

District 12, United Mine Workers of America, and Local 2117, United Mine Workers of America and Codell Construction Company, Incorporated and Local 318, International Union of Operating Engineers, AFL-CIO and Laborers Local 1197, Affiliated with Laborers International Union of North America, AFL-CIO and General Teamsters Local No. 347, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 14-CD-542

September 29, 1978

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

Upon a charge filed on October 21, 1977, and amended on November 2, 1977, by Codell Construction Company, Incorporated, herein called the Employer or Codell, and duly served on District 12, United Mine Workers of America, and Local 2117, United Mine Workers of America, herein collectively called UMW or Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 14, issued a complaint and notice of hearing on May 16, 1978, alleging that Respondents have engaged in and are engaging in unfair labor practices affecting commerce within the meaning of Sections 8(b)(4)(D) and 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that Respondents violated the Act by failing and refusing to comply with the terms of the Board's Decision and Determination of Dispute in a 10(k) proceeding.¹ In its answer dated May 25, 1978, Respondents admit in part, and deny in part, the allegations in the complaint.

On June 19, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment submitting that Respondents in their answer raise no issues which were not previously considered and decided by the Board in the 10(k) proceeding and that the complaint and answer raise only legal issues and that there are no disputed facts warranting a hearing in this matter. Subsequently, on June 27, 1978, the Board issued an Order transferring the proceeding to the Board and a Notice To Show

¹ *International Union, United Mine Workers of America, District 12, United Mine Workers of America, and Local 2117, United Mine Workers of America (Codell Construction Company, Incorporated)*, 235 NLRB (1978).

Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondents did not file a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, including the record in the Section 10(k) proceeding and the Board's Decision and Determination of Dispute therein, the Board makes the following:

Ruling on the Motion for Summary Judgment

Pursuant to Section 10(k) of the Act, following a charge and amended charge filed by the Employer alleging that Respondents had violated Section 8(b)(4)(D) of the Act, a hearing was held on November 29, 1977. On April 25, 1978, the Board issued a Decision and Determination of Dispute finding that there was reasonable cause to believe that Section 8(b)(4)(D) of the Act had been violated by Respondents and that there was no agreed-upon method for the voluntary settlement of the dispute to which all parties were bound. Concluding, therefore, that it was not precluded from making a determination of the merits of the dispute within the meaning of Sections 8(b)(4)(ii)(D) and 10(k) of the Act, the Board decided that the employees of Codell who are represented by Local 318, International Union of Operating Engineers, AFL-CIO (herein called Operating Engineers); by Laborers Local 1197, affiliated with Laborers International Union of North America, AFL-CIO (herein called Laborers); and General Teamsters Local No. 347, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called Teamsters), respectively, were entitled to the work in dispute, rather than employees represented by UMW.

In their answer to the complaint, Respondents admit that they have refused and continue to refuse to comply with the Board's Decision and Determination of Dispute, but deny that they have engaged in unfair labor practices within the meaning of Section 8(b)(4)(D).²

The issues raised by Respondents have previously been litigated, and there is no issue which is properly

² Respondents also deny the complaint allegations that on November 29, 1977, upon due notice, a hearing pursuant to Sec. 10(k) was held upon the dispute alleged in the charge and amended charge and that their refusal to comply with the Board's Decision and Determination of Dispute has a close, intimate, and substantial relationship to commerce among the several States. We find such denials raise no material issues warranting a hearing.

triable in this proceeding.³ As all material issues have been decided previously by the Board, or admitted by Respondents' answer to the complaint, there are no matters requiring a hearing. Accordingly, the General Counsel's Motion for Summary Judgment is granted.

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

The Employer is now, and has been at all times material herein, a Kentucky corporation with its principal office and place of business in Winchester, Kentucky, where it is engaged in the business of building and construction for industrial and commercial projects. During the year ending April 30, 1978, which period is representative of its operations during all times material herein, the Employer, in the course and conduct of its business operations, performed services valued in excess of \$50,000, of which services valued in excess of \$50,000, were performed in and for various enterprises located in States other than the Commonwealth of Kentucky. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

District 12, United Mine Workers of America; Local 2117, United Mine Workers of America; Operating Engineers; Laborers; and Teamsters are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background and Facts of the Dispute*

At all times material herein, Codell has had a contract with the Louisville and Nashville Railroad to perform all the grading, drainage work, and laying of subballast on a spur line from the Louisville and

³ See *Bricklayers, Stone Masons, Marble Masons, Tile Setters and Terrazzo Workers Local Union No. 1 of Tennessee, et al. (Shelby Marble & Tile Co.)*, 195 NLRB 123 (1972); *Local 40, International Brotherhood of Electrical Workers, AFL-CIO (F & B/Ceco of California, Inc., et al.)*, 205 NLRB 730 (1973).

In the Sec. 10(k) proceeding, Respondents stipulated to the introduction of certain evidence for the purpose of establishing that reasonable cause existed to believe that Sec. 8(b)(4)(D) had been violated, and they do not now contest the Board's finding that such reasonable cause existed. Accordingly, and in view of Respondents' admission in their answer that they have refused to comply with the Board's Decision and Determination of Dispute, we find that their conduct was intended to force and require the Employer to assign the disputed work to employees represented by them rather than to employees represented by Operating Engineers, Laborers, and Teamsters, respectively, and therefore was for an objective proscribed by Sec. 8(b)(4)(ii)(D) of the Act.

Nashville Railroad's existing track to the point of switch with a loop track located at the mine development project of Inland Steel Company, Mine No. 2, near McLeansboro, Illinois. On August 19, 1977, Codell dispatched several employees to begin work south of U.S. Highway 14 on some preliminary drainage pipe work. Codell's job superintendent, Palmer, was approached by UMW Committeeman Curry, who claimed all of Codell's work south of U.S. Highway 14 for employees represented by UMW. After Curry apparently concluded that the work Codell was performing that day was on the U.S. Highway 14 right-of-way rather than on land maintained by Inland Steel, he left the site without further comment. After that date, until September 1, 1977, Codell's employees worked only north of U.S. Highway 14.

On September 1, Codell's employees again began work south of U.S. Highway 14. On September 7, Codell's employees were stopped from working south of U.S. Highway 14 by approximately 150 men, many of whom wore hardhats bearing UMW decals. Moak, who acted as spokesman for these men, told Palmer that no more work would be done south of U.S. Highway 14 until it was resolved whether employees represented by UMW or by AFL-CIO unions would perform the work. Palmer agreed to cease work until the question was settled and directed his men to work on the north side of U.S. Highway 14. Work north of the highway continued until it was completed on September 22, and thereafter Codell laid off its employees until work south of the highway could be performed safely. On the morning of October 4, Codell again commenced work south of U.S. Highway 14. On that date, Codell employees were approached by approximately 200 UMW members. Curry served as the UMW spokesman and, after inquiring why Codell was again working south of the highway, read the following statement to Palmer:

For your own personal safety and the safety of your equipment, we are asking you to move back to the north side of the highway and do no work on the south side until we have an agreement in writing.

Codell then directed all of its employees and moved its equipment to the north side of the U.S. Highway 14 and did not attempt to perform work south of the highway after October 4. The next day, UMW District 12 Field Representative Beattie placed a picket sign at the jobsite south of the highway, which read as follows:

Codell Construction Company unfair to UMWA Construction Panel Members

That sign was still posted as of the date of the hearing in the 10(k) proceeding.

B. *The Determination of Dispute*

On April 25, 1978, the Board issued its Decision and Determination of Dispute assigning the work of performing all grading, drainage work, laying of sub-ballast, and related work being performed by Codell for the Louisville and Nashville Railroad from a point just south of U.S. Highway 14 to the point of switch with the loop track located at the mine development project of Inland Steel Company, Mine No. 2, near McLeansboro, Illinois, to employees represented by the Operating Engineers, Laborers, and Teamsters. The Board also found that Respondents were not entitled by means proscribed by Section 8(b)(4)(ii)(D) of the Act to force or require Codell to award the disputed work to employees represented by UMW.

C. *Respondents' Refusal To Comply*

In addition to their threats to the physical safety of Codell's employees and its equipment on October 4, 1977, and the placement of the picket sign on October 5, 1977, Respondents, since April 25, 1978, having refused, and continue to refuse, to comply with the Board's Decision and Determination of Dispute pursuant to Section 10(k) of the Act, in which the Board determined that they are not entitled to force or require the Employer to award the disputed work to employees represented by UMW.

On the basis of the foregoing, and on the entire record in this proceeding, we find, as described above, that Respondents' conduct in seeking to force or require the assignment of the work in dispute to employees represented by it, rather than to employees represented by Operating Engineers, Laborers, and Teamsters, and Respondents' refusal to comply with the Board's Decision and Determination of Dispute violated Section 8(b)(4)(D) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondents set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(4)(D) of the Act, we shall

order that they cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Codell Construction Company, Incorporated, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 12, United Mine Workers of America, and Local 2117, United Mine Workers of America; Local 318, International Union of Operating Engineers, AFL-CIO; Laborers Local 1197, affiliated with Laborers International Union of North America, AFL-CIO; and General Teamsters Local No. 347, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondents have violated and are violating Section 8(b)(4)(ii)(D) of the Act by attempting to force or require the Employer to assign all grading, drainage work, laying of subballast, and related work being performed by Codell for the Louisville and Nashville Railroad from a point just south of U.S. Highway 14 to the point of switch with the loop track located at the mine development project of Inland Steel Company, Mine No. 2, near McLeansboro, Illinois, to employees represented by UMW by means proscribed by Section 8(b)(4)(D).

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, District 12, United Mine Workers of America, and Local 2117, United Mine Workers of America, West Frankfort, Illinois, their officers, agents, and representatives shall:

1. Cease and desist from refusing to comply with the Board's Decision and Determination of Dispute and threatening, coercing, or restraining Codell Construction Company, Incorporated, or any other persons engaged in commerce or an industry affecting commerce where an object is to force or require Codell Construction Company, Incorporated, to assign all grading, drainage work, laying of subballast, and related work being performed by Codell for the Louisville and Nashville Railroad from a point just south of U.S. Highway 14 to the point of switch with the

loop track located at the mine development project of Inland Steel Company, Mine No. 2, near McLeansboro, Illinois, to employees represented by UMW rather than to employees represented by Operating Engineers, Laborers, and Teamsters.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at their business offices and meeting halls copies of the attached notice marked "Appendix."⁴ Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondents' representative, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish the Regional Director for Region 14 signed copies of such notices for posting by the Employer, if willing, in places where notices to employees are customarily posted.

(c) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

MEMBER MURPHY, dissenting:

I dissent from the grant of summary judgment in this case, notwithstanding the absence of an answer to our Notice To Show Cause why summary judgment should not be granted.

It is elemental that an essential for the grant of summary judgment is the allegation in the complaint of a *prima facie* violation of the Act. That has not been alleged here, and hence, notwithstanding the admissions in the answer to the complaint, a critical basis of a violation of Section 8(b)(4)(ii)(D) of the Act is omitted, since the complaint contains no allegation that the Respondent Union was seeking by prescribed means to force or require any employer to

assign particular work to employees represented by it rather than to employees in another labor organization or in another trade, craft, or class, conduct essential to establish a violation of the Act. The sole allegation is that the Union failed to comply with the Board's award in the underlying 10(k) proceeding; nothing in the Act provides that this is unlawful, standing alone.

Accordingly, I would dismiss the complaint against the Union in its entirety.

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT refuse to comply with the Board's Decision and Determination of Dispute awarding all grading, drainage work, laying of subballast, and related work being performed by Codell Construction Company, Incorporated, for the Louisville and Nashville Railroad from a point just south of U.S. Highway 14 to the point of switch with the loop track located at the mine development project of Inland Steel Company, Mine No. 2, near McLeansboro, Illinois, to employees represented by Local 318, International Union of Operating Engineers, AFL-CIO, Laborers Local 1197, affiliated with Laborers International Union of North America, AFL-CIO, General Teamsters Local No. 347, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or threaten, coerce, or restrain Codell Construction Company, Incorporated, or any other persons engaged in commerce or an industry affecting commerce, where an object is to force or require Codell Construction Company, Incorporated, to assign said work to employees represented by us rather than to the Operating Engineers, Laborers, and Teamsters.

DISTRICT 12, UNITED MINE WORKERS OF AMERICA, AND LOCAL 2117, UNITED MINE WORKERS OF AMERICA

⁴ In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."