

**Adderley Industries, Inc. and Local 1448, International Brotherhood of Electrical Workers, AFL-CIO. Case 4-CA-23435**

February 7, 1997

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On October 2, 1996, Administrative Law Judge Marvin Roth issued the attached decision. The General Counsel and the Respondent each filed exceptions and a supporting brief, and each filed a brief opposing the other's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs,<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions,<sup>3</sup> and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Adderley Industries, Inc., Blackwood, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

<sup>1</sup>The General Counsel's motion to strike is granted with respect to six portions of the Respondent's brief in support of exceptions, as specified in the motion, because they constitute representations concerning factual matters not part of the record in this proceeding. The General Counsel's motion to strike is denied with regard to the Respondent's exceptions document, because it substantially conforms with the requirements of Sec. 102.46(b)(1) of the Board's Rules and Regulations.

<sup>2</sup>The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's dismissal of the 8(a)(5) contract-repudiation allegation in this case, we find it unnecessary to rely on his finding, in part III,A,2 of his decision, that the Union sought to organize the Respondent's installation employees in order to persuade them not to cross anticipated picket lines relating to negotiations between the Union and a company with whom the Respondent had a business relationship.

<sup>3</sup>No exceptions were filed to the judge's dismissal of the 8(a)(1) allegation that the Respondent told its installation employees that it would not bargain with the Union.

In order to better conform with the judge's recommended order, we have substituted the attached notice for that of the administrative law judge.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten you with plant closure or cessation of operations if or because you choose Local 1448, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization as your collective-bargaining representative.

WE WILL NOT threaten you with discharge or other reprisal by telling you that you should seek work elsewhere if you wish to improve your wages or other working conditions through union or other concerted activity.

WE WILL NOT instruct you to tell the Union or any other labor organization to stop its organizing efforts.

WE WILL NOT create the impression of surveillance of employees' union activities, by indicating that we know the identity of union adherents, or their nonpublic union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

**ADDERLEY INDUSTRIES, INC.**

*Sheila Mayberry, Esq.*, for the General Counsel.  
*Robert Sz wajkos, Esq.*, of Philadelphia, Pennsylvania, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

MARVIN ROTH, Administrative Law Judge. This case was heard at Philadelphia, Pennsylvania, on June 20, 27, and 28, 1996. The charge and amended charges were filed respectively on January 25, February 22, April 12, and June 23, 1995, and June 18, 1996, by Local 1448, International Brotherhood of Electrical Workers, AFL-CIO (the Union). The complaint, which issued on June 29, 1995, and was amended at the hearing, alleges that Adderley Industries, Inc. (the Company or Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The gravamen of the complaint is that the Company allegedly (1) repudiated its collective-bargaining agreement with the Union, or (in the alternative) unilaterally subcontracted unit work, (2) failed and refused to furnish the Union with requested information relevant and necessary to the Union's role as unit bargaining representative, and (3) made various coercive statements to its employees. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evi-

dence, to argue orally, and to file briefs, the General Counsel and the Company each filed a brief.

On the entire record in this case,<sup>1</sup> and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs filed by the parties, I make the following

## FINDINGS OF FACT

### I. THE BUSINESS OF RESPONDENT

The Company, a corporation, with an office and place of business in Blackwood, New Jersey, is engaged in the business of providing cable television installation services. Prior to June 1994, the Company's facility was located in Thorofare, New Jersey. In the operation of its business, the Company annually derives gross revenues in excess of \$100,000, and purchases and receives goods valued in excess of \$5000 directly from points outside New Jersey. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. See *Raritan Valley Broadcasting Co.*, 122 NLRB 90 (1958).

### II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Alleged Repudiation of Contract or Unilateral Subcontracting of Unit Work

##### 1. The facts

Cable television came to Philadelphia in 1984, and Herb Adderley got a head start as contractor in the new industry. In 1983 he organized the Company, becoming its president and sole owner. In 1985, he obtained his first contract from Comcast Cablevision (Comcast), for performing installation work, specifically, connecting wire from the cable pedestal to the television or television converter, i.e., to the ultimate consumer. By the end of 1985, the Company had some 50 trucks in operation for use in this work. Adderley testified that he used independent contractors to perform this installation work, and prepared an appropriate form of agreement with them. The General Counsel contends that the alleged independent contractors were and are employees within the meaning of Section 2(3) of the Act. I shall hereafter use the term "installers" in referring to those individuals whose status is in issue.

In 1985, the city of Philadelphia authorized cable franchise companies to construct a cable grid system. That work involved laying of heavy cable underground, and aerial construction, meaning above ground erection of poles and other elements of the grid system. None of the persons who participated in this arrangement with the city government testified as witnesses in this proceeding. However, Edward Dasch, who has been the Union's business manager since October 1994, testified that he understood that when the city of Philadelphia permitted construction of a grid system, the franchise companies, the city government and the Union

agreed that the work would be performed by union workers. IBEW International Representative Don Siegal testified that "it would appear that there was some sort of (such) agreement," although he had no personal knowledge of the matter. In light of the testimony by Adderley (which will be discussed). I find that there was such agreement.

Herb Adderley testified in sum as follows: Comcast, which was one of the franchise companies, invited him to submit a bid to perform prewire construction as part of the grid system. He did, and the Company was awarded a contract as one of the contractors performing the work, specifically, as a minority contractor (Adderley is Afro-American). He began hiring individuals to perform the work. However, Comcast informed him that he had to have a contract with a local union. After making inquiries of Local IBEW officials, Adderley was referred to Harold Nathan, who was then the Union's business manager. Nathan said he would prepare an appropriate contract, but that Adderley must first acknowledge, in writing, that the Union would be the bargaining representative of his employees. Therefore, by letter dated March 4, 1986, the Company declared that it recognized the Union as representative and bargaining agent for its employees.

Adderley, further testified in sum as follows: He met three times with Nathan, who presented a proposal contract. They discussed the terms of the contract. Adderley understood that the contract covered only prewire construction work. He told Nathan that his installers were subcontractors, and that apart from the construction workers, the only person who might be covered by a union contract would be a warehouse employee. Nathan said, "[O]kay." They signed the proposed contract.

The contract, which was executed on April 11, 1986, was effective by its terms for 2 years, and from year-to-year thereafter, unless timely terminated by notice from either party. The contract contained the following provisions concerning coverage:

Section 1:01. *Bargaining Unit*: The Company recognizes the Union as the sole and exclusive Bargaining Agent, regarding wages, hours and working conditions, for all installation, service technicians and warehousemen employed by the Company.

Section 1:02. *Scope*: This Agreement covers the installation and maintenance of pre-wiring of multi occupancy buildings for C.A.T.V., C.C.T.V. and M.A.T.V.. This Agreement does not cover any work which properly comes under the work jurisdiction of Journeyman Wireman.

The contract contained, among other clauses, provisions for union shop, checkoff of dues, restrictions on subcontracting of unit work, wage rates, workweek, hours of work, overtime pay, and benefits.

Harold Nathan died in 1986. Joseph O'Neill succeeded him as union business manager. On April 11, 1988, O'Neill and Adderley, on behalf of the Union and the Company, executed a new contract, effective from that date until April 10, 1991, and from year-to-year thereafter unless timely terminated by either party. Insofar as pertinent to the present case, the 1988 contract was substantially identical to the 1986 contract (the alleged wage scale was not authenticated, and therefore not received in evidence).

<sup>1</sup> By order dated September 13, 1996, I corrected certain errors in the official transcript of proceedings.

On April 11, 1991, O'Neill and Adderley executed a third contract, effective from that date until April 10, 1994, and from year-to-year thereafter unless timely terminated by either party. Insofar as pertinent to the present case, the 1991 contract was similar to the prior contracts, except that the former article XIV was deleted. That article provided as follows:

*New Construction*

Section 14:01. When work under the terms of this Agreement is performed on building and construction job sites, all employees shall receive an hourly rate of pay which is equal to the sum of the Journeyman Wireman rate plus contributions to all benefit funds as provided in the applicable Inside Construction Agreement, employees working on Construction job sites shall be and maintain "A" membership in the Union and be paid the N.E.B.F. fund requirement.

Article XIV was the only contractual provision concerning contributions to fringe benefit funds. The parties did not execute any subsequent contract, and did not, by notice or otherwise, change or terminate the 1991 contract.

Herb Adderley testified in sum as follows: In addition to his contract with Comcast, the Company also contracted with Wade Cablevision and Greater Philadelphia Cablevision, Inc. (known as Greater Media) to perform work in connection with the grid construction. Construction of the Philadelphia grid system was completed in 1991. The Company laid off its employees engaged in this work. Adderley informed O'Neill that the work was completed.

However, the Company contracted to perform cable construction work in other cities, including Atlantic City and Trenton, New Jersey. In each instance, Business Manager O'Neill informed Adderley that the Union had no jurisdiction over such work. O'Neill referred Adderley to IBEW local unions in the respective areas. Adderley contacted the local unions, and executed contracts with them (Local 211 for Atlantic City, and Local 164 or Local 269 for Trenton). The Company continued to check off and remit dues to the Union for, and so long as he had, employees engaged in construction work. As such work petered out, the number of such employees declined, until the Company had none. It is undisputed that the Company last remitted union dues for the months of August and September 1993 (for two employees).

Meanwhile, in 1990, Greater Media, having underbid Comcast, replaced Comcast as a franchise cable company for the city of Philadelphia. The Company became a contractor to Greater Media for installation work, including installation of cable service, i.e., from the grid system to the consumer, and disconnects of such service. The Company used its installers to perform such work. As indicated, the Company regarded the installers as independent contractors, and did not apply its collective-bargaining agreements to them. As of the time of the present hearing, the Company was utilizing the services of some 100 to 150 installers, including about 40 in the Philadelphia area. The Company performs installation work in other areas, including New York City.

Greater Media has a collective-bargaining relationship with the Union. As of June 1996, and possibly earlier, their most recent contract had expired. The parties were operating under

extensions of contract conditions, and were still negotiating for a new contract.

Joseph O'Neill retired as the Union's business manager in October 1994. Edward Dasch, who succeeded O'Neill, testified in sum as follows: At a union meeting for Greater Media unit employees in November 1994, a steward complained that the Adderley people were doing unit work, and thereby depriving the Greater Media employees of overtime opportunities (Dasch testified at one point that the complaint referred to service i.e., repair work, and at another point, that it referred to installation and disconnects). Dasch investigated the situation, and made inquiries and observations concerning the work performed by the installers, and their terms and conditions of work.

By letter dated December 15, 1994, to Adderley, Dasch presented what he described as a filed grievance against the Company of alleged violation of the union security and other provisions of the union-company contract. Adderley did not respond to the letter. About 2 weeks later, Company Development Manager Curtis Victor told Dasch to contact the Company's attorney, but did not identify the attorney. By letter dated January 6, 1995, to Adderley, Dasch protested the Company's refusal to meet with the Union concerning its grievances. Adderley again failed to reply. On January 25, 1995, the Union filed its initial unfair labor practice charge. Thereafter, Adderley designated Frank Ciko as his representative to meet with Dasch.

Ciko met with Dasch and Union President Bishop on February 8, 1995. Ciko told the union representatives that the Company could not afford to pay union scale and benefits. He explained the compensation arrangements among Greater Media, the Company, and the installers.

By letter dated February 16, 1995, the Union requested certain information from the Company. The request will be discussed in the next section of this decision.

Dasch and Ciko met again on March 2, 1995. International Representative Siegel and Larry Presser were present. Presser owns American Communications Installation, which manages the Company's business. Ciko again asserted that the Company could not afford union wages and benefits. Dasch asked Presser how many contractors the Company had. Presser responded that it was none of Dasch's business. There were no further meetings between the Company and the Union.

By letter dated May 6, 1996, the Company gave notice of intent to terminate its contract with Greater Media effective as of July 6, 1996. The Company continues to do installation work for D.C. Wire, another cable franchise holder in the Philadelphia area.

## 2. Analysis and concluding findings

The complaint alleges that in or about late January 1995, the Company repudiated its contract with the Union, or in the alternative, that in or about August 1994, the Company subcontracted the unit work. General Counsel contends in sum, that section 1.01 of the collective-bargaining contracts defines the bargaining unit, section 1.02 is irrelevant to any determination of unit, the Company's installers are employees within the meaning of Section 2(3) of the Act, and therefore, the Company's installers are unit employees and covered by the collective-bargaining contract. The General Counsel further contends, in sum, that section 1.01 is conclusive as to unit coverage, that neither other contract provisions

nor evidence of the parties' intent and practice with respect to contract coverage can be considered, and that the only question before me with respect to contract coverage, is whether the installers are employees within the meaning of the Act.

I do not agree with the General Counsel's analysis of the issues. "The primary rule for the construction of contracts is that the court must if possible ascertain and give effect to the mutual intention of the parties. A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument. Individual words and phrases must be considered in connection with the rest of the contract." Where the intent of the parties, "as gathered from the 'four corners' of the writing" is "plain and unambiguous," parole evidence" will not be admitted to vary or contradict the agreement of the parties." *Williston on Contracts*, 3d ed., Sec. 600A. However, the Board and administrative law judge must take into consideration, extrinsic evidence concerning the intent of the parties, even where the meaning of contract language, including unit definition, appears to be clear in light of common usage or Board precedent. *NLRB v. Ortiz Funeral Home Corp.*, 651 F.2d 136, 139-140 (2d Cir. 1981), cert. denied 455 U.S. 946 (1982).<sup>2</sup>

Section 1.01 of the collective-bargaining contract purports to define a unit which includes all installation, service technicians, and warehousemen employed by the Company. However, section 1.02 purports to limit the scope of the contract to installation and maintenance of rewiring of multioccupancy buildings for C.A.T.V., C.C.T.V., and M.A.T.V. The two sections must be read and construed together. When considered together, they indicate that company employees as defined in section 1.01 are covered by the contract when and to the extent they perform the work defined in section 1.02.

International Representative Siegel had no personal knowledge concerning negotiation of any of the contracts between the Union and the Company. Siegel testified that in his opinion, section 1.02 was inserted in the contracts for two reasons: (1) to define the type of work for which the parties were negotiating wages and conditions; and (2) to provide guidelines for resolution of jurisdictional disputes between IBEW locals. The first reason is tantamount to an admission that the contracts in fact covered only the work defined in section 1.02. The second reason makes no sense, unless the first reason applies. As Siegel admitted, the second reason relates to internal IBEW matters. Therefore, a collective-bargaining contract would not be an appropriate document for resolution of such matters.

Business Manager Dasch testified that the term "pre-wiring" meant "the wiring of buildings that the cable company had gotten its new customers." He subsequently testified that rewiring meant installing cable wiring and hardware in preparation for the equipment to be installed."

Dasch's definitions make no sense. Plainly, "pre-wiring" is not the same as "wiring." His definitions also fail to ex-

plain the limitation in section 1.02 to rewiring of "multi-occupancy buildings," which would exclude wiring to individual homes. Moreover, Robert Costill, a General Counsel witness, contradicted Dasch's definitions. Costill has worked for the Company as an installer since it began operations. Costill testified that "pre-wiring construction" means "going into a building that's under construction and running the wires before the walls are up," and does not include hooking up the cable to the television or the VCR, i.e., the work of the installers.

Dasch's definitions also contradict the Board's own findings in this regard. *Electrical Workers IBEW Local 211 (Sammons Communications)*, 287 NLRB 930 (1987), was a Section 10(k) proceeding involving a jurisdictional dispute between Local 211 and the present Union (Local 1448). In describing the dispute, the Board found as follows:

Sammons operates a cable television delivery system in New Jersey. Sammons "prewires" (i.e., installs wiring and outlets inside walls during construction) commercial buildings for cable delivery of cable television programming.

The Board awarded the work in dispute to employees represented by Local 1448. Thus, in a proceeding to which the present Union was a party, the Board defined the work in question in a manner consistent with the Company's position in the present case.

Prewiring, as defined by the Board, at least arguably constitutes work in the building and construction industry. However, the work of the installers does not constitute work in that industry. Compare *Acco Construction Equipment, v. NLRB*, 511 F.2d 849 (9th Cir. 1975); *Operating Engineers Local 701 v. NLRB*, 578 F.2d 841 (9th Cir. 1978). The commerce allegation of the present complaint reflects the General Counsel's position that the Company is an enterprise engaged in the communications industry, rather than the building and construction industry. If not, then the complaint allegation would be inadequate to meet the Board's standards for assertion of its jurisdiction.

If the contracts at issue covered only rewiring as defined by the Board, then the contracts would be protected under Section 8(f) of the Act, without regard to any showing of union majority status. A contract which in whole or part covered installation work, would not enjoy such protection. In order to find that the contracts covered installation work, I would have to infer that the Company recognized and executed a collective-bargaining contract with the Union outside the protection of Section 8(f), without any inquiry as to whether the Union represented a majority of its employees, and did so pursuant to an arrangement or agreement to which the city of Philadelphia was a party. I am not inclined to draw such inference.

Company President Adderley was the only witness to testify concerning the negotiations which resulted in the contracts between the Company and the Union. As indicated, Union Business Manager Nathan died after the first contract was negotiated. Counsel for the General Counsel informed me that his successor, Joseph O'Neill, recently suffered an incapacitating stroke, and was consequently unable to testify. She stated that she had a doctor's note, confirming his unavailability to testify. Counsel for the General Counsel prof-

<sup>2</sup>*NDK Corp.*, 278 NLRB 1035 (1986), relied upon by General Counsel (Br. 21), involved a situation where there was no dispute as to the meaning of a contract. Rather, the employer contended that he agreed to sign the contract in reliance on the signatory union's representation that the contract would not be enforced. The Board declined to consider such parole evidence, to vary the terms of the contract. In the present case, the parties dispute the meaning of the contract.

ferred, pursuant to Rule 804(a)(4) of the Federal Rules of Evidence, O'Neill's investigatory affidavit in lieu of his testimony. Respondent counsel objected to receipt of the affidavit. He requested an opportunity to depose O'Neill at his home. Counsel for the General Counsel rejected the request.

I rejected the proffered affidavit, for failure to meet the conditions of Rule 804(b)(5). Specifically: (1) the affidavit was not inherently trustworthy, as it was given in anticipation of the present litigation; (2) the General Counsel failed to show a lack of any other probative evidence on the matter at issue; and (3) the General Counsel failed to give Respondent advance notice of the proffer. Therefore, I ruled that the interests of justice would not be served by receipt of the affidavit in lieu of O'Neill's testimony. I adhere to that ruling. As will be discussed, counsel for the General Counsel objected to receipt of testimony which would, and did, shed light on the manner in which the Company and the Union interpreted and applied their contract.

The terms and conditions of the contracts are in several respects inconsistent with the manner in which installers perform their work. The contracts provided for a basic work week of Monday through Friday, and basic hours (8 hours per day) between 7 a.m. and 6 p.m. However, installers have always worked from Tuesday through Saturday. They did so because Greater Media did not schedule hookups and disconnects for Mondays. The contracts also provided for hourly pay rates. However, installers have always been paid by the job, i.e., on a piece rate basis. The contracts provided that employees could not be required as a condition of their employment to furnish transportation for use in their work. However, installers have always provided their own trucks.

Henry Rhoades, a General Counsel witness, testified concerning a company meeting for installers in late April 1996. Rhoades has worked for the Company as an installer since March 1990. He never performed rewiring work. Therefore, his testimony would be illuminating on the manner in which the Company and the Union interpreted and applied their contracts. Nevertheless, counsel for the General Counsel objected to substantive testimony by Rhoades beyond the April 1996 meeting.

Rhoades' testimony was enlightening. Rhoades testified in sum as follows: He never joined the Union. He applied for union membership, but the Union never responded to his application. He always worked for the Company under the "independent contractor" system, i.e., under terms and conditions different from those under the contracts. He was unaware of any union contract. He first met Union Business Manager Dasch in April or May of 1996. Rhoades had never previously been approached by a union representative. Dasch said he wanted to help the installers, because he understood they were improperly charged for things like workers' compensation and health insurance. Dasch said that the installers were actually employees.

Rhoades' above-described testimony was uncontraverted. Rhoades' testimony is significant not only for what Dasch said, but also for what Dasch did not say. Dasch did not tell Rhoades that he was covered by a union contract, or ask whether he was a union member, and if not, why not. Rather, Dasch spoke to Rhoades as a nonunion employee in a non-organized unit. Dasch did so after the complaint issued in this case. In contrast, Robert Costill, who performed construction work for the Company, was told at that time that he had to

join the Union. After he switched to working as an installer, the Company stopped deducting union dues from his paycheck. It is evident from Rhoades' testimony, that the Union regarded company personnel as covered by its contracts only when they performed rewiring, i.e., construction work.

Business Manager Dasch testified that the Union's territorial jurisdiction covered the entire third district of his International, including the States of Pennsylvania, New Jersey, New York, and Delaware. However, Union Secretary Katherine Hughes testified that to her knowledge, the Union had no jurisdiction and no contracts in New York. As indicated, Greater Media has a collective-bargaining relationship with the Union. So far as indicated by the present record, the Company has always performed installation work, in all areas, on a nonunion, "independent contractor" basis, as have other contractors in the Philadelphia area. As indicated, Herb Adderley testified that whenever the Company undertook to perform construction work outside of Philadelphia, Business Manager O'Neill referred him to the IBEW local in the particular area, and he executed agreements with such locals. If this were not true, then the General Counsel could have produced officials of those locals to so testify. However, the General Counsel did not do so. It is evident that the Union regarded its contracts with the Company as covering only construction work in Philadelphia, although the Union anticipated that construction work in other areas would be performed on a union basis, under terms and conditions negotiated with the appropriate IBEW local.

In sum, the union contracts on their face purport to cover company employees only when engaged in rewiring, i.e., construction work. In light of this and other evidence discussed above, I credit the testimony of Herb Adderley that such was the intent of the signatory parties. As Adderley was an interested party, and the only available witness to testify concerning negotiation of the contracts, his testimony warrants careful scrutiny. However, the evidence strongly corroborates Adderley's assertions, which I find credible.

As the work of the installers was not covered by the union contracts, and did not constitute unit work, it follows that the Company did not repudiate its contract, by failing, as it had always failed, to apply the contracts to the work of the installers, regardless of whether the installers were employees within the meaning of the Act. The Company never repudiated its contract, i.e., never indicated that it would fail or refuse to apply its union contract to prewire construction work. When Company Representative Ciko met with the Union in 1995, he simply asserted in sum, that the Company could not afford to apply the contract to installation work. The inference is warranted, as argued by the Company, that the Union developed a new-found interest in the installers when it realized that unsuccessful negotiations with Greater Media might result in a strike, and therefore sought to organize or enlist the support of the Company's installers, in order to persuade them not to cross union picket lines.

As indicated, the complaint alleges in the alternative, that in about August 1994, the Company unilaterally subcontracted unit work. As the work at issue was not unit work, it follows that this allegation also lacks merit. Indeed, the alternative allegation makes no sense. The General Counsel argues at one point (Br. 15) that the Company subcontracted unit work to American Communications Installation (the Company's management firm) and to Allridge, Inc., an al-

leged firm using the name of a person formerly employed by the Company. At another point (Br. 25) the General Counsel argues that if the installers are independent contractors, then the Company unilaterally subcontracted unit work to them. The alleged date of August 1994 has no significance. As discussed, the Company has always performed installation work in the same manner, i.e., through the use of the installers whom it contends are, and always have been, independent contractors. And as indicated by Adderley's credited testimony, Business Manager Nathan was aware of the Company's practice and position when he signed the 1986 collective-bargaining contract.

For the foregoing reasons I am recommending that the pertinent allegations of the complaint be dismissed.

*B. Alleged Unlawful Failure and Refusal to Furnish Information to the Union*

The complaint alleges, in sum, that by letter dated February 16, 1995, the Union requested the Company to furnish certain information which was necessary for, and relevant to, the Union's performance of its duties as bargaining representative of the unit. The complaint further alleges that the Company violated Section 8(a)(1) and (5) by failing and refusing to furnish the requested information.

The letter (actually two letters) were not separately received in evidence, but are annexed to the complaint as "Attachment A." One letter was addressed to "ACI Cable Company" at the Company's address and the other to "DC Wiring, Inc." However, in its answer, the Company admitted that by the letter, the Union requested the Company to furnish the information set forth in attachment A. It is undisputed that the Company never responded to the letter. However, the General Counsel and the Company agree that the requested information is contained in documents furnished to counsel for the General Counsel pursuant to subpoena in connection with the present hearing.

The two letters were identical. Each asserted in sum, that the Union had reason to believe that union companies in its industry were permitting nonunion companies to perform their work. The Union asserted that such practices undermined and eroded bargaining units and union jobs and benefits. The Union further asserted that it was requesting pertinent information as part of the investigation of the matter; specifically, "concerning your Company's relationship with the non-union Company." Attached to the letter was a questionnaire covering 77 items, each of which pertained to an aspect of the ownership, management, nature, operations, wages, or benefits of "your Company" and the "non-union company." In sum, the questionnaire was addressed to the matter of whether the Company was conducting a double-breasted operation.

As of 1995, the Company was not performing any prewire, i.e., unit work. The testimony of Union Business Manager Dasch indicates that the request pertained to the work of the installers, i.e., nonunit work. The Union had no basis for believing or suspecting that the Company was subcontracting unit work. Therefore, the requested information was neither necessary for, nor relevant to, the Union's performance of its duties as unit bargaining representative. Accordingly, I am recommending that this allegation of the complaint be dismissed.

*C. Alleged Coercive Statements to the Company's Employees*

The complaint alleges that in late April 1996, the Company, by Curtis Victor: (1) told its employees the Company was not going to deal with the Union; (2) threatened to close the Company's operations because of the Union; (3) told its employees to call the Union and tell them to "back off;" (4) created the impression of surveillance among its employees by telling an employee that the Company was aware that the employee and other employees signed union authorization cards; and (5) invited its employees to terminate their employment because of their union sympathies. The complaint alleges that the Company thereby violated Section 8(a)(1) of the Act.

The General Counsel presented Victor as an adverse witness. Victor testified in sum that: he is the Company's development manager. He reports directly to President Adderley. Company management personnel report to him. He oversees company operations and has authority to hire and fire personnel. I find that Victor is, and was as of April 1996, an agent of the Company within the meaning of Section 2(2) of the Act, and authorized to speak to the installers on its behalf. At this point, it is not necessary to determine whether Victor supervised "employees" as defined in the Act.

It is undisputed that in late April Victor addressed a meeting of assembled company installers at the Company's dispatch trailer (located at Greater Media's Philadelphia facility). The General Counsel presented testimonies by two installers concerning the meeting. They gave differing versions of what was said. No other witnesses testified concerning the meeting.

James Davis worked as a company installer from January to June 15, 1996. Davis testified in sum as follows: Victor said the Union contacted the Company, but the Company would not negotiate with the Union, because the installers were contractors, and not employees. He said the Company would close its doors before negotiating with the Union. Victor said he thought the Union and the Government were in bed with each other. He told the installers that if they wanted to work for \$7 an hour, they could work for someone else. He said someone needed to call the Union and tell them to back down. He said that the only reason installers "Steve" and "Alfred" signed union cards was because the others signed such cards. Davis suggested that the installers from their own union. Victor responded that the cable industry would not allow it. Victor said that the Company could not afford to provide health benefits, the Company was limited by the amount of money paid by Greater Media, and the Federal Government set time limits, which were the basis for establishing pay rates.

Installer Henry Rhoades testified in sum as follows: He arrived late at the meeting. When he arrived, Victor asked him what he thought the Union could do for them. Rhoades answered that the Union said the Company was taking money illegally from the installers, and might be able to help them. Victor replied that the Union could not do anything for them, and asked whether they thought the Union could get them more money. Rhoades answered that he didn't know. Victor asked whether the Union said they would go on strike against Greater Media on June 1. Rhoades replied that the Union didn't say anything about that. Victor responded that the Union was supposed to strike, and the Union got the in-

stallers to sign cards because they expected the installers to join the strike. Victor said he told Greater Media that in the event of a strike, the Company would continue to work. Rhoades responded that he would check with the Union, because if the Union so believed, they were wrong and the installers had nothing to do with what the Greater Media people did. Victor said that if the installers signed cards and became union members, the Company would probably pull out of the Greater Media System.

Rhoades further testified in sum as follows: After the meeting he contacted the Union, and was told that the card signing had nothing to do with the Greater Media situation. About June 1, Rhoades talked with Company Assistant Project Manager James Brown, who is in charge of quality control and the Company's warehouse. Rhoades asked Brown about the rumor that the Company was pulling out as of July 6. Brown answered that it was a fact, and the day after Victor spoke to the installers, he gave Greater Media a 60-day notice of termination letter. Brown said that the office people would work for D.C. Wire. (As indicated, Davis and Rhoades testified that Victor met with the installers in late April. The Company's termination letter was dated May 6.)

I credit the testimony of Davis and Rhoades, and find that their testimony together reflects the substance of what Manager Victor told the installers. As indicated, Rhoades arrived late at the meeting, and evidently did not hear the remarks testified to by Davis.

If the installers are employees within the meaning of the Act, then the Company, by Victor, violated Section 8(a)(1) in four of the five respects alleged in the complaint, regardless of whether the installers were members of the bargaining unit, or performed work covered by the collective-bargaining contract. As employees, they were entitled to the protection of the Act. See *Mar Del Plata Condominium*, 282 NLRB 1012, 1027 (1987), and cases cited therein. However, if Victor was speaking to independent contractors, then his remarks would not be unlawful. Therefore, for the purpose of resolving these allegations, it is necessary to consider whether the installers are employees or independent contractors.

In determining whether individuals are employees or independent contractors, the Board is required to apply the common law of agency, and specifically, the "right-of-control" test. Under this test, an employer-employee relationship exists when the employer reserves not only the right to control the result to be achieved, but also the means to be used in attaining the result. On the other hand, where the employer has reserved only the right to control the ends to be achieved, an independent contractor relationship exists. The resolution of this question depends on the facts of each case, and no one factor is determinative. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968).

In *Standard Oil Co.*, 230 NLRB 967, 968 (1977), the Board described factors to consider in determining whether an employment relationship exists. Those factors are: (1) whether individuals perform functions that are an essential part of the company's normal operation or operate an independent business; (2) whether they have a permanent working arrangement with the company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the company's name with assistance and guidance from the company's personnel and ordinarily sell only

the company's products; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; (5) whether they account to the company for the funds they collect under a regular reporting procedure prescribed by the company; (6) whether particular skills are required for the operations subject to the contract; (7) whether they have a proprietary interest in the work in which they are engaged; and (8) whether they have the opportunity to make decisions which involve risks taken by independent businessmen which may result in profit or loss.

Applying the foregoing principles to the facts of the present case, I find that the Company's installers were and are employees of the Company within the meaning of the Act. In so doing, I have taken into consideration the testimony of the witnesses and company-generated documents and records pertaining to the period during which the Company performed installation work as a contractor for Greater Media. I have not taken into consideration, company records pertaining to New York-based personnel, in determining the status of Philadelphia-based personnel, i.e., those engaged in Greater Media's area of operations. No New York personnel were present at the April 1996 meeting, and their terms and conditions might differ from the Philadelphia personnel. However, the Company's records with respect to the New York personnel, also tend to indicate employee status.

The work of the installers is integral to and virtually coextensive with the Company's operations. In effect, they are employees who are paid on a piecework basis.

The installers work 5 days a week, from Monday through Saturday. They report to the Company's trailer between 8 and 8:30 each morning, and usually work until about 5:30 p.m. They report to Project Manager Ronald Rowland or his assistant, James Brown, who give the installers their assignments. The assignments are scheduled for 2-hour time periods, as arranged between Greater Media and the customer. Sometimes the installers are given a 6 to 7 p.m. time slot. If as occasionally happens, they complete their assignments by 12:30 p.m., the Company requires them to wait until 3:30 p.m. as there may be more work. If not, they are then released.

Installers are required to notify the Company if they are unable to report to or remain and work. If they fail to take assignments, their failure is considered a refusal to work, and they will receive fewer assignments the next day.

Theoretically, the installers may perform other work for themselves or other firms. In actual practice, the time constraints imposed by the Company make such options impossible during the Company's operating hours.

The contract between Greater Media and the Company required that the Company "shall at all times enforce good and workmanlike conduct among all employees, and shall not employ or work any person not skilled in the task assigned to him, and shall employ a competent supervisor and assistants who shall be in attendance full-time." In conjunction with these requirements, the contract includes subcontractors within the definition of employee, referring to "any supervisor, assistant, subcontractor or other employee" (emphasis added).

Greater Media and the Company closely supervise the work of the installers. Rowland or Brown determine the route and order in which the installers must perform their as-

signments. Installers must call in and report to the Company upon completion of each assignment. Greater Media and the Company have quality control personnel who inspect the installers' jobs. If in their opinion the work is not performed properly, or not completed, or not performed within the designated time slot, the Company will direct the installer to return to complete the job satisfactorily, within 24 or 48 hours without additional compensation, or will backcharge the installer, i.e., deduct a certain amount, set by the Company, from the installer's pay. The amount of the backcharge might, and usually did, exceed the installer's pay for the job.

The Company gives each installer a Greater Media installation manual, which specifies in precise detail, the manner in which the installers are to perform their assignments. The Company requires the installers to comply with the manual procedures.

Each work order indicates the charge to the customer for the job. If the customer has not made prepayment to Greater Media, the installer is instructed to collect payment. Checks are made out to Greater Media. The installer turns in all payments to the Company.

When installers begin working for the Company, they are required to go through a 2-week training period, regardless of whether, by reason of prior experience, they are familiar with the work. During the training period, the Company pays them a weekly salary.

The installers use their own trucks and personal tools in their work. The Company requires its installers to carry certain insurance, in specified amounts and to pay for their standard clothing, marked with the Company's name. The trucks must be painted white, and carry a sticker, provided by the Company, identifying the installer as a "contractor for Adderley Industries." Each installer wears a Greater Media identification badge, and must identify himself or herself to the customer as being from Greater Media. The Company provides each installer with converter boxes, wires, fittings, remote controls and other equipment needed for installation, which it receives from Greater Media. Installers cannot use such equipment obtained from other suppliers, even if the equipment is suitable for use and could be obtained more cheaply elsewhere.

The Company systematically evaluates the performance of its personnel, including installers. The written evaluations rate each person's performance in various categories (job understanding, job performance, job productivity, and cooperation), and give an overall rating. The evaluation forms include entries, which are used, to indicate whether the evaluation was discussed with the "employee," and the "employee's comments." A company "supervisor" prepares the evaluations for installers.

Upon commencing work for the Company, each installer signs an "Independent Contractors Agreement" prepared by the Company. The agreement purports to be for a 1-year period and automatically renewable from year to year thereafter unless timely terminated by either party in writing. Either party may terminate the agreement at any time upon 14 days' written notice to the other party. However, the Company may terminate the agreement at any time without prior notice for "good cause." According to the agreement, installers are paid by the job in accordance with a rate schedule, which can be changed by the Company.

In fact, the Company has almost unfettered discretion in determining the compensation of its installers. The Company has a three-level pay scale for types of jobs performed, depending on the qualifications and performance of the installer. The installers may progress or be demoted from one level to another, depending on the Company's evaluation. The Company may, and also does, give raises or bonuses to its installers, or promote them, e.g., to positions as dispatchers or assistant supervisors, based on the Company's evaluation of their performance. Such progression, e.g., as in the case of Gary Lovett, is characteristic of an employment relationship rather than an independent contractor status.

What constitutes "good cause" for termination of an installer is a matter solely within the Company's discretion. The installer has no recourse in the event of such summary action. When an installer leaves voluntarily, the Company records such action as a "resignation," rather than a termination of the Independent Contractors Agreement.

In addition to the matter of compensation, the Company has from time to time, imposed new or changed working rules, notwithstanding its written agreements with the installers. Thus, the Company changed existing conditions by requiring the installers to paint their trucks white, and by prohibiting installers from installing equipment not obtained from the Company.

Theoretically, installers may hire helpers. In practice, the Company has made this impossible. Henry Rhoades began using his son to help him. The Company informed Rhoades that his son would have to meet all of the requirements imposed upon installers, including registration with the Company, insurance coverage and payment of security deposits. Rhoades realized that under such conditions, neither he nor his son would gain any financial benefit from the arrangement. Therefore, he ceased using his son's services.

Installers can enhance or prevent diminution of their income through backcharges, only by performing their work in a timely and proper manner, as required and determined by the Company. Their opportunities are limited to the work assigned to them by the Company. The Company's rules and practices effectively preclude them from enhancing their income by reducing their costs. As discussed, the installers have no realistic opportunity to earn outside income during company working hours. In essence, they have no more control over their earning opportunity than a piece worker in a factory.

In sum, the Company reserves the right to, and in practice does, control the means by which the installers perform their work, as well as the end result, down the minutest of detail. All of the factors listed by the Board in *Standard Oil Co.*, supra, tend to indicate an employment relationship. Therefore, the installers were and are employees of the Company within the meaning of the Act.

Turning to the merits of the 8(a)(1) allegations, I find that the Company did not violate Section 8(a)(1) by telling the installers that the Company would not negotiate with the Union, because the installers were allegedly contractors and not employees. The Union was not the collective-bargaining representative of the installers, insofar as they performed nonconstruction work. Therefore, the Company could lawfully refuse to negotiate with the Union concerning employees performing such work, unless and until the Board certified the Union as their representative; notwithstanding that

Victor based the Company's position on an erroneous conclusion of law. See *Linden Lumber Division, Sumner & Co. v. NLRB*, 419 U.S. 301 (1974).

However, the Company went too far, when Victor told the installers that the Company would close its doors before negotiating with the Union. Victor did not purport to make a carefully phrased prediction, based on objective factors beyond the Company's control, e.g., that the Company could not afford to pay certain wage scales or provide certain benefits or other terms and conditions of employment. Rather, Victor equated union representation with plant closure. Therefore, the Company, by Victor, unlawfully threatened the employees with plant closure if the installers designated or selected the Union as their bargaining representative. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619-620 (1969).

The Company further violated Section 8(a)(1) when Victor told the installers that if they wanted to work for \$7 an hour, they could work for someone else. In the context, as here, of an employer's stated opposition to unionization, such statements constitute implied threats of discharge or other reprisal. *Kroger Co.*, 311 NLRB 1187, 1200 (1993), enf. 50 F.3d 1037 (11th Cir. 1995); *House Calls, Inc.*, 304 NLRB 311, 313 (1991); *Stoody Co.*, 312 NLRB 1175, 1181 (1993); *Sunland Construction Co.*, 309 NLRB 1224, 1235 (1992).

The Company also violated Section 8(a)(1) when Victor instructed the installers to tell the Union to stop its organizing efforts, specifically, that someone needed to call the Union and tell them to back down. Such statements are coercive and prohibited interference with self-organizational rights. *Indiana Cal-Pro*, 287 NLRB 796, 801 (1987), enf. 863 F.2d 1292 (6th Cir. 1988).

The Company additionally violated Section 8(a)(1) when Victor publicly identified two installers as having signed union cards, and indicated that the Company knew why they signed, and that other installers had signed cards. The Company thereby unlawfully created the impression of surveillance of union activity. See *Overnite Transportation Co.*, 254 NLRB 132, 133 (1981); *Seville Flexpack Corp.*, 288 NLRB 518, 524-525 (1988); *Gupta Permold Corp.*, 289 NLRB 1234, 1247 (1988).<sup>3</sup>

#### CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company's installers and service technicians are employees within the meaning of Section 2(3) of the Act, but are not covered by the collective-bargaining agreement between the Company and the Union.

4. By threats and other coercive statements, the Company has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The Company has not violated Section 8(a)(5) of the Act as alleged in the complaint.

<sup>3</sup> Henry Rhoades testified to questioning by Victor. However, the complaint does not allege unlawful interrogation.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) of the Act, I shall recommend that it be required to cease and desist therefrom and from any like or related unlawful conduct, and to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

The Respondent, Adderley industries, Inc., Blackwood, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure or cessation of operations if or because they designate or select Local 1448, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization as their collective-bargaining representative.

(b) Threatening employees with discharge or other reprisal by telling them they should seek work elsewhere if they wish to improve their wages or other working conditions through union or other concerted activity.

(c) Instructing employees to tell the Union or other labor organization to stop its organizing efforts.

(d) Creating the impression of surveillance of employees' union activities, by indicating that it knows the identity of union adherents, or their nonpublic union activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Blackwood, New Jersey facility and at each of its facilities within a 50-mile radius of Center City, Philadelphia, where it dispatches installers and service technicians, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or terminated its operations in the Philadelphia area, the Respondent shall duplicate and mail, at its own expense, a copy

<sup>4</sup>If 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.

<sup>5</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 1996, at the pertinent facility or facilities.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.