

**International Union of Operating Engineers, Local 513 and Thomas Industrial Coatings, Inc. and Painters District Council No. 2.** Case 14–CD–1078

September 29, 2005

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

The charge in this 10(k) proceeding was filed on June 13, 2005,<sup>1</sup> by Thomas Industrial Coatings, Inc. (the Employer), alleging that International Union of Operating Engineers, Local 513 (Operating Engineers), 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 represented by the Operating Engineers rather than to the Employer's own employees, who are represented by Painters District Council No. 2 (Painters). The hearing was held on June 28 before Hearing Officer Paula Givens.

The National Labor Relations Board affirms the hearing officer's rulings,<sup>2</sup> finding them free from prejudicial error. On the entire record, the Board makes the following findings

I. JURISDICTION

The Employer, a corporation with an office and principal place of business in Pevely, Missouri, is engaged in business as a commercial and industrial painting contractor. During the 12-month period prior to the hearing, the Employer performed services valued in excess of \$50,000 in States other than Missouri. The parties have 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 Operating Engineers is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> All dates are in 2005 unless otherwise specified.

<sup>2</sup> The Operating Engineers asserts that the hearing officer erred by admitting into evidence, after the parties' closing arguments and over the objection of its counsel, documents from a recent unfair labor practice charge involving the parties to this case. We find no merit in that assertion. One of the documents was a copy of a letter that was already in the record. The rest were official Board documents, of which the Board is entitled to take administrative notice. See *Painters Local 1447 (Hargrove)*, 306 NLRB 97 fn. 1 (1992); *Bryant & Stratton Business Institute*, 321 NLRB 1007 fn. 2 (1996).

The Operating Engineers also asserts that testimony regarding statements made by certain of its members that the hearing officer relied upon as a basis for finding competing claims to the disputed work is inadmissible hearsay. For reasons explained below, we find it unnecessary to rely on this evidence. Accordingly, we need not address the merits of the Operating Engineers' argument.

II. THE DISPUTE

A. *Background and Facts of Dispute*<sup>3</sup>

The Employer is a subcontractor on a job involving the replacement of expansion joints on the eastbound span of the Highway 70 Blanchette bridge that connects St. Charles and St. Louis Counties in Missouri. The general contractor on the project is KCI. The Employer's work on the project comprises removing lead paint from and recoating the power joints on the bridge. The Employer's employees are all represented by the Painters.

In order to perform the paint removal and recoating of the bridge joints, the Employer's employees must assemble a platform (called a safe span) from which the work can be done. This involves the operation of lulls (a kind of hoisting equipment) to raise sections of the safe span for assembly and to deliver equipment to workers on the span, as well as the operation of a bulldozer to pull stranded equipment out of the mud. In addition, the Employer's employees operate lifts to hoist workers onto the safe span. The Employer is using 3 lulls and 9 to 12 lifts on this project, for about 1 hour a day. The Employer assigned the operation of the lulls, lifts, and bulldozer to its employees.

On June 7, Painters Business Representative Richard Groeker met with representatives from other craft unions, including Business Representative Gary Broccard of the Operating Engineers. After the meeting, Broccard told Groeker he was going to have to go down to the bridge job because "Donny (Thomas) was doing some of his work down there"—referring to the operation of the lulls and lifts at Blanchette bridge. Broccard said that he would probably have to put up a picket because of the situation. Groeker reminded Broccard that the Painters had always done this kind of work and asked Broccard not to cause trouble.

On June 8 or 9, Broccard telephoned the Painters Business Manager Kevin Kenny to "tip him off" that the Employer was operating lifts and lulls on the bridge job as well as a bulldozer. Broccard did not mention what he intended to do about the situation.

On June 13, a supervisor for the Employer and a Painters member, Kevin Sparks, noted that several Operating Engineers were picketing at the inlets on either end of the eastbound span of the bridge. Sparks asked a picketer what the picket was about, but the picketer said he did not know. The picket signs stated that the Employer was paying wages below the standard established by the Operating Engineers in the area for employees engaged in construction work. The signs disclaimed any "work jurisdiction objective." Sparks' crew immediately ceased

<sup>3</sup> The following is based on undisputed record testimony.

operating the machinery on the jobsite in order to avoid friction with the Operating Engineers.

That same day, the Employer's owner, Don Thomas, spoke with Operating Engineers Business Representative Broccard about the pickets. Broccard stated that the Employer was running the lulls and the bulldozer on the job. He also complained that the Employer was paying "sub-standard wages." Thomas offered to pay the 8-cents-an-hour difference between the two unions' wage scales "if that would be an issue." However, in response to Thomas' inquiring what it would take to bring down the pickets, Broccard stated, "Quit operating the equipment."

On June 14, Supervisor Sparks again noticed a picketer on the St. Louis County side of the bridge. Sparks also saw KCI Project Manager Rich Rounds speaking to the picketer. Sparks was later instructed by Rounds and by KCI Foreman Tony Woodland that his workers should stop using the lulls on the job. When Sparks spoke to two Operating Engineers later in the day, he asked them whether they would picket if his workers operated the lulls, and they said that they would. Thereafter, KCI supplied Sparks with KCI's own employees—Operating Engineers—to operate the lulls, lifts, and bulldozer. Thomas observed the Operating Engineers operating the lulls, lifts, and bulldozer.

#### *B. Work in Dispute*

The parties have stipulated that the work at issue here includes the operation of the lulls and the bulldozer at the Highway 70 Blanchette bridge site. Although the Operating Engineers refused to stipulate that operation of lifts was also in dispute, the hearing officer found that this was disputed work based on testimony by Painters Business Manager Kenny. Specifically, Kenny testified that Broccard referred to the lifts as well as lulls and the bulldozer in "tipp[ing] him off" about the operation of the equipment by employees represented by the Painters at the Blanchette bridge site. That testimony was corroborated by Groeker's testimony that Broccard's statement after their June 7 meeting that Thomas employees were doing "his work" referred to operation of lifts as well as the lulls and bulldozer. We thus agree with the hearing officer that the disputed work involves the operation of the lulls, lifts, and bulldozer at the Highway 70 Blanchette bridge project, in St. Charles and St. Louis Counties, Missouri.

#### *C. Contentions of the Parties*<sup>4</sup>

The Employer argues that the statements made by Operating Engineer Business Representative Broccard and the statements by several Operating Engineers to Thomas establish reasonable cause to believe that a 8(b)(4)(D) violation has occurred. The Employer further argues that the collective-bargaining history between the Employer and the Painters, the Employer's evident preference for having its employees do the disputed work and its past practice of assigning such incidental operation of equipment to its employees, industry and area practice, and overall economy and efficiency of operations support an assignment of the work to employees represented by the Painters.

The Operating Engineers contends that it has disclaimed interest in the operation of the lulls and bulldozer at issue here and thus that the 10(k) notice of hearing should be quashed because there is no dispute. In the alternative, the Operating Engineers argues that the evidence presented is insufficient to make the preliminary showing of "reasonable cause" for believing that an 8(b)(4)(D) violation has occurred. Specifically, the Operating Engineers asserts that Broccard's statements are protected by Section 8(c), while the purported statements of several Operating Engineers were inadmissible hearsay.

#### *D. Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that (1) there are competing claims to the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute. *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001); *Teamsters Local 259 (Globe Newspaper Co.)*, 327 NLRB 619, 622 (1999); *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 114 (1998). We find that each of these conditions has been met.

The record establishes that, after a meeting of crafts union representatives on June 7, Operating Engineer Business Representative Broccard told Painters Business Representative Groeker that he would have to go down to the bridge job because "Donny (Thomas) was doing some of his work down there" and he would probably have to put up a picket. A week later, Operating Engineers did in fact set up a picket at the Blanchette bridge.

<sup>4</sup> No party has submitted a brief in this case. Instead, counsel for the Employer and counsel for the Operating Engineers made oral argument at the hearing. Counsel for the Painters adopted the Employer's recitation of facts and applicable law.

Although the picket signs bore an area standards message, the remaining evidence belies such an object. Thus, the Employer's owner, Thomas, told Broccard that he would pay the 8-cents-an-hour difference between the Painters' and Operating Engineers' pay scales "if that would be an issue." However, when Thomas asked Broccard what it would take to bring the pickets down, Broccard said nothing about paying according to area standards, but instead told Thomas to "[q]uit operating the equipment." Broccard obviously did not mean that the equipment should not be operated at all, but instead that Operating Engineers should operate it rather than Thomas' own employees. Reasonably construed, especially in light of his earlier threat, Broccard's statement indicates that the picketing had a jurisdictional objective.<sup>5</sup> We therefore find that there are competing claims for the disputed work<sup>6</sup> and that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. See *Carpenters Local 98-T (Permacrete Products)*, 307 NLRB 401, 402-403 (1992) (competing claims and reasonable cause found where union claimed work in dispute, threatened to picket, picketed with area standards message, and stated that pickets would be removed only if employees represented by union were assigned disputed work). See also *Electrical Workers Local 98 (Swartley Bros. Engineers)*, 337 NLRB 1270, 1271 (2002).<sup>7</sup>

We reject the Operating Engineers' assertion that a dispute no longer exists because it has effectively dis-

<sup>5</sup> Even if the picketing had an area standards as well as a jurisdictional object, that fact would not be controlling. Picketing falls within the scope of Sec. 8(b)(4)(D) as long as an object is to coerce an employer into assigning work to a group of employees represented by one union instead of to a group represented by another union. If that is the case, it is irrelevant that the picketing may also have had an area standards object. See, e.g., *Carpenters Local 98-T (Permacrete Products)*, 307 NLRB 401, 403 fn. 4 (1992) (citations omitted).

<sup>6</sup> In any event, the fact that employees represented by both unions have performed the disputed work itself establishes competing claims for that work. The performance of work by a group of employees is evidence of a claim for the work by those employees, even absent a specific claim. *Laborers Local 79 (DNA Contracting)*, 338 NLRB 997, 998 fn. 6 (2003).

<sup>7</sup> We reject the Operating Engineers' assertion that Broccard's statements are permitted by Sec. 8(c) of the Act, which provides that "The expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit [emphasis added]." Broccard's threat to picket, and his implication that the picketing would cease if the disputed work were reassigned to Operating Engineers, fall squarely within the exception to Sec. 8(c).

Because our findings are based on the picketing and Broccard's statements, we find it unnecessary to rely on Thomas' testimony that several Operating Engineers said that they would picket if his employees continued to operate the lulls, lifts, and bulldozer.

claimed any interest in the disputed work. The burden is on the party asserting that it has made a valid disclaimer that negates the existence of a jurisdictional dispute to prove "a clear, unequivocal, and unqualified disclaimer of all interest in the work in dispute." *Operating Engineers Local 150 (Interior Development)*, 308 NLRB 1005, 1006 (1992) (citing *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 939 (1989)).

We find that the Operating Engineers has failed to meet that burden. The purported disclaimer was anything but "clear, unequivocal, and unqualified." The Operating Engineers' attorney stated at the hearing that he "propose[d] disclaiming the work" and later that "the Union would disclaim interest in the operation of the lulls and the bulldozer." Such statements indicate only a possible disclaimer, not an actual one, and do not encompass the operation of the lifts, which is part of the disputed work. Moreover, the Operating Engineers' actions are inconsistent with a true disclaimer. The record establishes that after the picketing, the Operating Engineers, at KCI's behest, took over the disputed work, and there is no indication that the Operating Engineers' business agent at any time directed its members to stop performing the work. Under these circumstances we find that the Operating Engineers has failed to carry its burden of establishing a clear, unequivocal, and unqualified disclaimer of the work. *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB at 939; *Operating Engineers Local 150 (Interior Development)*, 308 NLRB at 1006-1007.<sup>8</sup>

Finally, the parties have stipulated that there is no agreed-upon method of voluntary adjustment of the work in dispute.

Because we find that there are competing claims to the work and reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred, and because there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k), we conclude 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 112 (Colum-*

<sup>8</sup> Because we find for the reasons stated that the Operating Engineers' disclaimer is not effective, we find it unnecessary to rely on the evidence that in February 2005, a few months prior to the dispute at issue, the Operating Engineers disclaimed interest in the same work at another bridge project of the Employer. The Regional Director relied on this evidence in declining to quash the 10(k) notice of hearing because he found that it raised doubt as to whether the Operating Engineers' disclaimer here was in good faith.

*bia 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 to the determination of this dispute:

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

There is no Board certification of either union as the representative of the Employer's employees. However, the Employer is signatory to a contract with the Painters covering the work at the Blanchette bridge project. The scope of the agreement encompasses "all work, tools, equipment, and materials needed in conjunction with painting, cleaning, or inspecting a bridge or tunnel of any kind located within the United States" and including "paint removal . . . even when such removal is not preparatory to painting." The contract also specifies that "this Agreement shall apply to . . . the operation of all necessary equipment and the handling of and clean up of all materials and debris in conjunction with the work on bridges, tunnels, viaducts and appurtenances." Moreover, the contract states that "the moving and handling of all trucks, scaffolding, all traffic control, and manning the boats will also be work covered by painters so long as the rental or leasing of such equipment is not covered under another Agreement to [sic] which the employer must comply." It is undisputed that the Employer's only contractual relationship with the Operating Engineers was for a 2-week period in February 2005, after which both parties repudiated their agreement.

Accordingly, we find that this factor favors awarding the work in dispute to employees represented by the Painters.

#### 2. Employer assignment, preference, and past practice

It is clear from the record and, in particular, from the testimony of the Employer's owner, Thomas, that the Employer assigned the disputed work to its employees, who are represented by the Painters, in accordance with its preference. Moreover, with regard to past practice, Thomas testified that his company operates in 26 states and, in its 14 years of operation, has always used its own employees to operate the lulls, lifts, and occasional bulldozer incidentally necessary to its bridge projects.

Accordingly, we find that the Employer's assignment, preference, and past practice also favor awarding the disputed work to employees represented by the Painters.

#### 3. Area and industry practice

The uncontradicted testimony of Employer Supervisor Sparks and Owner Thomas indicates that, in the Missouri

and Midwest region, operation of lulls, lifts, and bulldozers incidental to bridge projects performed by the area's major contractors is done by employees represented by the Painters. In addition, Painters Business Manager Kenny testified that District Council No. 2 represents employees of approximately 200 employers in its jurisdiction, all of whom use Painters to perform this work on similar projects.

Based on this uncontradicted evidence, we find that area and industry practice supports the assignment of the disputed work to employees represented by the Painters.

#### 4. Relative skills and training

Employer Supervisor Sparks testified that the Employer has a safety supervisor, Wayne Long, who has provided 2-hour training sessions to about six of the Employer's employees in lull and bulldozer operation. Owner Thomas testified that each of his six crews has a crew leader who has been trained in the operation of lulls and bulldozers, either by the Union or through industry-related programs sponsored by the Painting and Decorating Foundation (PDF) or by Wayne Long. In addition, Thomas testified that many of the equipment rental companies he uses provide training in the operation of the equipment to his employees upon request.

Although the record contains no specific evidence regarding operating engineers' relevant training or skills, Thomas conceded that he witnessed the operating engineers selected by KCI operating the equipment at issue here after the disputed work was reassigned.

Accordingly, we find that this factor does not favor awarding the disputed work to employees represented by either union.

#### 5. Economy and efficiency of operations

The record evidence indicates that although the lulls, lifts, and bulldozers on bridge jobs may be used for as much as 10 hours a day, the Employer is using them on average less than an hour a day on the Blanchette bridge project. Thomas explained that it is neither economical nor efficient to use operating engineers, who would either have to be contacted on an as-needed basis, with a concomitant delay in the performance of the work pending their arrival, or would have to be hired (and paid) for the entire day even when only needed for an hour. Thomas stated that it is more efficient and economical to use his own workers, who are appropriately trained, to do this work intermittently because "[i]t gives me the advantage that I can work my men steadily the rest of the day doing other operations that we would need such as cleaning the bridge and painting."

We therefore conclude that economy and efficiency of operations favors the assignment of the disputed work to employees represented by the Painters.

#### Conclusion

After considering all the relevant factors, we conclude that employees of Thomas Industrial represented by the Painters are entitled to perform the work in dispute. We reach this conclusion relying on the extant agreement between the Painters and the Employer, the Employer's preference, past practice, and assignment, area and industry practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by the Painters, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

#### DETERMINATION OF DISPUTE

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

1. Employees of Thomas Industrial Coatings, Inc. represented by Painters District Council No. 2 are entitled to perform the operation of the lulls, lifts, and bulldozer at the Highway 70 Blanchette bridge project in St. Louis and St. Charles Counties, Missouri.

2. International Union of Operating Engineers, Local 513, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Thomas Industrial Coatings, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, Local 513 shall notify the Regional Director for Region 14 in writing whether it will refrain from forcing Thomas Industrial Coatings, Inc. by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.