*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: March 16, 2004

TO : Roberto Chavarry, Regional Director
Region 13

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Communication Technology Services, Inc.
Case 13-CA-41046-1 590-0150
590-2525-5000
590-2525-2575

This case was originally submitted for advice as to whether a collective-bargaining agreement between the Union and the Employer is privileged under Section 8(f) when the Employer is engaged in the business of installing telecommunication wiring.

In an Advice Memorandum which issued on October 22, 2003, Advice concluded that the contract is not privileged under Section 8(f) because the Employer failed to establish that it was primarily engaged in the construction industry and failed to establish that the employees covered by the contract, who perform residential telephone installation and repair work, are engaged in construction work. The Region was directed to issue a complaint alleging a violation of Section 8(a)(2), absent settlement.

On December 12, 2003, the Union and the Employer met with the General Counsel regarding the complaint. At the conclusion of the meeting, it was agreed upon that the Employer would provide affidavit evidence supporting its assertion that the majority of its work is commercial construction work and therefore that it is primarily in the construction industry. It was also agreed upon that authorization cards submitted in support of a withdrawn representation petition would be examined to determine whether the Union represented a majority of the employees working under the contract and, if so, whether the charge should be dismissed on non-effectuation grounds.

After further investigation and a review of the additional information provided, we now conclude that the Employer is primarily engaged in the construction industry. The Employer previously failed to present sufficient evidence to support its claim that the majority of its work on a national basis is new or rehab commercial construction

work. The Employer had alleged that $14 million out of $25 million in revenue for the past year was from commercial "structured cabling." However, the evidence that the Employer provided failed to substantiate those figures. Thus, we concluded that even if the "structured cabling" work was construction work, the Employer had failed to meet its burden. The Employer has now provided affidavits from its Vice President of Operations, who has the overall responsibility for all projects throughout the country and from its Controller, who is responsible for overseeing accounts receivable and accounts payable, which support the Employer's assertion. The Vice President's affidavit explains that much of the Employer's commercial work is "structured cabling" work, which like other trade work, e.g., electrical, HVAC, and plumbing, is performed on construction sites during the course of the building project once the frame and other necessary components are in place.[1] Additionally, the Controller explains in his affidavit how he allocated revenues between residential work (defined as work on single family homes or apartments) and commercial work (defined as all other work) and established the percentages of revenue derived from each. Although one could argue that some of this commercial work, particularly on occupied buildings, was not "structured cabling" and was similar to the residential wiring work, we conclude that the Employer on balance has met its burden of demonstrating that it is primarily engaged in the construction industry.

However, we further conclude that the Employer has still failed to demonstrate that the technicians covered by the contract are engaged in construction work, for the reasons cited in the prior Advice Memorandum. There, we concluded, based on an evaluation of the work done and the polices behind Section 8(f), that the residential work performed by these technicians is not construction industry work. The Employer has provided no additional information that would lead to a different conclusion. Furthermore, the Employer has provided no evidence that these technicians do any work other than AT&T residential work. Moreover, the Vice President's affidavit states that the work these technicians are doing for AT&T is the only work covered by this contract.[2] Thus, the Employer concedes that

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[1] The Employer also provided copies of project documents and actual bids that further demonstrated that the Employer's "structured cabling" should be considered construction industry work.

[2] AT&T work done by the Employer in other states is sometimes covered by local agreements that apply to

it would have to sign a new agreement with the IBEW to cover commercial work in the event it began doing significant commercial work in Illinois. On this evidence, the Employer has not demonstrated that the agreement covers employees engaged in the building and construction industry. Accordingly, under the three-part Indio Paint[3] test, complaint should issue.

Finally, we would not dismiss this case on non-effectuation grounds because of the fact that a majority of the employees at issue had signed authorization cards. Local 134 produced 19 authorization cards as its showing of interest in case 13-RC-20959, which represented a majority of the 35 employees on the Employer's Excelsior list. However, the cards were signed on behalf of Local 134, not the International, and the International executed the 8(f) contract at issue. If employees select a union to represent them, its affiliated International cannot substitute itself or another local for the employees' desired choice.[4] The law permits greater flexibility when authorization cards are at issue regarding a showing of interest supporting a petition, but in that context the cards only serve to demonstrate the need for a Board election.[5] Here, reliance

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residential and commercial work, and those employees do both kinds of work.

[3] Paint Local 1247 (Indigo Paint), 156 NLRB 951, 956 (1966) citing Animated Display Co., 137 NLRB 999, 1020-1021 (1962); see also Techno Construction Corp., 333 NLRB 75, 83-84 (2001).

[4] Gulf Oil Corp., 135 NLRB 184, 184-185 (1962)(certified local sought to substitute another local because it was no longer feasible to maintain separate locals; Board denied petition, even though members of both locals had agreed to the substitution, because the change failed to insure continuity of the certified local and would result in a new and different local as the representative of the employees); The Gas Service Co., 213 NLRB 932, 932-933 (1974). Cf. CPS Chemical Co., Inc., 324 NLRB 1018, 1021 (1997)(Board found continuity of representation since local's president and chief functioning officer continued to represent employees and contracts were to be negotiated in the same manner).

[5] See Louis Pizitz Dry Goods Co., 71 NLRB 579,587 Fn 1, (1946)(employer contended that international union had not demonstrated a showing of interest among the employees because authorization cards only designated local; Board found that contention lacked merit because the requirement that petitioning union submit proof of representation is an

on these authorization cards would not lead to an election but to imposing the International as the employees' representative. Although the contract provides that Local 134 will represent the employees when they work in Local 134's jurisdiction, it does not permit Local 134 to represent them in bargaining and imposes another union on them when they work in another local's jurisdiction. Finally, in view of the importance to the industry of determining whether the work done by these technicians is construction industry work, and the likelihood that this issue will be raised again in future cases, dismissal on non-effectuation grounds would not be appropriate here.

Therefore, complaint should issue, absent settlement. Additionally, given the circumstances, the Region should contact Advice for an evaluation of any settlement proposal presented in this case.

B.J.K

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administrative policy "adopted to enable the Board to determine for itself whether or not further proceedings are warranted..." Matter of O.D. Jennings & Co., 68 NLRB 516, 518(1946)); See generally, River City Elevator Co., Inc., 339 NLRB No. 82 (2003)(employer argued that new showing of interest should be required before second election because of lapse of time and employee turnover; Board found no merit in the employer's contention on the grounds that showing is purely administrative matter, and "[u]nquestionably, it is not regarded as proof of the ultimate employee choice on the question concerning representation"). We note that, in all the cases where the Board has relied on cards executed on behalf of an affiliate to find a sufficient showing of interest to hold an election, the designation of the International was found to be sufficient showing of interest for the affiliated local; there are no Board cases finding that designating a Local was sufficient showing of interest for an affiliated International.