Laborers' International Union of North America (AFL–CIO), Laborers Local No. 860 *and* McNally/Kiewit ECT JV *and* International Union of Operating Engineers, Local 18. Case 08–CD–086140

April 8, 2013

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. McNally/Kiewit ECT JV (the Employer) filed a charge on July 27, 2012, alleging that the Respondent, Laborers' International Union of North America (AFL–CIO), Laborers Local No. 860 (Laborers), 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 it represents rather than to employees represented by International Union of Operating Engineers, Local 18 (Operating Engineers). The hearing was held on October 18 and 19, 2012, before Hearing Officer Catherine A. Modic. Thereafter, the Employer, Laborers, and Operating Engineers each filed a posthearing brief. Operating Engineers also filed a motion to quash the 10(k) notice of hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

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 within the 12 months preceding the filing of the charge, the Employer purchased and received at its Cleveland jobsite goods and services valued in excess of $50,000 directly from points located outside the State of Ohio. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

[1] Member Griffin, who is a member of the present panel, has recused himself and took no part in the consideration of this case.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is a partnership that was formed to construct the Euclid Creek Tunnel (ECT), an underground sewer tunnel, in Cleveland, Ohio. The tunnel is intended to carry, store, and treat water overflows from heavy rains and to prevent raw sewage from draining into Lake Erie and local rivers. The three job classifications in dispute, described more fully below, are ring builder 1 (RB1), ring builder 2 (RB2), and segment preparation person (SPP).

To excavate the tunnel, the Employer uses a tunnel boring machine (TBM), which was designed and built specifically for the project. The TBM is 370 feet long and 27 feet in diameter, and it moves on a rail line. As the TBM bores a 27-foot-diameter hole, workers simultaneously construct the tunnel lining by connecting segments of precast concrete, brought there by rail car. The TBM's components include a hydraulic loader, used to unload the tunnel lining support segments, and a segment vacuum erector, used to assemble the segments into rings. Each completely constructed ring of six segments measures about 5 feet in length.

Employees in the SPP, RB1, and RB2 positions work together to construct the tunnel lining. The SPP operates the hydraulic loader. After unloading each segment, the SPP inspects and cleans it and then moves it to a feed table, where the segment is rotated into the appropriate position for installation and then cleaned again. The SPP hammers dowels into each segment to align it and hold it in place. Once the segments form a ring, the SPP installs foam weather stripping around it. Additionally, the SPP works with two Laborers-represented employees to extend, or "leapfrog," the TBM's rail line. The SPP also cleans the work area using brooms, shovels, and a water hose.

After a new section of tunnel has been bored, the RB1 controls the hydraulics of the TBM's thrust cylinders, which are used to lift the ring segments into place. Each time the TBM is stopped, the RB1 performs a final inspection of each ring segment before it is installed. The RB1 works with the RB2 to verify, through identification marks on each segment, the proper sequence for installation of the six segments. The RB1 jockeys the segments into their proper positions using a hydraulic jack, cleans and clears the area of the TBM where the rings are assembled, and assists Laborers-represented employees with drilling, grouting, cleaning, and moving rails for both the segment-delivering rail car and the TBM.

The RB2 takes measurements to verify that the TBM will not collide with each segment being delivered. After the segments are in place, the RB2 bolts the segments

together using an impact wrench. The RB2 assists Laborers-represented employees with grouting by drilling verification holes and then patching those holes. The RB2 is also responsible for keeping areas clean and assists in moving rails for both the rail car and the TBM.

Ohio Contractors Association (OCA), of which the Employer is a member, and Operating Engineers are parties to the Ohio Heavy Highway Agreement (Highway Agreement). The Highway Agreement includes "Sewer, Waterworks and Utility Construction" as work performed under the Highway Agreement and identifies "Tunnel Machines and/or Mining Machines" as equipment covered by and subject to its terms and conditions. The Highway Agreement also contains a work preservation clause: it mandates a specific economic penalty in the event that a signatory employer assigns a piece of equipment covered by the Highway Agreement to an employee who is not represented by Operating Engineers. Specifically, the Highway Agreement states, "If the Employer assigns any piece of equipment to someone other than an Operating Engineer, the Employer's penalty shall be to pay the first qualified registered applicant the applicable wages and fringe benefits from the first day of the violation."

OCA and Laborers' District Council of Ohio are parties to the Ohio Highway-Heavy-Municipal-Utility State Construction Agreement (Construction Agreement).[2] The Construction Agreement covers "Sewer, Waterworks, [and] Utility Construction." In addition, several sections of the Construction Agreement employ the terms "tunnel work," "construction of sewers [and] tunnels," and related terms.

The Employer entered into a project labor agreement with each union for the tunnel work. Each project labor agreement incorporates the relevant OCA agreement. The project labor agreement with Operating Engineers was signed on February 2, 2011, and the agreement with Laborers was signed on May 2, 2011. There is no mention of the terms "Ring Builder 1," "Ring Builder 2," or "Segment Preparation Person" in the Heavy Highway Agreement, the Construction Agreement, or either of the project labor agreements.

On February 7, 2011, Employer Project Manager Tom Szaraz and Operating Engineers representatives signed a prejob conference form, which indicated that mining machines and Operating Engineers-represented TBM workers and segmenters would be used for the project. Szaraz testified that during the prejob conference, David Russell, a field agent for Operating Engineers, orally requested the work in dispute. Russell also gave Szaraz a blank assignment form on which to designate Operating Engineers-represented employees who would be assigned the work and specific equipment for those employees to use. Szaraz declined to fill out the form. He testified that he never told Russell that he would assign the disputed work to Operating Engineers-represented employees. Szaraz further testified that Russell again requested the work on two occasions in July 2012, when the two men discussed the matter further.

No prejob conference was held between the Employer and Laborers, although Laborers requested one in December 2010 and again after signing the project labor agreement in May 2011. On July 23, 2012, Anthony Liberatore, Laborers' business manager and secretary-treasurer, informed Szaraz that Laborers-represented employees would strike if the Employer assigned the tunnel project's "pipe segment installation work" to Operating Engineers. On July 27, 2012, the Employer filed the instant charge.

In August 2012, based on its superintendents' staffing recommendations, the Employer assigned Laborers members to the SPP, RB1, and RB2 positions. Soon afterwards, Operating Engineers filed a grievance alleging that the assignment of work to Laborers violated Operating Engineers' collective-bargaining agreement with the Employer.

B. Work in Dispute

The notice of hearing described the disputed work as "the segment installation work performed by ring builder 1 and ring builder 2." At the beginning of the hearing, the Employer and Laborers moved to amend the notice to include the work performed by the segment preparation person (SPP). Although Operating Engineers declined to stipulate to the addition, on the grounds that entering into a stipulation would be an admission contrary to its legal position that it never made a claim for the work, the testimony dealt with all three positions. There is no dispute that the Employer assigned all three positions to Laborers, and, as further discussed below, the record supports a finding that Operating Engineers claimed the work performed by employees in all three positions. We therefore find that the work in dispute includes the work of the SPP as well as that of the RB1 and RB2.

C. Contentions of the Parties

Operating Engineers contends that it has not claimed the disputed work and that the notice of hearing should therefore be quashed. Operating Engineers further argues that its claim is one of work preservation rather than work acquisition and that it has pursued only contractual grievances against the Employer for breaching the work

[2] There is no dispute that the Employer is bound by the terms of the Highway Agreement and the Construction Agreement.

assignment provisions of their collective-bargaining agreement. Alternatively, if the notice of hearing is not quashed, Operating Engineers asserts that employer preference should be disregarded in this case and that the work in dispute should be awarded to employees represented by Operating Engineers, based on the factors of collective-bargaining agreements and relative skills and training.

The Employer and Laborers contend that, because there are competing claims to the disputed work, the notice of hearing should not be quashed. They further contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated because of Laborers' threat to strike. Both the Employer and Laborers assert that there is no agreed-upon method for voluntary adjustment of the dispute. On the merits, Laborers asserts that the work in dispute should be awarded to employees it represents based on the factors of collective-bargaining agreements, employer preference, current assignment and past practice, area and industry practice, relative skills, and economy and efficiency of operations. The Employer also asserts that the work should be awarded to Laborers, largely for the same reasons. In particular, the Employer emphasizes its preference and past practice, and it further asserts that economy and efficiency of operations favor continuing the assignment of the work to Laborers-represented employees.

D. Applicability of the Statute

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

1. Competing claims for work

We find that there is reasonable cause to believe that both unions have claimed the work in dispute for the employees they represent. By its own admission, Laborers has done so, and employees it represents have been performing the work.

Operating Engineers contends that its actions did not constitute a competing claim for work. We reject this argument. Operating Engineers representatives orally requested the work on three occasions: during a prejob conference with the Employer in February 2011 and on two occasions in July 2012. Those requests are sufficient to establish a competing claim for the work. See *Electrical Workers Local 196 (Aldridge Electric, Inc.)*, 358 NLRB No. 87, slip op. at 3–4 (2012); *J. P. Patti Co.*, 332 NLRB 830, 832 (2000).[3] Accordingly, we find reasonable cause to believe that there are two competing claims for the disputed work.

2. Use of proscribed means

As described above, by letter dated July 23, 2012, Laborers stated that its members would strike if the Employer assigned the tunnel project's pipe segment installation work to Operating Engineers. Such a threat establishes reasonable cause to believe that Laborers used means proscribed by Section 8(b)(4)(D) to enforce its claim to the work in dispute. *Electrical Workers Local 48 (Kinder Morgan Terminals)*, 357 NLRB No. 182, slip op. at 3 (2011).

3. No voluntary method for adjustment of dispute

There is no evidence in the record of an agreed-upon method for voluntary adjustment of the dispute.

4. Work preservation defense

Operating Engineers asserts that the dispute involves a work preservation issue rather than a jurisdictional matter. If a dispute is fundamentally over the preservation of work a union's members have historically performed, it is not a jurisdictional dispute. *Machinists District 190 Local 1414 (SSA Terminal, LLC)*, 344 NLRB 1018, 1020 (2005), affd. 253 Fed. Appx. 625 (9th Cir. 2007); *Seafarers (Recon Refractory & Construction)*, 339 NLRB 825, 827 (2003), review denied sub nom. *Recon Refractory & Construction Inc. v. NLRB*, 424 F.3d 980 (9th Cir. 2005). The Board looks to the "real nature and origin of the dispute" to determine whether it actually constitutes a dispute between two unions or whether, instead, one union is "attempt[ing] to retrieve the jobs' of employees the employer chose to supplant by reallocating their work to others." *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818, 820–821 (1986) (quoting *Longshoremen ILWU Local 26 (American Plant Protection)*, 210 NLRB 574, 576 (1974)), affd. sub nom. *USCP-Wesco, Inc. v. NLRB*, 827 F.2d 581 (9th Cir. 1987). If the latter, the dispute is outside the scope of Section 10(k).

[3] In addition to its explicit claims for the work, Operating Engineers filed a grievance against the Employer to enforce the damages provision of the Highway Agreement, which requires the Employer to pay an Operating Engineers applicant contractual wages and fringe benefits in lieu of employing him or her. We find that Operating Engineers' grievance constitutes a claim for work in and of itself. See *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 4 (2010) (holding that "pay-in-lieu" grievance constituted claim for work); *Laborers (Eshbach Bros.)*, 344 NLRB 201, 202 (2005) (same).

To prevail on its work preservation defense, Operating Engineers must show that the employees it represents have previously performed the work in dispute and that it is not attempting to expand its work jurisdiction. *Carpenters (Prate Installations, Inc.)*, 341 NLRB 543, 544 (2004); *Stage Employees IATSE Local 39 (Shepard Exposition Services)*, 337 NLRB 721, 723 (2002). Operating Engineers fails to make that showing. Although Operating Engineers-represented employees have filled critical roles on other tunnel projects, including operating TBMs, there is no evidence that they have ever performed work analogous to segment handling and ring building. The Employer's project manager, Szaraz, testified that the "tunnel job" in this case involved "a piece of equipment of first impression." The record shows that neither union's members had prior experience with the TBM used here, which was in fact designed specifically for this project. During their prejob conference, Operating Engineers representatives informed Szaraz that they did not yet know of any "segmenters" among their members; Operating Engineers Field Agent Russell testified that he was unaware of any experienced ring builders. The TBM operator and a ring builder for this project were brought in from out of state because they had experience performing the required job tasks. The TBM manufacturer provided training onsite for the employees who were to perform the three jobs. Because the record shows that Operating Engineers' claim here encompassed work unlike any previously performed by employees it represents, Operating Engineers' "objective here was not that of work *preservation*, but of work *acquisition*." *Prate Installations*, above at 545 (emphasis in original) (citing *Stage Employees IATSE Local 39*, above at 723)). Accordingly, Operating Engineers fails to establish a work preservation defense.

We therefore find that this dispute is properly before the Board for determination, and we deny Operating Engineers' 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 IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577–579 (1961). The Board's 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).

The following factors are relevant in determining the outcome of this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence of a Board certification concerning the job classifications or work involved in this dispute.

As indicated above, the Employer is subject to collective-bargaining agreements with both Operating Engineers and Laborers. Each contract contains language that arguably encompasses the work in dispute. Operating Engineers' contract assigns sewer and underground work and "tunnel machine" work to its covered employees; Laborers' contract refers to "tunnel work."

"'In interpreting collective-bargaining agreements, the specific is favored over the general.'" *Laborers Local 1184 (Golden State Boring & Pipejacking)*, 337 NLRB 157, 159 (2001) (quoting *Steelworkers Local 392 (BP Minerals)*, 293 NLRB 913, 914–915 (1989)). In *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57 (2010), the Board found that the collective-bargaining agreement factor weighed in favor of the union whose contract specifically referred to the disputed work as well as related work and equipment, as opposed to the union whose contract was worded in more general terms. Id., slip op. at 6. In this case, each union's contract contains general language to describe the work within its jurisdiction. Operating Engineers' contract, however, explicitly mentions tunneling equipment in addition to sewer and underground work. Because Operating Engineers' contract describes its jurisdiction with greater particularity, the collective-bargaining agreement factor weighs slightly in favor of Operating Engineers.

2. Employer preference and past practice

The factor of employer preference is generally entitled to substantial weight. See *Iron Workers Local 1 (Goebel Forming)*, 340 NLRB 1158, 1163 (2003). Project Manager Szaraz consistently testified that it is the Employer's preference for Laborers to perform the three jobs in dispute.[4] Moreover, Laborers are currently performing this

[4] We reject Operating Engineers' contention that the Employer's preference here should be treated with "skepticism" because it is not "representative of a free and unencumbered choice." See *ILWU Local 50 (Brady-Hamilton Stevedore Co.)*, 223 NLRB 1034, 1037 (1976), reconsideration granted and decision rescinded on other grounds 244 NLRB 275 (1979). In *Brady-Hamilton Stevedore*, the Board accorded little weight to the employer preference factor where the employer's preference changed after the respondent initiated a work action. Ibid. Here, in contrast, the Employer has maintained a consistent preference for Laborers-represented employees, even when faced with a pay-in-lieu grievance filed by Operating Engineers. Therefore, we shall accord this factor its customary weight. Moreover, the other factors of skill, efficiency, and safety weigh in favor of the Laborers.

In any event, the situation presented here is typical of a 10(k) case: two unions' contracts arguably cover the work in dispute, and the employer has expressed a preference for one union over the other. The

work. *Teamsters Local 259 (Globe Newspaper Co.)*, 327 NLRB 619, 623 (1999) (weighing employer's stated preference as well as employer's assignment of work in dispute). Szaraz also testified that, for each previous tunnel construction project on which he has worked, Laborers performed tunnel construction tasks analogous to those in dispute here. More specifically, although Operating Engineers have driven TBMs, Laborers have previously operated the components attached to them and have used tools and techniques to install tunnel support systems that are similar to the tools and techniques required to install the support system here.[5] This factor weighs in favor of awarding the work to Laborers.

3. Area and industry practice

Laborers Business Manager Liberatore testified that Laborers have performed the tunnel lining work for every construction project within Laborers' jurisdiction, for the Employer as well as for other contractors in the region. Employer Project Manager Szaraz also testified that Laborers is the only union whose members have performed tunnel lining installation on projects in the region. There is no evidence in the record that a different trade performed this type of work. Accordingly, this factor weighs in favor of awarding the work in dispute to Laborers.

4. Relative skills and training

The record shows that employees represented by Laborers receive training at the Ohio Laborers' Training Center (Center) in subjects relevant to the instant project. Indeed, Liberatore testified that the Center offers safety courses as well as training on the subjects of soil identification, rigging, fall protection, and confined space protection, all of which are relevant to the tunnel project here. The Center also offers a tunneling course. Beyond the Center, Laborers have received additional training for the three jobs in dispute from the TBM manufacturer at the jobsite.[6] As for relative skills, there is ample evidence in the record that employees represented by Laborers regularly handle the tools required for the work in dispute. The record evidence does not establish that employees represented by Operating Engineers have received relevant training or that they possess the skills to perform the work in dispute. Accordingly, this factor favors awarding the disputed work to Laborers.

5. Economy and efficiency of operations

The Employer and Laborers argue that assigning the job classifications in dispute to Laborers results in greater efficiency of operations because Laborers-represented employees perform other work on the jobsite that requires similar skills; if Laborers-represented employees fill the positions in dispute, these employees can assist or fill in for other Laborers-represented employees when downtime is experienced. See *Operating Engineers Local 825 (Walters & Lambert)*, 309 NLRB 142, 145 (1992) (factor of economy and efficiency of operations favored union whose members possessed knowledge and skills necessary to perform additional craft work when not performing disputed work). The record supports this argument. For instance, the SPP's responsibilities include cleaning, hammering in dowels, and assisting in "leapfrogging" the rail forward. Other Laborers-represented employees working nearby perform similar or related tasks. The RB1 and RB2 employees also perform tasks that other Laborers-represented employees at the jobsite perform, such as cleaning, grouting, drilling, and general tunnel labor. See *Operating Engineers Local 150 (Beverly Environmental)*, 358 NLRB No. 143, slip op. at 3 (2012) (finding factor of economy and efficiency favored union whose represented employees had already been trained and were working on the site performing job tasks in dispute).

There is no evidence in the record that Operating Engineers have experience performing these job tasks or that the jobs Operating Engineers currently perform include these tasks. In fact, the record shows that Operating Engineers currently perform jobs that are distinct from the other jobs and require them to be physically removed from tunnel lining construction. For instance, the TBM operator is more than 100 feet away from the other workers and does not perform any cleaning or lining installation tasks. Project Manager Szaraz testified that it is more efficient and economical for Laborers to perform the work in dispute because assigning Operating Engineers to these positions would require the Employer to hire employees who could perform only one function on the project, which would increase project costs.

Board has the authority and the responsibility to assign disputed work under such circumstances. Operating Engineers has provided no evidence that would warrant disregarding the Employer's stated preference here.

[5] For instance, Laborers operated TBM components on the Westlake Interceptor and Southwest Interceptor jobs, two tunneling projects in the Cleveland area. On the Westlake Interceptor project, Laborers operated the erector attached to the TBM to lift and install ribs. On the Southwest Interceptor job, Laborers used a drill that was attached to the TBM to install the tunnel lining. On that project, Laborers also used an erector attached to the TBM to install steel ribs that formed the tunnel support lining system.

[6] Operating Engineers correctly notes that its members could also participate in the TBM manufacturer's onsite training for the work in dispute. Operating Engineers, however, did not satisfactorily demonstrate that employees it represents have done so.

There is no contrary evidence in the record.[7] Accordingly, the factor of efficiency and economy favors Laborers.

Conclusions

After considering all of the relevant factors supported by record evidence, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, past practice, area and industry practice, relative skills and training, and economy and efficiency of operations, all of which favor Laborers-represented employees. Consideration of these factors outweighs collective-bargaining agreements, the only factor that favors Operating Engineers. In making this determination, we are awarding the work to employees represented by Laborers, 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.

Employees of McNally/Kiewit ECT JV, represented by Laborers' International Union of North America (AFL–CIO), Laborers Local No. 860, are entitled to perform the jobs of ring builder 1, ring builder 2, and segment preparation person on McNally/Kiewit's Euclid Creek Tunnel project in Cleveland, Ohio.

Dated, Washington, D.C. April 8, 2013

Mark Gaston Pearce, Chairman

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[7] Operating Engineers argues that assigning the work in dispute to Laborers would not be economical because doing so would trigger damages resulting from the breach of the Employer's contract with Operating Engineers. This argument is flawed because the maintenance of a pay-in-lieu grievance after the Board has awarded the work in dispute violates Sec. 8(b)(4)(ii)(D). *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273, 274 (1992), enfd. 46 F.3d 1143 (9th Cir. 1995). Moreover, when analyzing economy and efficiency in a 10(k) dispute, the Board does not consider whether a successful grievance would subject an employer to financial liability for breach of contract. See *Beverly Environmental*, above, slip op. at 3; *AMS Construction*, 356 NLRB No. 57, slip op. at 5–6.