

International Union of Operating Engineers, Local 150, AFL–CIO and International Brotherhood of Teamsters, Local 703, AFL–CIO and Beverly Environmental, LLC and Laborers’ International Union of North America, Local No. 751.
Cases 25–CD–080014 and 25–CD–080015

September 25, 2012

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND BLOCK

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Beverly Environmental, LLC (the Employer) filed charges on May 1, 2012, alleging that International Union of Operating Engineers, Local 150, AFL–CIO (the Operators) and International Brotherhood of Teamsters, Local 703, AFL–CIO (the Teamsters) 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 they represent rather than to employees represented by Laborers’ International Union of North America, Local 751 (the Laborers). A hearing was held May 24, 2012, before Hearing Officer Nathaniel E. Strickler. Thereafter, the Employer and the Operators filed posthearing briefs.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.²

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 Employer is an Illinois limited liability company with its principal place of business in Markham, Illinois. During the 12-month period preceding the hearing, a representative period, the Employer purchased and received goods valued in excess of \$50,000 directly from points located outside the State of Illinois. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Based on the uncontested evidence presented at the hearing, the record establishes that the Operators, the Teamsters, and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

¹ The Laborers was served with the Order Consolidating Cases and Notice of Hearing, but it did not appear at the hearing and did not file a posthearing brief.

² Member Griffin is recused and did not participate in the consideration of this case.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer is a landscape construction contractor that works throughout the Chicago metropolitan area and has collective-bargaining agreements with the Operators and the Teamsters covering its plantsmen, installers, landscape helpers, and equipment operators. The plantsmen are represented by the Operators, the installers and helpers by the Teamsters, both in one contract. The equipment operators are covered by a separate collective-bargaining agreement with the Operators. At no time has the Employer been signatory to a collective-bargaining agreement with the Laborers.

The Employer is currently working on a pipeline project for Shell Oil in Limestone, Illinois. R&R Sewer and Water, the general contractor on the project, awarded a subcontract to the Employer to install silt fencing before other contractors install the pipeline, and to remove the silt fencing and restore the ground by spreading soil, sodding, and seeding after the pipeline is installed.

The Employer typically operates three-man crews with an equipment operator, a plantsman, and an installer. The operator plows the ground and rolls out the fence with a small tractor. The plantsman and the installer follow the tractor, line up the wood stakes, hammer the wood stakes into the ground, and staple the silt fence to the stakes. After the pipeline is installed, the Employer will remove the silt fence, spread black dirt using a skid steer or a small tractor, rake the dirt, and apply sod or seed.

The Employer assigned its work on this project, and has historically assigned all of its landscape construction work, to a composite crew of employees represented by the Operators and the Teamsters. On April 6, 2012,³ the Laborers’ business agent went to the worksite and told the Employer’s project manager that the Operators’ equipment operator could operate his tractor but that the plantsmen and the Teamsters-represented employees were not allowed on the jobsite because the people working behind the silt fence had to be “his Laborers.” The Laborers’ business agent then called the Employer’s president and repeated that the plantsmen and the Teamsters-represented employees would not be allowed on the project because “we don’t do it that way down here in this area, and we don’t use those guys, we use laborers.”

The Laborers’ business agent returned to the worksite on April 11 and took pictures of the Employer’s employees, and again stated that the work in dispute needed to be done by Laborers-represented employees. Throughout April and May, the Laborers also filed several griev-

³ All dates are 2012, unless otherwise noted.

ances against the general contractor for having subcontracted the work in dispute to the Employer. The grievances sought pay in lieu of work.

On April 11, the Operators and the Teamsters sent the Employer a letter acknowledging that the Laborers had made a claim for the landscape construction work at the Shell pipeline project and confirming that they too claimed the disputed work and would engage in “any and all means, including picketing, to enforce and preserve their historical and traditional work assignment.”

B. Work in Dispute

We find, based on the record, that the work in dispute is:

All landscape construction work being performed by employees of Beverly Environmental, LLC at the Shell Waterline Pipeline project in Limestone, IL, except for the operation of the silt fence installation machine.

The specific tasks involve the installation and removal of the silt fencing and the eventual restoration of the ground by raking soil and seeding and sodding. The operation of equipment such as skid steers and small tractors is not at issue.

C. Contentions of the Parties

In their briefs, the Employer and the Operators contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated because of the Operators and the Teamsters’ April 11 letter threatening picketing. They further contend that there are competing claims to the disputed work, and that there is no agreed-upon method for the voluntary adjustment of the dispute. On the merits, they collectively or individually assert that the work in dispute should be awarded to employees represented by the Operators and the Teamsters based on the factors of collective-bargaining agreements, employer preference and current assignment and past practice, area practice, relative skills, and economy, and efficiency of operations.

As noted, the Laborers did not appear at the hearing or file a brief. From the record, it appears that the Laborers claims that, at the least, in the Limestone, Illinois area, employees represented by it exclusively perform the type of work that it seeks at the Shell pipeline project.

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. This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work among rival groups of employees,

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. See, e.g., *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). On this record, we find that these requirements have been met.

1. Competing claims for work

By their own admission, the Operators and the Teamsters have claimed the work in dispute for the employees they represent, and those employees have been performing the work. The Laborers has claimed the work as well. There was evidence presented at the hearing that the Laborers’ business agent stated that the Operators and the Teamsters-represented employees were not allowed on the project and couldn’t do the work in dispute, and that the only way to resolve the issue was to have Laborers-represented employees perform the work. The Laborers also filed several pay-in-lieu grievances with the general contractor. In the circumstances of this case, both these actions constitute claims for the work. *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 114 (1998).

2. Use of proscribed means

We also find that there is reasonable cause to believe that the Operators and the Teamsters used means proscribed under Section 8(b)(4)(D) to enforce their claim. On April 11, they sent a letter to the Employer threatening to engage in “any and all means, including picketing” to preserve assignments to those employees they represent. This constituted a threat of economic action if the work was reassigned, establishing reasonable cause to believe a violation of Section 8(b)(4)(D) occurred.

3. No voluntary method for adjustment of dispute

We further find that there is no method for the voluntary adjustment of the dispute to which all parties are bound. Nothing in the relevant agreement between the Operators and the Teamsters and the Employer provides for a resolution to this dispute, and there is no showing that the Laborers would be bound in any event to any such resolution.

Based on the foregoing, we find that there is reasonable cause to believe that there are competing claims to the work in dispute, that Section 8(b)(4)(D) has been violated, and that there is no agreed-upon method for the voluntary adjustment of the dispute. We accordingly 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 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.

1. Collective-bargaining agreements

The Operators and the Teamsters have binding contracts with the Employer. Language in the relevant contract specifically covers plantsmen, installers, and landscape helpers who install sod, silt fencing, trees, and spread soil, i.e., the work in dispute. The Employer has no contract with the Laborers and has never employed employees represented by the Laborers. No evidence of any other collective-bargaining agreements was presented at the hearing. Therefore, the factor of collective-bargaining agreements favors an award to employees represented by the Operators and the Teamsters.

2. Employer preference, current assignment, and past practice

The Employer assigned the disputed work to employees represented by the Operators and the Teamsters and prefers that they continue to perform the work. The Employer has a past practice of assigning similar work to employees represented by these unions. Therefore, we find that the factors of employer preference, current assignment, and past practice favor awarding the disputed work to employees represented by the Operators and the Teamsters.

3. Area practice

Evidence was presented at the hearing that the Illinois Landscape Contractors Bargaining Association's bargaining agreement, to which the Operators and the Teamsters are parties, has about 760 signatory contractors throughout the entire jurisdiction and covers work like that in dispute here. No evidence was presented, however, as to what percentage of the contractor population these signatories represent, and there was no evidence regarding the historical practice of any other contractor except the Employer. Although the Laborers did

not participate in the hearing, there was undisputed testimony that the Laborers' business agent claimed that Laborers-represented employees traditionally performed the work in dispute in the area. Accordingly, we find the evidence insufficient to conclude that this factor favors any of the Unions.

4. Relative skills

The Operators and the Teamsters presented evidence that employees they represent have the skills necessary to perform the disputed work. The Employer has employed employees represented by these unions in the past; these employees are familiar with the Employer's requirements; and the Employer's president testified they have the skills to perform the work in dispute. The Employer has no experience with the Laborers, and no evidence was presented regarding the Laborers' employees' skills.

Given these considerations, and on this record, we find that the relative skills factor favors an award of the disputed work to employees represented by the Operators and the Teamsters.

5. Economy and efficiency of operations

The Employer testified that it is currently using employees represented by the Operators and the Teamsters, it would need to train any employees represented by the Laborers because it has never worked with the Laborers, and that this would be inefficient. There was no record evidence contradicting this testimony. We find that the factor of economy and efficiency of operations favors awarding the disputed work to employees represented by the Operators and the Teamsters.

Conclusions

After considering all of the relevant factors, we conclude that employees represented by the Operators and the Teamsters are entitled to continue performing the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and current assignment and past practice, skills, and economy and efficiency of operations. In making this determination, we award the work to employees represented by these unions, not to the unions or to their members.

Scope of the Award

In their briefs, the Employer and the Operators request that our award of the work encompass the entire area of the Laborers' jurisdiction because they contend, inter alia, that the Laborers' claim for this work was broad and

not limited to the Shell pipeline project. The Board customarily declines to grant an areawide award in cases in which the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See *Laborers District Council of Ohio Local 265 (AMS Construction)*, 356 NLRB 306, 311 (2010). 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 Beverly Environmental, LLC, represented by International Union of Operating Engineers Local 150, AFL-CIO, and International Brotherhood of Teamsters, Local 703, AFL-CIO, are entitled to perform all landscape construction work being performed by employees of Beverly Environmental, LLC at the Shell Waterline Pipeline project in Limestone, Illinois, except for the operation of the silt fence installation machine.