

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

Advice Memorandum

DATE: October 22, 2003

TO : Gail R. Moran, Acting 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 Section 8(a)(2) case was 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 primarily engaged in the business of installing telecommunication wiring. We conclude that the contract is not privileged under Section 8(f) because the Employer has failed to establish that it is primarily engaged in the building and construction industry and, even if the Employer could establish that it is primarily engaged in the construction industry, the work covered by the contract is residential telephone installation and repair work that is not construction work.

FACTS

Communication Technology Services, Inc. (the Employer) is a Massachusetts-based company that performs various types of communication equipment work, including wiring installation, throughout the United States. The Employer employs about 35 employees in Illinois and the majority of them are installation technicians.

On March 14, 2003,¹ the Employer became a signatory to a Voice-Data-Video (VDV) National Residential Agreement with the IBEW (the Union). The scope of work clause in the agreement states:

The work covered by this Agreement shall include the residential installation, testing, service and maintenance of all VDV and telecommunications systems performed by the Employer, which utilize the transmission and/or transference of voice, sound, vision or digital for residential,

¹ All dates 2003 unless otherwise noted.

security, and entertainment purposes for the following: TV monitoring and surveillance, background-foreground music, intercom and telephone interconnect, multi-media, multiplex, radio page, and protection alarms.

Although language in the contract states that the Employer recognizes the IBEW Local as the exclusive representative of all its employees performing work within the jurisdiction of the Union, the agreement does not contain any language describing the recognition as pursuant to either Section 9(a) or Section 8(f). However, the agreement contains such 8(f)-specific elements as an 8-day union security clause and a provision that prohibits subcontracting of any work covered by the agreement to an entity that does not recognize the IBEW or one of its locals. The Employer has presented no evidence that the IBEW represented a majority of its employees at the time the agreement was executed, and solely contends that the contract is an 8(f) agreement.

The Employer's Illinois technicians almost exclusively perform residential installation work. The vast majority of that work is contract work for AT&T: the technicians drive the Employer's trucks with AT&T logos attached, and also wear badges and shirts with AT&T logos. Their day-to-day work routine consists of completing two types of work orders, "provisional" and "maintenance."

Provisional work involves the technicians going to residences to provide AT&T telephone service, and includes attaching telephone wires from the SBC wires at the network interface box to the residence. The box is either located on a telephone pole, or in the basement if the structure is in a multi-residential facility. The technicians then make sure that all connections are successful by testing lines, and by checking with the customer that all the telephone jacks in the residence are working. Finally, the technicians inquire whether customers are interested in any additional service that they can provide, such as adding additional jacks. If so, the technicians run wire from another jack in a nearby room, or directly from the network interface box, to the desired location by tacking the wire to the baseboard. On rare occasions, if a customer insists and a technician gets supervisory approval, the technician pulls the wire through the wall. When technicians arrive at a jobsite where a customer is in the process of remodeling or altering a residence and the walls are not completed, the technicians are instructed to tell the customer that the Employer will not perform its service until the walls are fully installed.

Maintenance work involves the technicians going to residences and identifying and fixing problems reported by customers. Locating the source of the problem may be as simple as turning the telephone ringer back on, or may require the testing of lines at various places. Technicians may have to replace telephone jacks that are no longer functioning or repair shorts in a line. If the problem involves the wiring on the resident's side of the network interface box, the technicians fix it.

In addition to this telephone installation and repair work, the Employer claims that it is also engaged nationwide in performing new and rehab commercial installation work, which requires its electricians to work alongside other building trade employees at construction worksites. According to the Employer, it had about \$25 million in total revenues last year, and \$14 million of that came from commercial "structured cabling" jobs.² The Employer also asserts that when doing these commercial jobs, it is required to obtain building permits.³

ACTION

We conclude that the contract is not privileged under Section 8(f) because the Employer has failed to establish that it is primarily engaged in the building and construction industry and, even if the Employer could establish that it is primarily engaged in the construction industry, the work governed by the contract at issue here is residential telephone installation and repair work that is not construction work. Therefore, a Section 8(a)(2) complaint should issue, absent settlement.

Section 8(f) governs the relationship between a union and an employer engaged primarily in the building and construction industry concerning employees engaged in the building and construction industry.⁴ A party claiming it is

² The evidence submitted by the Employer to support this claim includes a list of examples of commercial jobs with a summary of the work performed. The Employer has not provided a comprehensive list of all jobs - commercial and residential - and the revenues derived from each.

³ The Employer also failed to provide any evidence to substantiate this claim.

⁴ Hudson River Aggregates, Inc., 246 NLRB 192, 199 (1979), enfd. 639 F.2d 865 (2d Cir. 1981); Painters Local 1247 (Indio Paint), 156 NLRB 951, 957 (1966).

privileged under Section 8(f) to enter a contract where the involved union has not established its majority status has the burden of establishing that the necessary conditions of Section 8(f) have been met.⁵ In order for an employer to lawfully enter into an 8(f) contract, three statutory requirements must be met: the employer must be engaged primarily in the building and construction industry; the agreement must cover employees engaged in the building and construction industry; and the agreement must be with a labor organization of which building and construction employees are members.⁶

Here, the Employer asserts that it is primarily engaged in construction work because the majority of its work on a national basis is new or rehab commercial construction. However, the Employer has failed to present sufficient evidence to support this claim. Thus, although the Employer provided a redacted list of jobs done and revenue generated, and states that \$14 million out of \$25 million in revenue from the past year was from commercial "structural cabling" jobs, this evidence is inconclusive as to whether the Employer is actually generating the majority of its income from commercial construction projects. The evidence fails to show the Employer's actual total commercial revenue for the past year, and fails to show any information regarding the Employer's actual residential revenue for the past year, making it impossible to determine whether the Employer's assertion is correct. Therefore, even if the commercial work is construction work, the Employer has failed to meet its burden of demonstrating that it is primarily engaged in the construction industry.

However, even if the Employer establishes that its commercial work makes it primarily a construction industry employer, it cannot meet the second part of the Animated Displays Company test because the contract covers only employees who are not in the construction industry. Although the Board has never directly passed on whether the installation and maintenance of telephone wiring is construction work within the meaning of Section 8(f), we conclude based on an evaluation of that work and the policies underpinning Section 8(f) that the residential work done by the technicians is not construction industry work.

⁵ See Bell Energy Management Corp., 291 NLRB 168, 169 (1988), citing Painters Local 1247 (Indio Paint), above.

⁶ Painters Local 1247 (Indio Paint), 156 NLRB at 956, citing Animated Displays Co., 137 NLRB 999, 1020-1021 (1962); Techno Construction Corp., 333 NLRB 75, 83-84 (2001).

The Act does not define "building and construction industry." However, the Board has defined building and construction work generally as "the provision of labor whereby materials and constituent parts may be combined on the building site to form, make, or build a structure."⁷ The Board also has stated that construction covers installation of

...those types of immobile equipment which, when installed, becomes an integral part of the structure and are necessary to any general use of structure. This includes such service facilities as plumbing, heating, air-conditioning, and lighting equipment...In general, construction does not include the procurement of special purpose equipment designed to prepare the structure for a special use.⁸

Additionally, the Board also considers Congress' rationale for adopting Section 8(f) when determining its applicability.⁹ Congress recognized that Section 9 of the Act was not consistent with certain circumstances that often arise in the construction industry. Thus, Congress deemed 8(f) pre-hire contracts appropriate because, *inter alia*, employers needed to know their anticipated labor cost in order to effectively bid on construction projects even though they may not hire any employees,¹⁰ and because it recognized the unique possibility of jobsite friction that could exist when union and nonunion workers were employed on the same construction site.¹¹

Here, the technicians' work is not done at construction jobsites, but rather at occupied residences, and is not done in the presence of other building and construction trade employees. With no other trade employees present, the possibility for conflicts with other trade employees does not exist. Furthermore, the nature of the maintenance and repair is not the type necessary to maintain a structure for its general purpose as

⁷ Painters Local 1247 (Indio Paint), 156 NLRB at 959 (emphasis added).

⁸ See C.I.M. Mechanical Co., 275 NLRB 685, 691 (1985).

⁹ Forest City/Dillon-Tecon, 209 NLRB 867, 868-869 (1974).

¹⁰ S. Rep. No. 187, 86th Cong. 1st Sess. 28, reprinted in 1959, 1959 U.S.C.C.A.N. 2318, 2344.

¹¹ Id.

contemplated by the Board's definition of construction.¹² Additionally, this work is not like that on a typical project where 8(f) contracts are signed to ensure that employers know what labor costs will be when bidding on projects and before hiring employees. The Employer's contract with AT&T requires that the Employer's technicians work on a continuing basis, and thus it employs a "permanent and stable" workforce.¹³

We recognize that in determining whether particular types of work should be considered construction work, the Board has looked to the North America Industry Classification System (NAICS), published by the Department of Labor's Census Bureau, for guidance¹⁴ and NAICS refers to telecommunication wiring, etc., as construction industry work. Thus, the section entitled Construction, 238210, Electrical Contractors, states that this subsection consists of:

... establishments primarily engaged in installing and serving electrical wiring and equipment ... Electrical contractors may perform new work, additions, alterations, maintenance, and repairs.

The section also merely lists communication equipment installation, intercommunication system installation, telecommunication equipment and wiring, and telephone installation as construction industry work. However, there is no description of the actual work covered by those headings, and thus no way to determine whether the type of telephone installation work done by the employees here, at occupied residences, would fall within these classifications. Since the NAICS does not clearly identify this type of work as construction industry work, and the

¹² U.S. Abatement, Inc., 303 NLRB 451, 455-56 (1991) (asbestos removal, like replacement, necessary to the maintenance of buildings and permanently attached equipment and fixtures, was construction work).

¹³ See C.I.M. Mechanical Co., 275 NLRB at 690 (while not determinative, regular skilled workforce may be factor militating against finding 8(f) status).

¹⁴ In 1997, the NAICS replaced the Standard Industrial Classification Manual (published by OMB) that the Board had previously looked to for guidance. See, e.g., U.S. Abatement, Inc., 303 NLRB at 456; Fenix & Scisson, Inc., 207 NLRB 752, 754-55 (1973); Painters Local 1247 (Indio Paint), supra, at 958.

Board's definition of construction industry work and the policies behind the creation of Section 8(f) would not support such a characterization, we conclude that the Employer has not demonstrated that the agreement covers employees in the construction industry.

Accordingly, the Region should issue a Section 8(a)(2) complaint, absent settlement.

B.J.K.