JD-65-05
Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AG COMMUNICATION SYSTEMS
CORPORATION[1] and LUCENT TECHNOLOGIES,
a single employer

and Case 33-CA-14450

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 21,
AFL-CIO

and

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, Party In Interest

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for the General Counsel.
Michael F. McGahan and Donald Kruger, Esqs.
(Epstein, Becker and Green, P.C.)
of New York, New York, for Respondent Lucent Technologies.
Gerald A. Golden and Jason Kim, Esqs.
(Neal, Gerber & Eisenberg), of Chicago, Illinois,
for Respondent AG Communication Systems Corporation.
Gilbert A. Cornfield, Esq., (Cornfield and Feldman),
Chicago, Illinois, for the Charging Party, IBEW Local 21.
Theodore E. Meckler, of Cleveland, Ohio,
for the Party-in-Interest, Communications Workers of America.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois on April 4-8, 2005 and June 6-7, 2005. Local 21 of the International Brotherhood of Electrical Workers (IBEW) filed the charge on October 22, 2003 and the General Counsel issued a complaint, as a result of that charge, on August 31, 2004. The General Counsel alleges that AG Communication Systems Corporation (AGCS) and Lucent Technologies were at all relevant times a single employer. As such, the General Counsel alleges that they violated Section 8(a)(5)

[1] According to AGCS' brief, the Respondent's proper name is AG Communication Systems Corporation, rather than AG Communication Systems, Inc., as set forth in the Complaint.

and (1) of the Act by merging AGCS' telephone equipment installers' bargaining unit, previously represented by the Charging Party, into a Lucent installers bargaining unit, represented by the Communications Workers of America (CWA), on August 1, 2003, and refusing to bargain with IBEW Local 21.

More specifically, the General Counsel alleges that the Respondents effectuated this merger without affording the Charging Party an opportunity to bargain over the decision to merge the bargaining units, or the effects of the merger. Respondents deny that they were a single employer at any time, and each contends that it had no obligation to bargain with the IBEW about the merger or its effects.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, AG Communications Systems Corporation, Lucent Technologies and the Charging Party, IBEW Local 21, I make the following

Findings of Fact

I. Jurisdiction

AG Communications Corporation (AGCS) and Lucent Technologies were engaged in the manufacture, sales and installation of telephone switching equipment prior to August 1, 2003. On that date, AGCS' installation services employees were integrated with Lucent's installation services organization. AGCS, so far as this record shows, was not engaged in the installation of telecommunications equipment after July 31, 2003.[2]

Respondents admit and I find, that they were employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act at all times relevant to this matter, and that the Union, the International Brotherhood of Electrical Workers, Local 21, is and was at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Background

AG Communications Systems Corporation (AGCS) was created in 1989 as a joint venture between AT&T, a predecessor of Lucent, and GTE, a predecessor of Verizon.[3] Pursuant to the joint venture agreement, Lucent was obligated to purchase 100% of AGCS' stock by December 31, 2003. Lucent increased its ownership share of AGCS in stages. Lucent initially owned 49% of AGCS stock. This increased to approximately 80% in 1994 and to approximately 90% in 2000. Local 21, or its predecessor, IBEW Local 336, was apprised of each occasion that Lucent increased the percentage of its ownership of AGCS and was aware that by the end of 2003, Lucent would own 100% of AGCS stock.

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[2] See Respondent AGCS' Answer to paragraph 2(a) of the Complaint.

[3] In 1996, AT & T transferred its interest in AGCS to Lucent. In 2000 GTE merged with Bell Atlantic to form Verizon.

In late 2002 or early 2003, Lucent decided to accelerate the final phase of this purchase. On February 3, 2003, Lucent purchased the remaining 9.9% of AGCS stock. AGCS installation services employees were primarily engaged in the installation of AGCS' GTD5 switch, used principally by Verizon. Lucent installers primarily worked with Lucent's 5-ESS switch, which was sold to a variety of customers. Lucent sold 10-20 times as many switches as did ACGS, a much smaller company. Even before the completion of the stock purchase, Lucent decided that it was going to integrate the installation component of AGCS' business with its own installations services operation. The Lucent equipment installers were represented by the Communications Workers of America (CWA). In early 2003, Lucent informed AGCS and the CWA of its intention to merge the installation services operations and accrete the AGCS bargaining unit into the CWA-represented unit, but purposely withheld this information from IBEW Local 21 until two weeks before integration became effective on August 1, 2003.

The last collective bargaining agreement between the IBEW and AGCS became effective on October 1, 2000 and expired by its terms on September 30, 2004. On July 17, 2003, Lucent Vice President William Schecter notified IBEW Local 21 that the installation services of Lucent and AGCS would be fully integrated on August 1, that AGCS installers would become members of the CWA bargaining unit on that date and AGCS installers would be assigned to appropriate job titles under the CWA collective bargaining agreement effective August 1. Schecter also informed IBEW Local 21 that "an accretion will have occurred" and that the IBEW would no longer be recognized as the collective bargaining representative of the former AGCS installers.

On August 1, 2003, the installation workforces of Lucent and AGCS were completely merged. AGCS installers became employees of Lucent. As of that date, the CWA bargaining unit consisted of approximately 2700 employees who had been Lucent employees on July 31 and about 250 who had been employees of AGCS. When Lucent laid off hundreds of installers later in 2003 and in early to mid-2004, the lay-offs were conducted under the CWA contract, pursuant to a seniority list that credited an employee's seniority with AGCS towards their seniority with Lucent. Fifty of the 200 AGCS equipment installers who became Lucent employees on August 1, 2003, were laid off during this time period.

Lucent involvement in AGCS' business prior to August 1, 2003

Due to the fact that I consider the Board's single employer doctrine to be irrelevant to this case, I deem Lucent's involvement in AGCS' business prior to August 1, 2003 to be likewise irrelevant. However, I recite the facts in that the General Counsel and Charging Party consider it significant. Moreover, if higher authority disagrees with me, I hope to obviate the need for this case to be remanded for additional findings of fact.

In early 2001, AGCS did business with telephone companies, such as the Regional Bell Operating Companies, that it had not done business with before. Some of these customers required that AGCS be certified to perform installation services within their offices. AGCS did not have such certification, so while it was seeking the certification, it provided some of its installers and management employees with Lucent ID badges. These individuals were informed that when working with companies requiring certification, they would be working under the certification status of Lucent.

On February 20, 2001, AGCS District Manager David Peterson informed some AGCS installers that:

> Some of you will also be receiving Lucent badges in the near future. I will explain more about that in future e-mails. However, if I ask you to wear a Lucent badge to a site, do not wear AGCS shirts, AGCS badges, or any other AGCS attire. If we wear Lucent badges, it is because we are going to the site as Lucent employees.
>
> GC Exh. 16

Two days later, Mitchell Bolnick, ACGS' director of business operations, informed Peterson by email that AGCS installers should wear both the AGCS and Lucent badges when working under the Lucent certification, AGCS Exh. 1. Pursuant to these instructions, on March 14, 2001, Petersen informed some of his installers that when working under the Lucent certification, they should wear the Lucent badge in front of and on the same clip as their ACGS identification badge, GC Exh. 7.

Some of these installers worked for customers in situations in which they wore a Lucent ID badge in 2001. When at least two installers became Lucent employees in August 2003, their new Lucent ID badge had the same photo and number as did the ID provided in 2001.

In September 2002, Theresa McCahill, a workforce relations manager at Lucent, sent an email to Patrick Murphy, Labor Relations Manager at AGCS, inquiring about the status of a voluntary retirement offer that AGCS was making to employees represented by the Charging Party, and manufacturing employees represented by the International Association of Machinists (IAM). Murphy reported back to McCahill on the progress of his discussions with the IBEW and IAM in several emails. On September 26, 2002, he informed McCahill that AGCS would be proceeding with additional lay-offs. McCahill passed this on to her superiors, including Ralph Craviso, head of Lucent's workforce relations office, William Schecter and Stephen Muscat.[4]

Two Lucent vice presidents, as well as a Verizon vice-president, sat on the AGCS five-person board of directors. Jeff Siegel, the President of AGCS, who was also on the Board of Directors, reported to David Geary, Lucent's Vice President for Convergent Solutions in his capacity as President (Tr. 453).

However, the two companies generally operated independently from each other, including with regard to their labor policies. Eighty percent of AGCS' business pertained to the manufacture and installation of telephone switches for GTE equipment, owned in 2003 by Verizon. AGCS competed with Lucent with respect to the remaining 20% of its business.

Lucent involvement in the affairs of AGCS after February 3, 2003

In January 2003, prior to the actual purchase of the remaining shares of AGCS stock, Lucent management decided that it would merge the AGCS equipment installer bargaining unit into the Lucent/CWA installer bargaining unit. Patrick Murphy, AGCS's human resources

[4] Muscat reports to Schecter, who reports to Craviso.

director, learned in February that Lucent had decided to merge the units. However, he never told the IBEW that the units were to be merged. I infer that Lucent directed Murphy not to inform the IBEW about the merger or accretion.

On February 4, 2004, Stephen Muscat, Lucent's workforce relations director, sent a memorandum to Lucent Vice-President David Geary, entitled "AGCS Labor Policy," for approval (GC Exh. 21(a)). The memorandum set forth a plan to complete integration of the AGCS installers represented by the IBEW into the existing CWA/Lucent bargaining unit within approximately sixty days of the purchase of the remaining AGCS stock, on April 1, 2003. Prior to April 1, Muscat anticipated that "AGCS should adjust its staffing to the appropriate level."

Muscat's plan also called for negotiations with the CWA regarding the terms and conditions for integration of the AGCS installers into the CWA unit. He discussed the potential of an IBEW effort to retain its separate representation of former AGCS installers after the integration and suggested that the sooner integration was accomplished the more difficult it would be for the IBEW to be successful. Muscat also addressed potential issues in negotiating with the CWA. Returning to the Charging Party, he stated:

> Should the IBEW initiate a National Labor Relations Board proceeding (e.g., an election, a unit clarification petition, an unfair labor practice charge, etc.) our position will be that the new employees have been or soon will be accreted into the CWA bargaining unit.

On March 4, 2003, Muscat called Staff Representative Robert Richhart of the CWA to discuss the merger of the installation employees into the CWA unit. They discussed a number of subjects including cross-training of Lucent and AGCS installers, integration of the AGCS and Lucent seniority lists and the possibility of providing enhanced lay-off protection to at least some AGCS installers with experience with that company's GTD5 switch. Neither AGCS nor Lucent provided IBEW Local 21 with information regarding the decision to merge the two bargaining units until July 17, 2003, two weeks before it was effectuated.

On April 1, 2003, Lucent organizations assumed operational and budgetary responsibility for many, if not all, AGCS organizations. Some AGCS managers became employees of Lucent and others, who remained employees of AGCS, began reporting to counterparts at Lucent. Danny Conner, who was in charge of AGCS installation services in the eastern part of the United States began reporting to Lucent manager Chris Camacho. Steve Page, who was in charge of AGCS installation services in the west, began reporting to Lucent manager Denise Putz. Rank and file installers continued to report to their AGCS supervisors and had no contact with Lucent supervisors or management.[5] Lucent was monitoring the operation of AGCS very closely during the spring and summer of 2003. For example, AGCS provided Lucent with a list of installers targeted to be laid off on May 3, 2003.

Also between April 1, and August 1, 2003, Barbara Landmann, then Lucent's Vice-President for Deployment Services in North America, began to oversee and manage the AGCS

[5] Some rank and file AGCS employees also became employees of Lucent on April 1. These included the professional engineers, who were not represented by the charging party.

installer unit "from the perspective of insuring that AGCS met all their customer commitments in a high quality way." She also oversaw AGCS' financial performance (Tr. 562).

On the basis of financial reports submitted by AGCS to Lucent's Chief Financial Officer, Landmann determined that AGCS had too many resources to support the amount of revenue that Lucent and AGCS were forecasting for the future. On July 9, 2003, Landmann designated a Lucent employee, Jesse "Lamar" Davis to lead a downsizing exercise for AGCS (GC Exhs. 31, 37). She directed the installation unit managers at AGCS (Conner and Page) and at Lucent (Camacho and Putz) to work with Davis on this exercise. Apparently, no additional downsizing occurred until after August 1.

The target date for complete integration of the installer units was pushed back several times. Lucent contends these delays were due to such difficulties as merging the AGCS order system and other processes into the Lucent system. Steve Muscat wrote to other members of the Lucent integration team on May 2, 2003, regarding his concern about the possibility of having to deal with a wage re-opener provision in the IBEW's collective bargaining agreement if integration did not occur before September 2003.

Lucent began training some AGCS installers on its products, including the 5-ESS switch, in June. Pursuant to decisions made by Lucent, AGCS scheduled training for sixteen Lucent installers at AGCS' offices in Phoenix, Arizona during the months of July and August, GC Exh 8. Some of this training pertained to the installation of AGCS' GTD5 switch. The IBEW filed a grievance over this training. On July 17, 2003, the IBEW requested arbitration of the grievance. AGCS did not respond to the request. The cross training of Lucent and AGCS installers was not completed by August 1, 2003, and continued for some time after that date.

As mentioned earlier, on July 17, William Schecter, Lucent Vice President for Workforce Relations, sent a letter to IBEW Business Representative Michael DeWitt informing the IBEW for the first time of Lucent's intention to merge the installation services of AGCS and Lucent. Schecter asserted that an accretion will have occurred on August 1, 2003, and therefore "the IBEW can no longer be recognized as [the former AGCS' installers] collective bargaining representative. In addition, effective on that date, union dues will no longer be tendered to the IBEW, either by Lucent or AGCS."

DeWitt responded to Patrick Murphy, AGCS' Human Resources Director, and sent a courtesy copy to Schecter. In his first letter of July 21, 2003, DeWitt offered, on behalf of Local 21, to submit the decision to merge the bargaining units to binding arbitration. He proposed that if the arbitration could not be completed in two weeks, that the merger of the bargaining units be postponed. Neither AGCS nor Lucent responded.

DeWitt wrote a second letter (GC Exh. 13) to Murphy and Schecter on July 21, 2003, requesting bargaining over the effects of the decision to merge the installation bargaining units. He also stated that the IBEW was not waiving its position that the decision itself violated Local 21's rights under its collective bargaining agreement with AGCS. Neither Lucent nor AGCS responded to this letter. On August 1, 2003, Local 21's former bargaining unit members became Lucent employees. Lucent dealt exclusively with the CWA as their bargaining representative.

Lucent Vice President Schecter also wrote to the CWA on July 17, imparting the same information conveyed to the IBEW about the forthcoming merger and accretion. He requested a meeting with the CWA to resolve a number of issues regarding the appropriate treatment of the soon-to-be accreted AGCS installers, Lucent Exhibit 22. After August 1, Lucent and the CWA in fact bargained over the effects of the accretion, such as the integration of the AGCS and Lucent seniority lists, Tr. 758-59.

Effective August 1, 2003, Lucent applied the terms of its collective bargaining agreement with the CWA to the former AGCS installers. They were given new job classifications and benefit packages that were consistent with the CWA contract and, at least in most cases a new supervisor, and a new base location. Starting on August 1, 2003, the supervision of former AGCS installers and installers who had worked for Lucent before August 1, was completely integrated. Some AGCS installers worked for supervisors who had been Lucent supervisors prior to August 1. Some Lucent installers worked for supervisors who had been AGCS supervisors prior to August 1. Under AGCS' contract with the IBEW, installers were based at their homes. Under the CWA contract they were assigned to a central office location as were those installers who worked for Lucent prior to August 1, Tr. 568-71.

Analysis

Was Lucent entitled to merge the former AGCS installers with its installers and accrete them into the CWA bargaining unit?

The term "accretion" generally refers to the addition of employees into a bargaining unit without an election, The Board set forth the fundamental principles regarding accretion in a number of cases, including a very recent decision *Frontier Telephone of Rochester, Inc.*, 344 NLRB No. 153 (July 29, 2005) and *Northland Hub, Inc.*, 304 NLRB 665, 677-79 (1991) enfd. 29 F. 3d 633 (9th Cir. 1994), a case which is factually somewhat similar to the instant matter.[6]

The Board has long followed a restrictive policy in determining whether the addition of a new group of employees to an existing bargaining unit is proper because such an accretion forecloses the basic right of the new group of employees to select their bargaining representative. The Board will not, under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit to be included in an overall unit without allowing those employees the opportunity to express their preference. On the other hand, the accretion doctrine "preserves industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made, *NLRB v. Stevens Ford, Inc.*, 773 NLRB 468, 473 (2nd Cir. 1985).

Generally, a valid accretion has been found only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the

[6] In *Northland Hub*, as in the instant case, bargaining unit employees continued to be employed immediately after the accretion and continued to be represented by a labor organization.

preexisting unit to which they are accreted. In determining whether an accretion is warranted, the Board considers integration of operations, centralized control of management and labor relations, geographic proximity, similarity in terms and conditions of employment, similarity of skills and functions, physical contact among employees, collective bargaining history, degree of separate daily supervision and degree of employee interchange. The most critical factors are employee interchange and common day-to-day supervision. The latter is particularly significant since the day-to-day problems of employees at one location may not necessarily be shared by employees who are separately supervised at another location. *Frontier Telephone of Rochester, Inc., supra*.

As of August 1, 2003, all installers working for Lucent, including the former AGCS installers, shared common working conditions and terms of employment. Even more importantly they worked for the same supervisors. The only distinction between the former AGCS installers and the former Lucent installers that survived the merger is that some former AGCS installers had expertise in working with the GTD-5 switch that many installers who had never worked for AGCS did not have. Similarly, since cross-training continued after August 1, many former AGCS installers lacked expertise in installing Lucent products on the date of the merger. I deem this to be an insufficient basis for concluding that the former AGCS installers retained a sufficient separate identity to render their accretion into the CWA unit invalid. [7] Moreover, Lucent began operating on August 1, 2003, pursuant to a well-defined plan to render the former AGCS installers fungible with those who had worked for Lucent previously.

The Board stated in *Holly Farms Corp.*, 311 NLRB 273, 279 (1993) that, "…in determining whether accretion is proper, unless there is a well-defined plan or timetable for achieving full functional integration of operations, the changed nature of the operation should be assessed at the time the withdrawal of recognition occurred." This suggests that the Board will find that an accretion is proper on the basis of a well-defined plan for full functional integration of operations in situations in which this degree of integration has not been achieved by the time of withdrawal. I find that in the instant case, Lucent had a well-defined plan for integration of AGCS and Lucent installation services, which it acted upon in instituting the cross-training of AGCS and Lucent installers prior to the merger. Therefore, Lucent was entitled to accrete the AGCS unit into the Lucent/CWA unit on August 1, 2003—even if the AGCS installers retained a separate identity as of that date. Thus, I conclude that Lucent had no obligation to bargain with the IBEW regarding the merger of the installation units or its effects.

Practical considerations also support this result, as well as demonstrate the overwhelming community of interest between the former AGCS installers and the preexisting bargaining unit. Lucent bargained about the merger and its effects with the CWA. The seniority lists of the installers were dovetailed so that AGCS installers were accorded a seniority date with Lucent which reflected their service with AGCS. The CWA had an obligation to represent the former AGCS installers fairly after August 1, 2003. Had Lucent been required to bargain with both the

[7] Furthermore, even if I am incorrect, it would be inappropriate for the Board to order either Lucent or AGCS to bargain with the IBEW prospectively if the former AGCS installers have lost their separate identity since August 1, 2003. Moreover, any backpay or make whole remedy should be tolled as of the date that this separate identity ceased to exist, *Northland Hub, Inc.*, 304 NLRB 665 n. 1 (1991).

CWA and the IBEW, it is possible that both unions may have bargained for preferential treatment of their installers. Since the CWA unit had more negotiating power given the size of its unit, it is conceivable that the former AGCS installers may have ended up in a much worse position than they in fact did.

AGCS was not required to bargain over Lucent's decision to merge the installer bargaining units and its effects.

As of August 1, 2003, AGCS was no longer the employer of any equipment installers. It simply had nothing to do with the integration of its former employees with the preexisting unit of Lucent installers.[8] Moreover, even if AGCS and/or Lucent had an obligation to bargain with the IBEW, there would be no remedy due either the IBEW or the former AGCS employees. Up until August 1, 2003, AGCS employees received whatever benefits were due them under the IBEW's collective bargaining agreement with AGCS. Since a valid accretion occurred on August 1, 2003, these employees were not subject to that agreement as of that date.

The single employer issue

The General Counsel and IBEW argue that for purposes of this case, Lucent and AGCS are a single employer. Thus, they contend that one or both, separately or together, had an obligation to bargain with the IBEW with regard to the decision to integrate the Lucent and AGCS installer units and to accrete the AGCS unit into the Lucent/CWA unit. They also contend that Lucent and/or AGCS were obligated to bargain regarding the effects of the merger/accretion.

I conclude that the single employer doctrine has no relevance to this case. The Board applies this concept in situations in which it wishes to treat two ongoing businesses as one--on the ground that they are owned and operated as a single unit, *Johnstown Corp.*, 322 NLRB 818 (1997); *NLRB v. Hospital San Rafael, Inc.*, 42 F. 3d 45 (lst Cir. 1994).

The reason the single employer doctrine has no applicability to this case is that as of August 1, 2003, AGCS no longer employed any equipment installers.[9] On August 1, all the equipment installers who had formerly worked for AGCS were employed by Lucent. The only

[8] I reject AGCS' argument that the IBEW bargained over the effects of the merger in 2000. Article 20 of the 2000-2004 collective bargaining agreement, entitled "Successor/Cessation of Bargaining Unit Operations," on which AGCS relies, is ambiguous as to whether it applies to the instant situation. I note that this Article states that it does not refer to "any changes that result from corporate reorganizations and restructuring or from the sale or other transfer of some or all of the Bargaining Unit Operations." Moreover, as the IBEW points out, AGCS took none of the measures required of it by Article 20 with respect to the merger of its installation services unit with that of Lucent.

[9] Thus, the allegation in Complaint paragraph 6(a) that Respondent integrated the installers employed by AGCS into an installer bargaining unit employed by Lucent, is inaccurate.

issue in this case is whether or not Lucent could accrete the former AGCS installers into the Lucent/CWA bargaining unit on that date.[10]

On August 1, 2003, Lucent owned 100% of AGCS. Lucent was operating its installation services as a single entity, rather than operating the former AGCS installation services separately. Lucent was required by Section 8(a)(5) to negotiate with the bargaining representative of its affected employees as to the effects of its decision to operate its installation services as a single entity. The issue herein is simply who was that representative or representatives. Having found that Lucent properly deemed the former AGCS installers to have been accreted into the CWA bargaining unit, it was obligated to bargain over the effects of the merger with the CWA, but not with IBEW Local 21, which did not represent any of its installers.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., August 12, 2005.

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Arthur J. Amchan
Administrative Law Judge

[10] Even if AGCS and Lucent were a single employer of the equipment installers on August 1, 2003, it does not necessarily follow that these installers constituted either a single or two separate appropriate bargaining units, *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800, 96 S. Ct. 1842 (1976).

[11] 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.