(k) hearing is not appropriate because Local 210 is merely asserting a work preservation claim over the disputed

<sup>3</sup> Insofar as Local 17 contends that it has not asserted a claim to the disputed work because it sought only to have the Employer apply Local 17's contract terms to employees performing the EZ Gang Drill work, we reject that contention. The Board has found that a union asserts a claim to work by declaring that an objective of its grievance is the application of contractually prescribed wage and benefit rates to the disputed work. See *Laborers Local 113 (Michels Pipeline Construction)*, 338 NLRB 480, 483 (2002).

Member Walsh finds it unnecessary to pass on whether, as the panel majority stated in *Michels Pipeline*, supra, a union asserts a claim to disputed work by merely declaring that an objective of its grievance is the application of contractually prescribed wages and benefits to the work. In agreeing that the evidence in this case is sufficient to support a finding that Local 17 has claimed the disputed work, Member Walsh observes that, contrary to Local 17's contention, the wording of Local 17's grievance in this case indicates that the objective of the grievance was not solely upholding Local 17's contractual standards and applying the contractual terms to whoever was doing the work. Rather, the grievance indicates that Local 17 considered the work to be bargaining unit work and was complaining that bargaining unit work was being assigned to "a non-bargaining unit member," i.e., an employee who was not represented by Local 17. Thus, Local 17 was concerned with the union affiliation of the individuals who were performing the disputed work, and not just their working conditions. Accordingly, Member Walsh finds that this grievance constitutes a claim to the disputed work for employees represented by Local 17.

work. The cases relied on by Local 17 involve disputes between unions and employers where the unions sought to protect contractually acquired work against the employers' attempts to reallocate, reassign, or subcontract the work at issue to another group of employees. See, e.g., *Teamsters Local 107 (Reber-Friel Co.)*, 336 NLRB 518, 520–521 (2001). This case is distinguishable, however, because it involves a traditional jurisdictional dispute between two unions, each of which asserts a claim to work in dispute, and thus involves a dispute falling within Section 8(b)(4)(D), which is properly resolved in a 10(k) proceeding. Cf. *Highway Truckdrivers & Helpers Local 107 (Safeway Stores)*, 134 NLRB 1320, 1322–1323 (1961) (Sections 8(b)(4)(D) and 10(k) were designed to resolve competing claims between rival groups of employees, and not to arbitrate disputes between a union and an employer where no such competing claims exist).

### 3. No voluntary method for adjustment of dispute

Local 210's agreement specifically exempts jurisdictional disputes, and there is no evidence that Local 210 is bound by any dispute resolution procedure negotiated by Local 17 and the Employer. Moreover, Local 210 repeatedly refused requests for tripartite arbitration between the parties. While the record demonstrates that the Employer and Local 17 have an arbitration hearing scheduled concerning assignment of the disputed work, there is no indication that Local 210 is bound to participate in that proceeding or to abide by any resolution achieved in the arbitration. Accordingly, we find that there is no agreed-upon method for the voluntary resolution of this dispute that binds all of the parties. See *Carpenters Local 7 (Five Bros., Inc.)*, 344 NLRB 910, 912 (2005).

In sum, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there is no voluntary method for adjustment of the dispute. We thus find that the dispute is properly before the Board for determination and deny Local 17's motion to quash the notice of hearing.

### E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577 (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).

We have considered the following factors, which we find relevant, and, for the reasons set forth more fully below, we conclude that the Employer's employees represented by Laborers are entitled to perform the work in dispute.

#### 1. Collective-bargaining agreements

The Employer is a signatory to separate collective-bargaining agreements with Laborers and Engineers. Article 4 of Laborers agreement covers "the operating and servicing of rock drilling machines" and "the operation of the air powered dowel drill and ancillary equipment." Article 5 of Engineers' agreement covers "blast or rotary drill[s] (truck or cat mounted non air tract)," "core drill[s] (machine or truck mounted)," and "test core drill machines (machine or truck mounted)."

Neither agreement specifically mentions the disputed work. However, rock drills, dowel drills, and blast or rotary drills (referenced in the Local 210 agreement) are all predecessors to the EZ Gang Drill and Laborers-represented employees have traditionally used these drills in the doweling process. The core drill (referenced in the Local 17 agreement), on the other hand, is a different type of drill and is not used in the doweling process.<sup>4</sup> Further, there is no evidence that the disputed drill at issue here is machine, truck, or cat mounted. Based on the foregoing, Local 210's agreement more specifically encompasses the disputed work. This factor thus favors awarding the disputed work to Laborers-represented employees. See *Carpenters (Prime Scaffold, Inc.)*, 338 NLRB 1104, 1106–1107 (2003).

#### 2. Employer preference, current assignment, and past practice

Consistent with its past practice, the Employer currently assigns the disputed work to Laborers-represented employees. In addition, the Employer prefers to continue assigning the work to these employees. Local 17 presented evidence that an Engineers-represented employee once performed the disputed work when Laborers-represented employees were occupied with other tasks. Such evidence does not, however, warrant finding the Employer's past practice to be inconclusive. See *Elevator Constructors Local 2 (Kone, Inc.)*, 349 NLRB 1207, 1210 (2007); and *Millwrights Local 1026 (Intercounty Construction Corp.)*, 266 NLRB 1049, 1052 (1983). The factors of Employer preference, current assignment, and past practice thus favor awarding the disputed work to Laborers-represented employees.

<sup>4</sup> Core drills remove concrete in a core, leaving a smooth hole suitable for running wire or cable through, while drills used in the doweling process pulverize the concrete, leaving rough surfaces to which the epoxy can bond.

### 3. Area practice

Local 210 submitted a letter from Edbauer Construction, an area employer, stating that it had a long practice of assigning the disputed work to Laborers-represented employees.<sup>5</sup> In addition, at the hearing, a witness for Local 210 testified that Laborers-represented employees had performed the disputed work on two additional jobsites in western New York State. In its brief, Local 17 offers no evidence or argument disputing the letter or the testimony. Based on the evidence presented, we find that the factor of area practice slightly favors awarding the disputed work to Laborers-represented employees.

### 4. Relative skills and training

Local 210 presented evidence that Laborers-represented employees have received on-the-job training on the disputed work lasting from 15 minutes to 2 hours. In addition, the record establishes that Laborers-represented employees have successfully performed the work in dispute on a number of occasions, thus establishing their ability to do the work. While there is no indication in the record that performance of the EZ Gang Drill work requires expertise, Local 17 did not present any evidence regarding the skills and training of Engineers-represented employees to perform the disputed work. In these circumstances, the relative skills and training factors favor awarding the disputed work to Laborers-represented employees. See *Bakery Workers Local 205 (Metz Baking Co.)*, 339 NLRB 1095, 1098 (2003); see also *Laborers Local 320 (Northwest Natural Gas)*, 330 NLRB 594, 597 (2000) (award of work favored to em-

<sup>5</sup> Local 210 also submitted an August 2006 letter from A&L, Inc., an area employer, stating that it had a 6-year practice of assigning the disputed work to Laborers'-represented employees. However, Local 17 presented a March 2007 settlement agreement entered into by A&L and Local 17 shortly before A&L ceased operations. In the settlement agreement, A&L acknowledged that operation of the EZ Gang Drill is governed by Local 17's collective-bargaining agreement. We therefore find that the letter and the settlement agreement negate each other and thus neither constitutes demonstrative evidence on the issue of area practice.

ployees receiving on-the-job training and successfully performing the work).

### 5. Economy and efficiency of operations

As stated above, the disputed work is only one part of the doweling process. Currently, Laborers-represented employees perform all aspects of that process. Engineers does not claim any of the work associated with the doweling process except the operation of the EZ Gang Drill. Assignment of the disputed work to Engineers-represented employees would thus require additional employees to perform all other aspects of the doweling process and would disrupt an established, efficient process. Moreover, the record establishes that most jobs require the use of traditional rock or dowel drills for areas the EZ Gang Drill cannot reach, and Engineers-represented employees do not use these drills. Accordingly, the factors of economy and efficiency of operations favor awarding the disputed work to Laborers-represented employees.

### CONCLUSIONS

After considering all the relevant factors, we conclude that Laborers'-represented employees are entitled to continue performing the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference, current assignment and past practice, area practice, relative skills and training, and economy and efficiency of operations. In making this determination, we award the work to employees represented by Laborers, not to that labor organization or to its members. The determination is limited to the controversy that gave rise to this proceeding.

### DETERMINATION OF DISPUTE

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

Employees of Surianello General Concrete Contractor, Inc. represented by Laborers' International Union of North America, Local 210 are entitled to operate the EZ Gang Drill at the Employer's jobsite located on Interstate 90 in Blasdell, New York.