International Union of Operating Engineers, Local 18 *and* Nerone & Sons, Inc. and R.G. Smith Company, Inc. and Laborers' International Union of North America, Local 310. Cases 08–CD–135243, 08–CD–143412, 08–CD–135244, and 08–CD–143415

October 1, 2015

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

This is a consolidated jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Employer Nerone & Sons (Nerone) filed a charge on August 21, 2014,[1] as amended on October 29, 2014, in Case 08–CD–135243. Nerone filed a second charge on August 21, 2014, as amended October 29, 2014, in Case 08–CD–135244. Employer R.G. Smith Company (R.G. Smith) filed charges on December 23, 2014, in Cases 08–CD–143412 and 08–CD–143415. In Cases 08–CD–143412 and 08–CD–135243, the Employers allege that International Union of Operating Engineers, Local 18 (Operating Engineers) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employers to assign certain work to employees represented by Operating Engineers rather than to employees represented by Laborers' International Union of North America, Local 310 (Laborers). In Cases 08–CD–135244 and 08–CD–143415, the Employers allege that Laborers violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing or requiring the Employers to assign certain work to employees represented by Laborers rather than to employees represented by Operating Engineers. An order consolidating cases and notice of hearing subsequently issued and a hearing was held on February 9, 2015, and March 27, 2015, before Hearing Officer Aaron B. Sukert.[2] Thereafter, the Employers, Laborers, and Operating Engineers filed posthearing briefs.[3] Operating Engineers also filed a motion to quash the order consolidating cases and notice of 10(k) hearing, which was deferred by the hearing officer to the Board for resolution.[4]

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

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, we make the following findings.

I. JURISDICTION

The parties stipulated that, in the 12-month period prior to the hearing, Employers Nerone and R.G. Smith each purchased and received materials valued in excess of $50,000 directly from points located outside the State of Ohio. The parties further stipulated, and we find, that the Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employers in this case are construction contractors performing work in various locales in northeastern Ohio. Nerone's work includes excavation, water treat-

[1] All dates are in 2014 unless otherwise indicated.

[2] In three recent, related cases, *Laborers' Local 894 (Donley's Inc.) (Donley's I)*, 360 NLRB No. 20 (2014); *Operating Engineers, Local 18 (Donley's II)*, 360 NLRB No. 113 (2014); and *Laborers' Local 310 (KMU Trucking & Excavating) (Donley's III)*, 361 NLRB No. 37 (2014), the Board found reasonable cause to believe that Sec. 8(b)(4)(D) of the Act had been violated with respect to Operating Engineers Local 18 and various Laborers' local unions. *Donley's I* involved Laborers' Locals 310 and 894; *Donley's II* and *Donley's III* involved Laborers' Local 310. Pursuant to a motion filed by the Employers and Laborers, the hearing officer incorporated the records in those cases into the instant proceedings.

[3] Laborers' posthearing brief incorporates the Employers' posthearing brief and adopts the Employers' arguments as its own.

[4] In its motion to quash, Operating Engineers contends that it was denied procedural and substantive due process because the statement of issues set forth in the January 28, 2015 notice of hearing (which Operating Engineers incorrectly refers to as having issued on February 12, 2015) includes whether the Board should grant an area-wide award covering "similar work being done by all employers." Operating Engineers argues that the references to "all employers" and "similar work" are not sufficiently specific to allow it to prepare for the hearing because the underlying charge specifies forklift and skid steer work performed at only two jobsites. Operating Engineers argues that under *Ross Stores v. NLRB*, 235 F.3d 669, 677 (D.C. Cir. 2001), Sec. 10(b) of the Act provides that the Board may only investigate and prosecute conduct encompassed within a charge.

We note that Operating Engineers presented similar arguments in its Special Appeal to the Board to postpone the hearing. The Board rejected Operating Engineers' Special Appeal on the merits. Moreover, the Board addressed and rejected similar arguments by Operating Engineers in *Donley's II*, supra, 360 NLRB No. 113 slip op at 1, fn 5. In short, while the Board has found that, in certain instances, generalized language in an unfair labor practice charge cannot support a particularized complaint allegation under Sec. 8(b), the Board has not extended this rationale to 10(k) cases. In any event, the Board has rejected arguments that a notice of hearing that includes jobsites not listed in the charge is invalid. See *Bay Counties Carpenters (Northern California Drywall Contractors Assn.)*, 265 NLRB 646, 647–648 (1982).

ment, sewer and water work, and certain building trades work. R.G. Smith's work involves steel and sheet metal work, mill maintenance, refractory work, piping, and roofing work. Both Employers have employed employees represented by Operating Engineers and Laborers and are members of the Construction Employer's Association of Greater Cleveland (CEA), a multiemployer bargaining association for construction companies operating in the Cleveland, Ohio area. CEA has negotiated the collective-bargaining agreements between the Employers and the Unions for many years. Those collective-bargaining agreements include work performed in Cuyahoga County where the jobsites at issue in these cases are located and have effective terms running from 2012 to 2015.[5]

The work of both Employers includes the operation of forklifts and skid steers (a small front-end loader) that both Employers have traditionally assigned to employees represented by Laborers. Nerone President Thomas Nerone and Field Superintendent Michael Griffin both testified that employees represented by Laborers operate forklifts and skid steers and that an employee represented by Operating Engineers may have operated such equipment on the very rare occasions where there was no other work for him. Griffin further testified that he was aware that Nerone assigned skid steer work to employees represented by Operating Engineers once or twice during the previous 20 years. R.G. Smith CEO Geoffrey Nicely and Industrial Division Manager Michael Black similarly testified that employees represented by Laborers typically ran the forklifts and skid steers, with employees represented by Operating Engineers doing so only when there was no other work for them to perform.[6] The testimony of the Employers' managers was corroborated by Laborers' representatives Michael Kearney and Kevin Clegg, who testified that they observed employees represented by Laborers performing forklift and skid steer work on all of their jobsites for at least 20 years (Kearney) and 16 years (Clegg).[7] Operating Engineers offered no witness to contradict this testimony.

On August 4, Operating Engineers faxed a grievance to Nerone alleging that, since July 30, Nerone had violated the CEA Agreement-Local 18 by assigning "bobcat and/or skid steer loader with any and all attachments" at its Hilton Hotel project in downtown Cleveland to someone other than an Operating Engineer-represented employee. Nerone had been performing plumbing work at that project using employees represented by Laborers to operate the skid steers. The grievance requested that Nerone "pay the first qualified [Operating Engineers'] applicant the applicable wages and fringe benefits from the first day of violation until project completion." In response, on August 18, Tom Nerone wrote Laborers, informing it of the grievance, and stating that, as a result, Nerone might be compelled to assign skid steer work to employees represented by Operating Engineers. Laborers responded the same day with a letter stating that Laborers "will take any action to protect the work jurisdiction of our members, including, striking the Downtown Hilton Hotel job, and any and all other jobs on which Nerone & Sons Inc. assigns the operation of skid steer to members of [Operating Engineers]."

Similarly, R.G. Smith had been utilizing employees represented by Laborers on its Foltz project in Strongsville Ohio. On November 6, Operating Engineers filed a pay-in-lieu grievance alleging that beginning November 3, R.G. Smith assigned someone other than an employee represented by Operating Engineers to perform forklift work at the Foltz project. In response, on November 19, Nicely wrote to Laborers, informing them of the grievance, and explaining that there was a possibility that arbitration of the grievance could result in assignment of forklift work to Operating Engineers. On that same date, Laborers responded by letter stating that "we will take any action to protect the work jurisdiction of our members, including, striking the job site located at 15900 Foltz Industrial Parkway, Strongsville Ohio, and any and all other jobs on which R.G. Smith Co., Inc. assigns the operation of skid-steer to members of [Operating Engineers]." Nicely testified that he attempted to arrange a meeting with representatives of Operating Engineers and Laborers to resolve the dispute but Operating Engineers stated that it was not interested in meeting.

[5] The term of the most recent CEA Agreement—Local 18 runs from May 1, 2012—April 30, 2015, and the CEA Agreement—Local 310 runs from 2012 through 2015. R.G. Smith and Operating Engineers are also signatories to letters of agreement with the Associated General Contractors of Ohio, which cover all areas of Ohio except those areas covered by the CEA Agreement—Local 18. Although R.G. Smith has been a party to several letters of acceptance to the AGC agreement, most recently on November 15, 2013, neither of the projects in this case is within the geographic jurisdiction of that agreement.

[6] Prior to the present dispute, Nicely recalled one other instance when Operating Engineers claimed forklift work, but that involved a jobsite outside the jurisdiction of Laborers Local 310. Operating Engineers filed a grievance over the work, which was settled by an agreement that R.G. Smith make a charitable contribution and "use [its] best efforts to comply with assignments in the future."

[7] Kearney's and Clegg's jurisdiction as field representatives covered the areas in dispute in this case, discussed infra. Kearney's jurisdiction included R.G. Smith's Strongsville site, and Clegg's jurisdiction included downtown Cleveland where Nerone's Hilton Hotel site was located.

B. Work in Dispute

The work in dispute in Cases 08–CD–143412 and 08–CD–143415 (Foltz) is the operation of forklifts and/or skid steers used at the Foltz Industrial Parkway construction site in Strongsville Ohio. The work in dispute in Cases 08–CD–135243 and 08–CD–135244 (Hilton) is the operation of forklifts, bobcats, and/or skid steer loaders with any and all attachments used at the Hilton Hotel construction site.[8]

C. Contentions of the Parties

The Employers and Laborers contend that there are competing claims for the work in dispute, that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated by the threats to picket and strike over the assignment of forklift, bobcat, and skid steer work at the Foltz and Hilton projects,[9] and the parties have not agreed on a method for voluntary adjustment of the dispute. The Employers and Laborers contend that the work in dispute should be awarded to employees represented by Laborers based on the factors of past practice and employer preference, area and industry practice, relative skills and training, and economy and efficiency of operations. Finally, the Employers and Laborers argue that the broad areawide award granted by the Board in *Donley's II* and *Donley's III* covers the dispute in this case, as those decisions awarded to Laborers'-represented employees forklift, bobcat, and skid steer work on jobsites where Laborers' and Operating Engineers' jurisdictions overlap.

Operating Engineers argues that the notice of hearing should be quashed because it has not claimed the work at issue.[10] Operating Engineers explains that it did not seek a change in assignment of the work but instead sought damages to remedy the Employers' violation of the work preservation clause in the CEA Agreement. As such, the current dispute is not appropriate for resolution under Section 10(k). Operating Engineers further argues that Laborers' threat to strike was the product of a "sham jurisdictional dispute" and collusion between Laborers and the Employers. Operating Engineers argues that should the Board reach the merits of the dispute, the 10(k) factors of collective-bargaining agreements, area and industry practice, economy and efficiency of operations, employer preference, and relative skills and training support an award of the work to employees represented by Operating Engineers. Finally, Operating Engineers argues that a broad award is not appropriate and the Board should limit its award only to the jobsites that were the subject of its grievances.

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 cause to believe that there are competing claims for the disputed work between rival groups of employees, and that a party has used proscribed means to enforce its claim to that work. Additionally, there must be a finding that the parties have not agreed on a method of voluntary adjustment of the dispute. Id. On this record, we find that this standard has been met.

1. Competing claims for work

We find 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 18 and November 9 letters to each Employer objecting to the assignment of forklift and skid steer work to Operating Engineers-represented employees. Furthermore, pursuant to well-established authority, the performance of this work by Laborers-represented employees evidences a claim to the work at issue. See *Sheet Metal Workers Local 54 (Goodyear Tire & Rubber Co.)*, 203 NLRB 74, 76 (1973); *Operating Engineers Local 513 (Thomas Industrial Coatings)*, 345 NLRB 990, 992 fn. 6 (2005) (same) citing *Laborers Local 79 (DNA Contracting)*, 338 NLRB 997, 998 fn. 6 (2003) (same).

We also find that Operating Engineers has claimed the disputed work by virtue of its pay-in-lieu grievances against both Employers alleging contract violations emanating from the Employers' assignment of forklift and/or skid steer work to employees represented by Laborers. The Board has long found that such pay-in-lieu grievances are essentially demands for disputed work. *Donley's III,* supra, 361 NLRB No. 37, slip op at 3; *Donley's II*, supra, 360 NLRB No. 113, slip op. at 4, citing *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 3 (2010); *Laborers (Eshbach Bros., LP)*, 344 NLRB 201, 202 (2005).

[8] A bobcat is a type of skid steer. Throughout the record, witnesses used the terms "bobcat," "skid steer," and "bobcat skid steer" interchangeably.

[9] The Employers and Laborers also cite threats to strike by Operating Engineers at other Cleveland-area jobsites over forklift and skid steer work, as set forth in *Donley's I* and *Donley's II.*

[10] Operating Engineers also argues that while the unfair labor practice charges filed by the Employers includes claims to operate both forklifts and skid steers at the Foltz and Hilton projects, Operating Engineers did not claim forklift work at the Hilton project and did not claim skid steer work at the Foltz project. We note, however, that the notice of hearing lists the work claimed at both sites as "forklifts and/or skid steers."

Additionally, we reject Operating Engineers' argument that its pay-in-lieu grievances against the Employers do not constitute claims to disputed work but are instead work preservation claims. The record shows that Laborers-represented employees have been performing forklift and/or skid steer work at both projects and the Employers have consistently assigned the type of work in dispute here to employees represented by Laborers. Thus, the grievances do not seek work preservation but instead seek work acquisition. The Board has found that these types of claims are appropriately resolved through a 10(k) proceeding. *Donley's III*, supra, 361 NLRB No. 37, slip op. at 3; *Electrical Workers Local 48 (Kinder Morgan Terminals)*, 357 NLRB No. 182, slip op. at 3 (2011), and cases cited therein.

2. Use of proscribed means

We find reasonable cause to believe that Laborers used proscribed means to enforce its claims to the work in dispute. As noted above, Laborers sent letters to R.G. Smith and Nerone stating that members of Laborers would picket and strike any projects where forklift and/or skid steer work was assigned to employees other than those represented by Laborers. These statements constitute threats to strike over the assignments of forklift and skid steer work, and the Board has long considered those types of threats to be a proscribed means of enforcing claims to disputed work. *Operating Engineers Local 150 (Patten Industries)*, 348 NLRB 672, 674 (2006).

We reject Operating Engineers' argument that the Employers colluded with Laborers to create a sham jurisdictional dispute. Where there is no affirmative evidence that a threat of proscribed action is a sham or product of collusion, the Board will reject this argument. *R&D Thiel*, supra, 345 NLRB at 1140. Here, there is no evidence that the Employers or Laborers colluded to issue a sham threat to picket or strike.

3. No voluntary method for adjustment of dispute

We also find no agreed-upon method for the voluntary adjustment of the dispute to which all parties are bound. The Employers and Laborers agree that there is no voluntary adjustment procedure in place between the parties to resolve the current work dispute. Operating Engineers would not so stipulate but proffered no evidence or argument to the contrary.

Based on the foregoing, we find that there are competing claims for the work in dispute, reasonable cause to believe that Section 8(b)(4)(D) has been violated, and no agreed-upon method for the voluntary adjustment of the dispute. We accordingly find that the dispute is properly before the Board for determination, and we deny Operating Engineers' motion to quash the notice of hearing.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577–579 (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, 1410–1411 (1962).

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

1. Certifications and collective-bargaining agreements

As set forth above, as members of CEA, the Employers are parties to multiemployer collective-bargaining agreements with Operating Engineers and Laborers. Operating Engineers' work jurisdiction is set forth in Article II, paragraph 10 of the CEA Agreement—Local 18 and provides that:

> In accordance with the terms of this Agreement, the Employer shall employ Operating Engineers for the erection, operation, assembly and disassembly, and maintenance and repair of the following construction equipment regardless of motive power: . . . Forklifts, Skidsteers, . . .

The relevant portion of the Laborers' collective-bargaining agreement is set forth in Article 1, Section 7, CEA Agreement—Laborers Local 301 and lists specific construction tasks, such as excavating and foundations, shafts and tunnels, and landscaping, as well as many others. The language regarding many of these tasks specifically covers the operation of forklifts and skid steers, stating the following:

> The operation of forklifts, all-terrain forklifts, skid steer loaders, and all or other machines of similar or like characteristics, whether driven by gas, diesel or electric power when used in the performance of the aforementioned jurisdiction shall be the work of the laborers.
>
> We find that the language in both contracts covers the work in dispute.

Therefore, the factors of certifications and collective-bargaining agreements do not favor an award to either group of employees.[11]

[11] The parties stipulated that there are no Board certifications concerning the employees involved in the instant dispute.

2. Employer preference and past practice

As set forth above, the Employers' representatives testified that they have assigned the disputed work to their Laborers-represented employees for decades. During these periods, representatives for both Employers testified that Laborers-represented employees consistently performed the disputed work, with employees represented by Operating Engineers performing such work on extremely rare occasions where there was no other work to do or, in the case of R.G. Smith, when the jobsite fell outside Laborers' jurisdiction. Representatives of both Employers testified that, consistent with this past and current practice, they prefer to continue assigning the disputed forklift and skid steer work to employees represented by Laborers. We find, therefore, that the factor of employer preference and past practice weighs in favor of awarding the work to employees represented by Laborers.[12]

3. Area and industry practice

The Employers and Laborers assert that area and industry practice support an award of the disputed work to Laborers-represented employees. In the previous related proceedings, the Board relied upon testimony of Tim Linville, executive vice president of the CEA, who stated that Laborers-represented employees consistently perform forklift and skid steer work. See *Donley's III,* supra, 361 NLRB No. 37, slip op. at 5. Similarly, in *Donley's II*, Ed Deaton testified that, as a field representative and Business Manager of Laborers for the previous 10 years, he has seen Laborers-represented employees performing the disputed work on the jobsites that he visited. See *Donley's* II, supra, 360 NLRB No. 113, slip op at 6. In the instant case, Michael Kearney, Laborers' field representative, testified that in his 16 years in the field, he has seen employees represented by Laborers operating forklifts and skid steers at the jobsites he has visited.

Operating Engineers argues that this factor favors the employees that it represents by citing letters of assignment listing forklift and skid steer operations at various jobsites. As the Board has previously found, however, these letters are inconclusive because they do not describe the actual work involved or the facts and circumstances surrounding the work. See *Donley's I*, supra, 360 NLRB No. 20, slip op. at 6. Operating Engineers also cites testimony by representatives of Nerone and R.G. Smith that they have utilized employees represented by Operating Engineers to perform forklift and skid steer work. The cited testimony is consistent with other testimony by these managers that the Employers have, on rare occasion, assigned the disputed work to employees represented by Operating Engineers, and does not contradict the Employers' testimony that the vast majority of the disputed work has been performed by employees represented by Laborers.

Based on the foregoing evidence, we find that this factor favors an award of the work in dispute to employees represented by Laborers.

4. Relative skills and training

Both Unions introduced evidence showing that they provide training in the operation of forklifts and skid steers and that the employees they represent are certified to operate this equipment. Additionally, representatives of the Employers testified that they provide training in the operation of forklifts and skid steers to their Laborers-represented employees. We therefore find that this factor does not favor an award of the disputed work to either group of employees.

5. Economy and efficiency of operations

Representatives of the Employers testified that it is more efficient and economical to assign the operation of forklifts and skid steers to employees represented by Laborers because the disputed work is required for only small segments of time sporadically throughout the day. Employees represented by Laborers use forklifts and skid steers as "tools of the trade" to move materials and then return to their regular duties. The disputed work constitutes only a small portion of employees' daily work with the remainder of the employees' work time spent performing tasks that employees represented by Operating Engineers are not qualified to perform. As such, if the Employers were to use employees represented by Operating Engineers for the forklift or skid steer work, there would be a contingent of employees standing idle throughout the day and the Employers would still have to employ Laborers-represented employees to perform the majority of the work on the jobsites. Therefore, it is more economical to assign forklift and skid steer work to

[12] Operating Engineers argues that the Board should treat this factor with skepticism because the Employers' preference is not "representative of a free and unencumbered choice," but is instead motivated by the Employers' desire to avoid damages under the work preservation clauses contained in both the CEA and AGC agreements. We reject this argument and note that the case cited by Operating Engineers, *ILWU Local 50 (Brady Hamilton Stevedore Co.)*, 223 NLRB 1034, 1037 (1976), reconsideration granted and decision rescinded on other grounds 244 NLRB 275 (1979), is readily distinguishable. There, the Board declined to rely on an employer's stated preference because that preference changed upon initiation of a work action. In the present cases, the evidence is clear that both Employers have consistently assigned the disputed work to employees represented by Laborers and have stated their preference to continue to use Laborers-represented employees to perform the disputed work.

employees represented by Laborers who can perform other work throughout the day, thereby minimizing the potential that the Employers would be required to pay employees for idle time. See *Seafarers District NMU (Luedtke Engineering Co.)*, 355 NLRB 302, 305 (2010); *Eshbach Bros.*, supra, 344 NLRB at 204. Under these circumstances, the factor of economy and efficiency of operations favors the award of the disputed work to Laborers-represented employees.[13]

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 based on the factors of employer preference and past practice, 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.

Scope of Award

The Employers and Laborers request a broad areawide award, covering the geographic jurisdiction of Operating Engineers. In support, they argue that the evidence in prior Board cases (*Donley's I, Donley's II,* and *Donley's III*) shows that Operating Engineers has a proclivity to violate Section 8(b)(4)(D) and that the dispute here is likely to recur.

In *Donley's II* and *Donley's III*, the Board granted broad areawide awards to employees represented by Laborers for work of the kind in dispute. See *Donley's II*, supra, 360 NLRB slip op. at 7; *Donley's III*, supra, 361 NLRB slip. op. at 6. Those awards cover the area where the jurisdictions of Laborers Local 310 and Operating Engineers Local 18 overlap, which encompasses the present disputes in Cuyahoga County, Ohio. Our award in the instant cases restates and applies that areawide order.

DETERMINATION OF DISPUTE

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

Employees of Nerone & Sons, Inc. and R.G. Smith Company, Inc., who are represented by Laborers' International Union of North America, Local 310, are entitled to perform forklift and skid steer work in the area where their employers operate and the jurisdictions of Laborers International Union of North America, Local 310 and the International Union of Operating Engineers, Local 18 overlap.

Dated, Washington, D.C. October 1, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[13] Operating Engineers argues that an award of the disputed work to Laborers-represented employees would result in the Employers breaching the work preservation clauses contained in the CEA Agreement, thereby exposing the Employers to liability for damages. As a result, Operating Engineers argues that assignment of the work to employees represented by Laborers would require the Employers to incur two sets of labor costs. We reject this argument and note that Operating Engineers' filing of pay-in-lieu grievances after the Board ordered the work in dispute to Laborers violates Sec. 8(b)(4)(ii)(D). *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273, 274 (1992), enfd. 46 F.3d 1143 (9th Cir. 1995).