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Laborers International Union of North America, Local 860 and Ronyak Paving, Inc. and International Union of Operating Engineers, Local 18.
Case 08–CD–089283

February 12, 2014

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND SCHIFFER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Ronyak Paving, Inc. (the Employer) filed a charge on September 14, 2012, alleging that Laborers International Union of North America, Local 860 (Laborers), violated Section 8(b)(4)(D) of the Act by engaging in and/or encouraging 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). A hearing was held on January 30 and 31, 2013, before Hearing Officer Jun S. Bang. Thereafter, the Employer and the Operating Engineers filed posthearing briefs.¹ Operating Engineers also filed a motion to quash the Section 10(k) notice of hearing.

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 parties stipulated that within the 12-month period preceding the filing of the charge, the Employer, an Ohio corporation with an office in Burton, purchased and received goods and services valued in excess of \$50,000 directly from points 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.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is a contractor engaged in street replacement, and roadway repair and conditioning. It typi-

¹ Laborers made an oral argument on the record in lieu of filing a brief.

cally performs approximately 100 to 150 projects in a year in several Northeast Ohio counties. Work on each of these projects entails grinding, paving, and milling tasks. The Employer employs approximately 10 to 15 employees represented by Operating Engineers and 20 to 25 employees represented by Laborers. Employees represented by Operating Engineers run grinding machines and backhoes. Employees represented by Laborers assist in various tasks, including the operation of skid steers/skid loaders (skid steers), farm tractors with mount attachments including rotary brooms (farm tractors), and, more recently, a Broce sweeper.² These machines that perform the assistance tasks are used for initial cleaning and maintenance work, cutting and cleaning up castings, and sweeping and maintaining the roadway before a mechanical sweeper comes onsite. The machines are also used to install and remove temporary driveway ramps and remove mailboxes where necessary. The employees operating these machines usually do so for about 1 to 3 hours a day. The employees perform manual tasks using picks, shovels, or hand brooms during the remainder of their worktime.

The Employer has had a collective-bargaining relationship with Laborers for approximately 6 years. The most recent agreement of record was effective from May 1, 2010 to April 30, 2013. The parties refer to this agreement as the "Heavy Highway Agreement" (HHA). It affords Laborers exclusive jurisdiction for all "Highway Construction" work within its geographic area, including construction of all streets, roads and work "in the excavation, preparation, concreting, paving, ramming, curbing and surfacing of streets, ways, courts, underpasses, overpasses and bridges, and the grading and landscaping thereof, and all other semi-and unskilled labor connected therewith . . . in above mentioned paving of streets, roads, runways, sidewalks and bridge decks." The HHA includes wage classifications for skid steer work and for the operation for all machine driven tools as well as vacuum devices.

The Employer also has had a collective-bargaining relationship with Operating Engineers for approximately 6 years. The most recent agreement of record was effective from May 1, 2010 to April 30, 2013. The parties refer to this agreement as the "Ohio Contractor's Association Agreement" (OCAA). It affords Operating Engineers exclusive jurisdiction for all "Highway Construction" work within its geographic area, including the con-

² Skid steers are small four-wheeled utility machines with various attachments including augers, cutter heads, rotary brooms, jack hammers, and buckets. Acquired in early 2012, the Broce sweeper performs the same function as the skid steers and farm tractors but it has an enclosed cab which is heated and air-conditioned.

struction of “streets, roads, expressways, turnpikes, bridges, drainage structures, grade separations, parking lots, rest areas, alleys, sidewalks, guardrails and fences.” The OCAA includes various rates of pay for equipment operators, including skid steer operators, under the Class C wage schedule, and farm tractor operators under the Class D wage schedule. The OCAA also includes, at paragraph 13, a provision stating that if a signatory 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 violation.”

The witnesses in this proceeding testified about work by Ronyak on three Ohio road projects: State Route 306, Geauga County (Route 306); Chamberlain Road, Twinsburg, Summit County (Chamberlain Road); and North Taylor Road, Cleveland Heights, Cuyahoga County (Taylor Road).

Operating Engineers’ Business Representative Jack Klopman testified that on several occasions in May 2012, he observed a Ronyak employee represented by Laborers operating a Broce sweeper on the Route 306 project. Klopman complained to the Employer’s owner David Ronyak that an employee represented by Operating Engineers was not being used. As a result of this complaint, the Employer assigned an employee represented by Operating Engineers on the Broce sweeper. However, both David Ronyak and his Operating Manager, Sean Petersen, testified that the engineer was removed after 1 day because he was unable to operate the machine properly.

In August 2012, Klopman observed employees represented by Laborers operating a paver, a roller, and a farm tractor on the Chamberlain Road project. Operating Engineers filed a grievance under paragraph 13 of the OCAA encompassing all three pieces of equipment. Petersen met with Klopman and Operating Engineers’ Business Representative David Russell to discuss the grievance. The Employer acknowledged that employees represented by Operating Engineers should have been operating the paver and the roller but asserted that an employee represented by Laborers was properly operating the farm tractor. Operating Engineers would not restrict the grievance. Ultimately, the Employer resolved the grievance by paying 8 hours of wages and fringe benefits to Operating Engineers-represented employees for all three pieces of equipment.

Also in August 2012, Russell observed employees represented by Laborers operating a skid steer and a farm tractor on the Taylor Road project. Petersen testified that Russell and Klopman telephoned him and claimed that

the skid steer and farm tractor work was “their work”. They asserted that the Employer was “in the wrong” and “need[ed] to put Operators in it.”³ Petersen further testified that Russell said that any time Russell visited the Employer’s worksites, the Employer had “better” have employees represented by Operating Engineers operating the equipment at issue in this case.

Petersen summarized by asserting that both Russell and Klopman verbally told him that skid steer and farm tractor work was Operating Engineers’ work and the members of that Union should be doing it. The parties stipulated that on or about August 29, 2012, Laborers’ Business Agent, Anthony Liberatore, verbally informed the Employer and then confirmed in writing that there would be a strike if the work of skid steers and farm tractors was reassigned to employees represented by Operating Engineers.

B. Work in Dispute

The notice of hearing described the disputed work as “[t]he work performed utilizing a skid steer/skid loader and a farm tractor with mount attachments including a rotary broom utilized by the Employer on its construction projects at project locations throughout Northeast Ohio, including the project site at Chamberlain Road, Twinsburg, Ohio.” The parties failed to stipulate to a description of the work during the hearing. Operating Engineers argues that the notice of hearing improperly exceeded the scope of the charge, which described the disputed work as performed on “various projects, including, but not limited to, projects located on North Taylor Road in Cleveland Heights, Ohio and on Chamberlain Road located in Twinsburg, Ohio.”⁴ Therefore it contends that the work in dispute should not encompass any work in Northeast Ohio beyond the North Taylor Road and Chamberlain Road projects, presumably excluding the Route 306 project. Operating Engineers does not argue that it failed to receive proper notice of the broader scope of the hearing or that it was otherwise prejudiced by the wording of the charge.

³ Operating Engineers filed a grievance for the Taylor Road skid steer and farm tractor work. Initially it was an oral grievance and Russell suggested to Petersen that the grievance could be resolved if the Employer signed up two of its employees represented by Laborers as employees represented by Operating Engineers. These two employees would then operate the skid steer and farm tractor on the Taylor Road project. Petersen declined to do this and Operating Engineers then filed a formal grievance, which was pending at the time of the hearing in this case.

⁴ Operating Engineers contends, among other arguments, that the notice should be quashed because it does not track the underlying unfair labor practice allegations, as assertedly required by Sec. 10(b). For the reasons stated in *Laborers Local 894 (Donley’s, Inc.)*, 360 NLRB No. 20, slip op. at 3 fn. 5 (2014), we find no merit in this contention.

We reject Operating Engineers' arguments. All parties had ample prior notice of the scope of the inquiry and were well aware of the underlying dispute. They had a full opportunity to adduce evidence, and they fully litigated the work in dispute for three specific project locations. In these circumstances, there is no evidence of any prejudice stemming from the description of the work in dispute. See generally *Operating Engineers Local 2 (PVO International)*, 209 NLRB 673, 673 fn. 2 (1974); *Longshoremen ILWU Local 10 (Matson Navigation Co.)*, 140 NLRB 449, 451 fn. 2 (1963). Based on the scope of litigation, we find it is appropriate to describe the work in dispute as the work performed utilizing a skid steer/skid loader, a farm tractor with mount attachments including a rotary broom, and a Broce sweeper at project sites on State Route 306, Geauga County (Route 306); Chamberlain Road, Twinsburg, Summit County (Chamberlain Road); and North Taylor Road, Cleveland Heights, Cuyahoga County (Taylor Road).

C. Contentions of the Parties

Operating Engineers moves to quash the notice of hearing, arguing that it has not claimed the disputed work and that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. In support of its motion, Operating Engineers contends that its claim is one of work preservation for the employees it represents rather than work acquisition. It asserts that it simply pursued contractual grievances against the Employer for breaching the work assignment provision of the OCAA and that it requested only the contractually prescribed damages for the breach. Operating Engineers further contends that the Employer manipulated the facts in order to create the appearance of a jurisdictional dispute.

Alternatively, if the notice of hearing is not quashed, Operating Engineers asserts that the work in dispute should be awarded to employees it represents based on the factors of collective-bargaining agreements, area and industry practice, economy and efficiency of operation, employer preference, and relative skills and training. Operating Engineers argues that the evaluation of economy and efficiency must take into account that, in its view, the Employer will have to pay contractual damages if the work in dispute is not awarded to Operating Engineers-represented employees. It also argues, in effect, that the Employer's preference here is tainted by its attempt to avoid its contractual obligations to Operating Engineers. Finally, Operating Engineers opposes any request for a broad order.

The Employer, in its posthearing brief, and Laborers, in closing argument at the hearing, contend that the notice of hearing should not be quashed, because compet-

ing claims to the disputed work, including Operating Engineers' two grievances, show the existence of a genuine jurisdictional work dispute. They further contend that evidence of threats to strike over job assignments demonstrates there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. Further, although the parties were unable to stipulate to this fact, the Employer and Laborers assert that there is no agreed-upon method of voluntary adjustment of this dispute.

On the merits, the Employer and Laborers assert that the work in dispute should be awarded to employees represented by Laborers based on the factors of the parties' collective-bargaining agreement, employer preference, past practice, area and industry practice, relative skills, and economy and efficiency of operations. Finally, the Employer and Laborers argue that a broad award is warranted because the work in dispute has been a continuous source of controversy in the relevant geographic area and Operating Engineers have demonstrated a proclivity to engage in unlawful conduct to obtain the disputed work.

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. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). 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. *Id.* We find that these requirements have been met.

1. Competing claims for work

We find that there is reasonable cause to believe that both Operating Engineers and Laborers have claimed the work in dispute for the employees they respectively represent. By its own admission in the parties' stipulation, Laborers has done so, and employees it represents have been performing the work. Moreover, on August 29, 2012, the business agent for Laborers threatened to strike if the Employer reassigned the work in dispute to employees represented by Operating Engineers in response to that Union's claim.

As noted, Operating Engineers moves to quash the notice of hearing based on its contention that it did not claim the disputed work. It argues that it was, instead, merely seeking to enforce the damages provision of the OCAA and to preserve its right to perform the work in dispute on upcoming projects. We reject these arguments and deny the Operating Engineers' motion to quash on

this basis. Operating Engineers effectively claimed the disputed work by filing the pay-in-lieu grievances concerning the work at two locations. See, e.g., *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 3 (2010) (pay-in-lieu grievance may constitute a competing claim for work); *Roofers Local 30 v. NLRB*, 1 F.3d 1419, 1427 (3d Cir. 1993), enfg. 307 NLRB 1429 (1992) (attempted distinction “between seeking the work and seeking payment for the work is ephemeral.”). In addition, as set forth above, witnesses for the Employer testified that Operating Engineers’ representatives orally requested the skid steer and farm tractor work at all three locations.⁵

We find no merit in Operating Engineers’ argument that it has a work preservation claim to the skid steer and farm tractor work and that therefore no valid jurisdictional dispute exists between the parties. To prevail on this argument, 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. See, e.g., *Teamsters Local 174 (Airborne Express)*, 340 NLRB 137, 139 (2003). Operating Engineers has failed to make that showing. The record established that employees represented by Laborers have been regularly performing the disputed work for the Employer in the 6 years since it signed the HHA with that Union.⁶ Where, as here, a union is claiming work for employees who have not previously performed it, the objective is not work preservation but work acquisition. *Id.*

2. Use of proscribed means

We find reasonable cause to believe that Laborers used means proscribed by Section 8(b)(4)(D) to enforce its claims to the work in dispute. As described above, by oral and written statements on August 29, 2012, Laborers gave notice that its members would strike if the Employer assigned the skid steer and farm tractor work to employees represented by Operating Engineers. There is no

⁵ There is sufficient evidence to establish Operating Engineers’ claim for the disputed work without relying on David Ronyak’s disputed testimony, denied by Operating Engineers’ witnesses, that Operating Engineers threatened to strike if the Employer failed to assign the skid steer and farm tractor work to Operating Engineers-represented employees

⁶ To support its work preservation claim, Operating Engineers cited three grievances successfully resolved pursuant to paragraph 13 of the OCAA where employers, other than the Employer here, assigned skid steer work to an employee not represented by Operating Engineers. We find no relevance in this evidence. Further, although there is evidence that an Operating Engineer performed the disputed work on 1 day, such an isolated assignment provides no basis to raise a valid work preservation claim regarding the disputed work. See *Stage Employees IATSE Local 39 (Shepard Exposition Services)*, 337 NLRB 721, 723 (2002).

merit to Operating Engineers’ allegation that Laborers’ threat to strike was a sham because the HHA contains a no-strike clause. It is well established that “[a] threat to strike or picket is not a sham . . . simply because the threatened action would have violated a no-strike clause.” See *Electrical Workers Local 196 (Aldridge Electric)*, 358 NLRB No. 87, slip op. at 3 (2012); *Lancaster Typographical Union No. 70 (C.J.S. Lancaster)*, 325 NLRB 449, 450–451 (1998). Moreover, Operating Engineers offers no affirmative evidence that Laborers’ threat was not genuine or that it was a product of collusion with the Employer. See *Operating Engineers Local 150*, supra at 1140.

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. Although the parties were unable to stipulate that there is no agreed-upon method for voluntary adjustment of the dispute, they did stipulate that Laborers is not party to the OCAA between the Employer and Operating Engineers. Witness testimony during the hearing also confirmed that there is no voluntary mechanism that is binding on all three parties to resolve the dispute.

Accordingly, we find that this dispute is properly before the Board for determination.⁷

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 (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 (1962).

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

⁷ We note that the Employer has concluded the work in dispute at the Route 306, Chamberlain Road, and Taylor Road projects. Nevertheless, “the Board has long held that completion of disputed work at the site that gave rise to the controversy is not a basis for quashing a 10(k) proceeding where there is no evidence that similar disputes are unlikely to recur.” *Carpenters Ohio Regional Council (Competitive Interiors)*, 348 NLRB 266, 268 (2006) (citations omitted). Here, the evidence indicates that similar disputes are likely to recur. Laborers acknowledged that it would continue to claim the disputed work, and Operating Engineers acknowledged that it intended both to pursue its outstanding Taylor Road grievance and to file grievances pursuant to paragraph 13 of the OCAA concerning the disputed work as to future projects.

1. Board certifications and collective-bargaining agreements

According to Petersen's uncontroverted testimony, the Employer does not "have any National Labor Relations Board certifications regarding the assignment of the skid steer or farm tractor."

The Employer has been signatory to agreements with both Laborers and Operating Engineers within Ohio for approximately 6 years, as noted above. The HHA entered into with Laborers includes a jurisdictional clause that includes all work within its geographic area, and specifically described as covering "Highway Construction" work such as construction of all streets, roads, and work

in the excavation, preparation, concreting, paving, ramming, curbing and surfacing of streets, ways, courts, underpasses, overpasses and bridges, and the grading and landscaping thereof, and all other semi- and unskilled labor connected therewith . . . in above mentioned paving of streets, roads, runways, sidewalks and bridge decks.

The HHA includes wage scale job classifications for skid steer work and for the operation of all machine-driven tools as well as vacuum devices.

The OCAA with Operating Engineers includes a jurisdictional clause that applies to all work within its geographic area, including "Highway Construction" work such as construction of "streets, roads, expressways, turnpikes, bridges, drainage structures, grade separations, parking lots, rest areas, alleys, sidewalks, guardrails and fences." The OCAA includes various rates of pay for equipment operators including operators of skid steers (under the Class C wage schedule) and farm tractors (under the Class D wage schedule).

We find that both the Laborers' HHA and Operating Engineers' OCAA have language in their agreements arguably covering the work in dispute.⁸ We therefore

⁸ Contrary to Operating Engineers' assertion, we do not find relevant to our consideration the fact that the OCAA includes wage classifications for both skid steer and farm tractor work while the HHA includes wage rates for skid steer work only. We find unavailing Operating Engineers' reliance on *Laborers Local 265 (AMS Construction, Inc.)*, supra, slip op. at 5 to support this argument. In *AMS Construction*, the Board found that the factor of collective-bargaining agreements slightly favored the agreement which "specifically" referred to "the disputed directional drilling work and related work (locating the pipe) and equipment (directional boring machine)" rather than the agreement "worded in more general terms." Although the OCAA includes classification of wages for two pieces of equipment rather than the one referred to in the HHA, there is no relevant distinction between "specific" rather than "general" language here because the specific pieces of equipment referenced perform similar work.

find that this factor does not favor awarding the work to employees represented by either union.

2. Employer preference and past practice

The Employer prefers that the work in dispute continue to be assigned to employees represented by Laborers, in accord with consistent past practice dating back approximately 6 years. The record reflects only a single instance when the Employer assigned an Operating Engineers-represented employee to operate a Broce sweeper on the Taylor Road project, but he was thereafter removed.⁹ We find that the factor of employer preference¹⁰ and past practice favors awarding the disputed work to employees represented by Laborers.

3. Area and industry practice

Petersen testified that in his 24 years of experience in Northeast Ohio, companies for which he worked or with which he was familiar, including the Employer, always used employees represented by Laborers and not Operating Engineers to perform skid steer and farm tractor work. Laborers Field Representative Leonard Rizzo testified that employers operating pursuant to the HHA in Ohio always use employees represented by Laborers to perform the disputed work. Laborers Field Representative Mark Olivo testified that in his 22 years in that occupation he had always observed employees represented by Laborers performing farm tractor and skid steer work on road construction projects. Laborers also submitted 90 letters from various employers to Laborers' affiliates either indicating that employees represented by Laborers generally performed skid steer and farm tractor work for them or documenting specific work assignments.

Klopman, to the contrary, testified that in the 10 years he worked in the field, employees represented by Laborers never operated skid steers. The parties stipulated at the hearing that Operating Engineers, in 85 Ohio counties and four Northern Kentucky counties, received 56 referrals for sweepers with brooms or farm tractors and 147 referrals for skid steers in 2012, 57 and 195 in 2011,

⁹ Klopman testified that he once saw another Operating Engineers-represented employee operating a skid steer for the Employer on the Route 306 project, who told him that he did this work for a couple of days. Even assuming the accuracy of this testimony, it is insufficient to counter the specific testimony that the Employer has consistently used employees represented by Laborers to perform the disputed work.

¹⁰ We find unpersuasive Operating Engineers' citation to *Longshoremen ILWU Local 50 (Brady-Hamilton Stevedore Co.)*, 223 NLRB 1034, 1037 (1976), revd. on other grounds 244 NLRB 275 (1979). In that case, the Board found the employers' preference for the employees of one union was not "freely indicated" because that union's employees had been reassigned the work when another union, whose employees had been preferred by the employers, went on strike. No such extenuating circumstances exist here.

58 and 152 in 2010, and 68 and 99 in 2009. According to testimony from the Operating Engineers' president, Richard Dalton, these referrals reflected dispatch requests by contractors for Operating Engineers with the ability to operate skid steers or farm tractors.

We find the above evidence inconclusive. Neither the letters of assignment submitted by Laborers nor the referrals relied on by Operating Engineers describe with meaningful specificity the work involved or the circumstances surrounding the assignment of an employee to perform it. Further, testimony from witnesses for the Employer and the Unions presents a sharply conflicting picture of area and industry practice. Based on all the above, we find that this evidence of mixed area practice does not favor an award of the work in dispute to either group of employees.

4. Relative skills and training

Petersen testified that no license was required for operating a skid steer or farm tractor. Laborers operate training centers in Cleveland and Howard and the Employer places a newly trained employee with an experienced employee to be acclimated to the Employer's procedures. Petersen further testified that safety comes first with "[k]nowing how to perform the function . . . the routine as you go down the road, where to put the material when you . . . sweep the material, how to make the ramps . . . [t]he skid steer has the ability to pick some of the material up, where the broom has the ability to sweep it over." The Howard training center offers a 6-hour course in skid steer safety which includes classroom study of OSHA regulations, NIOSH recommendations, loading maintenance practices, and operating procedures. There are also "hands-on" exercises with an obstacle course and a final written test. Olivo testified that he has received no complaints from the Employer about the work performed for the Employer by Laborers represented employees on skid steers and farm tractors.

The parties stipulated at the hearing that Operating Engineers has an Ohio Operating Engineers Apprenticeship and Journeyman Training Program with locations in Richfield, Logan, Signet, and Miamisburg. These locations have both outdoor and indoor facilities where there is apprenticeship training on skid steers and journeyman training on skid steers upon request. There is also training on farm tractors. Operating Engineers provides a 15-page "Skid Steer Loaders Student Workbook" which has detailed descriptions of equipment and how to operate it safely in its multiplicity of uses. Operating Engineers also provides a large number of attachments to the machines for its training on skid steers and farm tractors. Finally, Operating Engineers' training program requires

8 hours of classroom time and as much time in the field as necessary for the future employee to become proficient.

On this record, we find that employees represented by Laborers and those represented by Operating Engineers receive the necessary training and possess the skills requisite to perform the work in dispute.¹¹ Accordingly, we find that this factor does not favor an assignment of the work to either group of employees.

5. Economy and efficiency of operations

Petersen testified that it is more economical and efficient to use employees represented by Laborers to perform the work in dispute, which involves operation of machinery only 1 hour to 3 hours a day. Employees represented by Laborers perform various other manual labor tasks during the remainder of the day. In contrast, employees represented by Operating Engineers would work the 1 to 3 hours on the skid steer or farm tractor and then, as Petersen testified, "would probably just sit in the machine" for the rest of the day. Petersen emphasized: "[s]o we're going to pay an Operator 8 hours for the day to stay in that machine that is 1 to 3 hours." Russell corroborated Petersen's testimony. He stated that on jobs where employees represented by Operating Engineers used skid steers and farm tractors, the employer would have to pay those employees "8 hours even though it's a 1 to 2 hour operation."

We find that, because employees represented by Laborers are able to perform additional work on these projects when not performing the work in dispute, this factor favors an award to these employees.¹² See, e.g., *Labor-*

¹¹ We do not find that Operating Engineers' citation to *Laborers (Henkels & McCoy, Inc.)* 336 NLRB 1044, 1045 (2001) supports a contrary result. In that case, the Board found that the disputed work should be awarded to the union which provided comprehensive formal training rather than to the union which provided no training whatsoever but merely expected employees to learn "on the job." Here, employees represented by Laborers receive both on-the-job guidance and comprehensive formal training.

¹² Operating Engineers argues that the Employer's assignment of the work in dispute to employees represented by Laborers would not be economical, taking into account the potential damages resulting from the alleged breach of paragraph 13 of the OCAA. We reject this argument. The Employer should face no such liability because it is unlawful to pursue a pay-in-lieu grievance contrary to an extant Board jurisdictional work dispute award. See, e.g., *Sheet Metal Workers (E.P. Donnelly, Inc.)*, 357 NLRB No. 131 (2011), enf. 737 F.3d 879 (3d Cir. 2013).

We also find unpersuasive Operating Engineers' citations to *Teamsters Local 1187 (Anheuser-Busch, Inc.)*, 258 NLRB 997, 1001 (1981) and *Glaziers Local 1621 (Hart Glass Co.)*, 216 NLRB 641, 643 (1975) in support of its argument that assigning the work in dispute to Laborers-represented employees would not be economical. Neither of the cited cases involves the facts here. *Anheuser-Busch* involved contractual provisions which increased hourly costs because of job-bidding

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ers (*Eshbach Bros., LP*), 344 NLRB 201, 204 (2005) (greater versatility of Laborers-represented employees supported award of disputed work to them instead of employees represented by Operating Engineers); *Wisconsin Laborers District Council (Miron Construction Co.)*, 309 NLRB 756, 757 (1992) (same).

Conclusions

After considering all of the relevant factors, 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 and past practice, 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.

Scope of Award

The Employer requests that our award in this proceeding encompass all of the Employer's projects throughout certain named Ohio counties and anywhere Laborers and Operating Engineers have overlapping geographic jurisdiction. At the hearing Laborers also stated that it sought a statewide award. Operating Engineers opposes a broad order.

The Board customarily does not grant an award of the work in dispute beyond the specific jobsites involved where the charged party represents the employees to whom the work is awarded and to whom the employer

restrictions and work guarantees. *Hart Glass* involved similar contract provisions requiring foreman pay whether or not the employee acted as a foreman. The Board properly considered these issues when assessing economy and efficiency of operations in the cited cases.

contemplates continuing to assign the work. *Laborers Local 243 (A. Amorello & Sons)*, 314 NLRB 501, 503 (1994). Accordingly, we shall limit the present determination to the particular controversy that gives rise to this proceeding.

DETERMINATION OF DISPUTE

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

Employees of Ronyak Paving, Inc. represented by Laborers International Union of North America, Local 860, are entitled to perform work utilizing a skid steer/skid loader, a farm tractor with mount attachments including a rotary broom, and a Broce sweeper on project sites on State Route 306, Geauga County (Route 306); Chamberlain Road, Twinsburg, Summit County (Chamberlain Road); and North Taylor Road, Cleveland Heights, Cuyahoga County (Taylor Road).

Dated, Washington, D.C. February 12, 2014

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD