Operating Engineers Local Union No. 3 *and* Central Concrete Supply, Inc. *and* Teamsters Local 853.
Case 32–CD–172

September 29, 2010

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS BECKER, PEARCE, AND HAYES

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Central Concrete Supply, Inc. (the Employer) filed a charge on September 23, 2009,[1] alleging that the Respondent, Operating Engineers Local Union No. 3 (Operating Engineers) violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Operating Engineers rather than to employees represented by Teamsters Local 853 (Teamsters). The hearing was held on October 23, 27, and 28 before Hearing Officer Catherine Ventola. Thereafter, Teamsters, Operating Engineers, and the Employer 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, we make the following findings.

I. JURISDICTION

The parties stipulated that the Employer is a California corporation engaged in the business of supplying ready-mix concrete and building materials, and that the Employer annually provides in excess of $50,000 worth of services within the State of California to users meeting the Board's jurisdictional standards for retail enterprises and the direct inflow and outflow standard for nonretail enterprises. Accordingly, the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties further stipulated, and we find, that Teamsters and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer has been engaged in the manufacture (batching)[2] and delivery of ready-mix concrete in the San Francisco Bay Area since 1948, and has voluntarily recognized Teamsters and Operating Engineers to represent its employees in various capacities and locations since that time. The Employer currently operates two concrete batching facilities in Oakland, California. One is located at 2400 Peralta Street (Peralta) and the other at 401 Embarcadero Road (Embarcadero).

Teamsters-represented employees have exclusively performed the batching work at Peralta for various employers since at least 1970. Upon acquiring the facility's lease in 1999, the Employer assumed its predecessor's collective-bargaining relationship with Teamsters. The Employer leases Peralta from Cemex.

Bay Area Teamsters (comprising Local 853 and other locals) represented Embarcadero employees from the mid-1960s to the mid-1980s working for one of the Employer's predecessors at that facility. In 1984 or 1985, Operating Engineers began representing Embarcadero batching employees and did so until the Employer leased the facility from Hanson Aggregates (Hanson) in May 2009. Following the commencement of the lease, Hanson moved its employees and equipment from Embarcadero to its other batching facility and it laid off six Operating Engineers-represented employees. The Employer then relocated its primary operations from Peralta to Embarcadero, moving all of its employees, ready-mix trucks, and most of its equipment. The Employer intends to use Peralta as a "standby" or "satellite" plant, and dispatches its Embarcadero-based employees and trucks to Peralta as necessary.[3]

The Employer has hired no additional employees to perform the disputed batching work. Instead, the Employer uses its six Oakland batching employees to perform work at Peralta and Embarcadero concurrently. These Teamsters-represented employees can both batch concrete and drive ready-mix trucks. When both plants are open, four employees batch while two drive trucks, whereas when only one plant is open, two employees batch while four drive trucks.

Through the Aggregates and Concrete Association of Northern California (ACA), a multiemployer bargaining association, the Employer is party to separate collective-bargaining agreements with Teamsters and Operating Engineers. The ACA-Bay Area Teamsters contract covers all the Employer's truckdrivers, plus the concrete batching workers at Peralta and one other plant. When the contract was signed, Embarcadero was not one of the Employer's facilities. Based on its relocation to Embarcadero, the Employer has applied the Teamsters contract

[1] All dates refer to 2009 unless otherwise indicated.

[2] Batching consists of mixing sand, gravel, cement, and water to form concrete.

[3] The Employer must continue to operate Peralta at a minimum level to comply with its Cemex lease, and as needed to fill orders requiring Cemex raw materials and mixing formulas.

at that location as well. The ACA-Operating Engineers contract covers all the Employer's batching facilities where Operating Engineers were performing the batching work when that contract was signed. Both ACA contracts contain broad jurisdictional clauses.

After the Employer moved its operations, Operating Engineers filed a grievance under the ACA-Operating Engineers contract claiming that the Employer had violated the contract's job placement regulations by assigning the disputed work to "non-dispatched employees." As a remedy, Operating Engineers sought $1,594 in contributions to its Pensioned Health and Welfare Trust Fund and assurances that all "covered work" would be assigned to "dispatched employees" from its "Job Placement Center." The Employer and the ACA refused to arbitrate or otherwise participate in the grievance proceedings, prompting Operating Engineers to send a letter dated August 12 advising the Employer that Operating Engineers was going forward with arbitration and stating as follows: "it is our intention to consider alternative contractual means of enforcing the fringe benefit contribution obligation owed by your client, such as the one provided in section 13.00.00 to withdraw our members from the performance of any work for Central Concrete Supply, Inc." The letter asserted that doing so would not be a strike under the contract. Operating Engineers sent an additional letter dated August 20 threatening a Federal lawsuit in district court to compel arbitration. In addition, Operating Engineers sought "picket sanction" from other Operating Engineers local unions representing employees of the Employer in surrounding California counties. On September 8, Operating Engineers filed a suit to compel arbitration. The Employer filed a 8(b)(4)(D) charge with the Board on September 23.

B. Work in Dispute

The work in dispute consists of concrete batching performed by the Employer at its facility located at 401 Embarcadero Road in Oakland, California. Specifically, the disputed work is defined by stipulation as: the batching of aggregates, cement, water, admixtures, color, other than when manually added; maintenance of machinery; and the operation of conveyor belts and any other mechanical equipment, including the front end loader, used in the operation of the plant as well as the maintenance of said equipment. The disputed work is performed by six employees in the following two job classifications: (1) the batch plant operator or batchman, who operates an electronic console controlling the mixture of raw materials in a drum, and (2) the plant engineer or beltman/loader, who operates and maintains the conveyor belts used to move raw materials. Teamsters does not claim the heavy maintenance work performed by Operating Engineers at the Employer's concrete-batching facilities.

C. Contentions of the Parties

The parties stipulated that there are competing claims for the work in dispute. Teamsters and the Employer contend that there is reasonable cause to believe that Operating Engineers violated Section 8(b)(4)(D) by the proscribed means of threatening to picket, and that no all-party, agreed-upon voluntary method of resolving the dispute exists. Teamsters further contends that the disputed work should be awarded to employees represented by Teamsters based on the factors of certifications and collective-bargaining agreements, employer preference and past practice, and economy and efficiency of operations. The Employer contends that assigning the disputed work to its Teamsters-represented employees is proper based on the factors of employer preference and past practice, and economy and efficiency of operations.

Operating Engineers contends that because the Employer assigned the disputed work to employees represented by Teamsters based on the Employer's perceived obligations under the ACA-Bay Area Teamsters contract, the Employer effectively expressed no preference for Teamsters. Moreover, Operating Engineers argues that because the Employer has not relocated all of its Peralta operations to Embarcadero, Embarcadero is a new facility subject to Operating Engineers' jurisdiction. Finally, Operating Engineers contends that the Board should award the work in dispute to employees that Operating Engineers represents based on the factors of certifications and collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills, economy and efficiency of operations, and prior arbitration awards.[4]

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that there are competing claims to disputed work between rival groups of employees and that a party has used proscribed means to enforce its claim.[5] In addition, the Board must find that the parties have no agreed-upon method for volun-

[4] At the hearing, Operating Engineers contended that there was no reasonable cause to believe Sec. 8(b)(4)(D) had been violated and that there was an agreed-upon voluntary method of adjusting the dispute. However, Operating Engineers did not raise these arguments on brief to the Board.

[5] *Carpenters Local 624 (T. Equipment Corp.),* 322 NLRB 428, 429 (1996).

tary adjustment of the dispute.[6] For the reasons stated below, we find that this dispute is properly before the Board for determination on the merits under Section 10(k).

First, we find that there is reasonable cause to believe that there are competing claims to the disputed work because all parties joined in stipulating to the existence of competing claims. In any event, where, as here, two unions have contracts and each union claims its contract covers the same work, we have found competing claims for disputed work. See *Carpenters Los Angeles Council (Swinerton & Walberg)*, 298 NLRB 412, 414 (1990).

Second, we find that there is reasonable cause to believe that Operating Engineers used means proscribed under Section 8(b)(4)(D) to enforce its claim. Its August 12 letter to the Employer, threatening to withdraw its members from work at all the Employer's facilities unless the Employer assigned the disputed work to Operating Engineers through its Job Placement Center, constitutes a threat to take proscribed coercive action in furtherance of a claim to the work in dispute, despite Operating Engineers' contrary statement in the letter. See *Iron Workers Local 1 (Goebel Forming, Inc.)*, 340 NLRB 1158, 1160 (2003) (finding union threat to pull members off a jobsite a proscribed means of enforcing a claim). Moreover, the Employer and Teamsters learned that Operating Engineers had requested picket sanction from its neighboring local unions in surrounding counties. Threats to picket are a proscribed means of enforcing a claim to disputed work. See *Teamsters Local 158 (Holt Cargo)*, 278 NLRB 360, 361 (1986).

Finally, we find that there is no method for voluntary adjustment of the dispute to which all parties have agreed.[7] At the hearing, Operating Engineers introduced two agreements purporting to embody agreed-upon methods of voluntarily adjusting the dispute. Neither of these agreements binds the Employer. Operating Engineers also introduced multiple arbitration decisions issued under these and other agreements to which it is party. None of these decisions covers the disputed work or the same parties as in this dispute. Accordingly, we proceed to the merits of the dispute.

[6] *Bricklayers (Cretex Construction Services),* 343 NLRB 1030, 1031 fn. 2 (2004).

[7] It is settled that the Board will not hear a dispute when all the parties are bound to an alternative method of adjustment. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1140 (2005); see also *Operating Engineers Local 150, AFL–CIO (Nickelson Industrial Service)*, 342 NLRB 954, 955 (2004) (holding that "in order for an agreement to constitute an agreed-upon method for voluntary adjustment, all parties to the dispute must be bound to that agreement.").

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of the disputed work after considering various factors in light of the Board's "[e]xperience and common sense." *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 583 (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, 1410–1411 (1962). Based on the following factors, which we find are relevant to determining this dispute, we conclude that the Employer's employees represented by Teamsters are entitled to perform the work in dispute.

1. Certifications and collective-bargaining agreements

The Employer has recognized both unions voluntarily and there is no Board certification covering the disputed work.[8] Moreover, both Teamsters' and Operating Engineers' contracts with the ACA and the Employer are broad enough to cover the disputed work. Accordingly, we find that this factor does not favor an award of the disputed work to either group of employees.

2. Employer preference and past practice

The Employer has assigned all the disputed work to its employees represented by Teamsters and prefers that they continue to perform this work. Although the ACA-Bay Area Teamsters contract was stated by the Employer's Human Resources Manager at the hearing to be the reason for the Employer's preference, the Board does not generally examine the reasons for an employer's preference unless there is evidence that the employer was coerced. See, e.g., *Laborers Local 829 (Mississippi Lime Co.)*, 335 NLRB 1358, 1360 fn. 5 (2001). There is no evidence of coercion here, and thus the Employer's preference is a valid factor.

The past practice at Peralta has been to assign the disputed work to Teamsters-represented employees. Because of the Employer's relocation to Embarcadero, this past practice applies with equal force to that location. Operating Engineers' position disputing the legitimacy of the Employer's move from Peralta to Embarcadero is meritless. Whether the Employer completely moved its operations is irrelevant to whether assigning the disputed work to Teamsters-represented employees is proper. Cf. *Newspaper & Mail Deliverers (New York News)*, 291 NLRB 680, 680–681 (1988) (rejecting a preservation of

[8] Operating Engineers submitted a certification document at the hearing purportedly certifying Operating Engineers as the exclusive representative of all the Employer's employees. This certification was erroneous, and the Regional Director accordingly revoked it.

work argument where the employer moved the "physical location" of its delivery operations without changing the underlying work). Accordingly, we find that the factor of employer preference and past practice favors an award of the work in dispute to employees represented by Teamsters.

3. Area and industry practice

Both Teamsters and Operating Engineers presented evidence of their members performing concrete batching work in the Bay Area for more than 40 years. Additionally, both unions currently represent employees performing batching work for multiple Bay Area employers, and specifically represent employees performing batching work at several of the Employer's facilities. Accordingly, we find that this factor does not favor an award of the disputed work to either group of employees.

4. Relative skills

Both Teamsters and Operating Engineers presented evidence showing that their employee-members receive on-the-job training and have experience performing concrete batching work. Operating Engineers overstates the relevance of its apprenticeship program, as only about 25 to 30 of 300 total Operating Engineers-represented Bay Area batch workers actually completed this program.

Operating Engineers also relies on testimony that a manager for the Employer repeatedly contacted a laid-off Operating Engineer with questions about the Embarcadero plant, apparently to demonstrate that Teamsters-represented employees have had more difficulty adjusting to the Embarcadero equipment than would Operating Engineers-represented employees. However, Operating Engineers' witness admitted that while all batch plants function similarly, each one has idiosyncrasies and that Embarcadero has "extreme idiosyncrasies." This witness further admitted that he learned the idiosyncrasies through training he received from another employee with experience at that plant. The record therefore reflects that the contacts between the Employer and the laid-off Operating Engineer do not reflect a relative lack of skill by the Teamsters. This factor, therefore, does not favor an award of the disputed work to either group of employees.

5. Economy and efficiency of operations

Record evidence shows that using Teamsters-represented employees instead of Operating Engineers-represented employees will create efficiencies and prevent idle time because Teamsters-represented employees can both batch concrete and drive ready-mix trucks at Peralta and Embarcadero when the two facilities are operating on the same day. By contract, Operating Engineers-represented employees perform no work at Peralta. We therefore find that the factor of economy and efficiency of operations favors an award of the disputed work to employees represented by Teamsters.

6. Arbitration awards

Operating Engineers introduced several arbitration awards but they pertain to different work, employers, and/or unions than are before the Board in this dispute. In any event, arbitrators' jurisdictional dispute decisions do not bind the Board. A contrary Section 10(k) Board award of work will supersede an arbitrator's decision.[9] Thus, we find that this factor does not favor an award of the disputed work to either group of employees.

7. Loss of employment

The Employer's assignment of the disputed work to its Teamsters-represented employees rather than to unemployed workers from Operating Engineers' Job Placement Center will not cause a loss of Operating Engineers jobs. Contrary to Operating Engineers' contention, the loss of six of its members' jobs at Embarcadero was due to their layoff by Hanson, not the Employer. The Employer has no Operating Engineers-represented employees at either Embarcadero or Peralta. Accordingly, we find that this factor does not favor an award of the disputed work to either group of employees.

Conclusion

After considering all the relevant factors, we conclude that employees represented by Teamsters are entitled to perform the work in dispute. We reach this conclusion by relying on the factors of employer preference and past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Teamsters, and not to that union or 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 Central Concrete Supply, Inc., represented by Teamsters Local 853, are entitled to perform all the work in dispute at the concrete batch plant located at 401 Embarcadero Road in Oakland, California.

2. Operating Engineers Local Union No. 3 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Central Concrete Supply, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, Operating Engineers Local Union No. 3 shall notify the Regional Director for Region 32 in writing whether it will refrain from forcing

[9] *Carey v. Westinghouse Elec. Corp.,* 375 U.S. 261, 272 (1964).

the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C. September 29, 2010

Craig Becker, Member

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD