Laborers International Union of North America, Local 265 *and* Henkels & McCoy, Inc. and International Union of Operating Engineers, Local 18. Case 09–CD–116000

May 5, 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. Henkels & McCoy, Inc. (the Employer) filed a charge on October 30, 2013, alleging that Laborers International Union of North America, Local 265 (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 represented by Laborers rather than to employees represented by International Union of Operating Engineers, Local 18 (Operating Engineers). A hearing was held on December 19, 2013, before Hearing Officer Tamilyn A. Thompson. Thereafter, the Employer, Laborers, and Operating Engineers filed posthearing briefs. 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 the Employer, a Pennsylvania corporation with an office in Blue Bell, Pennsylvania, annually provides services valued in excess of $50,000 directly to customers outside the State of Pennsylvania. 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 is a labor organization within the meaning of Section 2(5) of the Act. We further find, consistent with the record and prior Board decisions,[1] that Operating Engineers is also a labor organization within the meaning of Section 2(5) of the Act.

[1] See, e.g., *Laborers Local 860 (Ronyak Paving, Inc.)*, 360 NLRB 236, 236 (2014); *Laborers Local 894 (Donley's Inc.)*, 360 NLRB 104, 104 (2014); *Laborers Local 860 (McNally/Kiewit)*, 359 NLRB 724, 724 (2013).

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is engaged in utility construction, including gas line work, nationwide. Its work is divided into three regions (Eastern, Central, and Western); it performs the most gas line work in its Eastern region. In the Central region, the Employer contracts with Duke Energy to install, renew, and replace gas mains and service lines in the greater Cincinnati area (the "Project"). The Employer began performing work on the Project in 2001; the Project is scheduled for completion in 2015. The Project work relevant to this proceeding involves the renewal and replacement of service lines extending from the street curb line to a residence or business.

The Employer generally employs one to three service line crews to perform Project work that includes excavation, installation of lines, connection of service, and restoration of the area. Prior to May 2013, each crew consisted of one employee represented by Laborers, one employee represented by Operating Engineers, and one employee represented by Pipefitters. The service component consists of an employee first locating the existing gas pipeline to be replaced and digging a trench with a miniexcavator to expose the line. Throughout excavation, which usually takes 2 or 3 hours, a laborer spots the line with a shovel to ensure that the miniexcavator does not hit the gas line. A portion of the old line is removed. During this time, a pipefitter enters the residence or business, disassembles the existing meter set, and prepares to get the new line into the building. A laborer then inserts a new pipe into the existing gas line, conducts pressure tests, and fuses the existing and new pipes together to tie the new pipe onto the main gas pipe. The latter work may only be performed by employees who have completed a 40-hour specialized training class and been certified by Duke Energy. After reconnecting service, an employee backfills the trenches using a miniexcavator if the surface is sod or grass, or a skid steer if the surface is improved (e.g., sidewalk, pavement). From 2001 until May 2013, both laborers and operating engineers operated the miniexcavators and skid steers.

The Employer has had a collective-bargaining relationship with Laborers and Operating Engineers for approximately 12 years. It is party to the Ohio Statewide Gas Distribution Agreement with Laborers. That agreement covers "all gas distribution work performed in the [S]tate of Ohio" and is effective from May 30, 2012 to May 31, 2015. The Employer is also signatory to the 2010–2013 Distribution and Maintenance Agreement between Operating Engineers and Distribution and

Maintenance Contractors.[2] That agreement covers "all distribution pipeline construction and maintenance work."

In 2013, Operating Engineers and Distribution and Maintenance Contractors negotiated a successor Distribution and Maintenance Agreement effective from June 1, 2013 to May 31, 2017. That agreement adds a work-preservation clause stating:

> If the employer assigns any piece of equipment to someone other than the Operating Engineers the Employer's penalty shall be to pay the first qualified registered applicant the applicable wages and fringe benefits from the first day of the violation until the end of the assignment. The Employer recognizes that the violation is a breach of the Distribution and Maintenance Contractors collective bargaining agreement and that the breach cannot be corrected by a reassignment of the work. The Union likewise understands that this paragraph prohibits it from requesting a reassignment of the work, thereby limiting its relief for the breach to damages as provided herein.

The agreement, by its terms, requires that all "Employers must sign individual copies of this Agreement to be bound hereby." At the time of the hearing, the Employer was observing the terms of the expired 2010–2013 Distribution and Maintenance Agreement and had not signed the 2013–2017 agreement.[3]

Sometime before May 2013,[4] Laborers' Field Representative Justin Phillips received complaints from his members about harassment by Operating Engineers' representatives who showed up at the Employer's jobsites. According to Phillips, Operating Engineers' representatives confronted Laborers-represented employees and job foremen, stating that laborers could not be on miniexcavators and skid steers.[5] In May, Phillips asked the Employer to sign a local contract with Laborers and assign the disputed work to employees represented by Laborers.[6] Phillips also informed the Employer that its competitors on the Project were using laborers to perform the work in dispute.

The Employer subsequently decided to reduce the size of its service line crews from three employees to two, and to assign the disputed work exclusively to employees represented by Laborers. The Employer made the change because it wanted to be more competitive with other contractors working on the Project, which were using two-person service line crews, consisting of one Laborers-represented employee and one Pipefitters-represented employee. In recent years, Duke Energy has awarded only a few modules[7] to the Employer; by changing to a two-person crew, the Employer hoped to reduce costs in order to retain, and potentially expand, Project work. On May 21, the Employer sent separate letters to Laborers and Operating Engineers informing them that, effective immediately, it would be switching to two-person crews consisting of one laborer and one pipefitter.[8] The letter further stated that it would no longer be

[2] The "Duration" section of the 2010–2013 Distribution and Maintenance Agreement provided that it would automatically renew absent either party giving written notice of its desire to renegotiate it at least 60 days prior to its expiration date on May 31, 2013. In a March 1, 2013 letter, Operating Engineers notified the Employer that it desired to renegotiate the agreement. Both Operating Engineers (at the hearing) and Laborers (in its posthearing brief) contend that this letter operated to negate the automatic renewal provision. Based on the agreement's own terms, we find that the Employer's collective-bargaining agreement with Operating Engineers expired on May 31, 2013. See *Carpenters Northeast Ohio Council Local 1929 (Luedtke Engineering)*, 307 NLRB 1323, 1325 (1992).

[3] Operating Engineers argues that the hearing officer prejudiced it by prohibiting questioning of the Employer's Labor Contracts Coordinator Susan Gannon regarding whether (1) she believed that the Employer is bound to the 2013–2017 Distribution and Maintenance Agreement, and (2) the Employer was paying wages and benefits specified in that agreement. We find no prejudicial error. First, Gannon's subjective belief is irrelevant to whether the Employer is bound to the 2013–2017 agreement. Second, even assuming that the Employer were bound to the 2013–2017 agreement, that would not change our analysis below that there are competing claims to the work and that Operators Engineers, by its conduct, sought to acquire, not merely to preserve, work. Indeed, the Board very recently rejected a work preservation argument where, as here, a union claimed that its collective-bargaining agreement prohibited it from seeking the actual assignment of work and limited its relief to economic damages. *Laborers Local 894 (Donley's, Inc.)*, 360 NLRB 104 (2014).

[4] All subsequent dates are in 2013, unless stated otherwise.

[5] The Employer's area supervisor, Rod Eversole, corroborated Philips' testimony regarding jobsite visits by Operating Engineers' business representatives. Eversole testified that Foreman Scott Brown informed him that in April, Operating Engineers' Business Representative Nate Brice visited a jobsite, and that upon learning that an employee represented by Laborers was operating a miniexcavator, Brice told Brown that he would write a grievance. Brice acknowledged that he had probably observed someone other than a person represented by Operating Engineers operating a miniexcavator or a skid steer in April and that he had run into Brown before June 4. Eversole also testified that Operating Engineers Business Representative Jeff Powell had previously come onto a jobsite and told Brown that he was not allowed on the miniexcavators, effectively shutting the job down for the day. The next morning, Powell told Eversole that if anyone other than an operator was on the excavator, he would take pictures the entire time; work ceased until Eversole could bring an operator down from another site.

[6] The Employer did not sign the local contract.

[7] Modules refer to individual jobs typically consisting of the installation of gas mains and service lines in a certain geographic area.

[8] The record shows that the Employer's May 21 decision to utilize two-person crews was not immediately applied across the field. One employee represented by Operating Engineers performed the disputed work on June 14, and was laid off from the Employer's service crew on June 17.

employing operating engineers on its service crews and that it would be assigning the work to laborers. Currently, as has been typical in its Eastern region, the service crews are comprised of one laborer and one pipefitter.

On June 4, Operating Engineers' Business Representative Nate Brice visited jobsites where the Employer was performing service work. At the Woodburn-Taft site, Brice observed Foreman Scott Brown operating a miniexcavator. Brice approached and asked Brown whether he was represented by Operating Engineers. When Brown said "no," Brice read him the "Miranda card," which states that the Employer assigned "someone other than an Operating Engineer" to operate equipment in violation of its contract with Operating Engineers and that Operating Engineers seeks damages, not the reassignment of work. On June 5, Brice filed a pay-in-lieu grievance against the Employer, seeking contractual damages for the alleged breach of the 2013–2017 agreement.

On June 14, the Employer and Operating Engineers met to discuss three grievances, including the Woodburn-Taft grievance.[9] The parties generally discussed the applicability of the contractual damages provision and whether the controversy was a jurisdictional dispute. The parties disagreed on these points and were unable to resolve the grievances. The Employer's representatives testified that Operating Engineers made "very clear" at this meeting that it was objecting to the move to two-person crews and the elimination of operating engineers from the service work.

On July 22, in pursuit of its Woodburn-Taft grievance, Operating Engineers filed a demand for arbitration with the American Arbitration Association regarding the skid steer and miniexcavator work on the Duke Energy service lines. In a letter dated July 29, the Employer's vice president and director of labor relations, Stephen Freind, informed Phillips that Operating Engineers had filed for arbitration and that the Employer therefore intended to reassign the operation of miniexcavators and skid steers to Operating Engineers. In a letter dated August 9, Laborers refused to disclaim the work in dispute and advised the Employer that if it reassigned the work from Laborers to Operating Engineers, Laborers "will take any and all actions necessary to preserve our work, including but not limited to, picketing and work stoppages on the Project."

B. Work in Dispute

The Employer and Laborers stipulated that the disputed work includes the operation of miniexcavators and skid steers on the Employer's service line crews working on Duke Energy gas service lines in the Cincinnati, Ohio area. Operating Engineers initially qualified its stipulation as to miniexcavators, stating that it was unclear what equipment was meant by a miniexcavator and that it wanted to have that developed at the hearing. Employer witnesses testified that John Deere model 35D is the primary brand and model it uses as a miniexcavator on the service line work, and that it does not consider anything larger than the John Deere 35D or similar equipment to be a miniexcavator. Operating Engineers' counsel subsequently stated on the record that "we've already identified the equipment at issue as being a John Deere 35D or similar type of equipment." Accordingly, we find that the work in dispute is the operation of miniexcavators, not larger than the John Deere 35D or similar equipment, and skid steers by the Employer's service line crews working on Duke Energy gas service lines in the Cincinnati, Ohio area.

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 preservation provision of the 2013–2017 Distribution and Maintenance Agreement and that it requested only the contractually prescribed damages for the breach. Operating Engineers further contends that the Employer is not the "innocent" employer, caught between two competing unions claiming the same work, for whom Congress intended to provide relief under Section 10(k). According to Operating Engineers, the Employer engaged in collusion with Laborers 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 operations, 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.

[9] Two of the grievances did not involve the disputed service work.

The Employer and Laborers each contend that the notice of hearing should not be quashed, because competing claims to the disputed work, including Operating Engineers' June 5 grievance, show the existence of a genuine jurisdictional work dispute. They further contend that the evidence of threats to picket and/or engage in work stoppages over job assignments demonstrates that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. Further, 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 agreements, employer preference, past practice, area and industry practice, relative skills and training, and economy and efficiency of operations.

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: (1) there are competing claims to the disputed work; (2) a party has used proscribed means to enforce its claim to the work in dispute; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute. On this record, we find that this standard has been met.

1. Competing claims for work

We find that there is reasonable cause to believe that both unions have claimed the work in dispute for the employees they respectively represent. Laborers has claimed the work by its August 9 letter, objecting to any assignment of the service work of operating a miniexcavator or a skid steer to Operating Engineers-represented employees. Even absent this specific claim, the performance of the disputed work by Laborers-represented employees here constitutes evidence of a claim for the work. See *Seafarers International Union (Luedtke Engineering Co.),* 355 NLRB 302, 303 (2010), quoting *Operating Engineers Local 513 (Thomas Industrial Coatings),* 345 NLRB 990, 992 fn. 6 (2005).

Despite its argument to the contrary, Operating Engineers has also claimed the disputed work. Operating Engineers' Field Representative Brice told the Employer's area supervisor and foreman that he would file a grievance against the Employer because someone other than an Operating Engineers-represented employee operated a miniexcavator in violation of its contract with Operating Engineers. See *Laborers Local 113 (Michels Pipeline Construction)*, 338 NLRB 480, 482 (2002). In addition, by filing the pay-in-lieu grievance against the Employer alleging contract violations with respect to its assignment of the service work, the Operating Engineers effectively claimed the work. See, e.g., *Laborers Local 860 (Ronyak Paving, Inc.)*, 360 NLRB 236, 239 (2014); *Laborers Local 265 (AMS Construction)*, 356 NLRB 306, 308 (2010) (pay-in-lieu grievance may constitute a competing claim for work); *Local 30, United Slate, Tile & Composition Roofers 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"). According to the Employer's representatives, Operating Engineers made clear during the June 14 grievance meeting that operating engineers should be performing the disputed work. Moreover, during the 10(k) hearing, Operating Engineers' counsel, while asserting that the grievance was merely a contractual claim for damages rather than a claim for work, refused to stipulate that Operating Engineers disclaimed the work. See *Electrical Workers Local 71 (Capital Electric Line Builders, Inc.)*, 355 NLRB 140, 142 (2010) (treating statements made on the record at the 10(k) hearing as a claim for work).

Operating Engineers argues that the Employer has not identified with specificity any statement made at the grievance hearing that constitutes a claim for the disputed work. Operating Engineers also argues that its pay-in-lieu grievance did not constitute a claim for the disputed work because photos taken to support the grievance show a John Deere 80C, equipment not at issue here. We find both of these arguments unavailing. First, in 10(k) proceedings, a direct conflict in testimony, much less a lack of specificity, does not prevent the Board from finding evidence of reasonable cause and proceeding with a determination of the dispute. See *J. P. Patti Co.*, 332 NLRB 830, 832 (2000); *Electrical Workers Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1383 (1998) (conflicting versions of event did not preclude the Board from finding reasonable cause). Second, we note that the June 5 grievance, which Brice testified he filed after seeing Brown operating a miniexcavator, does not reference any particular piece of equipment. Thus, as above, even assuming some conflicting testimony regarding the photos, we find reasonable cause to proceed to the determination of the dispute.

We reject Operating Engineers' contention that this is a work preservation dispute outside the scope of Section 10(k) of the Act. 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. *Team-*

sters Local 174 (Airborne Express), 340 NLRB 137, 139 (2003). Operating Engineers has failed to make the latter showing. Freind testified, without contradiction, that the Employer has previously assigned the disputed work to both Laborers and Operating Engineers. The record established that both Laborers-represented employees and Operating Engineers-represented employees have performed the disputed work for the Employer prior to May 2013.[10] Although the instant dispute arose after the Employer's exclusive assignment of the work traditionally performed by both unions to Laborers, the same type of disputes over the assignment of miniexcavators and skid steers has been "ongoing" even before the Employer's decision in May. As such, the "origin of the dispute" arose when Operating Engineers claimed all of the disputed work, including that previously performed by employees represented by Laborers. See *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818, 820 (1986) (the Board looks to "the real nature and origin" of the dispute in determining whether a jurisdictional dispute exists), affd. sub nom. *USCP-Wesco, Inc. v. NLRB*, 827 F.2d 581 (9th Cir. 1987).[11] Therefore, Operating Engineers' objective here was not that of work preservation, but of work acquisition. See *Teamsters Local 20 (Midwest Terminals of Toledo International)*, 359 NLRB 983, 984 (2013); *Carpenters (Prate Installations, Inc.)*, 341 NLRB 543, 545 (2004).

2. Use of proscribed means

By its August 9 letter, Laborers threatened to engage in picketing and work stoppages if the Employer assigned the service work of operating skid steers and miniexcavators to employees represented by Operating Engineers. Such a threat establishes reasonable cause to believe that Laborers used means proscribed by Section 8(b)(4)(D) to enforce its claim to the work in dispute. *Electrical Workers, Local 48 (Kinder Morgan Terminals)*, 357 NLRB 2217, 2218 (2011).

We find no merit in Operating Engineers' contention that Laborers' threat to picket and stop work was a sham and the product of collusion between the Employer and Laborers to invoke Section 10(k) and to avoid Operating Engineers' contractual damages provision. The Board has consistently rejected this argument where, like here, there is 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 (R&D Thiel)*, 345 NLRB 1137, 1140 (2005) (finding insufficient evidence of collusion where union told the employer's president that it wanted him to "file a 10(k)"); *Plumbers Local 562 (Grossman Contracting)*, 329 NLRB 516, 520 (1999). That the Employer provided Laborers with Operating Engineers' grievances is not affirmative evidence of collusion. See *Electrical Workers, Local 196 (Aldridge Electric)*, 358 NLRB 737, 739 (2012) (evidence of cooperation between employer and union during 10(k) proceeding does not demonstrate that threat was product of collusion). Nor is the evidence that Laborers provided examples of other contractors employing its members affirmative evidence of collusion. See *R&D Thiel*, above at 1139 (finding union's request to employer to sign an agreement to use its members for the job to be a claim for work).

3. No voluntary method for adjustment of dispute

The parties stipulated, and we find, that there is no agreed-upon method for voluntary adjustment of this dispute to which all parties are bound.

Because we find that all three prerequisites for the Board's determination of a jurisdictional dispute are established, we deny Operating Engineers' motion to quash the notice of hearing and find that this dispute is properly before the Board for resolution.

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 (Co-*

[10] Operating Engineers, in its posthearing brief, acknowledged that employees it represents have never performed the disputed work exclusively. Nevertheless, it contends that exclusive performance is not a prerequisite to a work preservation defense. However, in determining whether there is a jurisdictional dispute or a contractual dispute between an employer and a union, the Board considers exclusivity as an important factor. See *Recon Refractory & Construction v. NLRB*, 424 F.3d 980, 990–991 (9th Cir. 2005), denying petition for review of Board order quashing notice of hearing in 339 NLRB 825 (2003) (contractual dispute over the work traditionally performed by one union assigned away to another union that had *not* previously performed it); *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320, 1323 (1961) (declining to apply Sec. 10(k) where employer unilaterally created the dispute by transferring the work away from the *only* group previously claiming and performing it under a collective-bargaining agreement). The Board, in fact, did not quash the notice of hearing where an employer, that initially used two unions to perform the work, gave the work to one union. See *Operating Engineers Local 478 (Deluca/Lombardo)*, 314 NLRB 589 (1994); *District No. 10, IAM (Ken Thelen)*, 264 NLRB 1356 (1982). In any event, in the above-cited cases where the Board found a valid work preservation claim, employers made the assignment in violation of a contractual provision prohibiting such assignment of the disputed work. As Operating Engineers has failed to present any current collective-bargaining agreement to which the Employer is bound, and which would therefore mandate assignment of the disputed work to Operating Engineers, we reject Operating Engineers' work preservation defense.

[11] We note that the Employer's decision to assign the disputed work exclusively to Laborers was prompted by information supplied by Laborers' Field Representative Phillips to the Employer showing that its competitors were using Laborers to perform the disputed work. Phillips wanted to stop his members from being harassed by Operating Engineers' representatives for performing work covered by Laborers' collective-bargaining agreement.

lumbia Broadcasting), 364 U.S. 573, 577–579 (1961). The Board's determination in a jurisdictional dispute is "an act of judgment based on common sense and experience," reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

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

1. Board certifications and collective-bargaining agreements

The parties stipulated that there are no Board orders or certifications determining the collective-bargaining representative of the employees performing the work in dispute. Both Laborers and Operating Engineers, however, assert that their respective collective-bargaining agreements with the Employer entitle them to the disputed work.

Article I of the Laborers' Ohio Statewide Gas Distribution Agreement includes a jurisdictional clause that covers "all gas distribution work performed in the State of Ohio." It specifically describes the covered work as including "the digging and trimming of trenches and ditches for utility lines, . . . the bending of pipe, . . . the distribution of pipe and skids and placing of said skids and pipe over the trench; the cleaning, wrapping and doping of the pipe . . . ; work in connection with the lowering of the pipe and the removal of the skids . . . [and] the backfilling of trenches after the pipe has been laid."

Article I of the Operating Engineers' 2010–2013 Distribution and Maintenance Agreement (the agreement in effect at the time of the assignment) includes a jurisdictional clause that covers "all distribution pipeline construction and maintenance work. . . ." It specifically describes the covered work as "construction, installation, treating, repair, and/or reconditioning of distribution pipeline . . . which transport natural gas, liquid gas or vapors, . . . including portions of the work within private property boundaries or public streets, from the first metering station or connection at the main transmission line . . . to the Consumer or User." The agreement includes a wage rates and classifications section which classifies backhoe/excavator (all sizes) operators as group A operating engineers and skid steer loaders as group B operating engineers. However, article II clarifies that the "fact that certain classifications and rates are established does not mean that the Employer must employ workmen for any one or all such classifications, or must man all items of equipment on the job."

"In interpreting collective-bargaining agreements, the specific is favored over the general." *Laborers Local 1184 (Golden State Boring & Pipejacking)*, 337 NLRB 157, 159 (2001), quoting *Steelworkers Local 392 (BP Minerals)*, 293 NLRB 913, 914–915 (1989). Laborers argue that its collective-bargaining agreement favors an award to Laborers-represented employees because, unlike the more general language in the Operating Engineers' agreement, its agreement contains a specific description covering the work in dispute. Operating Engineers, citing *Laborers Local 265 (AMS Construction)*, 356 NLRB 306 (2010), argues that the factor of collective-bargaining agreements weighs in its favor because its contract covers both the disputed work and specifically identifies the construction equipment at issue, i.e., skid steers and miniexcavators. We find that Laborers and Operating Engineers both have language in their agreements arguably covering the work in dispute. As the record shows, Laborers' collective-bargaining agreement is more specific in its description of the work at issue, whereas Operating Engineers' collective-bargaining agreement, while referencing specific classifications in its wage scales, contains a more general description of pipeline work. Under these circumstances, we do not find that the factor of collective-bargaining agreements favors awarding the work to employees represented by either union. See generally *Laborers Local 1184 (High Light Electric)*, 355 NLRB 167, 169 (2010).[12]

2. Employer preference and current assignment

The factor of employer preference is generally entitled to substantial weight. See *Iron Workers Local 1 (Goebel Forming)*, 340 NLRB 1158, 1163 (2003). Area Manager Maxwell and Area Supervisor Eversole testified that it is the Employer's preference for Laborers-represented employees to perform the work in dispute,[13] and those employees are currently performing this work. *Laborers Local 265 (AMS Construction)*, above, slip op. at 5 (weighing employer's stated preference as well as em-

[12] We also reject Laborers' claim that the factor of collective-bargaining agreements favors awarding the disputed work to Laborers because Operating Engineers' 2010–2013 agreement expired. The Employer admitted that it made the assignment of the work in dispute on May 21, when it was bound to the 2010–2013 Distribution and Maintenance Agreement. "[W]e look to the state of the Employer's contractual obligations at the time it made the assignment of work." *Carpenters Northeast Ohio Council Local 1929 (Luedtke Engineering)*, 307 NLRB 1323, 1325 (1992).

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

ployer's assignment of work in dispute). Further, as discussed below, the Employer's preference is supported by considerations of economy, efficiency, and skill, all of which are legitimate, traditional factors relevant to awarding work in dispute. Compare e.g., *Graphic Communications Workers Local 508M (Jos. Berning Printing)*, 331 NLRB 846, 848 (2000) (declining to assign substantial weight to employer preference where the employer's preference is based on preference for "a stronger union" rather than traditional factors). Accordingly, we find that this factor favors an award of the disputed work to employees represented by Laborers.

3. Past practice

Since the Employer began working on the Project in 2001, its practice has been to use both employees represented by Laborers and employees represented by Operating Engineers to perform the disputed work. As the Employer's practice has never been to assign the work exclusively to either group of employees, the Employer's past practice does not favor an exclusive award of the disputed work to employees represented by either Union.

4. Area and industry practice

Both Laborers and Operating Engineers presented letters of assignment from contractors, indicating that employees they represent have performed skid steer and excavator work for these contractors at various jobsites in Ohio. The parties stipulated at the hearing that Operating Engineers Local 18 received 1705 referrals for excavators and 186 referrals for skid steers in 2013, 1567 and 147 in 2012, 1512 and 152 in 2011, 1482 and 99 in 2010, and 1241 and 99 in 2009. According to Operating Engineers' President Richard Dalton, these referrals reflected dispatch requests by contractors for operating engineers with the ability to operate skid steers or miniexcavators. However, neither the letters of assignment submitted by both Unions nor the referrals relied on by Operating Engineers (which often did not distinguish between excavators and miniexcavators) describe with meaningful specificity the work involved or the circumstances surrounding the assignment of an employee to perform it. This evidence is therefore inconclusive. See *Laborers Local 860 (Ronyak Paving, Inc.)*, 360 NLRB No. 40, slip op. at 5–6 (2014).

Freind testified that in the Eastern region where the Employer performs most of its service line work, the Employer has always used a two-person crew consisting of one laborer and one pipefitter. Maxwell testified that in the 13 states for which he is responsible as the Employer's area manager, employers use laborers to operate skid steers and miniexcavators on service line work. Phillips testified that other employers performing the service work for Duke Energy (the Employer's competitors) always use laborers to perform the disputed work.

In contrast, Operating Engineers offered limited testimony as to any area or industry practice of using employees it represents to perform work of the type that is in dispute. Dalton testified that operating engineers have been operating skid steers and miniexcavators for contractors who are signatory to the Distribution and Maintenance Agreement since the 1970s. Although skid steers and miniexcavators are used both in gas main and service line work, Dalton did not specify for which type of work the two pieces of equipment were used. Likewise, Philips testified that he observed another employer use an operating engineer to operate a miniexcavator without specifying whether the work was for the service lines or the main lines. Based on all of the above, we find that area and industry practice favors an award of the work in dispute to employees represented by Laborers.

5. Relative skills and training

The Employer and Laborers presented testimony that employees represented by Laborers possess the requisite skills and training to perform the disputed work and that they are experienced in doing so. Specifically, both Maxwell and Eversole testified that employees represented by Laborers have demonstrated that they possess the necessary skills and expertise to operate skid steers and miniexcavators on the Employer's service work. Phillips testified that he has received no complaints from the Employer about the work performed by Laborers-represented employees on skid steers and miniexcavators. Maxwell testified that Laborers-represented employees have received on-the-job training from the Employer as well as 40-hour specialized training for handling pipes from Duke Energy. Phillips testified that the Ohio Laborers' training center offers a 6-hour skid steer class.

Operating Engineers also presented testimony that employees it represents possess the requisite skills and training to perform the disputed work. Donald Black, the administrative manager of the Ohio Operating Engineers Apprenticeship Training Fund, testified that Operating Engineers has four training sites in Ohio. At these sites, Operating Engineers offers skid steer and excavator classes that include written examinations and practical skills tests, as well as specialized training for excavation in the pipeline.[14] The record also establishes that employees represented by Operating Engineers have been performing the work for a substantial period of time. The Em-

[14] Operation of miniexcavators is taught as part of a broader excavator class.

ployer provided testimony that it considered some of the disputed work performed by these employees unsatisfactory. However, the Employer continued to make assignments to employees represented by Operating Engineers until deciding, for reasons unrelated to their skills and performance, to assign the work in dispute exclusively to employees represented by Laborers. Accordingly, we find that this factor does not favor an assignment of the work to either group of employees.[15]

6. Economy and efficiency of operations

Maxwell testified that it is more economical and efficient to assign the disputed work to employees represented by Laborers because these employees perform other work in addition to the disputed work. Both Maxwell and Freind testified that Laborers-represented employees spend only 2–3 hours per day performing the disputed work and the remainder of a workday performing other duties that Operating Engineers-represented employees did not perform and were not trained to perform. Maxwell also indicated that Operating Engineers-represented employees were paid for a full day but, after digging a ditch, "spent a large portion of their day standing around" before having to backfill the ditch.[16] Accordingly, we find that the factor of economy and efficiency of operations favors awarding the disputed work to the more versatile employees, the employees represented by Laborers.[17] See, e.g., *Laborers (Eshbach Bros., LP)*, 344 NLRB 201, 204 (2005); *Seafarers International Union (Luedtke Engineering)*, 355 NLRB 302, 305 (2010) (weighing interchangeable job skills and ability to use smaller crews in awarding work); *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1141 (2005) (one group of employees sitting idle while another group works); *Laborers Local 113 (Michels Pipeline Construction)*, 338 NLRB 480, 484 (2002) ("[h]aving fewer employees accomplishing the same task . . . reduces costs in time, money, and personal safety).

CONCLUSION

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, area and industry 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.

DETERMINATION OF DISPUTE

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

Employees of Henkels & McCoy, Inc., represented by Laborers International Union of North America, Local 265, are entitled to perform the service line work utilizing a miniexcavator (defined as a John Deere 35D or similar equipment) and skid steers by the Employer's service line crews working on the Duke Energy project in the Cincinnati, Ohio area.

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[15] Contrary to Operating Engineers' assertion, *Laborers (Henkels & McCoy, Inc.),* 336 NLRB 1044, 1045 (2001), does not warrant a different result. There, 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 formal training but instead expected employees to learn "on the job." Here, not only do the employees represented by Laborers receive some formal training, they also have been performing the disputed work to the Employer's satisfaction.

[16] Operating Engineers contends that the hearing officer, by sustaining an objection to its question about the "intent and purpose" of the composite crew clause in the collective-bargaining agreement, committed prejudicial error by denying it an opportunity to develop testimony regarding the economy and efficiency of operations factor. We find no prejudicial error. The composite crew clause is in evidence, and Operating Engineers elicited testimony from Maxwell that two to three operating engineers could perform the other work that Laborers-represented employees performed in addition to the disputed work. In any event, although Operating Engineers may be correct that the Employer could order the employees represented by Operating Engineers to perform other work under the composite crew clause, the evidence shows that only a few Operating Engineers-represented employees possess the training to perform such work. In any event, Maxwell testified that the issue is not so much that operating engineers "can't" do the work as that they "won't" do the work; his supervisors have told him that operators are not interested in doing anything other than operating the equipment.

[17] Operating Engineers argues that assigning the work in dispute to employees represented by Laborers would not be economical because doing so would subject the Employer to damages resulting from its breach of the work preservation clause in the 2013–2017 Distribution and Maintenance Agreement. We reject this argument because: (1) Operating Engineers has not shown that the Employer is bound to the 2013–2017 Distribution and Maintenance Agreement, (2) pursuing a pay-in-lieu grievance after the Board has awarded the work in dispute violates Sec. 8(b)(4)(ii)(D), see *Machinists Lodge 160 (SSA Marine, Inc.)*, 360 NLRB No. 64, slip op. at 3 (2014), and cases cited therein, and (3) when analyzing economy and efficiency in a 10(k) dispute, the Board does not consider whether a successful grievance would subject an employer to financial liability for breach of contract, see *Laborers' Local 860 (McNally/Kiewit)*, 359 NLRB 724, 729 fn. 7 (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. Both of those cases are factually distinguishable.