

**Milwaukee & Southeast Wisconsin District Council
of Carpenters and Rowley-Schlimgen, Inc.**
Cases 30-CC-505 and 30-CE-25

August 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND TRUESDALE

On March 30, 1993, Administrative Law Judge Marion C. Ladwig issued the attached decision.¹ The General Counsel and the Charging Party-Employer filed exceptions and supporting briefs, and the Respondent-Union filed a brief in opposition. Thereafter, the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.

The principal issue in this case is whether the Employer is "an employer in the construction industry" as that term is used in the construction industry proviso of Section 8(e). The answer to that question determines whether the Respondent violated Sections 8(b)(4)(ii)(A) and 8(e), by maintaining and seeking to enforce, through grievances and court action, the union-signatory subcontracting provisions of the Association of General Contractors Commercial Carpenters Agreement to which the Employer and the Respondent are signatories.

The judge found that the Employer is an employer in the construction industry within the meaning of the 8(e) proviso with respect to the projects in issue. Accordingly, he dismissed the complaint on the basis that the Respondent's enforcement efforts were protected by the proviso.

The General Counsel and the Employer have excepted to the judge's construction industry finding, among other things. The General Counsel's primary contention is that such a finding is erroneous where, as here, the Employer neither acts as a general contractor nor uses any of its own employees to do the work, the installation of floor coverings. The General Counsel further contends that the Employer, in subcontracting for the performance of the carpet installation work,

is merely providing a service for the carpet it sells, much as an interior decorator would do. The Employer argues that it is primarily a supplier of office furniture and that it would have to be primarily engaged in construction for the 8(e) proviso to apply. Both the General Counsel and the Employer rely on *Carpenters Chicago Council (Polk Bros.)*, 275 NLRB 294 (1985), in support of their positions. For the reasons set forth below, we reject their arguments. We find that an employer qualifies as an employer in the construction industry for purposes of Sec. 8(e), where, as during the relevant period here, it is party to a construction-labor collective-bargaining agreement and it subcontracts the work at a construction site to a subcontractor whose principal has either been an acknowledged employee of the employer or has functioned in that capacity with respect to the jobsite work.

Facts

The Employer sells office products, including supplies, furniture, and draperies, and performs contract design work, i.e., designing office interiors, with or without providing all materials and installation. One facet of its business includes the sale and installation of contract floor covering, including carpeting, hardwood, vinyl sheeting, and vinyl tiling at construction sites, including newly erected buildings and existing buildings undergoing renovation or remodeling, as well as other commercial sites. The Employer usually subcontracts the work of installing the flooring,² and the record establishes that it has primarily engaged Quality Carpet Service (Quality) for this purpose since 1990. Quality is a nonunion company owned and operated by Robert Wick, who was employed in 1990 by the Employer as scheduler of floor covering installation.³ The Respondent procures flooring contracts at construction sites by submitting bids to, or negotiating with, general contractors or project owners.

²The parties stipulated that the Employer does not employ floor covering installers. The Employer's chief executive officer, Edward Rowley, stated however, that in 1987 and 1988, on a project (or projects) not identified in the record, the Employer placed the subcontractors' employees who performed the installation work on its own payroll at the request of the general contractor in order to avoid possible labor problems at the construction site.

³Rowley described Wick as a part-time, salaried employee of the Employer. Wick maintained his position with the Employer until December 31, 1991, 2 months after the Union filed suit in U.S. district court seeking to enforce the subcontracting provisions here in issue. In addition to "scheduling" installations, Wick's duties as an employee entailed inspecting the jobsite to see whether the floors were free of debris or furniture and ready to accept covering, and whether there were working elevators, and coordinating the installation with the person in charge of the project. In his deposition admitted by stipulation in this case, Rowley testified that salespersons now perform preinstallation and postinstallation inspections, but he did not know who handled scheduling.

¹The parties entered into a stipulation, waiving a hearing before the judge and agreeing that the record would consist of their stipulation and exhibits attached thereto (primarily pretrial affidavits and attachments given in a proceeding under Sec. 301 of the Labor-Management Relations Act filed by the Union against the Charging Party-Employer in the United States District Court for the Western District of Wisconsin.)

On March 1, 1991,⁴ the Employer signed a commitment to be bound by the terms of the AGC Agreement noted above, effective from June 1, 1990, through May 31, 1993. The agreement specifically covered carpet layers and wood and resilient floor layers.⁵ It also contained a union-signatory subcontractor clause that provides:

It is agreed that any work sublet and to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work and when a portion of [the] work to be sublet is under the jurisdiction of this agreement, the work shall be sublet to a subcontractor signatory to an agreement with the Greater Wisconsin Carpenters Bargaining Unit, or any of its affiliates.

Notwithstanding its execution of the agreement, the Employer continued subcontracting flooring installation work to Quality, which remained a nonunion subcontractor. On June 20, the Union filed a grievance against the Employer, asserting that it violated the subcontracting, jurisdiction, and other provisions of the agreement by contracting with Quality for installation of carpeting on several floors at the Greenway Tower Office project in Middleton, Wisconsin. On August 22, the Union filed a similar grievance concerning the Employer's subcontracting carpet installation to Quality at the Physicians Plus building in Madison. The Union also sought to arbitrate these grievances, and as noted above (fn. 1 supra), on October 28, the Union filed a suit in the United States District Court for the Western District of Wisconsin, seeking to enforce the subcontracting clause of the agreement.⁶ The Union filed three more subcontracting grievances in March and May 1992.⁷

⁴ All dates refer to 1991 unless otherwise indicated.

⁵ The agreement also covered the Employer's wall installation employees, two of whom were employed at the time the AGC agreement was signed by the Employer.

⁶ Relying principally on *Polk Bros.*, supra, the district court held that the Employer was not an employer in the construction industry within the meaning of Sec. 8(e) of the Act. On August 17, 1993, the U.S. Court of Appeals for the Seventh Circuit rejected the lower court's analysis, reasoning in part that *Polk Bros.* was "an aberration" in Board law. The appeals court cited *Los Angeles Building & Trades Council (Church's Fried Chicken)*, 183 NLRB 1037 (1970), and *Carpenters Local 743 (Longs Drug)*, 278 NLRB 440 (1986), and concluded that "whenever an employer is able to determine the nature of the workers who will be employed at a construction site through its selection of a subcontractor, the employer is, to that extent, an 'employer in the construction industry' within the meaning of [Sec. 8(e)'s] construction industry proviso." *District Council of Carpenters v. Rowley-Schlimgen*, 2 F.3d 765, 769 (7th Cir. 1993). The court vacated and remanded the case to the district court for further proceedings.

⁷ The sites of the jobs or projects that are the subject of the latter three grievances are not specified in the record.

Discussion

The Board has long recognized that the installation of floor covering at construction, renovation, and remodeling sites is construction industry work of the type performed by special trade contractors. In *Painters Local 1247 (Indio Paint)*, 156 NLRB 951 (1966), the Board affirmed the administrative law judge's conclusion that "the so-called building and construction concept subsumes 'the provision of labor whereby materials and constituent parts may be combined on the building site' to form, make or build a structure." (156 NLRB at 959.) In adopting the judge's analysis, the Board embraced the "definition" of construction used in the Standard Industrial Classification (SIC) Manual for 1957. The 1987 SIC Manual defines construction in the same terms as the 1957 manual: "The term construction includes new work, additions, alterations, reconstruction, installations, and repairs." Additionally, both SIC manuals recognize the installation of floor covering as a special trade within the construction industry.⁸

It is significant that the application of the construction industry proviso of Section 8(e), unlike Section 8(f), is not conditioned on an employer's being *primarily* engaged in the construction industry. The 8(e) proviso permits the establishment of union-signatory subcontracting clauses in the construction industry as a means of reducing the tensions that typically arise among the various crafts when union and nonunion labor are assigned to the same construction site. Given the relatively short-term nature of construction work, Section 8(f) attempts to assure the ready provision of labor and the prehire establishment of wages, hours, and other terms and conditions of employment in order to avoid the uncertainties and disruptions that would arise if, as is likely, negotiating an agreement took longer than the construction work itself. Thus, the underlying policies as well as the pertinent language of the two subsections differ.⁹ Additionally, as the Board observed in *Longs Drug*, 278 NLRB at 442, citing *Church's Fried Chicken*, supra, "[W]hether an employer is 'an employer in the construction industry' within the meaning of the first proviso of Section 8(e)

⁸ We note that the SIC manual uses the term "primarily engaged" in connection with special trades. Though helpful in defining the construction industry and the special trades it encompasses, the SIC Manual has not been strictly followed where the statute does not require that the employer be primarily engaged in a specific activity. [See, for example, *Indio Paint*, supra, where the Board found that a firm which similarly sold and installed carpeting and floor covering and performed contract work for general contractors was an employer in the construction industry under Sec. 8(e), citing the SIC manual.]

⁹ To the extent that the decision in *Polk Bros.*, supra, 275 NLRB at 296, suggests that there are no analytical distinctions to be made between the Sec. 8(e) proviso and Sec. 8(f) with respect to the determination of whether an employer is in the construction industry, we disavow it.

is dependent on the circumstances of each situation, rather than on the principal business of the employer.” Accord: *District Council of Carpenters v. Rowley-Schlingens*, 2 F.3d at 767-769.

Applying that analysis to the instant case, we find that the Employer was engaged in construction work at construction sites during the period for which the unfair labor practice is alleged. While the Employer has devoted a considerable portion of its case to stressing the relatively small amount of its entire business that is irrefutably construction site work by pointing out both the number of such transactions and the percentage of income derived from them, such evidence is immaterial except insofar as it bears on the question whether such work was more than de minimis. Although the Employer has classified its flooring installation projects as construction, nonconstruction remodeling, and neither, there is no dispute that a significant absolute amount of the Employer’s flooring installation work is performed at construction sites.¹⁰ Notably, no party disputes that the Greenway Tower Office and Physicians Plus Building projects over which the Respondent initiated the grievances and court action are construction projects.¹¹

The inquiry into the Employer’s construction industry status does not end there, however. In *Longs Drug, Church’s Fried Chicken*, and *Indio Paint*, the Board considered whether the employers possessed control over any segment of labor relations at the construction

¹⁰In this connection, we find it unnecessary to rely on the judge’s inferences that five high-priced flooring installation jobs which apparently were not the subject of grievances relating to this proceeding entailed such remodeling as would be considered construction. Further, we find it unnecessary to pass on the General Counsel’s argument that the judge improperly considered motive in his analysis and improperly drew an adverse inference as to the motive for the Employer’s reorganizing its business immediately prior to this proceeding. Even granting these points raised by the General Counsel, the Employer nevertheless was engaged in construction industry work on all the identified sites encompassed by the grievances.

¹¹The General Counsel argues that the judge mistakenly relied on the fact that the Employer procures its flooring installation contracts at construction sites through competitive bidding. He contends that competition with construction companies is not a factor in determining an employer’s 8(e) status. We note that although the manner in which an employer procures its work has not expressly been delineated as a probative factor in the Board’s determinations, it is arguably relevant to the inquiry and has received express mention and been implicitly relied on by judges and the Board in 8(e) and 8(f) cases where flooring sellers/installers’ construction industry status is in issue. In *Indio Paint*, supra, an 8(f) case, it was one of many facts relied on in determining that the employer was primarily engaged in construction. In *Polk Bros.*, supra, an 8(e) case, the fact that the employer did not bid competitively for carpet installation, but rather secured its business through retail advertising, was significant enough to warrant mention in determining that the employer was not a construction industry employer.

Apart from the fact that the employer in *Polk Bros.* did not competitively bid for business, that case is distinguishable from the instant case in that its carpet sales and installations were limited principally to home owners of already existing dwellings.

site. As alluded to earlier, the General Counsel maintains that because the Employer is not a general contractor as was the case in *Church’s Fried Chicken*, and because it subcontracts the flooring installation work and does not employ installers, we must find that it is not a construction industry employer because it lacks control over the work force. We disagree.

Although the Employer does not directly employ floor covering installers, its close connection with Quality, notably through Wick, is sufficient evidence of control over the work force at the job sites, at least for the purpose of determining whether it is a construction industry employer within the meaning of the Section 8(e) proviso. The competitive bid prices and negotiated prices that the Employer charges general contractors and project owners are based on prior discussions with Quality about its costs. (Quality bases its charges on the square footage of the installation job. Logic dictates that its costs are predominantly labor costs.) *Longs* says this is not meaningful. In any event, the Employer’s presence at the construction sites was manifest and its control over the nature of the work force and the quality of their performance was evident during the period that Quality’s principal, Wick, was concurrently employed as a scheduler and inspector by the Employer. Accordingly, we find that during the period of the subcontracting arrangement between the Employer and Quality for the Greenway Tower Office and Physicians Plus Building projects, the Employer, through its employee and agent, Wick, irrefutably exercised control over labor and performance at those sites.¹²

On the basis of all of the foregoing, we find that the Employer is “an employer in the construction industry” with respect to certain of its flooring contracts. Inasmuch as the subcontracting provision of the AGC agreement in issue is limited by its terms to construction sites and no party specifically disputes that the projects in issue are construction sites, we find that the Union has not violated Sections 8(e) and 8(b)(4)(ii)(A) of the Act as a result of its enforcement efforts.¹³

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

¹²In light of Wick’s status at the time of the complained of conduct, we find it unnecessary to rely on the judge’s inferences regarding Wick’s termination and his use of office space thereafter.

¹³The instant case is distinguishable from *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562 (1989), in which the Board found that the union violated Sec. 8(e) by attempting to force the employer, a general contractor who did not employ any unit employees, to agree to a subcontracting clause outside the context of a collective-bargaining relationship. Here, the Employer is bound by the terms of an existing contract.

Joyce Ann Seiser, Esq., for the General Counsel.
 Jack D. Walker and Dana J. Erlandsen, Esqs. (Melli, Walker, Pease & Ruhly), of Madison, Wisconsin, for the Company.
 Matthew R. Robbins and Naomi E. Eisman, Esqs. (Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman), of Milwaukee, Wisconsin, for the Union.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. The charges were filed on February 27, 1992. The consolidated complaint was issued July 23 and amended August 5, 1992. In a Stipulation of Facts (approved Nov. 24, 1992) the parties waived a hearing and agreed that the stipulation and attached exhibits would constitute the exclusive facts and the entire record.

The Company, through its interior finishes division (previously called the contract or carpet division), regularly competes with construction industry contractors for the installation of carpeting, vinyl tiling, hardwood, and other floor covering. It subcontracts floor covering for large general contractors and contracts directly with owners on large construction projects.

About March 1, 1991, it signed a commitment to abide by the Union's 1990-1993 AGC "Commercial Carpenters Agreement," which specifically covers "Carpet Layers" and "Wood and Resilient Floor Layers" and which contains a union signatory subcontractor clause. Unlike other contractor signatories who subcontract the installation of carpeting and other floor covering to union subcontractors in accordance with the agreement, the Company continued to subcontract its installations to a nonunion company whose owner was a salaried floor-covering inspector and scheduler on the Company's own payroll.

Contending that the union signatory subcontractor clause is lawful in the construction industry, the Union filed grievances and a court action to enforce the clause. The stipulated issues are (a) whether the Company is an employer in the construction industry; (b) whether the Union violated Section 8(e) by entering into and giving effect to the subcontractor clause; and (c) also violated Section 8(b)(4)(ii)(A) of the National Labor Relations Act.

On the stipulated record and after considering the briefs filed by the General Counsel, the Union, and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, distributes "office products including furniture, supplies, draperies, contract carpet, and contract design" (Jt. Exh. 3, attached Exh. 3, fn. 1, p. 7) at its facilities in Madison, Wisconsin, where it annually receives goods valued over \$50,000 directly from outside the State. I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Businesses of the Company

1. Retail division

The Company has had four divisions: retail, furniture, interior finishes, and supplies divisions (Jt. Exh. 3, pp. 8, 10).

It operated four stores in the retail division, selling office supplies and inexpensive office furniture. In 1991 the Company closed three of the four stores, downsizing its retail business. The volume of this business is "insignificant." (Jt. Exh. 3, pp. 8-10.) As discussed below, its two larger remaining businesses are primarily commercial.

2. Furniture division

The Company's major business is the sale and installation of "[a]ll kinds of commercial furniture . . . primarily the manufacturers steel case." This (in the words of Chief Executive Officer Edward Rowley) is referred to as "systems furniture," which is "furniture with paneling around [with] the work surface attached to the panels, and pedestals attached to the panels under the work surfaces and binder bins attached to the panels above the furniture." The Company also sells freestanding office furniture. (Jt. Exh. 3, pp. 21, 42.)

In addition, the Company performs "contract design" work in the furniture division, designing entire office interiors, with or without "providing all the materials and installation," including furniture and window and floor covering. This work is performed for both new construction and existing buildings, as when "a new tenant is coming in and wants the interior renovated." The annual sales of the contract design work are about \$150,000, which is a small portion of the sales of over \$20 million in the furniture division. (Jt. Exh. 3, pp. 21, 44-46 & attached Exh. 3, p. 16.)

There is no issue over whether the separate sales and installations in the furniture division (now a part of the "interiors" division, as discussed later) are in the construction industry. As conceded in the General Counsel's brief, the "primary" nature of the Company's business "is not at issue here."

3. Interior finishes division

a. Contract carpeting and other floor covering

The interior finishes division, which in the past has also been called the contract division and the carpet division, has been a discrete division, under a director. Each month (two 4-week "fiscal periods" and one 5-week period each quarter) the Company prepared separate financial statements for the division. These statements showed sales, gross profit, and expenses for the month, year-to-date, and past fiscal year. (Jt. Exh. 3, pp. 10-11, 13-14, 25-26 & attached Exh. 2; Jt. Exh. 7, attached Exhs. C, D.)

The major sales in this division are shown on the monthly statements as "Carpet & Installation," which includes sales and installations of carpeting, vinyl sheet (linoleum-type) goods, vinyl tiling, hardwood, and other floor covering. The volume increased from \$1,475,216 in the fiscal year ending June 2, 1990, to \$1,683,354 in the fiscal year ending June 1, 1991, and \$1,975,581 in fiscal year 1992 through April 25 (5 weeks before the end of the fiscal year on May 30). (Jt.

Exh. 3, pp. 13–14, 17–18, 39 & attached Exh. 2; Jt. Exh. 7, attached Exh. D.)

Although the Company ordinarily sells the carpeting and other floor covering that it contracts to install, I note that in fiscal year 1991, as the Company acknowledges, it also sold \$30,173 of “contract labor that we did not sell product along with it” (Jt. Exh. 3, p. 48 & attached Exh. 2). The Company acknowledges that it “Sometimes, but not always” marks up the subcontractor’s quoted installation charge when making its bid to the customer, “Depending on what you think you can get” (Jt. Exh. 3, p. 38).

The Company advertises its floor-covering business as “commercial only,” specifying “for commercial-institutional applications,” sales, installation, and repair, “by appointment only” (Jt. Exh. 3 p. 12 & attached Exh. 1). It competes with construction industry contractors for the installation of carpeting and other floor covering, through either bids or negotiations with general contractors and project owners (Jt. Exh. 3, p. 23; Jt. Exh. 4, p. 2; Jt. Exh. 5, pp. 2–4).

The Company subcontracts the installation of floor covering for such large general construction contractors as J. H. Findorff & Sons, Inc.; Joe Daniels Construction Co., Inc.; Kenneth F. Sullivan & Co., Kraemer Bros., Inc.; Oscar J. Boldt Construction; and Robert Newcomb Co., Inc. It has contracted carpet installations on such large construction projects as Black Earth Nursing Home, Capital Cities Distribution Center Building, Cottage Grove School, Greenway Office Tower Building, Hazelton Laboratory, Madison Area Technical College Campus, Physicians Plus Medical Center, and Saint Mary’s Hospital. (Jt. Exh. 3, p. 23–24; Jt. Exh. 4, pp. 2–3.)

The monthly financial statement for the 4-week period ending April 25, 1992 (printed a few days later, as usual, on May 4), shows that the only other sales in the division that month were of “Drapery,” which includes sales and installation of vertical blinds, window shades, “or any kind of window covers.” The drapery sales in the first 47 weeks of this fiscal year ending May 30 were \$206,690, only 10.46 percent of the \$1,975,581 in sales and installation of floor covering. There were no sales that month of demountable walls, which the Company had been selling and installing at construction sites. (Jt. Exh. 3, pp. 15–17, 39–41; Jt. Exh. 7, attached Exh. D.)

b. SIC classifications

In evidence are excerpts from the Standard Industrial Classification (SIC) Manual—1987, issued by the Executive Office of the President, Office of Management and Budget. There are two sets of excerpts, those introduced by the Company (Jt. Exh. 2, attached Exh. A, pp. 1–9, 53–54, 287–288, 290) and those introduced by the Union (Jt. Exh. 7, attached Exh. B, p. 63).

The Company’s SIC manual excerpts include the following (Exh. A, p. 53):

DIVISION C

Construction

The Division as a Whole

This division includes establishments primarily engaged in construction. The term construction includes *new work, additions, alterations, reconstruction, installations, and repairs.*

Three broad types of construction activity are covered . . . (3) construction activity by . . . *special trade contractors.* Special trade contractors are primarily engaged in *specialized construction activities*, such as plumbing, painting, and electrical work, and work for general contractors *under subcontract or directly for property owners.* [Emphasis added.]

The Union’s SIC manual excerpts (omitted from the Company’s excerpts) are on one page (U. Exh. B, p. 63), showing the classification of special trade contractors that engage in the specialized construction activity of installing carpeting and other floor covering. Under “Division C, Construction” (U. Exh. A, p. 7), this classification is listed in Industry 1752 and defined in part as follows:

Special trade contractors primarily engaged in the *installation of asphalt tile, carpeting, linoleum, and resilient flooring.* This industry also includes special trade contractors engaged in laying, scraping, and finishing parquet and other *hardwood flooring.* [Emphasis added.]

Among the subclassifications listed are the following:

Carpet laying or removal service—contractors
 Floor laying, scraping, finishing, and refinishing—contractors
 Hardwood flooring—contractors
 Linoleum installation—contractors
 Resilient floor laying—contractors
 Vinyl floor tile and sheet installation—contractors

c. List of floor-covering transactions

Also in evidence is a document, prepared by the Company, entitled “Carpet Transactions Detail Calendar Year 1991” (Jt. Exh. 7, p. 2, attached Exh. F). It lists the interior finishes division’s projects that the Company performed for 72 customers in 1991, either under subcontracts for general contractors or under direct contracts with project owners. The transactions *include* the sales and installations of other floor covering.

In preparing the list, the Company failed to follow the SIC definition of “construction,” which specifically includes “new work, additions, alterations, reconstruction, installations, and repairs.” Instead, CEO Rowley arranged with Controller Bryan Arndt to limit the construction projects on the list to include only “new construction” and “remod-

eled.” Rowley testified in his May 6 deposition (Jt. Exh. 3, p. 29):

Q. And would there have been discussions between you and [Arndt] as to how to define new construction and newly remodeled, that you recall?

A. Yes.

Q. And what discussion was there

A. New construction would be defined as new facility. Remodeled would be where there was *major work* done on the interior of the building, such as walls.

Q. So, for example, if the project was on a building that was there, and *did not* involve *removal of walls* to the buildings, that would *not* come under newly remodeled?

A. That’s my understanding. [Emphasis added.]

Of the \$1,896,493.57 total sales in calendar year 1991 of floor-covering installations, as shown on the list Arndt prepared, there are 19 sales on new construction projects totaling \$404,089.38 and 35 sales on remodeled projects (as defined by CEO Rowley) totaling \$465,288.80. Thus, among the sales to the 72 customers on the list, there are 54 sales on new and remodeled projects totaling \$869,378.18, which is 45.8 percent (less than half) of the total sales of floor covering and installations that calendar year.

The sales on one of the remaining projects, at Wausau Insurance (listed as “neither” new nor remodeled construction), amount to \$468,438.14. The largest acknowledged remodeled project, at First Star Development Corporation, is \$165,621.78, only 35.3 percent of that amount. I infer that the Wausau Insurance project is remodeling that did not involve the removal of walls. When the \$468,438.14 in sales on this project is added to the total acknowledged \$869,378.18 in sales on new and remodeled projects, the new total is \$1,337,816.32, which is 70.5 percent (a majority) of the \$1,896,493.57 total sales.

The next largest acknowledged remodeled project, at Oscar Mayer, is \$65,883.91. Each of four other projects (listed as “neither” new nor remodeled) is larger. They are a \$97,802.98 project at Jerome J. Mullins & Associates, a \$76,765.54 project at Nelson Industries, a \$75,708.28 project at Cuna Mutual Insurance, and a \$66,667.14 project at Wisconsin Power & Light, averaging \$79,235.98. When the \$316,943.94 total sales on these four probable remodeled projects is added to \$1,337,816.32, the new total is \$1,654,760.26, which is 87.2 percent of \$1,896,493.57.

In addition, I deem it likely that three (if not all) of the remaining projects (listed as “neither” new nor remodeled) are also remodeling. They are a \$32,245.89 project at Wisconsin Power & Light, a \$21,177.15 project at Carpetiers, and a \$20,959.13 project at Madison Gas and Electric, averaging \$24,794.05. This average is 12.8 times as large as the average of the 14 smallest listed remodeled projects, which range in size from \$996.25 to \$2,937.22—all below \$3000 and averaging \$1924.

When the amount of \$74,382.17 for these three likely remodeled projects is added to \$1,654,760.26, the new total is \$1,729,142.43, which is 91.1 percent of the \$1,896,493.57 total sales in the interior finishes division. This percent is almost twice the 45.8 percent the Company acknowledges. (The Company contends that “[l]ess than one-half of the car-

peting sold by [the Company] was installed in projects which involved new construction or remodeling.”)

Concerning the division’s gross profit in calendar year 1991, the \$91,655.67 gross profit on the acknowledged new and remodeled projects is 48.3 percent (less than half) of the \$189,615.59 total gross profit. When the \$25,288.94 gross profit on the large Wausau Insurance project is added to \$91,655.67, the new total is \$116,944.61, which is 61.6 percent (a majority) of the total gross profit.

When the \$38,635.76 gross profit on the four large probable remodeled projects and the \$10,726.96 gross profit on the three additional likely remodeled projects are added, the new total of \$166,307.33 is 87.7 percent of the \$189,615.59 total gross profit.

d. Different definition of “remodeled”

The week after Rowley gave his May 6 deposition, limiting the definition of “remodeled” to “where there was major work” involving “removal of walls,” Dennis Penkalski, the administrative assistant to the Union’s business manager, stated in an affidavit dated May 13 (Jt. Exh. 5, p. 3) that

Remodeling regularly performed by construction workers including carpenters, floor coverers, painters, and others may be very extensive but may not include actually moving walls of the building. For example, a large hotel will have an extensive construction remodeling project which will include new floor coverings through[out] the hotel as well as a variety of other construction tasks without actually moving walls within the hotel.

On May 22, as its response, the Company submitted to the district court the affidavits of Arndt and two of the salespersons who had assisted in making the list of transactions. They gave a different (and belated) definition of “remodeling.”

According to Arndt (Jt. Exh. 9), new construction is a new building, and remodeling is “*any* job where any construction work was performed on the building.” [Emphasis added.] He defined “neither” new construction or remodeling on the list of 1991 transactions “as a transaction where the only event was the installation of carpeting, with or without the installation of furniture.”

The affidavits signed by salespersons Bill Marks and Maryanne Vieau (Jt. Exhs. 10, 11) defined

new construction as a new building, remodeling as an existing building with some construction activity either contemporaneous with or immediately preceding the carpet installation, and “neither” as projects where only floor covering was involved, with or without furniture sales. [Emphasis added.]

Thus, the Company was still avoiding the SIC definition of “construction” as “new work, additions, alterations, reconstruction, installations, and repairs.” I infer that particularly because “installations” are specifically included in the SIC definition, the Company substituted “remodeled” (however defined) for the words, “additions, alternations, reconstruction, installations, and repairs.”

By limiting “construction” to “new construction” and “remodeled” projects, the Company was also ignoring the scope of the construction-industry proviso that applies to “the site of the construction, alteration, painting, or repair” (the same language contained in the subcontractor clause), as discussed below.

I note that the Company argues in its brief that remodeling would *include* “alteration, painting, or repair of a building.” Even if that were necessarily accurate, the Company at least implies that remodeling would not include the installation of carpeting, linoleum-type sheet goods, vinyl tiling, hardwood, and other floor covering, which also is “construction” as defined in the industry.

B. Attempted Enforcement of Subcontractor Clause

1. Adoption of AGC–Union agreement

The Company has followed the practice of subcontracting to nonunion contractors its installations of carpeting and other floor covering. The only times that it has placed carpet layers on its own payroll were in 1987 and 1988 when it did so “at the request of general contractors or customers in order to avoid or obviate real or perceived union problems” (evidently at construction sites where union employees were working). (Jt. Exh. 3, pp. 37–39; Jt. Exh. 7, attached Exh. G; Jt. Exh. 8.) The only other union carpenters the Company employed under its previous union agreements (not in evidence) were employees to install demountable walls that it formerly sold (Jt. Exh. 3, pp. 41–43; Jt. Exh. 8).

On June 1, 1990, the AGC and the Union signed the 1990–1993 “Commercial Carpenters Agreement” (effective through May 31, 1993), which specifically includes “Carpet Layers” and “Wood and Resilient Floor Layers” in the bargaining unit (Jt. Exh. 1, attached Exh. A, pp. 1, 16, 20, 30; Jt. Exh. 5, pp. 1–2). This AGC–Union agreement also includes a union signatory subcontractor clause, which tracks the construction-site language in the construction-industry proviso to Section 8(e). The subcontractor clause, section 14.1(a), provides (Jt. Exh. 1, attached Exh. A, p. 16):

It is agreed that any work sublet and to be done at the *site of the construction, alteration, painting or repair* of a building, structure, or other work and when a portion of [the] work to be sublet is under the jurisdiction of this agreement, the work shall be sublet to a subcontractor signatory to an agreement with the Greater Wisconsin Carpenters Bargaining Unit, or any of its affiliates. [Emphasis added.]

The construction-industry proviso, which is an exception to the 8(e) prohibition against “hot cargo” agreements that require an employer to refrain from doing business with any other person, states that nothing in Section 8(e)

shall apply to an agreement between a labor organization and an *employer in the construction industry* relating to contracting or subcontracting of work to be done at the *site of the construction, alteration, painting, or repair* of a building, structure, or other work. [Emphasis added.]

About March 1, 1991 (9 months after the AGC–Union agreement was signed), the Company signed an agreement

committing itself “to live up to and be bound by all the terms and provisions of the 1990–1993 Collective Bargaining Agreement” (Stipulation of Fact p. 1; Jt. Exh. 1, attached Exh. A).

2. Continued subcontracting to nonunion company

Although other floor-covering contractors, who are signatory to the AGC–Union agreement, subcontract the installation of carpeting and other floor covering to union subcontractors in accordance with the subcontractor clause in that agreement, the Company continues to subcontract its floor-covering installations to a nonunion subcontractor, Quality Carpet Service. That company is owned and operated by Robert Wick, who was (until December 1991) a salaried employee on the Company’s own payroll. (Jt. Exh. 3, pp. 32–33, 36, 48–49; Jt. Exh. 5, p. 3.)

Beginning in 1990, Wick worked in the interior finishes division as an inspector and scheduler of floor-covering installation. His duties, as described in CEO Rowley’s deposition, were as follows (Jt. Exh. 3, pp. 32–32):

Q. So he would be a part-time employee of your company as well as being the owner of a company that was subcontractor to you for installation of carpet, isn’t that correct?

A. Yes.

Q. What were his duties as an employee?

A. He was to schedule floor-covering installation. He was to inspect jobsite.

. . . .

Q. What’s involved in inspecting a jobsite, Mr. Rowley?

A. Looking at the jobsite to see if the floor is ready to accept covering, looking to see if there are elevators, to see whether the floor is free of furniture or . . . construction debris, to coordinate with the person who’s in charge of the project, normally the job superintendent, to see when they will be ready for the installation and to coordinate the scheduling with them.

This evidence shows that the Company, through its salaried inspector and scheduler in the interior finishes division, was taking an active part in managing floor-covering installation at the construction site.

The record does not reveal the amount of Wick’s salary. It reveals payments to Quality Carpet Service totaling \$261,306.36 in calendar year 1990, but not the payments in calendar year 1991 or fiscal year 1992, when the Company was “customarily” using that nonunion company for its installations. (Jt. Exh. 3, pp. 32, 36–37; Jt. Exh. 7, attached Exh. H.)

3. Attempts to enforce subcontractor clause

As agreed in the Stipulation of Facts (pp. 1–2), on June 20 and August 22, 1991, and on March 27 and twice in May 1992 the Union filed grievances seeking to enforce the union signatory subcontractor clause. The Union requested arbitration. On October 28, 1991, it filed a complaint in the District Court of Wisconsin under Section 301 of the Act, seeking to compel arbitration of the grievances filed up to that date. Following discovery, the Company filed a Motion for Summary Judgment. On June 2, 1992, the district court issued a

Memorandum and Order in Case 91–C–932–S, which the Union appealed to the Seventh Circuit Court of Appeals.

The parties further stipulated (p. 2) that the affidavits and exhibits presented to the district court “shall constitute all of the evidence to be presented” on the merits. The court’s Memorandum and Order are not included in the stipulated evidence.

4. Changes pending court enforcement

In December 1991, about 2 months after the Union brought the enforcement proceeding in the district court, the Company removed Wick (owner of its installation subcontractor, Quality Carpet Service) from his position on the the Company’s payroll as its inspector and scheduler of floor-covering installation in the interior finishes division. Yet the Company still continues to provide Wick an office and telephone (on an extension of the Company’s telephone) at its headquarters. (Jt. Exh. 3, p. 33, 48–49.)

When CEO Rowley was asked in his deposition who was performing Wick’s former duties, Rowley answered, “I’m not sure who does the scheduling” (Jt. Exh. 3, p. 36). The evidence does not reveal whether Wick is still performing that responsibility, despite his removal from the Company’s payroll.

When Rowley gave his May 6, 1992 deposition, he revealed that there were at that time only two divisions in the Company: the “interiors” division and the supplies division—not the previous four divisions: retail, furniture, “interior finishes,” and supplies. He testified: “Now the supplies division is a division that sells office supplies, pens, papers, pencils . . . we have now included the retail store in the office supplies division, so the supplies division is office supplies, and whatever you sell in the remaining retail store.” (Jt. Exh. 3, pp. 20–21.)

The significant part of this change was the elimination of the interior finishes division as a separate division. It had remained separate through April 25 (less than 2 weeks before), as shown by the division’s last monthly financial statement, which was issued weeks before the end of fiscal year 1992 on May 30. As discussed above, this monthly statement shows an increased volume of \$1,975,581 in sales and installations of floor covering year-to-date. This volume of sales and installations in 47 weeks of the fiscal year anticipated a volume of well over \$2 million for the entire fiscal year that ended 5 weeks later.

Rowley testified in his May 6 deposition (Jt. Exh. 3, pp. 20–21):

We [now] have two divisions. One is an interiors division, that is not the same as the interior finishes division

. . . .

Q. The interiors division, that includes much more than . . . what used to be the interior finishes division?

A. What was known at that time as the furniture division, so the interiors division includes a combination of the interior finishes division and the furniture division.

Thus on May 6, 1992, less than a month before the district court issued its June 2 ruling on the Motion for Summary Judgment, Rowley was announcing the combining of the

“interior finishes” division with the much larger furniture division into an “interiors” division. On April 15, 1992, 3 weeks earlier, the Company had submitted its “Affidavit of Edward Rowley in Support of Defendant’s Motion for Summary Judgment.” In paragraph 4 of the affidavit (Jt. Exh. 1, p. 2) the statement is made that “[d]uring [calendar year] 1991, a representative period, 8.76% of gross sales, and 3.8% of gross profits of the company [in all its businesses] were derived from the sale of carpeting” (Jt. Exh. 3, p. 22).

I infer that the impending enforcement proceeding in the district court was the motivating factor in the Company’s decision to discontinue the monthly financial statements for the interior finishes division at that time (weeks before the end of the fiscal year) and to combine that division with the Company’s large furniture division. There is no evidence of any change in the actual operation of the former interior finishes division.

That division was then operating with an annual volume of over \$2 millions in sales and installations of floor covering, in competition with construction industry contractors. Combining this floor-covering business with the Company’s larger commercial-furniture business, whose annual volume was over \$20 million, was evidently intended to support a theory that floor covering was a very small portion of a single business enterprise, not a discrete “employer in the construction industry,” making applicable the construction-industry proviso in Section 8(e).

Moreover, this change followed the earlier change also made after the court proceeding was brought: the Company’s removing the owner of its floor-covering subcontractor from the Company’s own payroll. That change was evidently intended to support a theory that the Company had no presence at the construction site and had no control over the subcontractor’s labor relations with the nonunion floor layers.

C. Contentions of the Parties

1. Union’s contentions

The Union contends that the Company is in the construction industry for purposes of the construction-industry proviso to Section 8(e). It therefore contends that it neither violated Section 8(e) by entering into, maintaining, and giving effect to the union signatory subcontractor clause, nor violated Section 8(a)(4)(ii)(A) by forcing the employer to enter into an agreement prohibited by Section 8(e).

The Union cites *Painters Local 1247 (Indio Paint)*, 156 NLRB 951, 953–954, 959 (1966), which involves a firm that sold and installed carpeting and other floor covering, that performed “contract work for general contractors engaged in residential and commercial construction,” and that was found to be classified in the Standard Industrial Classification (SIC) Manual (1957) as a “special trade contractor” in the construction industry. The Union relies on the Board’s specific finding that

providing labor and materials in connection with floor-covering installations, both for general building contractors and homeowners, beyond peradventure of doubt, constitutes “building and construction” work.

The Union contends that the Company’s primary business (selling and installing commercial furniture) is irrelevant to

coverage under the construction-industry proviso to Section 8(e). It cites *Los Angeles Building Trades Council (Church's Fried Chicken)*, 183 NLRB 1032, 1036-1037 (1970), which involves a company whose "primary business" was "selling fried chicken to retail customers," but which built its own stores, "acting as its own prime contractor." The Union relies on the Board's finding, with respect to Church's "operations in constructing stores," that Church's was "an employer in the construction industry within the meaning of Section 8(e)" and that its primary business was "immaterial."

The Union also contends that in the present case, "Clearly, the [Company] controls labor relations at its construction sites as it chooses the subcontractors and controls the quality of their work. Indeed, its subcontractor was, until the end of 1991, an employee of the employer."

The Union further contends that because of the "clear language" of the 8(e) construction-industry proviso (extending its coverage to work "at the site of the construction, alteration, painting, or repair of a building, structure, or other work"):

Whether the [Company] supplies and installs carpeting on new construction sites or on the sites of additions, alterations, or repairs does not alter the fact that it is in the construction industry.

2. General Counsel's contentions

Disregarding the "construction, alteration, painting, or repair" language in the construction-industry proviso to Section 8(e), the General Counsel contends that "if the employer is not engaged in building a structure, the employer is not engaged in construction." He argues:

Moreover, much of the [Company's] subcontracted carpet installation involves existing, rather than newly constructed, structures. Even that portion of [the Union's] gross sales derived from [the] sale of carpeting with installation for new construction is de minimus [referring to sales and installations of floor coverings on new construction projects in calendar year 1991 of \$404,089.38].

Agreeing with the Union, the General Counsel concedes that the "primary" nature of the Company's business "is not at issue here."

The General Counsel admits that "[i]t *may well be* [emphasis added] that the subcontractor performing carpet installation is an employer in the construction industry." Yet, pointing out that the Company itself employs "no employees who perform such carpet installation work," the General Counsel argues that the subcontractor's status as an employer in the construction industry "does not make [the Company] an employer in the construction industry by association." This argument ignores the Company's status as a substantial competitor of construction industry contractors in the business of installing carpeting and other floor covering.

The General Counsel argues that the Company "is not a general contractor employing others to perform construction work for which it is responsible." He may be implying that the Company is not responsible to general contractors and to project owners for the satisfactory installation of floor cover-

ing that it subcontracts to Quality Carpet Service. If so, the evidence would not support such a finding.

Like the Company, the General Counsel cites *Carpenters Chicago Council (Polk Bros.)*, 275 NLRB 294, 297 (1985), which involves an employer that operated "a chain of retail stores selling home furnishings, including large and small appliances, furniture, and carpeting at discount prices" and found by the Board not to be a contractor, as discussed below.

I disagree with the General Counsel's contention (apparently made in an attempt to analogize the facts of this case with those in *Polk Bros.*) that the Company "is engaged in the *retail* [emphasis added] sale of office furniture, office equipment, and office furnishings, including carpeting." The Company's retail business consists of only one store, selling an "insignificant" volume of office supplies and inexpensive office furniture.

3. Company's contentions

The Company contends that its "primary business is selling office supplies and furniture," although the General Counsel concedes that the "primary" nature of the Company's business "is not at issue here."

The Company contends that "only a *tiny fraction* [emphasis added] of its sales comes from [the] sale of carpeting with installation." In doing so it ignores the fact, as found, that shortly before the district court ruled in the enforcement proceeding, the Company combined the interior finishes division (which had over \$2 million in annual sales and installations of carpeting and other floor coverings) with the furniture division (which had over \$20 million in annual sales) for the very purpose of making this contention.

The Company also contends that its only involvement with construction is "tangential at best"—despite the evidence that (1) the installation of carpeting and other floor covering is defined as "construction" in the industry (as shown by the SIC manual), (2) the Company competes with construction industry contractors for the installation of floor covering, (3) it subcontracts the installation of floor covering for large general construction contractors, (4) it contracts to install carpeting on many large construction projects, including a \$468,438.14 remodeling project in 1991 for Wausau Insurance, (5) it subcontracts "contract labor" (in the amount of \$30,173 in fiscal year 1991) on products it does not sell, and (6) it has taken an active part in managing floor-covering installation at the construction site (through Robert Wick, its subcontractor's owner who, until December 1991, remained on the Company's payroll as a salaried floor-covering inspector and scheduler).

The Company points out that it does not have a contractor's license (Jt. Exh. 1, p. 2). There is no evidence, however, that a contractor or subcontractor is required to have a contractor's license to contract for the installation of carpeting or other floor covering, or that the subcontractor that does the installation is required to have a contractor's license.

The Company contends that the Board has held that similar companies are not "employer[s] in the construction industry," as defined in Section 8(e). It cites *Polk Bros.*, above, which involved a discount carpet retailer and not a special trade contractor in the construction industry. That

case, which the Company contends is “the case closest on point,” is clearly distinguishable, as discussed below.

The Company (which omitted from its SIC manual excerpts the clearly relevant classification of special trade contractors that engage in the specialized construction activity of installing carpeting and other floor covering, as found), relies on a clearly irrelevant classification: “SIC Wholesale Trade, Major Group 5021 Furniture, which covers wholesale distribution of furniture, including office furniture” (Jt. Exh. 2, attached Exh. A, p. 290). Even if the Company’s business of selling commercial office furniture (rather than its floor-covering business) were relevant, the commercial sales of office furniture clearly were not “wholesale,” defined as “the sale of goods in quantity, as to retailers or jobbers, for resale.”

Ignoring evidence (a) that the Company’s floor-covering business has an annual volume of over \$2 million, (b) that the Company subcontracts floor covering for large general contractors, (c) that it contracts directly with owners of large construction projects, and (d) that it contracted 72 projects (some of them quite large) in 1991, the Company contends that

[The Company] is an office furniture and supply company that *occasionally* sells carpets and has a subcontractor install them—at finished office buildings, remodeled office buildings, and new office buildings. [Emphasis added.]

This contention, regarding only “occasionally” selling carpeting, is not persuasive. Neither do I find persuasive the Company’s contention that it does not control its subcontractors’ labor relations or “retain control over installation work,” nor any of its various other contentions, which I have considered.

D. Concluding Findings

The Board has long recognized that contractors selling and installing carpeting and other floor covering are classified in the construction industry as special trade contractors.

In *Indio Paint*, above, 156 NLRB 951, 953–954, 958–959 (1966), the Board adopted the trial examiner’s inclusion of wall-to-wall carpet installations in the classification of special trade contractors, even though there was no subclassification of “soft floor covering installation work” listed in the 1957 edition of the Standard Industrial Classification (SIC) Manual. The Board also adopted his finding that “*providing labor and materials in connection with floor-covering installations*, both for general building contractors and homeowners, beyond peradventure of doubt, constituted ‘building and construction’ work.”

In the 1972 edition of the SIC manual, as found in *Polk Bros.*, above, 275 NLRB 294, 296–297 (1985), the specific subclassification of “carpet laying or removal service—contractors” was included in the classification of “SIC Major Group 17—Construction—Special Trade Contractors and subsection, Industry Number 1752.”

In *Polk Bros.*, however, the administrative law judge found (275 NLRB at 296) that over 99 percent of the carpet sales were “to the ultimate consumers, owners, and occupants of homes, condominiums, and apartments.” The “few sales to commercial customers are neither specifically solicited by advertisement nor bid upon by [the retailer]; they result from

purchases being made in response to its retail advertising.” Distinguishing *Indio Paint*, he found that “[i]n that case, unlike the instant situation, the Employer derived nearly two-thirds of its business from special trade contract work for general contractors who were engaged in residential and commercial construction. That work was done pursuant to subcontract awards made by general contractors on competitive bids.”

The Board adopted the judge’s findings and his conclusions (275 NLRB at 297) that (1) the discount carpet retailer was “not a contractor,” (2) the business was more characteristic of “SIC Retail Trade, Major Group 57—Furniture, Home Furnishes” in Industry 5713, “Floor Covering Stores,” and in the subclassification of “Carpet Stores—Retail” or “Rug Stores—Retail,” and (3) “the carpet installation operations of this [retailer] do not fall within the construction-industry proviso to Section 8(e).”

Contrary to the Company’s contention that *Polk Bros.* is “the case closest on point,” I find that it is clearly distinguishable. In sharp contrast, the Company is a contractor, and its floor-laying business (as well as its office furniture business) is primarily commercial.

By 1987, as quoted above, the SIC manual specifically included the classification of special trade contractors that engage in the specialized construction activity of installing carpeting and other floor covering. These special trade contractors “work for general contractors under subcontract or directly for property owners,” as does the Company in its floor-covering business.

I find that the Company is a special trade contractor in the construction industry, despite the Company’s recent combining of the “interior finishes” division (in which it is primarily engaged in sales and installations of floor covering) with the furniture division into a so-called “interiors” division. The Company’s contract floor-covering business remains in competition with other construction industry contractors who sell and install floor covering. The Company’s primary business of selling and installing commercial office furniture is immaterial. *Church’s Fried Chicken*, above, 183 NLRB at 1037.

I also find that the Company controls the subcontractor’s labor relations at the construction site and retains control over the floor-covering installation work. It controls the selection and retention of subcontractors, determines the price it will pay for the installations, and determines the markup to charge its customers above the subcontractor’s installation charges. Although the Company subcontracts the work, I infer that it remains responsible to the general contractor or project owner for satisfactorily installing the floor covering, both when it subcontracts installation of floor covering it sells and when it subcontracts “contract labor” to install products it does not sell.

Before the court proceeding was brought to compel arbitration, the Company retained on its payroll, as inspector and scheduler of its floor-covering installation, Robert Wick, who was the owner and operator of the nonunion company it customarily used for its installations. Through this salaried employee, as found, the Company was taking an active part in managing floor-laying installation at the construction site. When Wick was removed from the payroll about 2 months after the court action was brought, the Company continued to furnish him an office and telephone at its headquarters.

CEO Rowley was not aware of anyone else performing the duties of scheduling the installations.

The Company acknowledges that it has placed carpet layers on its own payroll “at the request of general contractors or customers in order to avoid or obviate real or perceived union problems” (evidently at construction sites where union employees were working).

Under the Board’s ruling in *Polk Bros.*, above, 275 NLRB at 296, the Union has the burden of establishing that the Company is in the construction industry. I find that the Union has met that burden and has established that the Company, in its contract floor-covering business, is “an employer in the construction industry” and that the union signatory subcontractor clause relates to the subcontracting of work to be done “at the site of the construction, alteration, painting, or repair of a building, structure, or other work,” within the meaning of the construction-industry proviso to Section 8(e) of the Act.

I therefore find that the union signatory subcontractor clause is lawful and that the Union did not violate Section 8(e) or Section 8(a)(4)(ii)(A) of the Act.

CONCLUSIONS OF LAW

1. The Company is an employer in the construction industry within the meaning of the construction-industry proviso to Section 8(e) of the Act.

2. The Union has not violated Section 8(e) of the Act by entering into, maintaining, and giving effect to the union signatory subcontractor clause.

3. The Union has not violated Section 8(b)(4)(ii)(A) of the Act by forcing or requiring the Company to enter into an agreement prohibited by Section 8(e) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The complaint is dismissed.

¹If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.