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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

590-2500
590-2525-3300
590-2550-5000
590-2575
590-5001
590-5001-5000

TO : Wilford W. Johansen, Director
Region 21

DATE: April 30, 1979

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

COPIES PLEASE

SUBJECT: Devcon Systems Corporation
Case No. 21-CA-17530

Communications Workers of America,
Local 11509, AFL-CIO
(Devcon Systems Corporation)
Case No. 21-CB-6790

These Section 8(f) related cases were submitted for advice on the issues of (1) whether the Employer is primarily engaged in the construction industry within the meaning of Section 8(f); (2) whether the Union is "a labor organization of which building and construction employees are members" within the meaning of Section 8(f); and (3) whether the entering into of a contract by an Employer in the construction industry with a Union at a time when the Employer had a representative complement of employees and the Union did not represent a majority of those employees is violative of Sections 8(a)(2) and (1) and 8(b)(1)(A).

FACTS

Devcon Systems Corporation (herein "the Employer"), a licensed electrical contractor, is engaged in the sale and installation of electrical fire protection systems for newly constructed buildings and for existing ones.

Prior to 1979, the Employer had not been signatory to any collective bargaining agreement. On January 9, 1979, the Employer's president, Ed Leonhart, signed a collective bargaining contract with the Communication Workers of America. The contract contained a 30-day union security clause and was to be administered by Local 11509. At the time, the Union did not represent a majority of the Employer's employees. The contract was forwarded to the Union's regional office in Los Angeles for approval, and was returned at the end of January or the beginning of February 1979, at which time the Union apparently gave Leonhart some Union membership application cards and dues check-

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off authorization cards, and asked him to distribute them to his employees. Leonhard distributed copies of the contract, and the membership application and dues checkoff authorization cards to each of his six employees.

Local 11509 has approximately 3,000 members, of which between 2,900 and 2,950 are employees at Pacific Telephone Company. Of the remaining 50-100 members of the Local, all but 15 are employees of a telephone answering service. The remaining 15 are employees of either an electrical contractor specializing in the sale and installation of fire protection and security systems or a contractor who installs various types of sound equipment, e.g., burglar alarms, P.A. systems, and fire protection systems.

The instant Section 8(a)(2) and (1) and 8(b)(1)(A) charges were filed by one of the Employer's employees who has refused to join the Union. 1/

ACTION

It was concluded that the Employer is primarily engaged in the building and construction industry, and that the Union is a labor organization of which building and construction employees are members. Thus, the contract entered into on January 9, 1979 is privileged under Section 8(f) 2/ and, accordingly, the relevant Section 8(a)(2) and (1) and 8(b)(1)(A) allegations should be dismissed.

With respect to the conclusions that the Employer is primarily engaged in the construction industry and that its employees are employees in the construction industry within the meaning of Section 8(f), 3/ it was noted that (1) it is estimated that approximately 90 percent of the Employer's revenue comes from the sale and installation of its fire

1/ The Region has concluded that the Employer violated Section 8(a)(2) and (1) when it unlawfully assisted the Union in the distribution of Union membership applications and checkoff authorization cards, and that the Union violated Section 8(b)(1)(A) when it told an employee he had seven days to join the Union, despite a 30-day union security clause in the contract. These issues were not submitted for advice.

2/ See Animated Displays Co., 137 NLRB 999, 1020-1021.

3/ See Painters, Local 1247 (Indio Paint and Rug Center), 156 NLRB 951.

protection equipment; (2) the Employer's employees, rather than others, perform the work of installing fire protection equipment at construction sites or other jobsites, often working alongside employees of other construction crafts; 4/ and (3) the employees are involved in the physical alteration of the building. 5/

With respect to the conclusion that the Union is "a labor organization of which building and construction employees are members" within the meaning of Section 8(f), it was noted initially that Congress' purpose in restricting the right to enter into prehire agreements to "labor organizations of which building and construction employees are members" was "to make it clear that criminal or 'paper unions' should not avail themselves of the privilege of entering into such agreements." 6/ There is no evidence that in the instant case the Union is other than a bona fide labor organization. It was further noted that although the vast majority of the Union's approximately 3,000 members are telephone company employees and not construction industry employees, nonetheless some of its members are employed by contractors who are engaged in the sale and installation of fire protection systems similar to the instant Employer, and thus were deemed to be employees in the construction industry.

Section 8(f) was viewed as privileging a contract in the construction industry with a minority union even where there is a representative complement of employees already working at the jobsite. In this regard, it was noted that in Progressive Construction Corp., 218 NLRB 1368, the Board appeared to reject the view that since the employer had a substantial and representative complement at the time it recognized the union, majority concepts of Section 9, rather than Section 8(f) concepts, are applicable. The Board stated (218 NLRB at 1368):

4/ Cf. Forest City/Dillon-Tecon Pacific, 209 NLRB 867, enf. 522 F. 2d 1107 (C.A. 9, 1975).

5/ The fact that the parties entered into a 30-day union security clause, rather than a 7 day clause, would indicate at most that they did not believe themselves to be within the ambit of Section 8(f). However, the issue is to be resolved by an analysis of the objective facts concerning the work that is performed, rather than on the basis of the parties' subjective views as to the scope of Section 8(f).

6/ See H. Rep. No. 741 on H.R. 8342, 86th Cong., 1st Sess. 20 (1959); I Leg. Hist. of the LMRDA of 1959, 778 (G.P.O. 1959). (hereafter referred to as "Leg. Hist.")

> Essentially General Counsel argues that Section 8(f) applies only to 'prehire' agreements; i.e., collective agreements entered into prior to the hiring of any employees or less than a representative complement. We do not agree. (footnote omitted).

The Board further stated (218 NLRB at 1368-69):

> Rather, Section 8(f) is written in the disjunctive. It provides that a collective bargaining agreement in the construction industry between qualified parties is not rendered unlawful either because it was signed before the employer had any employees <u>or before the union represented a majority of such employees</u>, or because it contains a 7-day union-security provision, or because it provides for establishment of hiring halls, or because it gives priority in employment to certain employees. (Emphasis added).

It was noted that the literal language of Section 8(f) suggests the same result. Section 8(f) reads: "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged in the building and construction industry to make an agreement covering <u>employees engaged (or who, upon their employment, will be engaged) in the building and construction industry</u> . . ." (Emphasis supplied). Thus, the literal language of Section 8(f) would appear to privilege contracts involving employees already working as well as future employees. 7/

7/ It should be noted that in the brief to the Board (at pages 8-9) in <u>Progressive Construction Corp.</u>, <u>supra</u>, counsel for the General Counsel argued:

> While this literal language of Section 8(f) indicates that Congress may have intended that some post-hire contracts would fall within 8(f), such contracts are limited to those executed after one or more employees, but less than a representative complement, had been hired. Thus, once a representative complement has been hired, questions concerning representation can, and should, be resolved quickly under Section 9 concepts, either through a Board-conducted election or through voluntary recognition upon demonstrated majority status where no other union is in the picture. There is no longer any need for the special protection of Section 8(f), i.e., the privilege of contracting immediately without comporting with conventional Section 9 resolution of any representation.

The Board, however, apparently rejected this argument without comment.

In addition, the view that Section 8(f) would privilege contracts in the construction industry with minority unions even when the employer has a representative complement of employees already at work is buttressed by the legislative history of Section 8(f). Admittedly, where an employer already has employees, some of the considerations that lay behind Section 8(f) may not be present. Section 8(f) was enacted in large part because contractors need to know their labor costs prior to submitting bids on construction jobs and because they must be able to have available an immediate supply of skilled craftsmen ready for quick referral. 8/ When an employer has a representative complement of employees already at work and is compensating them at a given level of wages and benefits, it knows its labor costs, and generally has no need for a readily available supply of skilled craftsmen. It could therefore be said that Section 8(f) was not intended to cover such a situation. 9/ However, this was not the sole impetus for Section 8(f). The legislative history of Section 8(f) shows that Congress also recognized that "representation elections in a large segment of the industry are not feasible to demonstrate . . . majority status due to the short period of actual employment by specific employers." 10/ Thus, Section 8(f) also reflects a desire by Congress to facilitate union representation in the construction industry and this would appear to be equally applicable where an employer has a representative complement of employees at work. In those situations where the employees at the jobsite do not wish to be represented by the union, the final proviso to Section 8(f) 11/ allows them to petition for an election to vote out the union.

Thus, the contract entered into by the parties on January 9, 1979, at a time when the Employer apparently had a representative complement of employees at work and the Union did not represent a majority of the employees is privileged by Section 8(f) and the related Section 8(a)(2) and (1) and 8(b)(1)(A) charges should be dismissed, absent withdrawal. 12/

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8/ See, e.g., H. Rep. No. 741 on H.R. 8432, 86th Cong., 1st Sess. 19 (1959), I Leg. Hist. 777.

9/ Cf. The Irvin-McKelvy Company, 194 NLRB 52, 60; Oilfield Maintenance Co., Inc., 142 NLRB 1384.

10/ S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. 55-56 (1959); I Leg. Hist. 451-452.

11/ "Provided further, that any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Section 9(c) or 9(e)."

12/ Although the Region found unlawful assistance in this case, such assistance occurred after the 8(f) contract became an accomplished fact, and would not therefore taint the contract under the second paranthetical phrase of Section 8(f).