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**Construction & General Laborers' District Council of Chicago and Vicinity *and* Henkels & McCoy, Inc., Great Lakes Division and International Brotherhood of Electrical Workers, Local 196, AFL–CIO. Party–in–Interest.**

**International Union of Operating Engineers, Local 150, AFL–CIO *and* Henkels & McCoy, Inc., and Great Lakes Division International Brotherhood of Electrical Workers, Local 196, AFL–CIO Party-in-Interest.** Cases 13–CD–604–1 and 13–CD–607–1

November 16, 2001

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

Henkels & McCoy, Inc. (Henkels or Employer) filed the charges in this Section 10(k) proceeding on March 9 and 30, 2001. The charges allege that the Respondents, Construction & General Laborers' District Council of Chicago and Vicinity (Laborers) and International Union of Operating Engineers, Local 150, AFL–CIO (Operating Engineers Local 150 or Local 150), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees they represent, rather than to employees represented by International Brotherhood of Electrical Workers, Local 196, AFL–CIO (IBEW Local 196).[1] The 10(k) hearing was held on April 30, 2001, before Hearing Officer Paul Prokop.

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

## I. JURISDICTION

The Employer, a Pennsylvania corporation, is a utility contractor. During the past calendar year, it derived gross revenues in excess of $1 million, and purchased goods and services valued in excess of $50,000 from suppliers located outside the State of Illinois. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act. We further find, based on the stipulations of the parties, that the Laborers, Operating Engineers Local 150, and IBEW Local 196 are labor organizations within the meaning of Section 2(5).

[1] Sec. 8(b)(4)(D) states in relevant part: "It shall be an unfair labor practice for a labor organization or its agents . . . . to threaten, coerce, or restrain any person engaged in commerce . . . . where [an] object thereof is . . . . forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . . rather than to employees in another labor organization."

## II. THE DISPUTE

### *A. Background and Facts of Dispute*

On January 1, 2001,[2] the Employer entered into a 3-year contract with Excelon Corporation[3] to perform overhead work, underground residential distribution (URD) work, and underground (UG) work throughout the northern region of Illinois, mostly in the Chicago area. At issue in this proceeding is UG work, which involves the installation of concrete-encased conduit in underground trenches using hand tools and heavy equipment machines, including trucks, backhoes, and bulldozers. As described by the Employer, this work consists of "digging underground trenches and manholes, pouring concrete in the trenches, laying the pipe, encasing the pipe in concrete, and, finally, covering the trenches."

Although the Employer has collective-bargaining agreements with all three Unions covering the disputed work, it assigned the UG work to employees represented by Operating Engineers Local 150 and the Laborers. As a result, IBEW Local 196 filed a grievance on February 14, seeking reassignment of the disputed work to members of its bargaining unit. In response, Operating Engineers Local 150 and the Laborers each threatened to strike the Employer to protect their jurisdiction, unless the Employer withdrew from the grievance proceeding. The Employer then filed the instant charges with the Board.

### *B. The Work in Dispute*

As indicated above, the disputed work involves underground conduit and manhole work, including operation of backhoes and all heavy construction equipment, and excavating of multi way duct banks and manholes.

### *C. Contentions of the Parties*

The Employer, Operating Engineers Local 150, and the Laborers contend there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. They further contend the work in dispute should be awarded to employees represented by Local 150 and the Laborers based on the relevant factors discussed below. IBEW Local 196 contends the relevant factors favor an award of the disputed work to members of its bargaining unit.

### *D. Applicability of the Statute*

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, it must find reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated, and that the parties have not agreed on a method for the voluntary adjustment of the dispute. 29 U.S.C. § 160(k); *Teamsters Local 40 (Cus-*

[2] All dates are in 2001 unless stated otherwise.

[3] Excelon Corporation is the new name for Commonwealth Edison.

*tomized Transportation*), 327 NLRB 296, 297 (1998). We find both prerequisites are met in this case.

On March 9, the Laborers sent a letter to the Employer threatening a strike unless it withdrew from the grievance proceeding initiated by IBEW Local 196. On March 28, Operating Engineers Local 150 sent a similar letter. Those letters constitute reasonable cause to believe that Section 8(b)(4)(D) has been violated. See *St. Louis Theatrical Brotherhood Local 6 (Savvis Center),* 334 NLRB No. 1, slip op. at 2 (2001). Further, the parties stipulated there is no agreed-upon or approved method for voluntary adjustment of this dispute to which all parties are bound. Accordingly, we find the dispute is properly before the Board for determination.

*E. Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting),* 364 U.S. 573 (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 (Jones Construction),* 135 NLRB 1402 (1962). The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

The parties stipulated there is no Board certification or order determining the collective-bargaining representative of the employees performing the work in dispute. The Employer has a collective-bargaining agreement with each Union, and each agreement appears to cover the work in dispute. Consequently, this factor does not favor any one of the three bargaining units. See *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 115 (1998).

2. Employer current assignment and preference

The Employer assigned the disputed work to employees represented by Operating Engineers Local 150 and the Laborers, and prefers that they continue to perform the work. This factor therefore favors awarding the disputed work to those employees.

3. Area and industry practice[4]

The evidence shows that most contractors in both the Northern Illinois region and the Chicago area assign UG work to operating engineers and laborers. Indeed, the evidence shows that in the Chicago area 13 of 15 underground utility contractors follow this practice. IBEW Local 196 Assistant Business Manager Gary Cope claimed there were about 250 Local 196 members performing URD and UG work, and that two contractors, Aldridge and Trenchit, had used electrical workers to perform UG work. Cope, however, did not know how many Local 196-represented electrical workers were actually performing UG work (the disputed work), as opposed to URD work. Moreover, the evidence shows that both Aldridge and Trenchit had assigned UG work to operating engineers and laborers in the past.

Accordingly, we find this factor favors awarding the disputed work to employees represented by Operating Engineers Local 150 and the Laborers.

4. Relative skills and training

Employees represented by Local 150 and the Laborers complete extensive training dealing specifically with UG work. For example, Local 150's apprenticeship program involves hundreds of training hours operating the heavy equipment used in UG work. The Laborers' training program teaches pipe laying and trench protection skills. These employees also receive OSHA training. In contrast, employees represented by IBEW Local 196 do not receive any formal training to perform UG work. They are expected to learn "on the job."

On balance, we find the greater training requirements satisfied by employees represented by Local 150 and the Laborers militates in favor of awarding them the disputed work.

5. Economy and efficiency of operations

Reassigning the disputed work to employees represented by IBEW Local 196 would impose on Henkels the expense of hiring and training new employees and supervisors, rather than allowing Henkels to complete the project with its current supervisors and employee pool. We have found similar impositions to be inefficient. See *Operating Engineers Local 649 (McDougal Hartmann Co.),* 316 NLRB 212, 215 (1995). Moreover, the evidence shows that the hiring and training of new employees would delay the project for 1 to 4 days, possibly costing Henkels the contract with Excelon.

IBEW Local 196 maintains that members of its bargaining unit should be awarded the UG work because the ductwork will ultimately house electrical cables, which Local 196-represented employees will install. In support, Local 196 cites *Machinists District 118 (Meredith Printing),* 243 NLRB 892 (1979). The Board in that case found that efficiency was promoted when disputed work was assigned to employees who were performing other aspects of the project.

We find *Meredith Printing* clearly distinguishable. There, the Board found that the disputed work (fabricating small metal brackets) was "incidental" to work that was already being performed by the operating engineers. Moreover, the record showed the disputed work might arise intermittently as the operating engineers were per-

[4] When relevant, the Board considers as an additional factor the employer's past practice in assigning the disputed work. See *Savvis Center,* supra*; Plasterers Local 502 (Elliot Construction)*, 333 NLRB No. 96, slip op. at 2 (2001). This is, however, the Employer's first time conducting UG work in the Chicago area. Accordingly, we focus instead on area and industry practice. See *Carpenters Local 171 (Knowlton Construction),* 207 NLRB 406, 407 (1973).

forming their duties. In those circumstances, the Board found economy and efficiency were best served by awarding the disputed work to the operating engineers.

Here, in contrast, the record indicates that the UG work is a significant step in the process and precedes the actual laying of the electrical cables. Thus, the disputed UG work may not fairly be characterized as "incidental" to laying electrical cables.

IBEW Local 196 also cites *Sheet Metal Workers Local 141 (Fred B. DeBra Co.),* 245 NLRB 310 (1979), for the proposition that "composite crews" (crews composed of employees represented by different unions) are inherently inefficient in their operation. In that case, however, the Board found that a proposed composite crew was inefficient because one group of employees stood idle while the other performed a specific task. Here, the evidence shows the operating engineers and laborers have been working together without any similar conflicts.

For these reasons, we find the factor of economy and efficiency of operations favors awarding the UG work to employees represented by Operating Engineers Local 150 and the Laborers.

## CONCLUSION

After considering all the relevant factors, we conclude that Henkels' employees represented by Operating Engineers Local 150 and the Laborers are entitled to perform the disputed UG work. We reach this conclusion based on the factors of employer assignment and preference, area and industry practice, relative skills and training, and economy and efficiency of operations. In making this determination, we are awarding the disputed work to employees represented by the above Unions, not to those Unions or their members. This determination is limited to the controversy giving rise to this proceeding.

## DETERMINATION OF DISPUTE

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

Employees of Henkels & McCoy, Inc., represented by Construction & General Laborers' District Council of Chicago and Vicinity and International Union of Operating Engineers, Local 150, AFL–CIO, are entitled to perform the underground conduit and manhole work, including operation of backhoes and all construction heavy equipment, and excavating and placing of multi-way duct banks and manholes throughout Excelon's northern region.

Dated, Washington, D.C. November 16, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD