International Longshore and Warehouse Union, Local 10, AFL–CIO *and* Cemex Construction Materials, L.P. *and* International Union of Operating Engineers, Local 3, AFL–CIO. Case 20–CD–739

February 22, 2008

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS LIEBMAN AND SCHAUMBER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). CEMEX Construction Materials, L.P. (the Employer) filed a charge on October 11, 2007,[1] alleging that the Respondent, International Longshore and Warehouse Union, Local 10, AFL–CIO (ILWU or Local 10), 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 the International Union of Operating Engineers, Local 3, AFL–CIO (Operating Engineers or Local 3). The hearing was held on November 2 and 5 before Hearing Officer Paula R. Katz. Thereafter, the Employer and Local 10 filed posthearing briefs.

The National Labor Relations Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.[2]

I. JURISDICTION

During the 12 months ending October 31, the Employer derived gross revenue in excess of $500,000 and purchased and received at its facilities in California goods valued in excess of $50,000 directly from points outside the State of California. 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 ILWU and the Operating 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 produces ready-mix concrete using sand, aggregate rock, and cement delivered to its batch plant adjacent to Pier 92 in the Port of San Francisco, California.[3] In 2005, the Employer acquired RMC Pacific Corporation, including RMC Pacific's ready-mix concrete operation on Mariposa Street in San Francisco.[4] Sometime before 2005, RMC Pacific had begun making arrangements for locating a new batch plant at one of the piers in the Port of San Francisco because of planned redevelopment of the area around the Mariposa Street facility.

In 2006, the Employer began operating the new batch plant on land leased from the Port of San Francisco adjacent to pier 92. Raw materials used to make the ready-mix concrete were trucked to the pier 92 batch plant. Trucks continue to deliver some of the raw materials, but on September 21 the Employer also received a delivery of sand and aggregate by barge. The barge was tied to the dock adjacent to the pier 92 plant for unloading.[5]

The barge is unloaded by an employee operating a front-end loader, also called a bucket loader, to scoop the bulk material from the deck of the barge and put it into a hopper located on the barge. The hopper deposits the material onto a conveyer belt, which transports the material into the batch plant for storage or to be directly added to concrete being mixed.

The Employer assigned the operation of this front-end loader to its employees represented by Local 3, who perform all the production work at the pier 92 batch plant. As a member of the Aggregates and Concrete Association, the Employer is bound by a collective-bargaining agreement between the Bay Area Building Materials Dealers and Local 3, commonly known as the Bay Area Batch Plant Agreement, which covers the employees working at the pier 92 batch plant.[6] The Employer does not employ any employees represented by Local 10 and does not have a collective-bargaining agreement with Local 10.

The president of Local 10 told the Employer that if any work was to be performed by the Employer on its barge at pier 92, that work belonged to Local 10. On September 21, Local 10 picketed the Employer at pier 92. The picket signs read: "CEMEX AND LOCAL #3

[1] Unless otherwise indicated, all dates refer to 2007.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] Concrete is a mixture of cement, water, aggregate rock, and sand. Ready-mix concrete is a type of concrete produced in "batches" at a batch plant by mixing different proportions of the materials to meet particular specifications. The mixture is loaded into a transit mixer mounted on a truck or barge for delivery to a jobsite, where it is poured.

[4] The Mariposa Street facility is not located next to the water, so no barge unloading was performed there.

[5] At the time of the hearing, the Employer had received only one barge delivery. Because of limited storage capacity at the pier 92 batch plant, the Employer was using the barge as additional storage space.

[6] The Employer also employs truck drivers, represented by the Teamsters, who operate the ready-mix trucks that deliver the concrete, and vehicle mechanics, represented by the Machinists, who service the ready-mix trucks.

OPERATING ENGINEERS ARE INFRINGING ON ILWU LOCAL #10 JURISDICTION AT PIER 92."

The Employer filed an 8(b)(4)(D) charge against Local 10 on October 11. On October 16, Local 10 notified Region 20 that it would not engage in picketing or similar conduct at pier 92 pending a resolution of the underlying jurisdictional dispute between the two unions. The Employer started unloading the barge on October 22, using its employees represented by the Operating Engineers.

B. Work in Dispute

The parties stipulate that the disputed work is "the movement of bulk aggregate rock and/or sand by bucket loader from a barge located at Pier 92 in San Francisco, California, to its first and final point of rest in the hopper on the barge."

C. Contentions of the Parties

The Employer stipulates that this 10(k) dispute is properly before the Board for determination. On the merits of the dispute, 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 its employees represented by the Operating Engineers.

Local 10 also stipulates that this jurisdictional dispute is properly before the Board for determination. On the merits of the dispute, Local 10 contends that the work in dispute should be awarded to ILWU-represented employees based on the factors of employer past practice and area and industry practice.[7]

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work, and that a party has used proscribed means to enforce its claim to the work in dispute. Additionally, there must be a finding that the parties have not agreed on a method for the voluntary adjustment of the dispute. See, e.g., *Operating Engineers Local 150 (R&D Thiel),* 345 NLRB 1137, 1139 (2005).

We find that these requirements have been met. The parties stipulated that Local 3 and Local 10 both claim the work in dispute. In addition, as stated above, on September 21, the day the barge arrived, Local 10 picketed the Employer at pier 92 with signs reading: "CEMEX AND LOCAL #3 OPERATING ENGINEERS ARE INFRINGING ON ILWU LOCAL #10 JURISDICTION AT PIER 92." The parties stipulate and we find that there is reasonable cause to believe that Local 10 used proscribed means to enforce its claim to the disputed work. See, e.g., *Operating Engineers Local 150 (Royal Components)*, 348 NLRB 1369, 1370 (2006). Finally, the parties stipulated that there is no agreed-upon method of resolving the dispute.

We therefore find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k). Accordingly, we find that the dispute is properly before the Board for determination.

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 the Operating Engineers are entitled to perform the work in dispute.

1. Certifications and collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute. The parties stipulated that the Employer is not failing to comply with a Board order or certification determining the bargaining representative for the employees performing the work in dispute. Accordingly, we find that the factor of certification does not favor awarding the work in dispute to employees represented by either union.

The Employer does not have a collective-bargaining agreement with the ILWU.[8] It does have a collective-bargaining agreement with the Operating Engineers. That agreement covers all of its employees engaged in producing concrete at the Employer's pier 92 batch plant. The agreement does not expressly and specifically refer to the work in dispute. It does, however, refer to that work in more general terms. The agreement requires the

[7] Local 3 did not file a posthearing brief.

[8] Local 10 notes, and the Employer acknowledges, that the Employer contracts with stevedoring companies to unload oceangoing vessels, and that the employees of those companies are covered by a collective-bargaining agreement between Local 10 and the Pacific Maritime Association. The Employer is not, however, bound to that agreement.

Employer to recognize Local 3 "as the sole collective bargaining representative of all Employees of the Employer performing work within the recognized jurisdiction of [the Operating Engineers]." It has long been acknowledged that the operation of heavy equipment is within the recognized jurisdiction of the Operating Engineers, see *Operating Engineers Local 825 (Cruz Contractors)*, 239 NLRB 490, 493 (1978), and it is equally well established that front-end loaders are heavy equipment, see, e.g., *Desert Aggregates*, 340 NLRB 289, 298 (2003); *Laborers Local 76 (Carlson & Co.)*, 286 NLRB 698, 698 (1987). In addition, the Employer's collective-bargaining agreement with Local 3 includes the classification "mechanical loader"; Local 3's district representative testified that, although employees working in any of the classifications set forth in the agreement are capable of performing the disputed work, operation of the bucket loader falls within the duties of the agreement's "mechanical loader" classification. Pursuant to the agreement, the Employer has assigned the operation of a bucket loader to move materials at the plant to employees represented by the Operating Engineers. Based on the foregoing, the factor of collective-bargaining agreements favors awarding the work in dispute to employees represented by the Operating Engineers. See *Longshoremen ILA Local 3000 (Coastal Cargo)*, 289 NLRB 542, 544 fn. 9 (1988) (finding collective-bargaining agreement factor favored awarding disputed work to employees represented by the Teamsters, where employer's agreement with the Teamsters listed covered job classifications but did not describe the work performed by those classifications, and the employer had no agreement with the rival ILA); *Longshoremen ILA Local 1242 (Dependable Distribution)*, 316 NLRB 1, 2 (1995) (finding collective-bargaining agreement factor favored awarding disputed work of unloading and warehousing cocoa beans to employees represented by union that had agreement with employer covering all warehouse employees, over workers represented by competing union that had no agreement with employer).

2. Employer preference and past practice

The Employer does not employ ILWU-represented employees and has never assigned any work to ILWU-represented employees. The Employer has always used employees represented by the Operating Engineers to perform work related to the production of concrete, including operating a bucket loader to move materials at the plant. Nevertheless, the operation of a bucket loader to unload a barge was performed for the first time after the barge delivery arrived at pier 92 in September. Thus, the Employer has no past practice of assigning the work in dispute, and we find that the factor of past practice does not favor an award of the disputed work to employees represented by either Union.

The Employer currently assigns the disputed work to its own employees represented by the Operating Engineers because it considers itself obligated by the collective-bargaining agreement to do so and because it believes that it is more efficient to assign the disputed work to employees familiar with the overall operation. The Employer prefers that the work in dispute continue to be performed by employees represented by the Operating Engineers. Thus, we find that the factor of employer preference favors assigning the work to employees represented by Local 3.[9]

3. Industry and area practice

The Employer, the Operating Engineers, and the ILWU each introduced evidence concerning the loading and unloading of various bulk materials from vessels in the San Francisco Bay area.[10]

Local 3 introduced evidence that employees represented by the Operating Engineers have loaded and unloaded bulk materials—aggregate rock, sand, and dredge spoils—from barges for other Bay area employers. The Operating Engineers' district representative testified that workers represented by Local 3 have unloaded asphalt aggregate from barges onto conveyor belts that carry the material into asphalt production facilities. Specifically, the district representative testified that workers represented by the Operating Engineers at a facility located in Petaluma, California, have unloaded asphalt aggregate from a barge using a front-end loader.

The ILWU contends that the sand and aggregate delivered by barge to the Employer at pier 92 is "revenue cargo," i.e., "cargo that someone has paid for and put on a vessel to be shipped and received elsewhere." Local 10 introduced

[9] In its brief, the ILWU argues that the Employer's stated preference to assign the disputed work to employees represented by the Operating Engineers is contradicted by the "admission" of Joe Sosteric, a manager for the predecessor, RMC Pacific. An ILWU witness testified that, when RMC Pacific was considering locating a batch plant adjacent to a pier at the Port of San Francisco, Sosteric told him that the company had no objection to assigning unloading of barge deliveries at the pier to ILWU-represented workers. This testimony was admitted over the Employer's hearsay objection based on the ILWU counsel's representation that it was not being offered for the truth of the matter asserted. Contrary to her representation to the hearing officer, the ILWU in its posthearing brief is plainly attempting to assert the truth of Sosteric's statement by characterizing it as an admission contrary to the Employer's stated preference. In any event, there is no basis for finding that Sosteric's statement constitutes an admission by the Employer. Sosteric was never an agent of the Employer; there is no evidence that the Employer was even aware of the alleged statement, much less that the Employer had authorized it, adopted it, or become in any way bound by it.

[10] The parties did not offer any separate evidence of industry practice. Indeed, they do not agree as to what the relevant industry is here.

testimony that the unloading of "revenue cargo" at a commercial dock, such as Pier 92, is work traditionally performed by members of Local 10. Local 10 contends that employees represented by the Operating Engineers do not unload "revenue cargo" at commercial docks, but only "construction materials" at private company docks or at construction sites. Local 10 presented evidence that ILWU-represented employees working for stevedoring companies in the San Francisco Bay area have unloaded bulk cargo from vessels, including by operating a self-unloading vessel's conveyor system to discharge sand and rock from the vessel's holds, and by unloading cement from the holds of oceangoing vessels by means of a procedure that involves, at one stage, the operation of bucket loaders.

We find that the foregoing evidence does not establish a clear or consistent area or industry practice with regard to the specific work in dispute. At best, the record shows that employees represented by both unions have on occasion performed work generally similar to the disputed work. Accordingly, we find that the factor of area and industry practice does not favor an award of the work in dispute to employees represented by either Union.

4. Relative skills

There is no dispute that employees represented by Local 3 are qualified to operate the bucket loader. Local 3 does not dispute that workers represented by Local 10 have the skills to operate the bucket loaders. The Employer does not dispute that some workers represented by Local 10 have the requisite skills to operate the bucket loader. We find that this factor does not favor awarding the disputed work to employees represented by either union.

5. Economy and efficiency of operations

The record shows that the Employer's employees represented by the Operating Engineers interchangeably perform all the functions necessary to carry out the Employer's ready-mix concrete production operations at the pier 92 batch plant. These functions include operating bucket loaders to deliver raw materials to the conveyor belt, controlling the conveyor belt system to coordinate the movement and delivery of the proper materials in the proper proportions to produce concrete to specification, and performing routine maintenance on plant equipment. The record further shows that the Employer has trained its employees on the various jobs so they are familiar with the entire operation. It regularly moves employees, including the operator of the bucket loader, from one function to another during the workday as needed. The Employer also has moved the Local 3-represented employees to its other plants depending on production needs. The record further indicates that the duration of the barge unloading assignment varies daily from one to several hours.

It is undisputed that ILWU-represented workers would perform only the work of operating the bucket loader on the barge and are not qualified to perform other work for the Employer at the batch plant. Thus, when there was no unloading to perform, the Employer could not assign other work to ILWU-represented workers, who would then be idle. Accordingly, we find that this factor strongly favors awarding the disputed work to the Employer's employees represented by the Operating Engineers.[11]

Conclusion

After considering all the relevant factors, we conclude that employees represented by International Union of Operating Engineers, Local 3, AFL–CIO are entitled to continue performing the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference, and economy and efficiency of operations. In making this determination, we award the work to employees represented by the Operating Engineers, 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.

1. Employees of CEMEX Construction Materials, L.P. represented by the International Union of Operating Engineers, Local 3, AFL–CIO are entitled to perform the movement of bulk aggregate rock and/or sand by bucket loader from a barge located at pier 92 in San Francisco, California to its first and final point of rest in the hopper on the barge.

2. International Longshore and Warehouse Union, Local 10, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force CEMEX Construction Materials, L.P. to assign the disputed work to workers represented by it.

[11] In arguing that the factor of economy and efficiency of operations favors an award of the disputed work to employees represented by the Operating Engineers, the Employer expressed a concern that Local 10 may not have a sufficient number of qualified bucket-loader operators to ensure that, on any given day, its hiring hall could supply a qualified operator to the Employer. Local 10 claims that it has enough workers at the hiring hall who possess all the requisite skills, so that the Employer's operations would not be adversely affected by an award of the disputed work to ILWU-represented employees. Because the reasons described above lead us to find that this factor strongly favors awarding the work to employees represented by Local 3, we find it unnecessary to address whether the Employer's concern is valid and further bolsters that finding. Thus, we do not pass on whether the ILWU's hiring hall would have enough qualified bucket-loader operators to supply the Employer's needs.

3. Within 14 days from this date, International Longshore and Warehouse Union, Local 10, AFL–CIO shall notify the Regional Director for Region 20 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.