

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATION BOARD  
REGION 12

In the Matter of

CARSO CONSTRUCCION DE  
PUERTO RICO, LLC <sup>1/</sup>

Employer

and

Case 12-RC-127828

COMMUNICATION WORKERS OF  
AMERICA, LOCAL 3010

Petitioner

**REGIONAL DIRECTOR'S  
DECISION AND ORDER**

**I. INTRODUCTION:**

The Employer, a telecommunications construction company, provides construction and installation services in connection with the installation of telecommunication lines; including telephone and internet lines in the Commonwealth of Puerto Rico. <sup>2/</sup> The Petitioner has filed a petition with the National Labor Relations Board under Section 9(a) of the National Labor Relations Act (Act) seeking to represent a unit of all the Employer's full-time and part-time installers employed by the Employer at its 8 Toa Baja, Puerto Rico facility, and throughout the Island of Puerto Rico, excluding, all other employees, guards, and supervisors as defined in the Act. <sup>3/</sup> The Employer, in contrast to the Petitioner, asserts that the installers sought to be represented by the Petitioner are independent contractors, not its employees.

I have carefully reviewed and considered the record evidence and the arguments of the parties at the hearing and in their post-hearing briefs. I find that the installers sought by the Petitioner are independent contractors and that they are not employees of the Employer. In explaining how I reached this determination, I will describe the Employer's operations, discuss the duties of the individuals at issue, set out the applicable legal precedent and analyze each issue in relation to the precedent.

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<sup>1/</sup> The name of the Employer appears as stipulated at the hearing.

<sup>2/</sup> At the hearing, Petitioner made a motion to amend the petition to remove XFR COMM CORP. from the petition, thereby eliminating XFR COMM CORP. as a joint employer to Carso Construccion de Puerto Rico, LLC. Hearing no objection, the Hearing Officer granted the motion, and XFR COMM CORP. was removed from the petition, leaving only Carso Construccion de Puerto Rico, LLC as the Employer of the petitioned for unit.

<sup>3/</sup> The petitioned for unit was amended at hearing to include the phrase "throughout the Island of Puerto Rico."

## **II. FACTUAL OVERVIEW:**

### **A. The Employer's business**

The Employer is in the telecommunications construction and installation business whereby it provides services related to the installation of telecommunication lines. Its office is located in a single facility in Toa Baja, Puerto Rico. Ivan Martinez is the Employer's Operations Manager for Puerto Rico and the highest ranking manager on site on a day-to-day basis for the Employer. Construction Manager Ivan Lara, Human Resources Director Cristina Ramos, and Chief of Administration Jose Galindea report directly to Ivan Martinez. Construction Manager Lara has two departments that report to him directly; the Installation Department and the Construction Department. The Construction Department is made up of a Superintendent of Construction (vacant position), Chief of Construction (fiber optics) Carlos Villalobos, 20 skill workers, 3 fiber optics supervisors, 3 construction supervisors, and 35 construction crew workers who report to the construction supervisors. <sup>4/</sup>

The 33 petitioned for installers involved in the instant proceeding fall under the Installations Department. The Installation Department is made up of a Superintendent of Installations (vacant position) and Chief of Installations, Maintenance, and Radio Bases, Elvis Perez Irena. Reporting to Irena are Fiber Optics Supervisors Julio Blanco and David Hernandez, and Installations Supervisor Oswaldo Davila. Blanco and Hernandez oversee 25 maintenance crew members who work for the Employer through a professional services contract. Davila oversees Installation Coordinators Natalia Lopez Robles and Angela Gonzalez, and Inspectors Hector Jimenez and Ricardo Flores. Robles, Jimenez and Flores are employees of the Employer, and Gonzalez works for the Employer through a professional services contract. The record reflects that Inspectors Jimenez and Flores do not have the authority to hire, fire, discipline, promote, reassign, or effectively make a recommendation regarding the authorities discussed above. There is no record evidence regarding whether Jimenez and/or Flores possess and exercise any of the other statutory criteria set forth in Section 2(11) of the Act. As will be discussed in more detail below, installation coordinators distribute work orders to the installation technicians, also referred to as installers, who are the subject of the instant petition.

The Employer's business is dependent on its contract with Claro, a company which provides telecommunication services, including digital telephone, fiber optics, and internet service, to customers in Puerto Rico. The Employer has a contract with Claro to provide construction and installation of telecommunication lines, including telephone and internet lines, for customers throughout Puerto Rico. Specifically, the petitioned for installers install the necessary hardware for customers to receive telephone, fiber optics, and internet services from Claro. Claro is the Employer's sole customer, and has been its only customer during the Employer's approximate 1 year in operation in Puerto Rico.

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<sup>4/</sup> According to the Employer's organizational chart, Villalobos, the skill workers, the fiber optics supervisors, the construction supervisors, and the construction crew members work for the Employer through a professional services contract, and are not employees of the Employer.

## **B. Establishment of the employment relationship**

The installers involved in this proceeding each sign an Independent Contractor Contract (hereinafter “the contract”), executed by each installer and a representative of the Employer. The contract specifically describes the relationship between the installer and the Employer as one of Independent Contractor and not of employer and employee. The contract specifically states that the installer is “not authorized to act on behalf of or bind Carso, or incur in expenses on behalf of Carso or carry out any representation or an express or implicit guarantee on behalf of Carso, unless it has previously been authorized in writing.” According to the contract, the Employer will not withhold any amount from Carso’s fees for social security, income tax, disability insurance, and those fees are the complete responsibility of the installer. The fee deducted from the installers’ paycheck is the amount required by the Puerto Rico Treasury Department for Independent Contractors. The record reflects this amount to be 7 percent after \$1,500.<sup>5/</sup> Installers do not receive any benefits; including health insurance, annual leave, or sick leave.

Additionally, the contract states installers are able to contract with their own helpers to assist them in the performance of installation duties. The installer maintains control of the helper, and maintains control of any wages, insurance, and/or insurance corresponding to the relationship between the installer and the helper. The contract specifically states “Carso is only interested in the final result of the Contractor’s [installer’s] work, therefore the Contractor [installer] may use the method of operation that is more convenient for him to comply with the terms of the contract, subject to the legal and ethical standards that are applicable.” The installers are also required by their individual contracts to apply for and obtain all permits, licenses, insurance and authorizations that are necessary, if any, to be able to render the contracted services. The contracts are effective 30 days from the time of execution, and may be renewed from month-to-month at the discretion of the Employer.

Once a potential installer initiates contact with the Employer, the installer is brought in to an interview with Human Resources Director Ramos. Oswaldo Davila has also participated in the interviews. In interviews, potential installers are provided information regarding the business, the job functions they will perform, are given a tool list, and are given a pricing list that is attached to the contracts. With respect to the tool list, installers are handed a list of tools which they will be required to possess in order to perform their work. Each installer is responsible for obtaining the necessary tools. The Employer does not provide any of the required tools. Prior to the contract being signed, there is no Employer process for ensuring potential installers have the required tools. However, once an installer has executed the contract, the Employer’s Administration department has a process in place to verify installers possess the required tools.<sup>6/</sup>

Installers are paid according to the set pricing list attached to their executed contracts. The pricing list provides specific fee amounts payable to installers once a specific service is performed. As examples, installers receive \$6 for a DSL Modem Installation, \$85 for an IPTV Installation, and \$23 for an Interior Extension Installation. There are 12 services with corresponding fees set forth on the pricing list. The pricing list is non-negotiable, and installers have no input in setting the fees they are to receive for the performance of each service.

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<sup>5/</sup> The record, however, does not reflect what is meant by the \$1,500 amount.

<sup>6/</sup> The record does not reflect the specific process for verifying that installers possess the necessary tools.

### **C. Beginning of the installers service**

After the Employer and an installer execute the contract, the installer is sent to Claro's facility to obtain an identification (ID) card to wear while performing services. The ID has a picture of the installer with a Claro logo at the bottom of the ID. Underneath the picture is the installer's name, his title of installer, and the word Carso. Claro also provides the installer with an identifying employee number which begins with "CP," has two zeros, then 3 additional numbers which identify the installer, i.e., "CP00XXX." That number is used by both Claro and the Employer to identify the installer on work orders and in Claro's system used to track work orders.

According to installer Jesus Benitez Burgos, he received 2 weeks of training prior to beginning his installation work; training started with a video on how to perform installations, how to relate to customers, and which also discussed the materials and tools needed. During the second week, he was assigned Hector (last name not given, but likely Hector Jimenez, Inspector, and Ruben (last name not given, but likely former Inspector Supervisor Ruben Melendez Ramos).<sup>7/</sup> Benitez Burgos was not paid while he was being trained. However, there is record evidence that an installer named Carlos Galvez executed his employment contract on March 18, 2014, and performed an installation that same day. Thus, the record is not clear if all installers are required to attend training, or how it is decided which installers are required to attend training. Ruben Ramos testified generally the Employer occasionally provides training to installers on Saturdays by showing a video at its facility. The record does not reflect, however, how often this occurs, if installers are required to attend, and if they are paid for attending.

### **D. Methods for installers to obtain work and payment**

Installers must call an installation coordinator to obtain work assignments. After an installer requests work, a coordinator will list available work orders that are obtained from reviewing the Claro system. Once Claro receives customer service requests, corresponding work orders are entered into the Claro system which are then sent to the Employer's installation coordinators. Installers have complete discretion to decide which work orders they want to perform. Work orders fall into four different Puerto Rican zones (defined areas around the Island): North, Metro, East, and South. Installers can choose to perform work in the zone they live in, or any other zone. Installers do not receive discipline or any negative treatment for declining work. They are simply asked to call on another day. If installers request work orders in person at the Employer's facility, they receive a printout of the work order. If they request the work remotely, they receive an email with the order. The coordinators generally instruct installers to perform the oldest work orders first so not to upset customers. However, there is nothing in the record to suggest installers are disciplined in any way for failing to follow that instruction. Additionally, Claro has asked Carso that work orders be completed within 3 days. However, if the order is not completed within 3 days, and it has to eventually be referred to another installer to perform the service(s), the original installer does not receive discipline for failing to complete the installation. According to the record, the Employer has no procedure in place to deal with a situation where every installer has declined to perform a particular work

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<sup>7/</sup> Melendez Ramos testified that he was an Inspector Supervisor. While the Petitioner contends throughout its brief that Ramos was a supervisor, no testimony was elicited to establish that Ramos met any of the supervisory indicia as articulated in Section 2(11) of the Act.

order, and that specific situation has never occurred. Once an installer has finished an order, he or she calls the coordinator to close it. The coordinator then goes into the Claro system to “close” the order, which then is sent to Claro to verify that the work was performed and that the installation is working properly.

For installers to be paid, they must provide the installation coordinators, or installation supervisor, with their pre-invoice form which documents the specific work orders completed by the installer during a given week. Each installer must turn in this form to be paid. The pre-invoice form is a document created by the Employer and given to installers for the purpose of tracking their completed orders. It has spaces for an installer’s name as well as an installer’s identification number (the CP number). The coordinator then provides the pre-invoice form to Human Resources Director Ramos, who prepares an installation invoice that is forwarded to the Administration Department for payment. Ramos only uses the installer’s pre-invoice to determine payment. She reviews the specific service performed and pays the installer the pricing list amount for that service. Installers are paid for each service performed. They do not receive hourly wages.

#### **E. Materials used by installers and transportation used to perform their services**

The Employer maintains a warehouse where it stores installation materials needed by the installers. Examples of items stored at the warehouse are installation materials, construction material for external plants, and construction material for fiber optics. The warehouse is managed by Warehouse Supervisor Jorge Sanabria, an employee of the Employer. The materials are needed by installers to perform their services, and are provided to them without charge. Installers obtain materials from the warehouse whenever needed. The record reflects that former Inspector Supervisor Ruben Melendez Ramos occasionally delivered materials to the installers in the field. Claro provides the installation materials housed at the Employer’s warehouse. The Employer does not pay Claro for the materials.

Most installers are required to use their own vehicles for work transportation. However, there are about six installers that are provided Employer vehicles to perform their work. The record reflects that those six installers were acquired from a competitor for which they drove a company vehicle, so the Employer rented vehicles for them to continue performing their duties in a similar manner. The six installers who provided vehicles have a separate pricing list, and they make less money per service than those who use their own vehicles. The Employer does not reimburse any of the installers for gas or other work-related vehicular expenses. The vehicles provided to the six acquired installers have the Claro logo on them, not the Employer’s logo. <sup>8/</sup>

#### **F. Uniforms**

Additionally, former Inspector Supervisor Ruben Martinez Ramos testified that installers were given two uniforms; some gray polos with the Employer’s name on the front, and some red

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<sup>8/</sup> The record is unclear with respect to logos being provided to the installers that use their own vehicles. According to Human Resources Director Ramos, Claro requires the Employer and the individual installers to have Claro logos for their vehicles. The record is unclear as to who paid for the logos, but the Employer has paid for some of the signs (logos). The record is also unclear as to who provides the installers with signs for their vehicles, Claro directly or the Employer. One installer testified that he is not required to identify his vehicle with a logo.

polos purchased by the Employer with the Claro logo.<sup>9/</sup> Conversely, an installer testified that he was not required to wear a uniform; he was only required to wear a personal identification badge. Ruben Melendez Ramos also testified that the Employer provided safety equipment to some installers free of charge; including a harness, safety cones, “men working” signs, reflective vests, a hat, a hard hat, and safety goggles or glasses.<sup>10/</sup>

### **G. The inspection process**

As noted above, the Employer employs two inspectors who inspect and determine the quality of installations performed by the installers. Inspectors perform inspections of roughly 10 percent of the completed installations; which are selected at random. Inspectors prepare three forms in the inspection process: a quality verification, a photographic report, and a quality survey. The inspection is judged based on a Claro manual establishing how each installation is to be performed.<sup>11/</sup> If an inspector finds an issue with an installation that needs to be corrected, the inspector’s report is uploaded into an Employer intranet system, and the installer is notified that the deficient installation needs to be corrected within 24 hours. Installers do not receive any form of discipline for failed inspections. If an installer is unable to complete the fix within 24 hours, the order is given to another installer to complete. Installers are not paid for work orders that fail inspection and are not completed by that installer.

The remaining 90 percent of inspections may be inspected by Claro. If a Claro inspector “fails” an inspection, the same process described above is utilized; Claro notifies the Employer that a particular work order has not passed inspection, and the Employer notifies the installer that they have 24 hours to correct the deficient installation. If the responsible installer does not fix the issue within 24 hours, the order is given to another installer and the original installer is not paid for the order. No discipline is issued by the Employer to installers if they fail to fix a failed inspection. If Claro levies a fine against the Employer, which can occur when there is a “severe deviation” to the installation, that fine is then given to the responsible installer to pay in conformity with the contract executed by the Employer and installers.

### **H. Installers ability to work elsewhere while installing for the Employer**

According to Davila, installers are able to work for other businesses while simultaneously performing installation services for the Employer. Davila asserted that he has had conversations with several installers who have told him they were working elsewhere while

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<sup>9/</sup> Ruben Ramos testified that he did not provide the uniforms to the installers, but merely picked them up for Human Resources Director Cristina Ramos.

<sup>10/</sup> This testimony is unclear and generalized. Ruben Ramos initially testified that he never personally provided safety equipment to installers. Ramos later indicated that he believed the safety equipment was given to the six installers who are provided with an Employer vehicle. He then further testified that there were 10 additional installers to whom he provided safety equipment.

<sup>11/</sup> The record includes a lengthy document submitted by Petitioner created in April 2010, prior to the Employer beginning business in Puerto Rico. An installer testified that he was told throughout his recruitment and training that he would receive a manual, then testified that he was given the April 2010 manual by Hector (last name not given, but likely Hector Jimenez, an Inspector) about 1 to 2 weeks after his training. Ruben Melendez Ramos, former Inspector supervisor for the installation department, testified generally that installers were given the April 2010 manual, and that the manual was used in the inspection process. It is unclear, however, if this April 2010 manual included in the record is the Claro manual.

also performing services for the Employer. Thus, on one occasion, an installer purportedly told Davila that he was not going to work for the Employer for the rest of that week because he found other work for a different company. Another installer reportedly told Davila that he worked a paper route and sold women's clothing products while contracted to perform services with the Employer. A third installer told Davila that he was going to contact Bermudez and Longo, a competitor of the Employer, to inquire whether they could provide him with work because the Employer was not giving the installer enough work. According to Davila, the Employer did nothing with any of the information that installers were working elsewhere while performing services for it. Former Inspector Supervisor Ruben Ramos provided a different account, testifying generally that in the interviews, potential installers were told if they worked for other contract companies, they needed to surrender their IDs for those entities and stop working for them. However, no specific examples of applicants being so advised are reflected on the record.

### **I. Installers are not supervised, nor are they subject to discipline**

According to Davila, the installers are not supervised. They are not disciplined.<sup>12/</sup> One installer testified that he would communicate with Hector Jimenez often if he needed help on a particular installation, and that Jimenez and Ruben Ramos would travel to his worksite if he needed their assistance. Ruben Ramos testified that he would assist installers if they called him for help. According to Ramos, he would spend most of his day on Monday collecting installers' pre-invoices, and most of his day Friday delivering paychecks to installers. Ramos testified that he was instructed by his supervisors to call each installer every morning at 8 a.m. to ensure that they were at their first work order for the day.

### **III. LEGAL ANALYSIS:**

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." The Supreme Court has found that the common law agency test applies when determining whether an individual is an employee or an independent contractor. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968); *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322-323 (1992). In *Roadway Package System*, 326 NLRB 842 (1998) and *Dial-a-Mattress Operating Corp.*, 326 NLRB 884 (1998), the Board adopted the common law test of agency to determine whether an employee is an independent contractor. The test, as set forth in the Restatement 2d of Agency Sec. 220(2), for determining whether an employee is an independent contractor is:

- a) the extent of control which, by agreement, the master may exercise over the details of the work;
- b) whether or not the one employed is engaged in a distinct occupation or business;
- c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- d) the skill required in the particular occupation;
- e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- f) the length of time for which

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<sup>12/</sup> An installer testified generally that he was disciplined on one occasion, where he was "admonished" by Human Resources Director Ramos after he had an issue with his personal vehicle that kept him from performing services for approximately 1 month. Former Inspector Supervisor Ruben Ramos testified that installers do not receive written discipline, but are effectively disciplined when the Employer stops giving them work orders. Again, no specific examples of this occurring were provided.

the person is employed; g) the method of payment, whether by the time or by the job; h) whether or not the work is part of the regular business of the employer; i) whether or not the parties believe they are creating the relations of master and servant; and j) whether the principal is or is not in business. The Board held that the list of factors are not exhaustive in applying the test and it will consider “all the incidents of the individual’s relationship to the employing entity.” *Roadway*, supra at 850. See also, *Slay Transportation Co.*, 331 NLRB 1292, 1293 (2000).

Applying the above precedent, I find, on balance, that the installers are independent contractors and not employees within the meaning of Section 2(3) of the Act. The specific reasons for my finding are discussed below. I have considered the arguments raised and cases cited by the Petitioner and find them to be inapposite as discussed in various portions of the analysis below.

1. Common law agency factors as they relate to employment status:

**A. The extent of control which the master may exercise over the details of the work**

Examining the first factor in the common law agency test, the Employer exercises minimal control over the details of the installers work. In fact, the contract between the Employer and installers specifies that the Employer is only interested in results, not the method used to achieve the results. The record establishes that installers are not supervised. Installers decide which orders they would like to complete, and no testimony was elicited to suggest otherwise.<sup>13/</sup> An installer can receive assistance from an inspector, but only after he or she reaches out to an inspector for assistance, will help be given. There was no testimony that installers must consult the inspectors or any other employees of the Employer. Further, installers are only required to call the Employer’s coordinators when they are closing the orders so that the Employer can communicate that information to Claro.

While testimony reflects that installers use a manual which outlines how to perform installations, and that manual is used by inspectors in evaluating the quality of installations, that manual is provided by Claro, which is then given to installers and inspectors by the Employer. Petitioner makes much of the fact that the manual instructs installers in completing their installations, provides directives in communicating with customers, and is used by installers in all facets of their work. While it certainly behooves installers to follow the instructions laid out in the manual, it appears the only effect of their failure to do so is their work may not pass inspection, causing them to correct the work or lose the anticipated pay for the work defectively performed. There is no evidence to suggest installers are disciplined, or that the Employer considers the failure to follow the manual, in referring future work orders.

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<sup>13/</sup> Petitioner asserts orders are assigned, not referred, and relies on the testimony of Installer Jesus Benitez Burgos. Specifically, Benitez Burgos testified that he knew which orders to complete because they were assigned to him. The word “assign” as used in that context could mean that the coordinators directed Benitez Burgos to complete the work orders without Benitez Burgos’ input, but it equally could mean that the work orders were given to Benitez Burgos, or assigned, in the Claro system after Benitez Burgos accepted said work order. Put another way, Benitez Burgos’ name was added to the specific work order, i.e. Benitez Burgos was assigned the work order, after Benitez Burgos accepted the order. No follow up testimony was elicited to confirm whether Benitez Burgos had input in which work orders he completed, however, Davila, who has worked as a coordinator, was specific that installers choose which orders they want to complete.

Similar to *Dial-a-Mattress*, where the involved employees were found to be independent contractors, most installers here use their personal vehicles, which they clearly can use for other daily needs, and they are responsible for the vehicles' maintenance. *Dial-a-Mattress*, 326 NLRB at 891. While six installers do use Employer-provided vehicles, those installers receive less payment for each service provided, and there is no record evidence to suggest that they are supervised in any way as a result of being provided a vehicle.

Moreover, installers have discretion to use helpers to assist them in the performance of their work. The Employer is not involved in installers' use of helpers; another indication that the Employer lacks any control over the details of installers work. Also, the Employer does not exercise disciplinary authority over installers or their helpers.

With regard to control, Petitioner notes Ruben Melendez Ramos testified that he was instructed by his supervisors to call installers every morning at 8 a.m. to ensure that they were at their first work order of the day. However, Petitioner witness Melendez Ramos, was not asked whether installers were in any way disciplined for failing to report to their first work order by 8 a.m. Additionally, Petitioner failed to elicit corroborating testimony from installers to support Melendez Ramos' assertion that he called installers every morning to ensure that they were present at their first customer at 8 a.m. Consequently, there is no evidence that installers received any discipline or negative treatment if they were not at their first order at that time, and no evidence from installers that they were even called every morning. Thus, the record evidence only establishes that even if inspectors called installers every morning at 8 a.m. to ensure that they were present at their first work order, no discipline was given to installers who were tardy or failed to show up for a scheduled appointment.

Petitioner also argues for employee status by citing the Employer's instruction that installers should prioritize orders by age. Once again, however, the record establishes that installers did not receive negative treatment from the Employer for failing or refusing to prioritize by the dates on which orders were received by them. Indeed, if orders were not completed within about a week, those orders were simply referred to another installer. No evidence exists, for example, to show that installers who failed to complete orders within 1 week were refused future work orders. The Employer's instruction that installers complete the oldest work orders, and its subsequent referral of uncompleted orders, is not indicative of employee status, but rather of the Employer's need for the work to be completed.

Benitez Burgos testified that he provided services to customers Monday through Friday between 8 a.m. and 5 p.m. as those hours were the operating hours for Claro. Additionally, Petitioner asserts that Cristina Ramos required Benitez Burgos to complete a minimum of 10 orders per week, and 2 orders per day. However, Benitez Burgos merely testified that Ramos requested that he meet those daily and weekly targets.

As noted above, much of the instructions given to installers, and time constraints indicated, do not carry discipline if such targets are not met. This precise situation is akin to the owner-operators in *Dial-a-Mattress*, found to be independent contractors, who were not subjected to any Employer work rules, yet were expected to comply with Dial's procedures defined in its memoranda. *Dial-a-Mattress*, supra, at 888.

The Petitioner further points to the contract as a means for finding employee status, yet each argument is flawed. Petitioner contends the contract prevents installers from using helpers. However, not only does it specifically allow for helpers, the contract merely precludes installers from sub-contracting the “totality of any part all [sic] of the services that are object of this Contract.” Davila testified clearly that he experienced at least two situations where an installer indicated to Davila that the installer would be using a helper, and Davila did not object. The contract executed between the Employer and installers contains an indemnification clause, whereby installers are required to reimburse, indemnify, and defend the Employer in certain listed situations. See *Dial-a-Mattress*, supra, at 891 (“in employer-employee relationships, employers generally assume the risk of [] third-party damages, and do not require indemnification from their employees”). Based on the weight of the evidence discussed above, the criterion of the “extent of control” weighs in favor of independent contractor status.

**B. Whether or not the parties believe they are creating the relations of master and servant; The length of time for which the person is employed**

The contract entered into by the Employer and the individual installers undoubtedly contemplates an independent contractor relationship between the parties. Not only does the contract specify that the employment relationship is that of independent contractor status, it also recognizes that installers must make their own arrangements for disability insurance and the like. Moreover, the contract specifies that the employment relationship is effective for 30 days, with the Employer having the discretion to renew the contract month-to-month. Thus, each individual installer’s contract with the Employer is temporal in nature. Accordingly, both factors, i.e., the parties’ beliefs as to the employment relationship created and the duration of the employment relationship, certainly weigh in favor of independent contractor status.

**C. The method of payment, whether by the time or by the job; Opportunity for entrepreneurial gain**

Another factor weighing in favor of independent contractor status is the method of payment. Installers are paid per job, not by the hour. While the Petitioner argues for employee status by noting the Employer’s requirement that installers fill-out pre-invoice forms which have a space for an “employee” number, the record is clear that installers are not required to turn in the form on a specific day, and the “employee” number is assigned by Claro, not the Employer.

Additionally, while the contract executed by the installers and the Employer attaches a set pricing list determined by the Employer, individual installers still exercise entrepreneurial control over their employment, and can certainly impact their own compensation. See *St. Joseph News-Press*, 345 NLRB 474, 479 (2005). The more work completed by an installer, the more money he will make. If installers choose to take fewer work orders, they will earn less money. It is completely up to each installer to decide how much work to perform. As noted above, installers may enlist the assistance of helpers; which can have the effect of quicker installation times, and can translate to more orders completed in a week. In this manner, they have the ability to generate more income. Moreover, the Employer deducts nothing from the installers’ payment, aside from the mandatory professional services fee that the Puerto Rico Treasury requires. Installers receive no benefits as part of their employment relationship with the Employer, and do not accrue annual or sick leave.

Petitioner cites legal authority for the proposition that installers do not have entrepreneurial gain, or risk of loss, simply because they can choose to perform more orders, and thus make more money. See *Lancaster Symphony Orchestra*, 357 NLRB no. 152 (2011). The facts in that matter are distinguishable to the facts in the instant case. In *Lancaster*, it appears the musicians played at one location in Lancaster, Pennsylvania. *Lancaster*, 357 NLRB no. 152 at slip. op. 1. The musicians were paid a set amount for rehearsals and performances, and “the musicians do not receive more or less money based on ticket sales, or how well or poorly they perform in a given performance.” *Id.* at 7.

The quotation cited by Petitioner is only directed at the *Lancaster* musicians’ opportunity for gain. However, for purposes of deciding a particular workers’ employment status, entrepreneurial gain is but one part of that factor, the other being the risk of loss. While the musicians in *Lancaster* had no opportunity for loss, installers in the instant matter certainly do. If their work fails inspection and installers are unable to fix the issue, they are not paid for the job. Additionally, the farther an installer has to travel to perform an installation, the more money he has to spend on gas and greater wear-and-tear is placed on his vehicle. Consequently, in deciding which orders to complete, and how many orders to complete, installers must factor in the costs associated for each job, and the risks that accompany each job. As such, the instant matter is clearly distinguishable from the Board’s decision in *Lancaster*.

**D. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work**

The Employer does not provide the installers with the tools required to perform installation services. Nor does the Employer require installers to verify that they possess the requisite tools at the time the parties enter into the contract. It is the responsibility of each installer to ensure they possess the necessary tools to perform installation services. While Human Resources Director Cristina Ramos testified generally that there is a review by the Administration Department to determine whether an installer possesses the requisite tools, the record fails to disclose the specific process, or what happens if it is found that individual installers do not possess the right tools. The Employer maintains a warehouse where essential installation materials are stored, but it does not purchase these materials, nor does it pay Claro for them. Instead, Claro provides the installation materials to the Employer free of charge, and the Employer merely acts as a conduit for the installers to obtain the materials.

Petitioner again cites *Lancaster* where the Board found the musicians to be employees, explaining that while the musicians use their own instruments and clothing, the Employer provided every other instrumentality, including music, stands, chairs, and the concert hall. Here, however, installers are required to use their own tools, and most are required to use their own vehicles. The few installers that use Employer supplied vehicles receive less compensation for each service performed. Moreover, the materials used by installers are provided by Claro, not the Employer. Simply because the materials are housed in an Employer warehouse is inconsequential. Customers, customer locations, and orders are provided by Claro, not the Employer.

In addition, although Melendez Ramos provided generalized testimony that the Employer supplied installers with uniforms, Petitioner’s own witness Benitez Burgos specifically testified that he was not required to wear a uniform, only an identification badge which had both a Claro

logo, and the Employer's name. <sup>14/</sup> Consequently, I conclude that this criterion weighs heavily in favor of independent contractor status.

**E. Whether or not the work is part of the regular business of the employer; Whether or not the one employed is engaged in a distinct occupation or business**

Certain factors lend toward finding employee status rather than independent contractor status. Here, the work of installers goes to the heart of the Employer's business. Moreover, installers are engaged in a distinct occupation, namely the installation of telecommunication materials. This criterion favors a finding of employee status.

**F. The skill required in the particular occupation; The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; Whether the principal is or is not in business**

Other common law factors, however, are less clear than those described above. With respect to the skill required in performing the installers' duties, the record reflects that at least one installer, Benitez Burgos, had no telecommunications installation experience prior to beginning his employment with the Employer, and that he did not receive extensive training in the field. However, as noted above, another installer performed installation duties the very day he signed his contract; suggesting previous installation experience. Undoubtedly a specific skill set is required to perform the duties of installer, yet it is unclear how difficult it is to master that specific skill set. Furthermore, it is unclear on the record whether installation work is typically performed in Puerto Rico by installers who are independent contractors or by those who are employees. However, the record evidence establishes the Employer does not directly utilize any installers, beyond the installers sought by Petitioner, suggesting at the very least, that the Employer uses only contractors to perform installation services. Additionally, there is evidence that the Employer has contracted with two independent companies to perform installation work, further suggesting that installation work is typically done through a contractor relationship. Finally, I note that the principal is in business. Thus, this criterion again favors a conclusion that the installers sought herein are independent contractors.

*2. Additional Factors:*

There are other factors, here, that further support a finding of independent contractor status for the installers sought by Petitioner. Installation Supervisor Davila was personally informed by several installers that they maintained jobs with other companies, including one installer who worked, or intended to work, for a competitor of the Employer, and upon learning of that information, the Employer took no action against those installers. See, *Thomson Newspapers*, 273 NLRB 350, 352 (1984). While Petitioner contests Davila's testimony as being vague, Melendez Ramos' testimony that he was present for interviews where the Employer told potential installers they could not install for other installation companies was equally vague, with no details of dates or specific installers interviewed. Also, while the record is unclear as to whether the installers were required to have Claro's logo on their vehicles, installers were not

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<sup>14/</sup> Although former Inspector Supervisor Ruben Melendez Ramos offered testimony that the Employer provided safety equipment to installers, that testimony was both unclear and contradictory, and is of little probative value.

required to have the Employer's logo on their vehicle, and Benitez Burgos testified that he was not even required to have Claro's logo on his vehicle. See, *The Evening News*, 308 NLRB 563, 564-565 (1992). Additionally, the Employer does not reimburse installers for gas or other operating costs incurred by operating their personal vehicles during the performance of their installation duties.

In *St. Joseph News*, Board Member Liebman dissented from the Board's finding of independent contractor status, placing significant weight on the newspaper carriers' economic dependence on the newspaper. *St. Joseph News*, 345 NLRB at 483-484. Specifically, Member Liebman argues for the inclusion of "economic dependence" as a factor to be considered in discussing the newspaper carriers' employment status, and asserts to do so is "a relevant consideration under the common law agency test." *Id.* at 485. To date, the Board continues to use the common law agency test for analyzing an employment relationship, and has not yet adopted a specific inclusion of economic dependence as a factor to be considered.

Even if economic dependence were added to the common law agency test for establishing independent contractor versus employee status, such would not necessitate a finding of employee status in this matter. In *St. Joseph News*, the contract executed by the newspaper carriers and the newspaper afforded the newspaper the right to change the contract's terms unilaterally. *Id.* In the instant matter, the contract allows for the modification and amendment to the contract, but only upon written agreement of both parties. Thus, a unilateral amendment or modification of any of the provisions in the contract between the Employers and installers would give rise to a breach of contract; evincing more of an arm's length relationship. Further, both parties have the right to terminate the contract.

Whereas newspaper carriers' routes and newspaper prices were predetermined by the newspaper, in the instant matter, such is not the case. *Id.* It is true here that the price for specific installations is set by the Employer, and the installers have no basis for modifying those prices. However, a key distinction can be made. As Member Liebman points out, in *St. Joseph*, the newspaper controls whether a particular route can be enlarged, thus allowing the carrier to increase his profit margin; or whether an existing route is too large, and needs to be reduced. *Id.* Here, the equivalent Employer control would, for example, allow the Employer to control how many orders an installer is given in a certain time period. While there is some testimony that installers must complete their work orders to be able to receive more, there is no evidence to suggest the Employer restricts how many orders an installer can receive per day, week, or month. Instead, the bulk of the evidence shows installers are able to complete as many orders as they choose, subject only to how quickly they can accomplish the work and how many hours they are willing to work. Furthermore, installers are able to use helpers, and thus, could conceivably complete more orders, allowing them to earn more money. Thus, the ability of installers herein to control their potential for economic gain distinguishes this matter from the facts of *St. Joseph News*, *supra*.

Additionally, Member Liebman also found it significant that the newspaper has the ability, if it chooses, to restrict a carrier from delivering competing newspapers, or other products, on his route, by exercising its unilateral right to modify the contract. *St. Joseph News*, 345 NLRB at 486. Here, as noted above, the Employer has no right to unilaterally implement changes to the contract, and record evidence establishes that certain installers have outside work, with one working for a competitor. Unlike in *St. Joseph News*, the Employer does not reimburse

installers for any costs associated with operating their vehicles. *Id.* Member Liebman concludes that the factors discussed above, when compared with the common law factors which indicate employee status, establish that the newspaper carriers are in fact employees, not independent contractors. *Id.* Conversely, not only are many of the factors relied upon by Member Liebman significantly different in the instant case, the overwhelming evidence establishes that installers are independent contractors. That conclusion is not altered, even when using Member Liebman's economic dependence test.

3. Discussion of Board decisions finding employee status:

In *Adderley Industries, Inc.*, 322 NLRB 1016 (1997), the Board upheld the Administrative Law Judge's finding that cable installers were employees, not independent contractors. Using the common law agency test, the Judge found, *inter alia*: (1) the installers work was integral to the Company's business; (2) installers were required to report to the Company's trailer each morning; (3) they were given work assignments each day by a Company manager; installers were required to wait to 3:30 p.m. each day before being released, even if their work was completed by 12:30 p.m.; (4) installers were required to notify the Company if they were unable to report or remain at work on a given day; (5) time constraints imposed by the Company made finding outside work impossible; (6) the installers work was closely supervised, meaning the Company determined the route and order in which installers must perform their assignments, installers had to call the Company to close an order, and if the work did not pass inspection, they would be required to fix the issue within 24 to 48 hours; (7) installers used a manual given to them by the Company; (8) installers were required to collect payment from the customer if the customer had not pre-paid; (9) installers were required to attend a 2-week training, regardless of prior experience, and installers were paid for their time at training; (10) while installers used their own vehicles, the Company mandated that the vehicle be painted white with the Company's name; (11) installers wear required clothing marked with the Company's name; (12) written evaluations of installers work were performed by the Company; (13) the Company has a three-tier wage structure where installers can be promoted or demoted, and/or issued bonuses by the Company; (14) installers' helpers must conform to the Company's requirements; and (15) the Company can require installers to comply with unilaterally changed work rules. *Adderley Industries*, 322 NLRB at 1022-1023.

Whereas there are a couple similarities between the facts in *Adderley* and the instant matter, it is clear the Company in *Adderley* controlled the means by which their installers worked to a far greater degree than the Employer here. Installers in the instant matter did not have to report to a certain location, nor did they have to wait around for a lengthy period of time if they had completed their orders for the day. If installers attended training, they were not paid. Here installers never collected payment from customers, were not required to wear a particular uniform, and were not required to have any identifying markers on their vehicles. Further, installers were not given performance evaluations, were not promoted or demoted, were never given raises or incentives, and their helpers were not required to meet Employer standards or requirements. Installers here were not required to call the Company each day to report if they were unable to work that day. Most significantly, the employer in *Adderley* retained entrepreneurial control over installers' ability to earn more or less money by assigning the work and by severely restricting the hours installers had available to perform outside work. In sum, the facts in the instant matter are undoubtedly distinguishable from those in *Adderley*, tilting heavily in favor of a conclusion that the subject installers are independent contractors.

The instant matter is also distinguishable from *Roadway Package Systems, Inc.*, 326 NLRB 842 (1998), where pick-up and delivery drivers were found to be employees, not independent contractors. In *Roadway*, drivers were required to operate uniformly marked vehicles (vehicles were custom designed by Roadway, and were identical as to make, model, internal shelving, and rear door, and clearly displayed Roadway's colors and logo) and wear a Roadway approved uniform. *Id.* at 851. They were prohibited from conducting outside business for other companies throughout the day, and were required to return their vehicles to Roadway's terminal in the evening, where they left them overnight. *Id.* Further, Roadway encouraged the sale of used vehicles from former to new drivers. *Id.* at 852. If a driver's vehicle was out of service, Roadway had a ready source of replacement vans drivers could use. *Id.* Like in *St. Joseph News*, Roadway could unilaterally reconfigure a drivers' route if that route was becoming too busy. *Id.*

Here, installers received no assistance from the Employer if their vehicles were out of service. Indeed, one installer lost a month's work when he did not have an operable vehicle. They were not required to possess a certain type of vehicle, and were not required to adorn their vehicles with the Employer's logo. Installers are free to conduct outside business in their free time, and no restriction is placed on their ability to do so. Additionally, as noted above, there is no evidence that the Employer restricts the number of orders an installer can have, and only requires that they finish their orders before obtaining new ones. Further, the Employer does not restrict the number of orders referred to an installer in a given time period. Consequently, much of the control exercised by the employer in *Roadway* is not present in the instant matter.

## **V. CONCLUSIONS AND FINDINGS:**

Based upon the entire record in this matter and in accordance with the above-referenced narrative, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. Communication Workers of America, Local 3010 is a labor organization within the meaning of the National Labor Relations Act.
3. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. <sup>15/</sup>
4. The installers are independent contractors and not employees as defined in Section 2(3) of the Act.

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<sup>15/</sup> The parties stipulated, and I find, that the Employer is a Puerto Rico corporation and is engaged in the business of the construction and installation of telecommunication lines, including telephone and internet lines, with main offices and/or facility located in Toa Baja, Puerto Rico. During the past 12 months, a representative period, the Employer provided services in excess of \$50,000 to enterprises directly engaged in interstate commerce, including Puerto Rico Telephone/Claro. During the same period of time, it had gross revenues in excess of \$1,000,000.

**VI. ORDER:**

The undersigned hereby ORDERS that the petition filed in this matter is dismissed.

**VII. RIGHT TO REQUEST REVIEW:**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **June 23, 2014**. *The request may be filed electronically through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>16/</sup> but may **not** be filed by facsimile.*

Dated at Cincinnati, Ohio this 16<sup>th</sup> day of June 2014.



Gary W. Muffley, Acting Regional Director  
Region 12, National Labor Relations Board  
South Trust Plaza  
201 East Kennedy Blvd, Suite 530  
Tampa, FL 33602-5824

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<sup>16/</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.