

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

CINCINNATI BELL TELEPHONE COMPANY

Employer

and

Case 9-UC-478

COMMUNICATIONS WORKERS OF AMERICA,  
LOCAL 4400

Petitioner

CINCINNATI BELL TELEPHONE COMPANY AND  
ARC (ALTERNATIVE RESOURCES CORPORATION)

Employers

and

Case 9-UC-479

COMMUNICATIONS WORKERS OF AMERICA,  
LOCAL 4400

Petitioner

**ACTING REGIONAL DIRECTOR'S DECISION AND  
ORDER DISMISSING PETITIONS**

**I. INTRODUCTION**

Cincinnati Bell Telephone Company (CBT) is a subsidiary of Cincinnati Bell Inc. (CB). The Petitioner is the recognized bargaining representative for a unit consisting primarily of CBT employees. Alternative Resources Corporation (ARC) performs certain contract work for CBT related to a help desk associated with Internet services. By its petition in Case 9-UC-478, filed pursuant to Section 9(b) of the National Labor Relations Act, the Petitioner seeks to clarify the existing bargaining unit by accreting the help desk ARC employees into the CBT unit. Cincinnati Bell Technology Solutions (CBTS) is a subsidiary within the family of CB corporations specializing in systems dealing with data storage and transmission. By its petition in Case 9-UC-478, the Petitioner also seeks to accrete a large group of CBTS employees into the CBT unit.

A hearing officer of the National Labor Relations Board held a hearing on the issues raised by these petitions. Thereafter, the parties to the proceeding filed post-hearing briefs.<sup>1/</sup> I have carefully considered the evidence and the arguments presented by the parties, including those contained in their briefs, and conclude that because the employees sought to be accreted into the existing CBT bargaining unit existed before the current CBT/Petitioner collective-bargaining agreement was entered into and have not historically been included in the bargaining unit, and there being no substantial change in the duties and responsibilities of any of the employees involved since that time, they do not constitute an accretion to the existing unit. Accordingly, I will dismiss the petitions.

In this Decision, I will first set forth the facts and legal precedent relevant to my determination. I will then analyze the facts in the context of the legal precedent and articulate in detail the rationale for arriving at my determination.

## **II. FACTUAL OVERVIEW**

### **A. Background:**

CB is the parent corporation of a number of subsidiaries providing some form of communication services in the Cincinnati, Ohio area. These subsidiaries, in general, share corporate officers. One of these subsidiaries is CBT. As noted above, there is a collective-bargaining agreement between CBT and the Petitioner. Although executed on July 25, 2002, the agreement is effective by its terms from May 12, 2002 until May 7, 2005 - assuming either party gives at least 60 days prior notice of termination. It appears that the current agreement is but one of a succession of such collective-bargaining agreements. From the petitions filed in this matter, it appears that there are approximately 1,000 employees in the CBT bargaining unit.

In defining the group of employees that the Petitioner is acknowledged as representing, the recognition clause of the agreement refers to specific titles of employees rather than setting forth any general unit description. The vast majority of employees covered by the agreement are employees of CBT, but apparently a few are employees of Cincinnati Complete Protection, Inc. and Cincinnati Bell Public Communications - both subsidiaries of CB. It is unclear how these employees came to be covered by the CBT collective-bargaining agreement. There is no indication that this agreement, or any previous agreement, has covered either group of employees sought to be accreted by the Petitioner; and the classifications of employees set forth therein do not appear on their face to encompass the classifications formally held by the employees it seeks to accrete into the recognized unit.

### **B. Facts Pertaining to Case 9-UC-478:**

By the petition filed in Case 9-UC-478, the Petitioner seeks to accrete into the unit set forth in the collective-bargaining agreement with CBT “all employees jointly employed by

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<sup>1/</sup> The brief of Cincinnati Bell Telephone Company was not filed until April 19, 2004, the next business day after the due date for receipt of briefs. Since neither party opposes my late receipt of this brief, I have accepted it.

Cincinnati Bell Telephone Company and ARC (Alternate Resources Corporation).” The record shows that ZoomTown is a DSL (digital subscriber line) broadband high-speed service for connecting to the Internet that is marketed to subscribers in CBT’s service area. In February 2002, ARC entered into an agreement with CBT to perform end-user support for CBT’s ZoomTown help desk and began providing this service in March 2002. The operations of the ZoomTown help desk assumed by ARC had previously been performed by another non-CB company for CBT and apparently at least a few of the predecessor contractor’s employees were kept on by ARC. There is no indication that the Petitioner ever represented the predecessor’s employees.

Fuse is a dial-up Internet connection service, apparently also marketed in the CBT service area. Prior to March 2003, there was a separate Fuse help desk for customers serviced by another contractor. In March, however, ARC was awarded the contract for this work, which was incorporated into its operations. Even prior to assuming primary responsibility for Fuse help calls, ARC’s staff handled customer questions related to Fuse; since apparently certain aspects of Fuse (such as its e-mail service), are also incorporated into the ZoomTown system.

GSM (Global System for Mobile Communication) Fuse - a system for connecting to the internet with a cell phone like device marketed under the name “Blackberry” - was recently added to the mix of Internet connection options for which CBT is responsible. In September or October 2003, ARC was given the GSM Fuse help desk contract.

Monthly, ARC now handles approximately 44,000 calls related to ZoomTown, 9,000 calls related to Fuse, and 1,000 calls related to the GSM service. The ARC personnel performing this service are located on one floor of a CB building. They consist of an ARC Site Manager; two ARC Supervisors; two Trainers; nine Tech Leads; sixty Tier 1 agents; and twenty-eight Tier 2 agents. The parties agree that the site manager, two supervisors and two trainers would not appropriately be included in any bargaining unit based on their supervisory or managerial status. As indicated previously, none of the remaining classifications sought by the Petitioner to be accreted are found in the CBT/Petitioner agreement.

Customer issues dealt with by ARC’s help desk personnel include issues related to “connectivity” (the ability of a subscriber to connect to the Internet via their modem, their Internet service provider or their GSM phone), e-mail and installation issues associated with new customers installing their own modems. Calls are received on a system allowing customers to select the most appropriate routing for their call, depending upon the reason for the call. If a call is misdirected and ARC help desk employees receive a call not encompassed within the parameters of the ARC employees’ duties, they will route that call to the appropriate group. For example, if a customer wishes to cancel service, the call will be routed to the SAV (save) desk. In some situations the ARC Tier 1 or Tier 2 agent will not be able to handle the issue and it may be “escalated” to an ARC lead tech. CBT has its own employees who, at least as part of their duties, man a help desk, - including ADSL (Asymmetric Digital Subscriber Line) Technicians manning an AIS (ADSL Installation and Support) help desk. Certain calls are escalated to the AIS help desk. AIS employees also support other CBT technicians who have issues, as well as support the CBT business office. AIS employees are located on a different floor of the same building in which the ARC employees work.

CBT also maintains a Network Operations Center (NOC). A part of the duties of the NOC is to monitor the Fuse and ZoomTown data network. Certain calls related to issues involving the network may be escalated to the NOC. Calls are tracked on a “Remedy” ticket system, which ARC employees as well as NOC and AIS employees may access. It appears that the fact that the AIS help desk employees are part of the escalation of calls and also sometimes deal directly with customers underlies the Petitioner’s belief that there is a similarity of duties between ARC employees and unit employees such that the ARC employees should be accreted. However, calls are not only escalated by ARC employees performing work for CBT to CBT employees, but, depending upon the issue, to other groups of contract employees. For example, certain matters concerning voice support are transferred to employees of Convergys, a non-CB company that evidently is under contract to handle issues in that area.

On a day-to-day management basis, the contact persons for CBT and ARC are ARC Site Manager Sheri Papadatos and CBT Help Desk Manager Kelly Switzer. On the days which Switzer works (Mondays, Wednesdays and Fridays) she will meet with Papadatos to go over any issues that have arisen concerning the ZoomTown help desk. Any complaints concerning its operation from either the CBT hierarchy or customers are conveyed from Switzer to Papadatos. It is then up to Papadatos to handle them. If the issue raised concerns the conduct of an employee, Switzer has no input into whether the complaint will result in any negative consequences to the employee.

Neither Switzer nor any other CBT manager has any input into ARC’S disciplinary policies, attendance policies, hiring practices, assignment of employees, wage scale or benefits provided employees. Wages and benefits of the ARC employees appear unrelated to those found in the BCT/Petitioner collective-bargaining agreement. CBT does provide the procedures to be followed by ARC employees manning the ZoomTown help desk; these concern how to handle most issues that come up, what questions to ask, and when to escalate a call. The processes are not, however, scripted and the ARC agent determines how they are in practice implemented and judges how to best resolve the issue raised by the caller.

Finally, the following paragraph is found in one of the agreements between ARC and CBT:

A•R•C team members are to maintain a professional level of conduct at all times while performing business on behalf of CBT. This includes but is not limited to adhering to all CBT security guidelines and codes of conduct. In the event that an A•R•C technical consultant fails to meet these guidelines, CBT shall have the right to request A•R•C removing the offending employee from this engagement.

However, this clause has never been invoked and Switzer’s interpretation of it is that ARC would have the authority to decline any such request.

C. Facts Pertaining to Case 9-UC-479:

By its petition filed in Case 9-UC-479 the Petitioner seeks to accrete into the unit set forth in the CBT/Petitioner collective-bargaining agreement approximately 100 employees of CBTS. As noted previously, Cincinnati Bell Telephone Solutions is the current name of one of the subsidiaries in the CB family.<sup>2/</sup> It has existed under first one name, and then another, for some years prior to its most recent name change. It is unclear how long this corporation has been in existence, but it certainly predates at least the current CBT/Petitioner collective-bargaining agreement. The right to utilize the name predating the Cincinnati Bell Telephone Solutions moniker was sold with certain of the corporation's non-Cincinnati area operations.

In very general terms, CBTS provides "data and computing centric solutions" while CBT has traditionally provided "network type services" and voice transmission. In conceptualizing what the majority of CBT's traditional business has been, the example given is that the bulk of its work has been providing, monitoring and maintaining the "highway" upon which information travels to the customer's premises - "up to the curb" at the customer. Certain of its operations are also involved with providing, what is for the most part, voice-oriented equipment on customers' premises and, with respect to some larger customers, the internal links upon which voice and data transmissions flow. In contrast, CBTS is data oriented - providing data storage, the sale of certain data oriented systems, the care and monitoring of data oriented systems (whether or not purchased from and installed by CBTS), and data transmission and interpretation at points on the customer's side of "the curb."

One group operating within the CBT corporate structure is the Large Business Systems (LBS) group, which is apparently allied with the Strategic Customer Care Center (SCCC). This group provides and maintains telephone equipment for businesses and other large customers such as school systems. LBS installs and maintains the product line of a non-CB company marketing under the name "Avaya." Until recently, it also sold the Avaya equipment. The Avaya system is oriented toward voice transmission. CBTS primarily installs and maintains systems and products of a non-CB company marketing under the name "Cisco." Cisco systems are designed to handle data transmissions. Both CBT and CBTS have, on occasion, installed a system called Three-Com; which apparently handles some applications varying from the Avaya and Cisco systems, but this does not appear to be a favored system.

Although there is some overlap of skills, a method of analyzing where CBTS's employees' duties and skills diverge from those of CBT is to utilize the Open System Interconnection (OSI) model of data transmission that consists of seven "layers." Each layer is more complex and so requires more technical knowledge. Layer 1 consists of the physical "connectivity" of the system; traditionally the telephone lines or wires of the CBT system, but now also consisting of airwave transmissions. Layer 2 is the data link layer. It is the switching connectivity or bridge in the model, passing a transmission from one network to another with no ability to otherwise route it. It is described as being akin to an interpreter between two individuals who speak different languages. Layer 3 is the network layer. This layer provides

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<sup>2/</sup> It is not directly owned by CB, but by another CB company two links removed from CB in the wholly-owned subsidiary chain of corporations.

switching and routing technologies. It can interpret the “sub-netting” of the IP (Internet Protocol) address so that it can route within the network to predetermined locations. Layer 4, or the transport layer, is described as the first layer with intelligence. At this layer the data flow between parties across the network is controlled and divided into chunks or packets. Layers 5 and 6 - the session and presentation layers - begin the process of preparing data for the application layer or Layer 7; the layer at which the customer actually utilizes the data (such as composing, sending and receiving e-mail). Layers 5 and 6 synchronize the data packets and translate the data between its network format and the application format.

CBTS conducts its business essentially at Layer 3 and above - with most employees at least having an understanding of Layer 4; and many working at higher layers. CBT employees essentially conduct their work at Layer 3 and below. Thus, under certain circumstances, the hand-off from the transmission network maintained by CBT employees at Layer 3 and the pick-up by CBTS employees at that layer, will result in these employees working side by side. Although recently reduced from the larger geographic area in which it formerly conducted business to one more restricted to the Cincinnati area, CBTS still operates in geographic areas serviced by phone systems other than CB subsidiaries. In these situations either employees of the local phone service or contractor employees make the hand-off.

While employees working at higher OSI layer levels must of necessity have an understanding of the lower layers, it does not appear that the converse is true. Apparently due to the programming and related skills required of many of the CBTS employees, the education level desired of a new CBTS employee is a 4-year degree - apparently CBT employees working at Layer 3 and below generally do not have such degrees. The pay scale of CBTS employees differs from CBT employees and appears generally higher. CBTS employees are also eligible for bonuses apparently not available to the CBT bargaining unit employees. CBTS employees do not share supervision with CBT employees at the working level and their benefits differ in many respects. Although there may be some locations where both CBT and CBTS employees work - such as at the operations of large customers - the bulk of the CBTS employee workforce is located at a CBTS NOC center at a facility separate from CBT employees.

A recent shifting of certain CBT operations to combine with those of CBTS apparently served as the impetus for the petition in Case 9-UC-479. This transfer/merger began in January 2004, and was explained to LBS CBT unit employees at a meeting conducted in February 2004. The transfer/merger has been, for the most part, implemented. This reorganization may be explained as having occurred due to evolving technology. Traditionally, voice and data are described as having “been two separate worlds, two separate networks.” What has developed, which has blurred the lines of demarcation between CBT and CBTS from the perspective of customers and potential customers, is the emergence of Voice Over Internet Protocol. Internet Protocol (IP) identifies a computer’s location on a network and provides the path for data packets to be transferred from one computer to another. Voice Over IP is a method of transmitting voice communication via data packets over a network rather than through the traditional method of phone transmission. Thus, a system based on data transmission, such as Cisco’s, can also serve as the basis of a phone system for a company. However, for certain applications, such as a PBX (Private Branch Exchange - although not defined in the record, PBX is described by at least one source as a private telephone switchboard that provides on-premises dial service and may

provide connections to local and trunked communications networks) phone service not piggy backed onto data (apparently such as the vast majority of Avaya systems dealt with by CBT employees) is superior. This is because with a data telephony system, the packets carrying voice must be prioritized ahead of other data packets resulting in a slow-down of the non-voice data packets.

Because Avaya would be more appropriate for certain customers' phone needs and Cisco for others, what was perceived at some upper level of the CB corporate structure was a problem with CBT and CBTS competing against each other in situations where one or the other would be the logical choice. Moreover, there was evidently some customer confusion in having to provide redundant information to what a customer might view as the same company. What was decided was to move the CBT LBS sales and revenue accounting functions to CBTS. To accommodate this transfer approximately 40 to 45 non-unit employees were shifted from CBT to CBTS. However, while sales and revenue associated matters were transferred to CBTS and folded into its operations to allow the newly merged marketing force to promote either Avaya or Cisco systems to customers depending on customers' needs, the installation and serving of the Avaya system remains with the CBT group.<sup>3/</sup>

With respect to the approximately 70 CBT LBS bargaining unit employees, they remain with CBT and the record reflects no change in their duties, immediate supervision, benefits or work life in any respect. Likewise, there is no evidence that the work performed by the CBTS employees sought to be accreted into the unit has changed in any way as a result of the shifting of certain CBT LBS functions to CBTS, and their immediate supervision and other terms and conditions of employment remain the same.

### III. LEGAL CONTEXT

“Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly-established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category - excluded or included - that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.” *Union Electric Co.*, 217 NLRB 666, 667 (1975). Indeed, “[t]he limitations on accretion . . . require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. *It is the fact of historical exclusion that is determinative.*” *United Parcel Service*,

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<sup>3/</sup> Petitioner entered an e-mail into the record which may be interpreted to conclude that managed services for CBT customer Versign would be transferred from CBT to CBTS, but this apparently never actually occurred.

303 NLRB 326, 327 (1991). See also *Robert Wood Johnson University Hospital*, 328 NLRB 912 (1999).

“Thus, where a position or classification has historically been excluded from or included in the unit, and there have not been recent, substantial changes that would call into question the placement of the employees in the unit, the Board generally will not entertain a petition to clarify the status of that position or clarification, regardless of when in the bargaining cycle the petition is filed.” *Bethlehem Steel Corporation*, 329 NLRB 243 (1999), citing as authority *Plough Inc.*, 203 NLRB 818, 819 fn. 4 (1973). Moreover, the Board will not ordinarily clarify the unit placement of disputed employees in midterm of a collective-bargaining agreement between the parties involved, on the theory that granting the petition at such a time would be disruptive of a bargaining relationship voluntarily entered into by the parties when they executed the existing contract. *Edison Sault Electric Co.*, 313 NLRB 753 (1994); and *Arthur C. Logan Memorial Hospital*, 231 NLRB 778 (1977). *San Jose Mercury & San Jose News*, 200 NLRB 105 (1973); *Credit Union National Assn.*, 199 NLRB 682 (1972); *Wallace-Murray Corp.*, 192 NLRB 1090 (1971).

Finally, I note that “[t]he Board has followed a restrictive policy in finding accretion because it forecloses the employees’ basic right to select their bargaining representative.” *Towne Ford Sales*, 270 NLRB 311 (1984); see also *Giant Eagle Markets*, 308 NLRB 206 (1992). Thus, the accretion doctrine is not applicable to situations in which the group sought to be accreted would constitute a separate appropriate bargaining unit, and thus would be able to decide for themselves whether they wish to be represented. *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1970); *Passavant Health Center*, 313 NLRB 1216, 1218 (1994); *Beverly Manor-San Francisco*, 322 NLRB 968, 972 (1997). Indeed, case law indicates that the community of interest between employees sought to be accreted and the existing unit must be “overwhelming” for an accretion to be found. *Compact Video Services, Inc.*, 284 NLRB 117, 119 (1987); *Safeway Stores, Inc.*, 256 NLRB 918 (1981).

#### IV. ANALYSIS

I note that both groups of employees that Petitioner seeks to accrete into the unit described in its collective-bargaining agreement with CBT clearly existed before that agreement was reached. In the case of the CBT employees, they have existed for some time. While ARC employees appeared more recently on the scene, they filled the shoes of employees of predecessor non-CB related employers, whose employees were unrepresented by Petitioner. Thus, under the case law outlined above, the threshold issue is whether there have been any “recent, substantial changes in the duties and responsibilities of the employees” involved in this matter.

With respect to the ARC employees, although they assumed more duties related to Fuse and GSM service during the term of the CBT/Petitioner collective-bargaining agreement, even though ARC employees may have had to expand their knowledge base in order to deal with issues associated with these services, the record does not indicate that the assumption of duties involving fielding calls in these areas in any way caused a substantial change in their duties and responsibilities, and moreover, CBT bargaining unit employees were completely unaffected.

With respect to the transfer/merger of certain aspects of the CBT LBS operations to/with CBTS operations, there has been no apparent change in the duties and responsibilities of either the CBTS employees sought to be accreted or the CBT LBS unit employees. Since the petitions seek to accrete employees in positions historically outside the recognized bargaining unit, and it has not been established that there has been any recent substantial change in these positions, they may not now be accreted into the existing recognized unit.<sup>4/</sup>

## V. CONCLUSIONS

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of the Act.
4. The bargaining unit currently represented by the Petitioner shall not be clarified as requested by the Petitioner.

## VI. ORDER

IT IS HEREBY ORDERED that the petitions filed herein be, and they hereby are, dismissed.

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<sup>4/</sup> Even were I to find the accretion petitions could now be entertained, I would not find the groups of employees sought as appropriately accreted into the recognized unit. With respect to the ARC employees, I conclude that they are not employees of CBT - jointly with ARC or otherwise. To establish that two or more employers are joint employers the entities must share or codetermine matters governing essential terms and conditions of employment. *Airborne Freight Company*, 338 NLRB No. 72, slip op. at 1, fn. 1 (2002); *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1301 (2000); *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *Airborne*, 338 NLRB No. 72, at 1, fn. 1; *M.B. Sturgis*, 331 NLRB at 1301; *Riverdale*, 317 NLRB at 882, citing *TLI, Inc.*, 271 NLRB 798 (1984). The essential element in this analysis is whether a putative joint employer's control over employment matters is direct and immediate. *Airborne*, 338 NLRB No. 72, at 1 fn. 1, *TLI*, 271 NLRB at 798-799 (emphasis added). Thus, because CBT has no direct control over hiring, firing, disciplining, supervising, or directing ARC employees, and at best its processes concerning how to handle calls is only some minimal indirect control, CBT is simply not their employer nor is CBT a joint employer with ARC.

With respect to the CBTS employees, assuming that subsidiaries in the CB family constitute a single employer, the CBTS employees are for the most part separately located, have distinct supervision, have a pay scale separate from CBT unit employees, have many separate benefits and there does not appear to be any noteworthy interchange of unit employees with those sought - other than perhaps an employee or two being hired by CBTS who had worked for CBT. Thus, the CBTS employees sought to be accreted would constitute a distinct appropriate unit and have no "overwhelming" community of interest with the existing unit. Consequently they are not subject to being accreted for that reason.

## **VII. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **May 6, 2004**.

Dated at Cincinnati, Ohio this 22<sup>nd</sup> day of April 2004.

/s/ Earl L. Ledford

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