

**International Union of Operating Engineers, Local 150 and All American Decorating Corporation d/b/a All American Decorating Service and Painters District Council No. 14, Party in Interest. Case 13-CD-363**

September 29, 1989

**DECISION AND DETERMINATION OF DISPUTE**

**BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND HIGGINS**

The charge in this Section 10(k) proceeding was filed June 4, 1986, by the Employer, alleging that the Respondent, Operating Engineers, Local 150, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by the Painters District Council No. 14 (Painters). The hearing was held June 25, 1986, before Hearing Officer Margaret B. Peck.

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,<sup>1</sup> finding them free from prejudicial error. On the entire record, the Board makes the following findings.

**I. JURISDICTION**

The Company, an Illinois corporation, is a painting subcontractor in the building and trades industry with its principal place of business in Chicago, Illinois, where it annually purchased and received goods and materials valued in excess of \$50,000 and during that same period of time received gross revenues in excess of \$50,000. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Operating Engineers Local 150 and the Painters District Council No. 14 are labor organizations within the meaning of Section 2(5) of the Act.

**A. Background and Facts of Dispute**

The Employer is a painting subcontractor. In mid-April 1986 it began work as a subcontractor with J. W. Halm/Agee Construction Company, the General Contractor on the Loop El Rehabilitation

Program, performing certain work at the Quincy and Wells Street Station. This work consists of removing the old wooden platform to expose the existing steel for modification, sandblasting and repainting the steel structure, and installing a new wooden platform. The Employer, who employs about 100 painters, assigned an average of 3 painters to the Quincy/Wells project. The painters erect the scaffolding and rig the tarps. One painter sandblasts the appropriate surface. The sandblasting equipment is hooked up to and powered by an air compressor. While this painter is sandblasting, the other painters are preparing another surface for sandblasting, moving scaffolding and tarps, sweeping or moving sand, or painting the exposed steel surfaces. The compressor, meanwhile, is turned on at the start of the workday, off at lunchtime, on again after lunch, and off at day's end. Starting and stopping the compressor is done by pushing a button. The painters also check the oil and gasoline levels in the compressor and fill it with these fuels as needed. The Employer's employees, all of whom are represented by the Painters, perform these tasks as an incidental part of their jobs. The painters do not perform other maintenance or repair work on the compressor, which is serviced by the company that leases it to the Employer.

On May 27, 1986,<sup>2</sup> the Employer's vice president, Samy Hammad, testified that he received a telephone call from Carl Davis, the Operating Engineers' business representative, informing him that the Employer would have to hire an operating engineer to run the compressor because it was larger than 150 CFM.<sup>3</sup> Hammad told Davis that the Employer had a collective-bargaining agreement that gives the work to the Painters. Davis replied that he would visit the Employer's office the next day with a Local 150 memorandum of agreement and unless the Employer put an operating engineer on the compressor, the Respondent would "shut the job down." The next day, May 28, Davis, along with another business representative, Dulkoski, visited Hammad at the Employer's office. They told Hammad to sign the memorandum of agreement and assign an operating engineer to run the compressor and then the Employer would have no problems. When Hammad refused to sign the agreement, he was informed by Dulkoski of a side agreement between the Respondent and the Painters in which the Painters awarded the operation of all compressors larger than 150 CFM to the Respondent's jurisdiction. This was subsequently confirmed in a telephone call between Hammad and

<sup>1</sup> The hearing officer referred the Operating Engineers' motions to quash the notice of hearing and to dismiss the charge for lack of competing claims for the work to the Board for a ruling. In view of our findings below, we shall deny the motions.

Although the Painters and their counsel were served with a notice of hearing, they did not attend the hearing.

<sup>2</sup> All dates are 1986 unless otherwise noted.

<sup>3</sup> Cubic feet per minute.

the president of the Painters Union. Hammad also testified that he asked Davis and Dulkoski for some time so that he could contact the Association's attorney who drafted the collective-bargaining agreement between the Painters and the Employer's Painting and Decorating Contractors' Association. The following day, May 29, Dulkoski telephoned Hammad and asked if the Employer had reached a decision. Hammad testified that he asked to be given until the following Monday, but Dulkoski refused and told him that the Employer would receive a telegram.

On May 30, the Employer received an area standards telegram from Dulkoski, which included a statement that the Operating Engineers would take steps to preserve its area standards. The parties stipulated that the Respondent received a letter dated May 30 from the Employer's attorney seeking the basis for its area standards claim. There was no evidence presented that the Respondent answered the letter.

On June 2, 3, 4, 5, and 9, the Respondent posted pickets carrying area standard picket signs at the Quincy and Wells jobsite.<sup>4</sup> The Employer's painters refused to cross the picket line and no work was performed on those dates. Charges were filed on June 4 and the picketing stopped by June 10, at which time the Employer's painters returned to work. On June 17 the Painters notified the Regional Director that it disclaimed any interest in operating compressors larger than 150 CFM on the Quincy and Wells jobsite. However, the Employer's employees represented by the Painters continued to operate the air compressor at the Quincy and Wells jobsite.

#### B. Work in Dispute

The work in dispute involves the operation of an air compressor larger than 150 CFM, used by the Employer in connection with its sandblasting and painting work at the Quincy and Wells Street Station located in Chicago, Illinois.

#### C. Contentions of the Parties

The Employer contends that the Respondent has violated Section 8(b)(4)(D) of the Act by engaging in area standards picketing for a proscribed object of forcing the Employer to reassign the disputed work from the Painters-represented employees to the Operating Engineers-represented employees who have claimed jurisdiction over such work.

<sup>4</sup> The record reveals that other than Dulkoski's remark to Hammad that the Employer would be paying an operating engineer less than a painter to operate the compressor, there was no evidence that the Operating Engineers investigated the wages and benefits enjoyed by the Painters-represented employees

The Employer further contends that the disputed work should be awarded to the Painters-represented employees on the basis of employer preference, existing collective-bargaining agreement, efficiency and economy, area and industry practice, and because there is no voluntary method of resolving the dispute. As for the Painters' disclaimer regarding the disputed work, the Employer contends that it is ineffective because the painters continued to perform the disputed work and because it did not require a sacrifice or impose a hardship on the painters. The Operating Engineers contends that there is no basis for finding a violation of Section 8(b)(4)(D) because the Painters' disclaimer has eliminated any competing claim for the disputed work. The Operating Engineers claim the work by virtue of a 1977 memorandum with the Employer's predecessor which is, it claims, binding on the Employer. Finally, the Operating Engineers contends that current Board law regarding the disclaimer of work by one union, has distorted the purpose of the statute.

#### D. Applicability of the Statute

Before the Board may proceed to the determination of a dispute pursuant to Section 10(k) of the Act it must be satisfied that (1) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and (2) the parties have not agreed to a method for the voluntary adjustment of the dispute.

It is not disputed that Operating Engineers Business Representative Davis called the Employer and, after laying claim to the disputed work being performed by the Painters, threatened to "shut the job down" unless an operating engineer was assigned to operate the compressor. It is also undisputed that in a meeting the next day with the Employer's vice president, Hammad, Operating Engineers Business Representatives Davis and Dulkoski presented Hammad with a memorandum of agreement for the work and stated, "You sign this and put one of our guys on [and] you will have no problems." In this same meeting, when Hammad requested 2 days to consult with the attorney for the Employer's multibargaining association about the matter, Dulkoski stated, inter alia, that the Employer "only had one day [Thursday] and that is it. . . . We will do what we have to do." It is further undisputed that the following day, Dulkoski called Hammad and asked if he had made a decision, but when Hammad requested more time, Dulkoski stated, "No, that is it. . . . and I am going to send you a telegram today." Hammad received an area standards telegram the next day from the Operating Engineers stating that it had determined that

the Employer was not maintaining the area standards for operating engineers on the Employer's project and that the Employer's continued failure to comply with area standards left the Operating Engineers with no other alternative but to take necessary lawful action to insure the preservation of area standards. Picketing commenced on June 2 and lasted to June 10, when it ceased.

It is also undisputed that on the second day of the picketing,<sup>5</sup> in response to a question by the Employer's field superintendent, the picketers said they were picketing because any compressor over 150 CFM must be operated by a member of the Operating Engineers.

In determining the applicability of the statute, the Board must consider whether an object of the picketing was to force or require the Employer to reassign the work in dispute from employees represented by the Painters to members of the Operating Engineers. The establishment of one proscribed object is sufficient to bring a union's conduct within the statutory language of Section 8(b)(4)(D). *Cement Masons Local 577 (Rocky Mountain Prestress)*, 233 NLRB 923 (1977). *Carpenters Local 593 (T & P Iron Works)*, 266 NLRB 617 (1983).

The record establishes that the Operating Engineers never contacted the Employer regarding wages paid to the painters. Nor is there evidence that the Operating Engineers availed themselves of any other means of ascertaining such information. Thus, it is clear that the Operating Engineers made no reasonable inquiry into the Employer's pay scales. This fact, coupled with the Operating Engineers' repeated attempts to gain the disputed work from the Painters-represented employees, to whom the Employer had assigned the work, leads us to find that an object of the picketing engaged in by the Operating Engineers was to force or require the Employer to reassign to the Operating Engineers the disputed work that had previously been awarded to the Painters. *Plumbers Local 130 (Contracting & Co.)*, 272 NLRB 1045, 1047 (1984).

We also find that the asserted disclaimer of the Painters concerning the work in dispute is ineffective and that thus the jurisdictional dispute remained active. The Painters were assigned the work and they neither questioned nor rejected the assignment. Instead they performed it, as assigned. That the work was incidental to their main tasks, and required little of their worktime, does not detract from that fact. Nor is the situation changed

because they did not cross the picket line of the Respondent. They performed no work of *any kind* at the jobsite during the picketing. After the picketing ceased, however, they resumed their normal duties, including the operation of the compressor, the work in dispute. Although the Painters purportedly disclaimed the work 1 week later, the Painters-represented employees of the Employer continued to perform it without interruption and insofar as the record shows, without complaint, restraint, or threat of discipline from their union. We therefore conclude that they were continuing to claim the work and that it is of no consequence, as argued by the Respondent, that none of them came forward at the hearing specifically to lay claim to the work. *Bricklayers Local 2 (E. J. Harris Construction)*, 254 NLRB 1003, 1004 (1981).

The asserted disclaimer is also ineffective because it did not require the Painters-represented employees to give up or sacrifice anything of value to them.<sup>6</sup> See, e.g., *Longshoremen ILA Local 1291 (Pocohantas Steamship Co.)*, 152 NLRB 676, 679-680 and 154 NLRB 1785, 1789 (1965), enfd. 368 F.2d 107, 110 (3d Cir. 1966), cert. denied 386 U.S. 1033 (1967). They went on performing their painting tasks, without any reduction in their wages or benefits resulting from the disclaimer. Neither they nor their union ceded any of their trade's jurisdiction, whether or not they continued to perform the work in dispute. Nor is there any likelihood or indication in the record that they would have forfeited their jobs with the Employer if they had renounced the assignment of the disputed work rather than, as here, continued to do it. Thus, the disclaimer had absolutely no effect on their employment with the Employer and the remuneration they received from it.<sup>7</sup> This is not surprising con-

<sup>6</sup> Member Cracraft finds it unnecessary to rely on this rationale. Rather, she would find the disclaimer ineffective solely on the basis that Painters-represented employees continued to perform the work in dispute following the purported disclaimer.

<sup>7</sup> The Respondent's argument—that evidence of sacrifice is immaterial to the disclaimer's validity—ignores that a disclaimer without sacrifice, where the disclaiming party will continue to receive pay for the disputed work, means that the essence of the jurisdictional dispute (i.e., a claim for pay) remains.

The Respondent also, in effect, alleges that the Board in cases of this type has misconstrued the statute to find that two active claims for the work are not a prerequisite to finding the existence of a jurisdictional dispute. In support of this argument the Respondent cites *Electrical Workers IBEW Local 40 (F & B/Ceco)*, 199 NLRB 903 (1972), *Teamsters Local 326 (Eazor Express)*, 203 NLRB 1002 (1973), and *Electrical Workers IBEW Local 610 (Landau Outdoor Sign Co.)*, 225 NLRB 320 (1976). The Respondent's interpretation of these cases, however, fails to acknowledge that the disclaiming party in each case, like the Painters in the instant case, neither ceased performing the work in dispute nor disclaimed the pay they received for performing it. Consequently, to the extent these cases hold that two active claims for the "work" are not necessary for the existence of a jurisdictional dispute, "active" is used in the sense of "affirmatively seeking out" and "work" is used in the narrow sense of "tasks to be performed." See our decision issued today in *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 121 fn 14

<sup>5</sup> The pickets carried signs stating, "Notice to the Public . . . All American does not pay the prevailing wage and economic benefits for Operating Engineers which are standard in this area. Our dispute concerns only the substandard wages and benefits paid by this company. Local 150, International Union of Operating Engineers, AFL-CIO."

sidering that the disputed work, as noted, was done on an incidental basis and required at times no more than pushing a button to start and stop the compressor. In such circumstances it is impossible to allocate part of their compensation to the disputed work, a fact that was not likely lost on their representative, the Painters, or any of those directly affected by the dispute. We thus conclude that the Painters did not intend or expect the disclaimer to have any adverse impact on their employment, including their compensation for work performed. Consequently, we find that the Painters' disclaimer fails to extinguish the jurisdictional dispute that we have found to exist.

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

#### E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

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

##### 1. Certification and collective-bargaining agreements

The evidence does not show that there is a Board certification relative to the disputed work.

No collective-bargaining agreement brought to our attention mentions specifically the operation of air compressors, but the collective-bargaining agreement between the Painters and the Painting and Decorating Contractors Association, of which the Employer is a member, defines in article II, section 6 of that agreement the scope of the painters' work to include: "all work regarding the . . . removal of paints . . . [and] all preparatory and ancillary work necessary in connection with the removal of paint including the . . . sanding of surfaces and the operation of all tools and equipment used . . . including but not limited to . . . miscellaneous hand and power driven tools including sandblasting . . . equipment." We find this description encompasses the work in dispute.

The Operating Engineers also contends that the Employer is bound by a 1977 memorandum of agreement between it and a prior employer, All American Decorating Service, because that agreement contained a self-renewal clause and was still in effect at the time the business was sold. In order to find this agreement arguably binding on the Employer, we would have to find that the Employer is the alter ego of the predecessor. See *Pinter Bros.*, 263 NLRB 723, 739 (1982); *Jersey Juniors*, 230 NLRB 329 (1977). The Operating Engineers failed to establish the existence of an alter ego relationship. Therefore, we find no basis for the Operating Engineers' claim that its agreement with the prior employer was binding on this Employer. We therefore find that the collective-bargaining agreement between the Employer and the Painters favors an award to the employees represented by the Painters.

##### 2. Employer and area practice

The record discloses that most, if not all, of the Painting Contractors in the Chicago area, including the Employer, have traditionally assigned the operation of compressors larger than 150 CFM to their painters, who also operate the sandblasting equipment. Thus, we find this factor favors an award to employees represented by the Painters.

##### 3. Skills, economy, and efficiency

Employees represented by the Painters or the Operating Engineers are both experienced and qualified to operate the disputed air compressors. The record also shows not only that the operation of the air compressor is relatively simple but also that it does not require full-time attention. The Employer currently employs only individuals represented by the Painters to perform sandblasting and painting work. Such employees are able effectively to operate the air compressor in conjunction with their normal job duties for the Employer. If the Employer were required to hire an employee represented by the Operating Engineers to operate the air compressor, his job duties would consume only 3 to 20 minutes of the entire 8-hour workday. Accordingly, while the skill factor favors neither group, we find that the factors of economy and efficiency favors an award to employees represented by the Painters.

##### 4. Employer preference

The Employer assigned the work in dispute to, and prefers that it be performed by, employees represented by the Painters; this factor, while not determinative, favors an award to these employees.

### 5. Interunion agreements

At the hearing, the Operating Engineers introduced a copy of an April 1985 interunion agreement between the Painters and the Operating Engineers, which ceded the operation of air compressors in excess of 150 CFM to the Operating Engineers. However, record testimony shows that the Employer neither was a party to this agreement nor manifested an intention to be bound by it. In *Laborers Local 646 (General Refrigeration)*, 268 NLRB 472 (1983), the Board ruled that this type of agreement is not entitled to any weight in which "there is no evidence that the Employer ever agreed to be bound by the agreement." Moreover, record testimony showed that although the Painters notified Region 13 of its purported disclaimer, the employees represented by the Painters have continued to perform the disputed work for the Employer and other area painting contractors. Therefore, we accord no weight to the interunion agreement in determining the award of the disputed work.

### Conclusion

After considering all the relevant factors, we conclude that employees represented by the Painters are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's collective-bargaining agreement with the Painters, employer preference, and employer and area practice, and the economy and efficiency of the work performed by the Painters-represented employees. In making this determination we are awarding the work to employees represented by Painters District Council No. 14, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.<sup>8</sup>

<sup>8</sup> The Employer requests a broad award applying to this and similar work disputes arising between it, other painting contractors and the Op-

### DETERMINATION OF DISPUTE

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

1. Employees of All American Decorating Corporation d/b/a All American Decorating Service represented by Painters District Council No. 14 are entitled to operate the air compressor in excess of 150 CFM used by All American Decorating Service in connection with its sandblasting and painting work at the Quincy and Wells Street Station in Chicago, Illinois.

2. International Union of Operating Engineers, Local 150, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require All American Decorating Corporation d/b/a All American Decorating Service to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Union of Operating Engineers, Local 150 shall notify the Regional Director for Region 13, in writing, whether or not it will refrain from forcing Ross, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with this determination.

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erating Engineers While the Employer correctly cites the standard for issuing such an award, *Electrical Workers IBEW Local 104 (Standard Sign & Signal Co.)*, 248 NLRB 1144, 1147-1148 (1980), it has not demonstrated that "a broad order [sic] is indispensable to the fashioning of a meaningful award here." While the Operating Engineers in this case did use proscribed means to force the assignment of the disputed work to employees it represented, it did so for a very brief period and, soon after the filing of the instant charge, cooperated with Region 13 to allow work to continue on the Quincy and Wells jobsite while the parties submitted their dispute to the Board for determination. In these circumstances, we cannot conclude that the operating engineers are likely to engage in further unlawful conduct to obtain work similar to that in dispute