

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

Advice Memorandum

DATE: February 29, 2000

TO : Mary Zelma Asseo, Regional Director
Region 24

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

SUBJECT: Innovative Communications Corporation 339-2531
Case No. 24-CA-8472 370-0750-0700
385-7533-4080-5000
470-0642

This case was submitted for advice regarding whether the Employer violated Section 8(a)(1), (2) and (5) when it refused to recognize or bargain with the representative of a recently certified bargaining unit, whose job functions were consolidated with those of a larger bargaining unit represented by a rival union.

FACTS

The Employer, Innovative Communications Corporation ("ICC"), is the parent of five telecommunications subsidiaries: Virgin Islands Telephone Company (VITELCO); Vitel Cellular ("Cellular"); VitelCom, St. Thomas Cable ("St. Thomas"); St. John's Cable ("St. John's"); and St. Croix Cable ("St. Croix").

Since 1974, the 250 hourly employees of VITELCO have been represented by the Steelworkers ("USWA"). The USWA also represented 24 employees in a St. Thomas/St. John's bargaining unit. The remaining subsidiaries were unrepresented.¹

In February, 1999,² the Employer and USWA began negotiations regarding the next VITELCO collective-bargaining agreement, which was to expire September 30. At that time, the parties began preliminary discussions regarding the consolidation of job functions between ICC's five subsidiaries. The Employer desired a consolidation in order to cross-train employees so that the same office or

¹ The unrepresented employee complements are as follows: Cellular (5-6 employees), VitelCom (1-2 employees), and St. Croix (24 employees).

² All dates refer to 1999 unless otherwise noted.

field employee is able to respond to a customer's telephone, cable, cellular, and other communications needs.

In August, the Union began meeting with St. Croix employees in order to determine if they were interested in Union representation. John Tutien, a Vice President of the Employer, had contacted the President of Our Virgin Island Labor Union ("Union"), which had been recently founded. Tutien indicated that he had heard of the Union in a local radio station. He informed the Union that it should check out the employees of St. Croix, as they would be needing representation. However, the official told the Union that he wanted to keep his contact with the Union a secret. The Union then met with employees of St. Croix on four occasions. On August 11, the Union filed a representation petition regarding two units of St. Croix employees. On August 30, the USWA asked to be placed on the ballot as an intervenor.

In September, formal negotiations between the Employer and the USWA resumed. At the first bargaining session on September 2, the Employer proposed that the negotiations be kept secret, and the USWA apparently agreed.³ At the September 2 bargaining session, the parties negotiated the consolidation of the five ICC subsidiaries' job functions under the VITELCO collective-bargaining agreement. The parties finalized all consolidation issues by September 22, and entered into an agreement on September 30.

On September 22, a consent election was held regarding the St. Croix units. The Union received all 24 votes; the USWA received none.⁴ There were no challenges. On October 5, the Union was certified as the collective-bargaining representative of two units, one for the office employees and one for the field.

³ The Employer proposed that:

All negotiations should be kept confidential. If either party believes a public statement or statements to non-company executives or non-bargaining committee union members should be made, they must provide 24 hours written notice to the other side.

⁴ Prior to the election some St. Croix employees had heard rumors of negotiations between VITELCO and ICC and some sort of merger, but did not believe it applied to St. Croix.

On October 1, Beverly Chongasing, Human Resource President for VITELCO, and Barry Dunham, Comptroller for St. Croix, met with St. Croix employees. Chongasing informed the St. Croix employees that St. Croix had merged with VITELCO, and that ICC and the USWA had negotiated a new collective-bargaining agreement covering them. Chongasing said that the Employer had been unable to comment on the negotiations before because it had sworn to keep the negotiations secret. When asked about the status of the Union, Chongasing stated that the Union did not exist, and that the bargaining unit employees were members of the USWA.

On October 1, the Employer began applying the USWA collective-bargaining agreement to the St. Croix bargaining unit employees. As a result, St. Croix employees received a pay increase, but lost a Christmas bonus, a 401(k) plan, free cable TV and seniority; their health plan changed; and layoff provisions favored VITELCO employees. On that date, St. Croix employees' paychecks began to be issued by VITELCO instead of St. Croix. In addition, in October the Employer began cross-training St. Croix and VITELCO employees.⁵ The Employer also installed new software displaying all Employer customer accounts, but currently St. Croix employees can only service St. Croix cable TV accounts. Early this year, the Employer intends to transfer all of its employees to a building that it is now constructing. However, to date, no unit employees have been relocated from St. Croix, St. Croix employees still exclusively perform St. Croix work, and the five subsidiary corporations have not been merged.⁶

On October 6, the Union wrote the Employer that the Union was "quite disturbed" by the Employer's failure to advise the Union of the merger. On October 8, the Union met with the Employer in Tutien's office regarding the merger with VITELCO. The Employer apologized for not being able to discuss the negotiations earlier due to a "gag order" agreement between the Employer and the USWA. The Employer said that due to the merger of positions, St. Croix cable TV positions no longer existed; instead, all the Union's members had become Steelworkers.

⁵ To date, only a few St. Croix employees have been trained to perform VITELCO jobs. However, St. Croix employees have trained many VITELCO employees to perform St. Croix jobs.

⁶ The Employer maintains that it is consolidating job functions, not merging corporate identities.

On October 16, the Employer and Union met with approximately 14 St. Croix employees and the Employer explained the purpose of the merger. During that meeting, the Union learned that dues had been deducted from the paychecks of St. Croix employees. The Union assumed the deductions had been on behalf of the USWA, as the Union had not yet submitted any dues deduction authorizations. The Union informed the Employer that it intended to represent the St. Croix employees and was not going to allow dues to be deducted for another union. The Employer indicated that it must have been a payroll error, and said the amount would be placed in escrow.

On October 25, the Union filed the instant charge alleging that since October 1, the Employer unlawfully refused to bargain with, and withdrew recognition from, the Union. On October 25, the Union also asked the Employer for documentation supporting the Employer's claim that St. Croix merged with VITELCO, by what authority the Employer withheld USWA dues from St. Croix employees, and why the Employer contends that the USWA represents the St. Croix employees.

On October 26, the Union met with St. Croix employees to determine if they were interested in having the Union represent them. At the meeting, employees signed dues deduction authorization forms on behalf of the Union.⁷

In October, VITELCO (Chongasing and others acting at the request of Chongasing) handed out USWA dues deduction authorization cards to all St. Croix bargaining unit employees and told them that they needed to be signed. Several weeks later, VITELCO picked up the cards (at the request of Chongasing). Employees understood that if they did not sign, they could "go home" and would not have a job. Immediately after learning of these events, on November 3, the Union submitted 17 dues check-off authorization cards to St. Croix's General Manager. The Union received no response and no Union dues were deducted or remitted to the Union.

On December 9, the Union requested effects bargaining, as employees were upset about the loss of benefits such as the Christmas bonus. In that letter the Union stated that it would not "walk away" from the St. Croix bargaining unit.

⁷ The authorization forms were not immediately submitted to the Employer because the Union did not want employees to feel the Union was after their money.

ACTION

We conclude that, absent settlement, the Region should issue complaint alleging that the Employer violated Section 8(a)(1), (2), (3), and (5) by prematurely recognizing, bargaining and entering into a collective-bargaining agreement with the USWA prior to any consolidation of St. Croix and VITELCO; refusing to recognize and bargain with the Union; applying the USWA-VITELCO collective-bargaining agreement to St. Croix employees; coercing employees to sign USWA authorization cards and dues deduction forms; and deducting USWA dues without prior written authorization.

A. No Accretion Took Place Because There Has Been No Merger

In Massachusetts Electric Co.,⁸ the Board stated that an accretion to a bargaining unit occurs when "employees are transferred from an employer's facility where operations have ceased and are joined with similarly situated employees covered by a collective-bargaining agreement at another of the employer's facilities . . . if the functions and classifications of the transferred employees remain essentially unchanged." However, where the employees being merged have been historically represented by different unions, "statutory policies will not be effected if, through the application of ordinary principles of accretion, a bargaining agent is imposed on either unit of the newly integrated operation,"⁹ where "neither group of employees is sufficiently predominant to remove the question concerning overall representation."¹⁰

Since an accretion deprives affected employees of the opportunity to register their preference for or against representation, "the Board will find accretion appropriate only where the disputed employees display 'little or no separate group identity,' as well as demonstrate an 'overwhelming community of interest' with the employees in the preexisting unit."¹¹ In determining whether new

⁸ 248 NLRB 155, 157 (1980).

⁹ Id.

¹⁰ Martin Marietta Co., 270 NLRB 821, 822 (1984).

¹¹ Dennis Manufacturing Co., 296 NLRB 1034, 1036 (1989) (citations omitted) (finding that shredders/sorters in a paper facility do not share a community of interest with other waste separation employees due to absence of job

employees share a community of interest with another bargaining unit, the Board weighs the following factors: integration of operations, centralization of management and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, and employee interchange.¹²

Moreover, in Hudson Berling,¹³ the Board held that an accretion cannot take place until job functions actually have been consolidated.¹⁴ In that case, the employer acquired two wholesale distribution firms which it intended to merge at a new facility. Both firms were represented by different unions. Prior to transferring employees to the new location, the employer renegotiated one of the union contracts and applied it to both firms' employees, thus recognizing only that union as the exclusive bargaining representative of all of the employees. The Board held that the employer had violated Section 8(a)(1) and (2) by doing so.

While it was not unlawful for the [Employer] to enter into a renewal contract with Local 222 covering the Brooklyn location, by extending that contract to a new facility which had not commenced operations and, therefore, at a time when no employees were employed, [the Employer] in effect entered into a prehire contract.¹⁵

interchange, skill, training, and wages, thus accretion was inappropriate).

¹² Ryder Integrated Logistics, Inc., 329 NLRB No. 89, slip op. at 7 (November 12, 1999), (citations omitted).

¹³ Hudson Berling Corp., 203 NLRB 421, 422 (1973), enf'd, 494 F.2d 1200 (2d Cir. 1974), cert. denied, 419 U.S. 897 (1974).

¹⁴ Accord: Progressive Service Die Co., 323 NLRB 183, 187 (1997) (normally, the date of accretion is the date of merger, citing Borden, Inc., 308 NLRB 113, 122 (1992)); Harte & Co., 278 NLRB 947, 950 n.11 (1986) (explaining Hudson Berling), enf'd, 19 F.3d 502 (10th Cir. 1994), cert. denied, 513 U.S. 9227 (1994)).

¹⁵ Id. See also Boston Gas, 235 NLRB 1354, 1355 (1978), where the Board held that a smaller represented bargaining unit of customer service employees had been validly

In the instant matter, no merger has taken place yet. Despite the Employer's intention to consolidate St. Croix and VITELCO employees at a single new location, as of this date no employees have actually been transferred and both groups continue to perform their respective job functions with no employee interchange other than a minimal amount of cross-training. Consequently, applying Hudson Berling, prior to the actual merger there cannot be an accretion. Therefore, the Employer was not privileged to recognize and bargain with the USWA as collective-bargaining representative of the St. Croix bargaining unit employees, nor was it privileged to extend the VITELCO-USWA collective-bargaining agreement to St. Croix bargaining unit employees. In doing so, the Employer violated Section 8(a)(1) and (2). In addition, by not recognizing and bargaining with the Union, which was the certified representative of the St. Croix bargaining unit employees,¹⁶ and by unilaterally implementing the USWA-VITELCO collective-bargaining agreement,¹⁷ the Employer violated Section 8(a)(1) and (5).

In the event that a merger of St. Croix and VITELCO actually occurs, the Region should analyze the new operation and employee complement to determine whether the merger constitutes an accretion under established principles. If so, the Employer is obligated to provide timely notice of the merger, along with a closure of the St. Croix facility, and to bargain with the Union over its effects on St. Croix bargaining unit employees.¹⁸

B. Dues Checkoff and Union Cards

accreted into a larger unit of employees at a single location after the employer consolidated all of its customer service activities into one location.

¹⁶ Genesis Eldercare, Inc., 330 NLRB No. 72, slip op. at 1 (January 13, 2000); General Fabrication Corp., 330 NLRB No. 60, slip op. at 1 n.3 (December 30, 1999),.

¹⁷ NLRB v. Katz, 369 U.S. 736, 743 (1962).

¹⁸ First National Maintenance Corp. v. NLRB, 452 U.S. 666, 681-82 (1981); Children's Hospital, 312 NLRB 920, 930 (1993), enf'd, 87 F.3d 1304 (9th Cir. 1996); Overnite Transportation Co., 306 NLRB 237 n.3, 241 (1992); Los Angeles Soap Co., 300 NLRB 289, 289 n.1 (1990).

1. **Unlawful Deduction, Coercion, and Assistance regarding USWA Dues Checkoff Authorizations and Membership Cards**

The Board has repeatedly held that dues checkoff authorizations must be made voluntarily, and that "[a]ny conduct, express or implied, which coerces an employee in his attempt to exercise this right" violates the Act.¹⁹ The Employer's distribution of USWA dues deduction forms, as well as USWA membership forms, with the understanding that if employees did not sign they would lose their jobs, constitutes unlawful coercion in violation of Section 8(a)(1) and (3).²⁰ Such conduct also constitutes unlawful assistance to the USWA in violation of Section 8(a)(2).²¹

CONCLUSIONS

¹⁹ Plumbers Local 81 (Morrison Construction), 237 NLRB 207, 210 (1978) (citing Electrical Workers, Local 601 (Westinghouse Electric Corp.), 180 NLRB 1062 (1970)). See also Pan American Grain Co., 317 NLRB 442, 448 (1995) ("The Act guarantees employees the right to determine for themselves, free from coercion, whether they shall sign checkoff authorizations").

²⁰ See, e.g., Teamsters Local 738 (E.J. Brach), 324 NLRB 1193, 1198 (1997) (employer's distribution of dues checkoff cards to new temporary employees at orientation, along with other employment documents and instruction to complete documents, and employer's collection of documents at the end of the day, deemed coercive); Pan American Grain, 317 NLRB at 448 (employees told they must sign checkoff forms in order to retain their jobs); Grason Electric Co., 296 NLRB 872, 873 (1989) (foreman distributed membership and authorization cards and employees told to sign or face termination), enf. denied on other grounds, 951 F.2d 1100 (9th Cir. 1991). Cf. Keller Plastics Eastern Inc., 157 NLRB 583, 587 (1966) (not unlawful for employer to distribute union dues checkoff authorization if done in non-coercive manner, where contract contains a union security and checkoff provisions); Colin Service Systems, Inc., 226 NLRB 70, 71 (1976) (same).

²¹ Pan American Grain, 317 NLRB at 448; Siro Security Service, Inc., 247 NLRB 1266, 1273 (1980).

Accordingly, we conclude that, absent settlement, the Region should issue complaint alleging that the Employer violated Section 8(a)(1), (2), (3), and (5) by: prematurely recognizing, bargaining and entering into a collective-bargaining agreement with the USWA prior to consolidation of St. Croix and VITELCO; refusing to recognize and bargain with the Union; applying the USWA-VITELCO collective-bargaining agreement to St. Croix employees; coercing

employees to sign USWA authorization cards and dues deduction forms; and deducting USWA dues without prior written authorization.²²

B.J.K.

²² The Injunction Litigation Branch will contact the Region regarding the Region's sua sponte recommendation that 10(j) proceedings be instituted.