Frontier Telephone of Rochester, Inc. *and* Communications Workers of America, AFL–CIO*

Rochester Telephone Workers Association and Daryl R. Albright Rochester Telephone Workers Association (Frontier Telephone of Rochester, Inc.) *and* Daryl R. Albright. Cases 3–CA–23502, 3–CA–23535, 3–CA–23575, and 3–CB–7932

July 29, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 25, 2004, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent Frontier Telephone of Rochester (Respondent Frontier) and the General Counsel each filed exceptions, supporting briefs, and answering briefs. The Respondent Rochester Telephone Workers Association (Respondent Union) also filed an answering brief to the General Counsel's exceptions. The General Counsel and Respondent Frontier filed reply briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

1. The accretion[3]

The principal issue in this case is whether Respondent Frontier violated Section 8(a)(1), (2), and (3) and whether Respondent Union violated Section 8(b)(1)(A) by, among other things, agreeing to accrete an unrepresented group of Frontier's Internet help-desk technicians into a bargaining unit covered by a collective-bargaining agreement between the Respondents. The judge found that the accretion was lawful and dismissed these complaint allegations. We disagree and find the violations as alleged.

Respondent Frontier is a local telephone company in Rochester, New York, that provides telephone and internet service to residential and business customers. Frontier operates six "call centers" throughout the country, including one on Jefferson Road in Rochester. The dispute in this case centers on two classifications of employees who work at this call center—the Internet help desk technicians (IHD techs) and a group known as customer service representatives (CSRs).

The Union has represented the CSRs for nearly 30 years. The most recent collective-bargaining agreement covering the CSRs and various other classifications of Frontier employees was effective from January 2000 through February 2003. At the time that this contract took effect, Respondent Frontier employed IHD techs, but the techs were not represented by a union and they were not employed in Rochester. Rather, they were employed at another Frontier call center in Phoenix, Arizona.

In 2000, the parent owner of Respondent Frontier (Global Crossing) sold certain of its Frontier assets, but Global Crossing retained for itself the IHD operation. As stated by the judge, the effect of this sale was to leave Respondent Frontier "with an Internet product but no help-desk operation to service it." Accordingly, Frontier decided to reestablish an IHD and to locate it in Rochester's Jefferson Road call center, in a vacant area adjacent to where the CSRs worked, but separated by a concrete fire wall. An initial startup staff of 35–40 IHD techs was hired and operations commenced in December 2000.

By January 2002,[4] the number of IHD techs had expanded to about 120. As their numbers grew, so too did their interest in union representation—but not by the Union. Late that month, tech Alan Costa contacted representative Don DePerna of the Communications Workers of America (CWA) to inform DePerna that the techs were interested in CWA representation. DePerna held meetings with the techs over the next few weeks. On February 28, having collected authorization cards from approximately 65 percent of the techs, CWA filed a representation petition with the Board seeking to represent the techs as a separate appropriate unit. Just the day before that petition was filed, however, Respondent Frontier acceded to a demand from the Respondent Union for recognition of the techs and for their inclusion in the bargaining unit with the CSRs. The Respondents formalized this arrangement on March 13 by executing a memorandum of agreement that extended coverage of

* We have corrected the Union's name.

[1] No exceptions were filed to the judge's dismissal of the Sec. 8(a)(1) allegations discussed in sec. III.E.1.a,c and d of his decision, or to the dismissal of the Sec. 8(a)(1) allegation regarding the statement made by Supervisor Bakari to employee Albright, discussed in sec. III.E.1.e. There are also no exceptions to the judge's dismissal of the allegation that employee David Carmer was discharged in violation of Sec. 8(a)(3). See sec. III.E.3.b of the judge's decision.

[2] 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.

[3] The term "accretion," as used herein, means the addition of employees into a unit without an election. As discussed herein, the accretion may be lawful or unlawful, depending on the circumstances.

[4] All dates hereinafter are in 2002, unless otherwise indicated.

their existing bargaining agreement, including its union security clause, to the techs.

In finding that a lawful accretion had occurred, the judge made extensive factual findings with respect to the traditional community-of-interest factors relevant to the Board's analysis of accretion issues. For the most part, we agree with his factual findings. However, we disagree with the legal analysis and conclusions that the judge drew from his fact findings.

The judge's legal analysis of the accretion issues consisted entirely of the following brief discussion:

> [t]he call center is an integrated facility wherein all employees in various capacities work toward achieving the Company's goals and objectives—mainly keeping, maintaining, and increasing its customer base through the provision of state-of-the-art telephone and internet service.
>
> The Call Center employees work together in performing [customer service] using inter alia, the same equipment, under [essentially] the same working conditions, with similar skills, education and comparable training, common management and labor relations all at the same location. The Call Center is [an] integrated facility where the [CSR] consultants and the IHD [techs] work hand in glove to perform [the Company's] raison d'etre, customer service.

Based on this analysis, the judge found that the Rochester IHD techs had lawfully accreted into the CSR unit. For the reasons discussed below, we reverse the judge, find that no lawful addition occurred, and find the alleged Section 8(a)(1), (2), (3), and 8(b)(1)(A) violations.

Analysis

The fundamental purpose of the accretion doctrine is to "preserve 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 F.2d 468, 473 (2d Cir. 1985). However, because accreted employees are absorbed into an existing bargaining unit without an election or other demonstrated showing of majority status, the accretion doctrine's goal of promoting industrial stability places it in tension with the right of employees to freely choose their bargaining representative. Accordingly, the Board follows a restrictive policy in applying the accretion doctrine. *Safeway Stores,* 256 NLRB 918 (1981); *Wackenhut Corp.*, 226 NLRB 1085, 1089 (1976). One aspect of this long-standing restrictive policy, which was recently restated in *E. I. Du Pont de Nemours, Inc.*[5] has been to permit accretion "only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted." Supra at 608 quoting *Ready Mix USA, Inc.,* 340 NLRB 946, 954 (2003).[6]

In determining, under this standard, whether the requisite overwhelming community of interest exists to warrant an accretion, the Board considers many of the same factors relevant to unit determinations in initial representation cases, i.e., integration of operations, centralized control of management and labor relations, geographic proximity, similarity of 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. *E. I. Du Pont,* supra at 608; *Compact Video Services,* 284 NLRB 117, 119 (1987). However, as stated in *E. I. Du Pont,* the "two most important factors"—indeed, the two factors that have been identified as "critical" to an accretion finding—are employee interchange and common day-to-day supervision.[7] *Super Valu Stores,* 283 NLRB 134, 136 (1987), citing *Towne Ford Sales,* 270 NLRB 311, 312 (1984).

In this case, there are some community-of-interest factors that favor an accretion. This is not unusual, as cases are "rare" in which every factor points to or against accretion. *E. I. Du Pont,* supra. However, we find that the factors that favor an accretion do not outweigh the factors that militate against such a finding.

Addressing, first, the factors that weigh in favor of accretion, we note that both the CSRs and techs work in geographic proximity in the same building at the Jefferson Road call center (albeit separated by a fire wall). We also agree with the judge that the overall operations of the call center, including the work of the CSRs and techs, are functionally integrated. As correctly described by the

[5] 341 NLRB 607 (2004).

[6] This test is different than the traditional community-of-interest test that the Board applies in deciding appropriate units in initial representation cases. In that context, the Board will certify any unit that is *an* appropriate unit, even if it is not the most appropriate unit. *Bartlett Collins,* 334 NLRB 484 (2001). In the accretion context, however, "[a] group of employees is properly accreted to an existing bargaining unit when they have such a close community of interests with the existing unit that they have no true identity distinct from it." *NLRB v. St. Regis Paper,* 674 F.2d 104, 107–108 (1st Cir. 1982). Thus, the issue here is not whether an RC petition could properly be processed in a unit consisting of CSRs and techs. Such a unit could be an appropriate unit and, if so, an election would be held.

[7] As noted below, the absence of these two factors will ordinarily defeat a claim of lawful accretion. This is not to say that the presence of these factors will establish a claim of lawful accretion.

judge, both groups of employees "work in tandem" in responding to customer telephone inquiries relating to the internet services sold by Respondent Frontier. Further, during the course of these telephone exchanges the CSRs and techs occasionally transfer customers to each other. Finally, we agree with the judge that "[u]ltimate management authority" at the call center, including authority regarding labor relations matters, is centrally controlled by Angela Christian, who is Respondent's vice president of customer care and, as the judge noted, the "highest-ranking manager at the call center." Christian, assisted by a human resources department and other management personnel with specific responsibilities covering CSRs and techs, sets the call center's annual budget, determines employee staffing levels, negotiates with the Union the terms and conditions of employment applicable to CSRs, and unilaterally determines and monitors the terms and conditions of employment applicable to the techs.

Though these factors favor a lawful accretion, we find that they are offset by several factors that disfavor such a finding. Among the factors which weigh against a lawful accretion finding are the two deemed by the Board to be most "critical" to an accretion—employee interchange and common daily supervision.

With respect to the factor of interchange, the Board distinguishes between two types of interchange—temporary transfers and permanent transfers—and "regard[s] permanent transfers to be a less significant indication of actual interchange than temporary transfers." *Novato Disposal Services*, 330 NLRB 632 fn. 3 (2000). Here, the judge's own factual findings establish the complete absence of the more important form of interchange, and very few instances of the less significant type. Specifically, with respect to temporary transfers, the judge found, and the record establishes, that "CSRs and IHD techs have never filled in for each other." As for permanent transfers of techs to CSR positions, the judge correctly found that this also has never occurred. However, the judge did find that six CSRs have permanently transferred into tech positions.[8]

A synopsis of the evidence regarding transfers, therefore, shows that over the 14-month period between the commencement of IHD operations at the Rochester call center and the accretion, there were no temporary transfers, no permanent transfers of techs to CSR positions, and only five permanent transfers of CSRs to tech positions.[9] We conclude that this evidence falls well short of supporting a finding of interchange between CSRs and techs.[10]

Turning to the second critical element necessary to find a lawful accretion—common day-to-day supervision, we find that the evidence likewise fails to support such a finding. As noted above, we agree with the judge that there is centralized control of management and labor relations affecting all employees at the call center. However, the Board has instructed that:

> [an] important element is whether the day-to-day supervision of employees is the same in the group sought to be accreted. *Save-It Discount Foods*, 263 NLRB 689 (1982); *Weatherite Co.,* 261 NLRB 667 (1982). This element is particularly significant, since the day-to-day problems and concerns among the employees at one location may not necessarily be shared by employees who are separately supervised at another location. *Renzetti's Market*, 238 NLRB 174, 175 (1978).

Towne Ford Sales, supra, 270 NLRB at 311–312.

Here, the record demonstrates, as reflected once again in the judge's own factual findings, that the techs and CSRs are not commonly supervised. To the contrary, the techs have their own separate supervisory structure and identity. As the judge noted, Gregg Wergin testified that he is the manager of the IHD and the "highest-level supervisor" within that department. Reporting to him are a

[8] In fact, only five CSRs permanently transferred to tech positions before the accretion. A sixth CSR transferred after the accretion and cannot be considered as legally relevant to an accretion analysis. See *Gould, Inc.,* 263 NLRB 442, 446 (1982) (accretion determinations are based on facts existing at time of accretion.)

[9] We additionally note that because these permanent transfers occurred after Respondent Frontier restarted its IHD operation and sought to expand its tech workforce, they likely are not representative.

[10] We reject the judge's statement in fn. 24 of his decision that employee interchange "connotes . . . having regular contact between the groups" of existing unit employees and those being accreted to the unit. Employee contact is a factor analyzed separately in accretion determinations, and neither of the cases cited by the judge supports his statement that employee contact and employee interchange are considered by the Board as synonymous. In any event, we note the judge's undisputed finding that "CSRs and IHD techs have only occasional face-to-face contact or interaction."

Further, although not entirely clear, the judge appears to suggest that employee interchange may exist based on his finding that "CSRs and IHD techs receive overlapping training to do their respective jobs." We disagree for two reasons. First, contrary to the judge's statement in fn. 28 of his decision, there is nothing in the testimony of IHD Supervisor Londa Jericho (Tr. 2178 and 2228) or tech Kitty Maier (Tr. 304–307, 2648–2650, 2659–2661) that indicates that CSRs and techs are trained to perform each others' jobs. Their testimony, as well as the reference to joint training in fn. 28 of the judge's decision, refers to short orientation sessions that are offered to CSRs to provide them with some insight as to the role of the techs in Respondent Frontier's internet service operations. (Techs receive no reciprocal orientation or training regarding the jobs performed by the CSRs.) Second, even assuming that both groups are trained to perform the jobs of each other, the fact, which has already been established above, that they do not perform each others' jobs, precludes a finding of employee interchange. *Combustion Engineering,* 195 NLRB 909, 912 (1972).

group of lower-level supervisors known as "coaches" who "directly supervise[]" the techs, and "[a]ccording to Wergin . . . are his 'eyes and ears' with respect to the help-desk techs and serve as the first line of management's contact with them." In this capacity, the coaches, with occasional input from Wergin, exercise authority over the techs in a manner that affects the most vital aspects of their employment. The coaches interview and hire the techs and are solely responsible for evaluating their job performance, including the critically important ability to resolve customer inquiries pertaining to problems with various functions of a customer's internet service. By evaluating the techs, the coaches independently control the techs' opportunity for advancement. Specifically, a coach's favorable evaluation permits a tech to take a written test that assesses technical knowledge which, if passed, results in their promotion to the next highest "tier" of the tech pay scale. The coaches are also responsible for imposing discipline, except termination which is meted out by Wergin. The coaches monitor job performance and, as described in fn. 136 of the judge's decision, they issue written warnings to the techs for various work-related infractions and, if deemed necessary, place the techs on "performance improvement plans." Wergin testified that in administering this discipline, the coaches "don't check with anyone [in] management. . . ."

In sum, as to the element of day-to-day supervision, the foregoing evidence shows that the IHD operates as a distinct department within the call center, with a substantial degree of autonomy and supervisory control vested in IHD manager Wergin and his coaches with respect to personnel matters.[11] Neither Wergin nor the tech coaches exercise any supervisory authority over the CSRs. Similarly, CSRs are separately supervised by CSR coaches and managers, none of whom exercise any authority over the techs. In accord with Board precedent, therefore, we find that the second "critical" element of common daily supervision weighs heavily against lawfully accreting the techs into CSRs bargaining unit.

Thus, the two most important factors of interchange and common daily supervision have not been satisfied. Further, our examination of additional factors further supports our conclusion that a lawful accretion did not occur.

First, there are important differences between the techs' and CSRs' terms and conditions of employment. The CSRs and techs work different hours. The IHD operates without interruption, every day throughout the year, 24 hours a day. This requires the techs to work round-the-clock shifts to ensure their presence at the help desk at all times. The CSRs, by contrast, work only daytime hours from Monday to Saturday. Unlike the techs, the CSRs do not work night shifts, Sundays, or holidays.

Another major difference, which the judge noted, is that the "CSRs and IHD techs are subject to different leave and benefit policies." The CSRs' benefits, as set forth in their collective-bargaining agreement, entitle them to up to 5-weeks paid vacation (depending on seniority), excused absences, personal leave, sick leave, 11 paid holidays, pension coverage, and layoff and recall protection based on seniority.[12] The techs, by contrast, receive none of these specified benefits or seniority-based perquisites. Rather, techs are given 19 paid-time-off (PTO) days per year which they may use for any purpose. We agree with judge, therefore (see fn. 45 of his decision), that "in terms of benefits, the techs and CSRs are worlds apart."

We also agree with the judge that the compensation formulas for the techs and CSRs are "fundamentally different." The techs are paid strictly by the hour while the CSRs, in accordance with their collective-bargaining agreement, are paid on an incentive basis that includes an hourly rate that is supplemented by a "pay for performance" bonus program, as well as commissions based on their level of sales.[13]

We find that this difference in compensation formulas is indicative of another significant difference between the CSRs and techs—their skills and duties. The commissions paid to the CSRs are reflective of the fact that they sell a product. This is one of their primary job functions according to Vice President Christian, and was estimated by CSR Lutanya Highsmith to constitute 80 percent of her overall job duties. Specifically, the CSRs attempt to establish customer accounts by selling the Respondent's local or long-distance telephone services as well as its dial-up and high speed DSL internet services. They also

[11] The Respondent Frontier effectively concedes this point through its director of technology, Michael Canova, who stated that Wergin has "overall responsibility for the Help Desk function which includes the coaches; direct supervisory control for the Help Desk." (Tr. 1569.)

[12] In analyzing the accretion issue, Member Liebman does not rely on differences in terms and conditions of employment that are the result of collective bargaining. For example, benefits of CSRs are, of course, subject to negotiations, which necessarily do not control benefits of nonunit employees. Any resulting disparity should not provide a separate basis for excluding employees from a bargaining unit if those employees otherwise meet the Board's test for accretion. To do so would amount to excluding employees on the basis that up to now they had been excluded, a "patent form of circular reasoning." *Oxford Chemicals, Inc.,* 286 NLRB 187, 188 (1987).

[13] In fn. 41 of his decision, the judge stated that techs, like CSRs, also can earn sales bonuses through a program called "Take the Lead" if they sell a company product. However, very few of the techs who testified stated that they ever heard of this program, and none testified that they ever sold a product and earned a "Take the Lead" bonus.

pitch add-on features such as call-forwarding, call-waiting, e-mail and voice mail. After this primary function is complete and, in the judge's words, "the customer [is] on board for regular telephone service and Internet service," the CSRs perform their secondary function of maintaining the customer account, for example, by fielding customer questions relating to charges on their telephone or Internet bills.

Techs, on the other hand, do not engage in any sales activity or perform any of the other tasks performed by the CSRs. This explains why the techs' pay does not include sales commissions. Best described by techs Doug Daly and Kitty Maier, the duties of a tech are to provide computer assistance service of a technical nature by "troubleshooting" internet connection problems that are presented to them over the phone by customers. This entails walking a customer through a series of questions to isolate the reasons for the failure of their internet service and guiding them through the necessary steps to correct the problem. For example, if the problem is with e-mail, Daly testified that he asks the customer for any error messages that may be displayed on the computer screen, and after determining "what application they're using for mail," he attempts to correct the problem by telling the customer to "check on this, tell me what it reads now, click on this, tell me what is there, go ahead and change that, take that out and retype it. . . ." Maier described a similar trial-and-error technique that she uses in resolving the common problem of a customer's inability to view a web page.

Concededly, both groups are collectively involved in "customer service." However, contrary to the judge, we do not find that this supports his finding that a lawful accretion is warranted here. "Customer service" is a broad concept that arguably could describe the jobs of any number of employees in numerous settings. In and of itself, this terminology does not signify whether, in an accretion setting, different groups of "customer service" employees should be in the same bargaining unit. See, e.g., *Safeway Stores*, supra, 256 NLRB at 918 (Board rejected accretion of delicatessen employees into unit of bakery employees, notwithstanding that both groups' duties' primarily involved "waiting on the public."). Instead, the relevant question is whether the customer service duties of the CSRs and techs are sufficiently similar to warrant the techs' inclusion in the bargaining unit. Because we have found that the duties performed by both groups are not similar, it necessarily follows that this factor does not favor a lawful accretion.

We conclude our analysis with a discussion of one final but significant factor that weighs against the techs' lawful accretion to the CSR bargaining unit—bargaining history. The relevance of this factor in an accretion analysis was discussed recently in *Kaiser Foundation Hospitals,* 343 NLRB No. 8 (2004). In *Kaiser*, the issue was whether research assistants, a position that had continuously existed for over 20 years, could lawfully be accreted into a bargaining unit from which they historically had been excluded. Relying on well-settled precedent that accretion is never appropriate as to a group that the parties to a bargaining relationship historically have failed to include in the unit,[14] the Board in *Kaiser* found that the research assistants' historical exclusion from the bargaining unit rendered inappropriate their accretion into it.

We find that the limitation on accretion set forth in *Kaiser* and antecedent precedent is controlling here. Although there has been some history of bargaining unit representation of employees who performed internet customer assistance duties, that history has not been recent. As discussed more fully by the judge,[15] when Respondent Frontier first introduced internet services to customers in the mid-1990s during the infancy of the Internet phenomenon, it created an "Internet Team" comprised of 13 unit employees whose duties involved selling the service (a current CSR function) as well as answering customer inquiries regarding problems with their internet connection. However, as the Internet system grew and became more complex, Frontier realized the need for individuals with more advanced technological skills than those possessed by the bargaining unit's Internet Team. Accordingly, the Internet Team was disbanded and a new contingent of employees was hired who, as the judge noted, met the Respondent's heightened requirements for "more technical knowledge, computer language, external computer systems and Internet applications. . . ." This group of employees was assigned what now constitutes IHD functions and, with the consent of the Union, was excluded from the then applicable 1997–2000 collective-bargaining contract. Thereafter, this group remained unrepresented until the events giving rise to the instant dispute, i.e., their accretion by the Respondents into the successor 2000–2003 contract. It is this recent and continuous exclusion, and the fact that the earlier inclusion occurred at a time when IHD and CSR functions were commonly performed, that is determinative under *Kaiser Foundation* and *United Parcel Service*, and which weighs against the techs' accretion into the CSR bargaining unit.

In conclusion, we find, on the record as a whole, that the evidence fails to establish that the techs have little or

[14] *United Parcel Service*, 303 NLRB 326, 327 (1991), enfd. 17 F.3d 1518 (D.C. Cir. 1994), cert. denied 513 U.S. 1076 (1995).

[15] See secs., III,B,3 and D,6 of his decision.

no separate group identity, or that they share an overwhelming community of interest with the CSR bargaining unit employees. Accordingly, applying the principles set forth by the Board for analyzing accretion issues, we find that the techs did not constitute a lawful accretion to the bargaining unit of CSR employees represented by the Union and that the Respondents, therefore, violated Section 8(a)(1) and (2) and Section 8(b)(1)(A) of the Act, respectively, by agreeing on February 27, and memorializing that agreement in a written Memorandum of Agreement on March 13, to apply the terms of their existing collective bargaining agreement to the techs at a time when a majority of these employees did not support the Union. We further find that because the collective-bargaining agreement contained a union security clause that required the payment of dues to the Respondent Union as a condition of employment, the Respondent Frontier separately violated Section 8(a)(3) by applying the bargaining agreement to the techs, Section 8(a)(1) by informing the techs that the agreement's union security provision applied to them, and Section 8(a)(3) by collecting union security payments from the techs and remitting those payments to the Union. The Respondent Union, by accepting either directly from the techs or indirectly by collection from the techs by Respondent Frontier and remittance to the Respondent Union, separately violated Section 8(b)(1)(A).[16]

2. Creating the impression of surveillance

As discussed above, the techs commenced their CWA organizing efforts in January 2002. Notwithstanding the agreement between the Respondents to accrete the techs into the CSR bargaining unit, the techs continued their CWA organizational campaign. Among the organizational tools the techs utilized during the campaign was a "Yahoo!" internet web page that tech Ron Boulware created for the purpose of facilitating discussion among the techs on the various union and employment issues that concerned them.[17] The judge found that IHD supervisor Mazi Bakari's statement to a tech, that Bakari was aware of a message that another tech had posted on the Yahoo! web page, violated Section 8(a)(1) by creating the impression among the techs that their union activities were under surveillance. We disagree and dismiss this allegation.

Bakari was a coach of a team of techs that included Dan Wood and Daryl Albright. Upon his arrival at work one night in mid-March, Bakari was greeted by a group of techs, including Wood, who were "laughing and joking" among themselves. Wood told Bakari that he (Bakari) was the "joke of the day." Wood was referring to an e-mail that tech Albright had posted on the Yahoo! website. The first page of the e-mail was an announcement, in celebratory-style language and punctuation, that Albright had just prevailed at a disciplinary meeting with management officials who had decided not to issue Albright a poor-performance warning that Bakari had recommended.[18]

Wood invited Bakari to his desk to have a look at the e-mail. Bakari walked over to Wood's desk, observed on his computer screen that the e-mail was from Albright and that it was posted to the Yahoo! website. Wood then forwarded a copy of it to Bakari's computer.

Several days later, Bakari was in the help desk breakroom where techs Christodoulou and Coletti were discussing the ongoing accretion dispute. According to Christodoulou, Coletti asked Bakari "what do you think about the union." (Coletti did not specify the Union to which he referred.) Bakari replied that he "knew about the Yahoo group and what Daryl [Albright] had posted." Christodoulou testified that he was "surprised" and a "little intimidated" by this remark because he "assumed" that the Yahoo! website was dedicated solely for the benefit of the techs who wished to discuss CWA representational issues, and that access to the website by management personnel was not possible.

The judge found that Bakari's statement to Christodoulou that he knew about the Yahoo! website and the message that Albright posted on it violated Section 8(a)(1) because the statement "could reasonably cause an employee to believe that his or fellow employees' union activities were being surveilled." The judge reasoned that Bakari's statement conveyed the "clear message" that Respondent Frontier knew about the website as well as its "objective, its mission, participants, and the content of the employees' concerns." For those like Christodoulou and other techs who had subscribed to the website and thought that it was "secure and privileged only to them," the judge found that Bakari's statement could have had a "chilling effect." Although the judge acknowledged that Wood had exposed the website to Bakari and that the website "was not indeed secure," the judge nonetheless concluded that Bakari's statement was

[16] The complaint did not allege an 8(b)(2) violation.

[17] Yahoo! is an Internet Service Provider (ISP) that, among other things, provides a service where users may post comments on bulletin and message boards related to a particular subject matter.

[18] The text of Albright's e-mail message reads "went into the meeting today, they folded, due to union pressure and recordings, VICTORY IS SWEET. CWA ALL THE WAY!!!!!" This e-mail was part of a "string" of related messages posted by Albright and other techs to the Yahoo! website. Wood's testimony suggests that what he considered to be comical may have been another of Albright's e-mails in the message string that was critical of Bakari as a supervisor.

unlawful because "employees like Christodoulou had no actual knowledge that other subscribers were giving management information about the [website]." For the reasons discussed below, we find no 8(a)(1) violation.

In determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the test that the Board has applied is whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. *Flexsteel Industries*, 311 NLRB 257 (1993); *Schrementi Bros.,* 179 NLRB 853 (1969).[19] The essential focus has always been on the *reasonableness* of the employees' assumption that the employer was monitoring their union or protected activates. As with all conduct alleged to violate Section 8(a)(1), the critical element of reasonableness is analyzed under an objective standard, not the subjective reaction of the individual involved, to determine whether an employer's actions tend to restrain, coerce, or interfere with the Section 7 rights of employees. *KSM Industries*, 336 NLRB 133 (2001); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992); *El Rancho Market*, 235 NLRB 468, 471 (1978), enfd. mem. 603 F.2d 223 (9th Cir. 1979).[20]

Contrary to the judge, we cannot find under the foregoing principles that Bakari's statement reasonably would cause Christodoulou to assume that his union activities or those of his fellow techs were under surveillance by Respondent Frontier. Christodoulou's own testimony undermines this assumption, as do other circumstances surrounding Bakari's remark. Although Christodoulou testified that he assumed that the Yahoo! website was basically a "private" website, i.e., "by invitation only" to tech employees, he acknowledged that he did not know the identities of all the subscribers to the website and thus could not be sure that it was restricted only to techs. Further, there is nothing on the home page of the Yahoo! website that indicates that it was restricted to techs only, nor is there any evidence that tech subscribers were told to maintain the secrecy of the website's existence.

Also significant was Christodoulou's testimonial acknowledgement that any subscriber to the website could read messages posted to it by other subscribers, and then show them to anybody else. This is precisely what happened in this case. Tech Wood, a subscriber to the Yahoo! website, read a message that tech Albright had posted to it, and then showed it on his office computer to Bakari and e-mailed him a copy of the message. Given Christodoulou's acknowledgement that this could happen and that the website may not have been as secure as he thought it was, i.e., for techs only, coupled with the lack of evidence indicating to subscribers that the website was for the private use of techs, we think it unreasonable for Christodoulou to have assumed from Bakari's remark that he (Bakari) learned, by means of unlawful surveillance, the message that Albright had posted on the website. To the contrary, we think that a reasonable employee would assume that Bakari lawfully learned of Albright's message exactly the way Bakari did—through public dissemination by another website subscriber.

The reasonableness of this assumption is consistent with the public nature of the CWA's efforts to represent the techs. As the judge noted, by the time of Bakari's remark to Christodoulou in mid-March, the CWA's "interest in representing the techs was known" to all at the call center as a result of the CWA's petition seeking to represent the techs. In connection with the petition filing, the techs organizational activities had now become public. Indeed, it was in this context that Bakari found himself in the tech breakroom, among two techs discussing the accretion, when he was asked what he thought about it. His remark was simply an observation about the techs' CWA union activity which another tech had chosen to make public.[21]

In sum, nothing in Bakari's statement itself or the context in which it was made reasonably should have caused Christodoulou to assume that the Respondent was engaged in surveillance of the techs' union activities. Thus, we conclude, contrary to the judge, that the General Counsel has not met his burden of establishing that this comment violated Section 8(a)(1).

3. The *Wright Line* analysis

Applying the dual motive analysis set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), the judge found that Respondent Frontier violated Section 8(a)(3) and (1) by discharging Ronald Boulware for engaging in protected union activity. Although we agree with this finding, we do not agree in all respects with the judge's *Wright Line* analysis.

[19] The Board has noted that an impression of surveillance violation does not require a finding that employees attempted to keep their union activities secret, or that the employer obtained knowledge of the employees' union activities by unlawful means. See *United Charter Service,* 306 NLRB 150, 151 (1992).

[20] Accordingly, Christodoulou's testimony that he was "surprised" and "intimidated" by Bakari's remark is irrelevant to our analysis.

[21] Member Liebman would adopt the judge's finding that Bakari's statement violated Sec. 8(a)(1), for the reasons he stated.

"Under that analysis, the General Counsel must initially establish union or protected activity, knowledge, animus and adverse action. Once the General Counsel makes this initial showing, the burden of persuasion then shifts to the Respondent to prove that the same action would have taken place even absent any protected activity." *Robert Orr/Sysco Food Services,* 343 NLRB No. 123, slip op. at 1 fn. 6 (2004).

In agreeing with the judge that the General Counsel met his burden, we find that the protected activity that Boulware engaged in, and which Respondent Frontier both knew about and harbored animus against, was his union activities in leading the organizing campaign by the CWA.[22] In agreement with the judge, we find that Respondent Frontier's animus toward Boulware and his CWA activities was also demonstrated by the timing of his discharge within 1 week of learning of his CWA activities. Finally, we find that Respondent Frontier's accretion violations tend to demonstrate its animus against the CWA organizing effort, which was led by Boulware.

We further find, in agreement with the judge, that Respondent Frontier failed to meet its *Wright Line* burden of establishing that it would have discharged Boulware even absent his CWA activities. In this regard, Respondent argued that the "principal" reason that it discharged Boulware was because he transferred the contents of the company's internal web page to his Yahoo! website in violation of a valid work rule, i.e., its Authorized Use Policy (AUP) which governs the proper use of its workplace computers. However, as the judge correctly noted, before learning of Boulware's CWA activities, Respondent Frontier was aware of Boulware's violation of the AUP and other workplace rule violations, and not only failed to discharge him for these transgressions but gave him his annual performance evaluation which made no mention of the AUP violation. In light of this evidence which establishes, contrary to Respondent Frontier's asserted *Wright Line* defense, that it discharged Boulware for his CWA activities and not for AUP or other work rule violations, we do not rely on Section III,E,3,a,1 of the judge's decision where he discusses Respondent Frontier's defense to Boulware's discharge.

Finally, we agree with the judge that the right to reinstatement and full backpay to remedy his unlawful discharge was forfeited by Boulware as a result of misconduct that he engaged in while employed, but not discovered by the Respondent until the hearing. Specifically, in response to a subpoena served on Boulware during the hearing, it was discovered that during the course of his employment Boulware had forwarded from his office computer to his home e-mail account approximately 22,000 pages of company records that included customer credit card information, customer account passwords, their user names, their telephone numbers and home addresses. The judge found that by "purloin[ing]" this "proprietary and confidential information," Boulware engaged in serious misconduct that not only violated the AUP but also "subjected [the Respondent] to possible loss of customers and lawsuits." Accordingly, the judge concluded that this "after-acquired knowledge" of Boulware's misconduct which, had the Respondent known of it at the time of his unlawful discharge would have resulted in his lawful discharge, warranted denial of remedial reinstatement as well as backpay for the period following the discovery of Boulware's misconduct.

Our colleague argues in her partial dissent that Boulware's e-mailing of work material to his home computer cannot be "characterized as newly discovered or 'after-acquired' evidence" because the Respondent knew that Boulware had been doing this prior to his discharge, yet failed to discharge him for it. Therefore, she finds that there is no justification for cutting off his backpay and denying him reinstatement.

In disagreeing with our colleague, we note first that although it is true that the Respondent was aware, prior to Boulware's discharge, that he had forwarded work-related material to his home computer, there is no evidence that the Respondent was aware that the forwarded material included customer credit card information and other sensitive and confidential material that was discovered after his discharge. To the contrary, the only material forwarded home by Boulware, of which the Respondent was aware prior to discharging him on unrelated unlawful grounds, was a set of suggested tips for use by fellow techs to "troubleshoot" computer problems presented by customers.[23] Second, and equally significant, the mass of sensitive and confidential information forwarded by Boulware to his home computer and discovered by the Respondent at the hearing was, as the judge found, "purloined," i.e., it was retained by Boulware on his home computer. By contrast, as previously stated, the known information forwarded home by Boulware prior

[22] We thus do not rely on the judge's finding that Boulware engaged in protected activity by transferring to his "Yahoo!" website the contents of certain discussions that employees had posted on Respondent Frontier's internal web page (the message board) pertaining to union matters and other workplace issues.

[23] Boulware had listed these tips on a "DSL Escalation Form" that he created on his work computer, forwarded it to his home computer for completion, and then forwarded back to his home computer. See fn. 129 of the judge's decision and the sentence in the text it references. The Respondent learned in early March that Boulware had done this and ordered him not to forward work home again.

to his discharge was forwarded back to his work computer and, thus, was not purloined.

Accordingly, in light of this misconduct, we shall not order the Respondent Frontier to reinstate Boulware and we will limit his backpay to the period prior to the discovery of his misconduct. *Aldworth Co.,* 338 NLRB 137, 147 (2002).

AMENDED REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order that they cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent Frontier unlawfully recognized and entered into a collective-bargaining agreement on March 13, 2002, with the Respondent Union as the representative of previously unrepresented Internet help desk technicians, we shall order Respondent Frontier to withdraw and withhold all recognition from the Respondent Union as the collective-bargaining representative of those employees, and we shall order both Respondents to cease applying to those employees the terms of the collective-bargaining agreement, or any extension, renewal, modification, or superseding agreement,[24] unless or until the Respondent Union is certified by the Board as such representative.

We shall also order that the Respondent Union and Respondent Frontier, jointly and severally, reimburse previously unrepresented help desk technicians, present and former, for dues and initiation fees involuntarily exacted from them as a result of the unlawful application of the union-security clause in the Respondents' collective-bargaining agreement, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent Frontier shall further be ordered to take the action set forth in the remedy section of the judge's decision with respect to the unfair labor practices committed against Ronald Boulware.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Frontier Telephone of Rochester, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting recognition to the Respondent Union as the exclusive collective-bargaining representative of the Internet help desk technicians at a time when the Union does not represent a majority of those employees.

(b) Informing help desk technicians that the union-security provisions of the collective-bargaining agreement with the Respondent Union applies to them.

(c) Applying the collective-bargaining agreement to the help desk technicians.

(d) Collecting union-security payments from the help desk technicians and remitting those payments to the Respondent Union.

(e) Discharging employees or in any other manner discriminating against them with regard to their hire or tenure of employment, or any term or condition of employment, because they join and assist any union and engage in protected concerted activities, and/or to discourage employees from engaging in such activities, and/or to encourage employees to join or assist any union.

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

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

(a) Rescind and withdraw the recognition given the Respondent Union as the exclusive collective-bargaining representative of the help desk technicians unless and until the Union is selected by the help desk technicians in a Board conducted election.

(b) Rescind and withdraw the application of the collective-bargaining agreement with the Union to the help desk technicians unless and until the Respondent Union is selected by the help desk technicians in a Board conducted election.

(c) Jointly and severally with the Respondent Union reimburse the help desk technicians for any payments made under the terms of the union-security clause of the collective-bargaining contract with the Respondent Union, with interest.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Ronald Boulware, and within 3 days thereafter notify him in writing that it has done so, and that the discharge will not be used against him in any way.

(e) Within 14 days from the date of this Order, make Ronald Boulware whole for any losses he suffered by reason of the discrimination against him as set forth in the amended remedy section of this decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, so-

[24] Nothing in this decision should be construed as requiring Respondent Frontier to rescind benefits conferred on the group of previously unrepresented Internet help desk technicians as the result of the unlawful application of contract provisions to them. See, e.g., *Kaiser Foundation Hospitals,* 343 NLRB No. 8, slip op. at 2 (2004).

cial security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Rochester, New York facility copies of the attached notice marked "Appendix A."[25] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained 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 the 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 closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 27, 2002.

(h) 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.

B. The Respondent Union, Rochester Telephone Workers Association, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting the Respondent Employer's grant of recognition as the exclusive collective-bargaining representative of the help desk technicians at a time when the Union does not represent a majority of those employees.

(b) Informing the help desk technicians that the union-security provisions of the collective-bargaining agreement with the Employer applies to them.

(c) Applying the collective-bargaining agreement to the help desk technicians.

(d) Accepting, either directly from the help desk technicians or by collection from them by the Employer and remitting to the Union, union-security payments from the help desk technicians.

(e) In any like or related manner 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) Reject and refuse the recognition given the Respondent Union as the exclusive collective-bargaining representative of the Respondent Employer's help desk technicians and continue to decline to represent these employees unless and until the Union is selected by the help desk technicians in a Board conducted election.

(b) Rescind and withdraw application of the collective-bargaining agreement with the Employer to the help desk technicians unless and until the Union is selected by the help desk technicians in a Board conducted election.

(c) Jointly and severally with the Respondent Employer reimburse all help desk technicians for any payments made under the terms of the union-security clause of the collective bargaining agreement, with interest.

(d) Preserve and within 14 days of a request, or such additional time as the regional director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

(e) Within 14 days after service by the Region, post copies of the attached notice at its Rochester, New York facilities set forth in the "Appendix B."[26] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained 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 the notice is not altered, defaced or covered by other material.

(f) 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 Union has taken to comply.

MEMBER LIEBMAN dissenting in part.

I would not cut off the remedy owing to discriminate Boulware as of the date of the unfair labor practice hearing.

The majority adopts the judge's finding that discriminatee Boulware engaged in misconduct, which was only discovered by the Respondent at the hearing, and now justifies the forfeiture of his right to reinstatement and

[25] 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."

[26] See fn. 25, supra.

the cutoff of any backpay accrued subsequent to that discovery. Specifically, the judge found that Boulware had forwarded a large number of customer records, contained in work e-mails, to his home computer and that the e-mail forwarding was performed by a feature of the software provided by the Employer on his work computer, which apparently forwarded all of Boulware's work e-mail to his home upon activation.

The Respondent, however, was aware *prior to Boulware's discharge* that he had activated this function and was having difficulty, due to its complexity, in turning it off. (In fact, a manager assisted Boulware in figuring out how to turn it off.) Taking into account this information, the Board unanimously finds in regard to the underlying allegation concerning Boulware's discharge, that the Respondent was in fact aware that he had violated its Authorized Use Policy (AUP) by this e-mail forwarding (as well as other conduct). Since the Employer did not in fact discharge him at the time for this conduct, we conclude that the Respondent unlawfully discharged him because of his activities in support of the Communications Workers of America (CWA)—and not for any violation of the AUP, including the e-mail forwarding.

I fail to see how this same conduct can now be characterized as newly discovered or "after acquired" evidence and justify cutting off his backpay and denying him reinstatement. See *John Cuneo, Inc*., 298 NLRB 856 (1990) (backpay is limited to the date on which the employer acquired knowledge of the discriminatee's misconduct). Indeed, it is the employer's burden to "establish that the discriminatee's conduct would have provided grounds for termination based on a preexisting lawfully applied company policy and any ambiguities will be resolved against the employer." Id. at fn. 7. I am unpersuaded by the judge's and the majority's reliance on the Employer's supposed later discovery of the massive scale of this forwarding, the inclusion of private customer data within the e-mails, and its retention on Boulware's home computer. Under the circumstances described above, it seems doubtful that the Employer was actually surprised that a substantial quantity of material including customer information had been forwarded during the interval that Boulware had activated the forwarding function and before he could—with the Employer's assistance—deactivate it. Further, during this interval—or afterwards—the Employer expressed no interest in how Boulware was disposing of this mass of material. Accordingly, I find the record evidence to be, at best, inconclusive as to the Employer's lack of knowledge and thus insufficient to support the cutoff of backpay and the denial of reinstatement to the discriminatee.

APPENDIX A

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

At the heart of the National Labor Relations Act is the principle that employees may freely select or decline union representation. When the employees in a job classification, such as our help desk technicians, are not represented by a union, it is necessary and appropriate to first determine that a majority of such employees desire representation before recognizing a union to represent them and applying a collective-bargaining agreement with a union-security clause and union-security payment obligations to those employees.

After a trial at which we and the Rochester Telephone Workers Association submitted evidence and argued our case, the National Labor Relations Board found that we violated the National Labor Relations Act by recognizing the Union as the exclusive representative for purposes of collective bargaining of our help desk technicians.

The Board also found that we violated the Act by applying our contract with the Union to the help desk technicians, including the union-security provisions of that contract, and by informing them they were bound by its terms.

In addition, the Board found that we violated the Act by collecting and remitting to the Union, union-security payments from the help desk technicians.

Finally, the Board found that we violated the Act by discharging Ronald Boulware because he engaged in union and other activity that is protected by the Act.

The National Labor Relations Board has required us to post this notice and to honor the promises we now make to our employees in it.

Accordingly,

We give our employees the following assurances.

WE WILL NOT grant recognition to the Union as the exclusive collective-bargaining representative of our help

desk technicians, at a time when the Union does not represent a majority of those employees, and will not so recognize the Union unless and until the Union is certified by the Board as their representative.

WE WILL NOT apply our contract with the Union, including its union-security provisions, to our help desk technicians, unless and until the Union is certified by the Board as their representative.

WE WILL NOT inform our help desk technicians that our contract with the Union, including its union-security provisions, applies to them.

WE WILL NOT collect union-security payments from the help desk technicians and remit those payments to the Union.

WE WILL NOT discharge employees or in any other manner discriminate against them with regard to their hire or tenure of employment, or any term or condition of employment, because they join and assist any union and engage in protected concerted activities, and/or to discourage employees from engaging in such activities, and/or to encourage employees to join or assist any union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the rights set forth above.

WE WILL withhold and withdraw all recognition of the Union as the exclusive collective-bargaining representative of the help desk technicians, unless and until the Union is certified by the Board as their representative.

WE WILL jointly and severally with the Union make whole all the help desk technicians for any and all union-security payments made by those employees pursuant to a collective-bargaining agreement's union-security language, with interest.

WE WILL, within 14 days from the date of this Order, make Ronald Boulware whole for any losses he suffered by reason of the discrimination against him, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Ronald Boulware, and within 3 days thereafter notify him in writing that we have done so, and that the discharge will not be used against him in any way.

FRONTIER TELEPHONE OF ROCHESTER, INC.

APPENDIX B

NOTICE TO MEMBERS
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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

At the heart of the National Labor Relations Act is the principle that employees may freely select or decline union representation. When the employees in a job classification, such as the help desk technicians employed by the Employer, are not represented by a union, it is necessary and appropriate to first determine that a majority of employees desire representation before recognizing a union to represent them and applying a collective-bargaining agreement with a union-security clause and union-security payment obligations to those employees.

After a trial at which we and the Employer submitted evidence and argued our case, the National Labor Relations Board found that the Employer violated the National Labor Relations Act by recognizing us, the Rochester Telephone Workers Association, as the exclusive representative for purposes of collective bargaining of the help desk technicians.

The Board also found that we violated the Act by applying our contract with the Employer, to the help desk technicians, including the union-security provisions of that contract, and further violated the Act by informing the technicians that they were bound by its terms.

Finally, the Board found that we violated the Act by collecting union-security payments both directly from the help desk technicians and indirectly from the Employer who had in turn collected the monies from these employees.

The National Labor Relations Board has required us to post this notice and to honor the promises we now make to our members and the help desk technicians.

Accordingly,

We give our members and the help desk technicians the following assurances.

WE WILL NOT accept recognition from the Employer as the exclusive collective-bargaining representative of the Employer's help desk technicians at a time when we do not represent a majority of those employees and will not accept such recognition in the future unless and until we are certified by the Board as their representative.

WE WILL NOT apply our contract with the Employer, including its union-security provisions, to the help desk technicians unless and until we are certified by the Board as their representative.

WE WILL NOT inform the Employer's help desk technicians that our contract with the Employer, including its union-security provisions, applies to them.

WE WILL NOT collect union-security payments either directly from the help desk technicians or indirectly from the Employer who provides such payments after collecting them from the technicians.

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

WE WILL withdraw, disclaim and refuse any role as the exclusive collective-bargaining representative of the help desk technicians unless and until we are certified by the Board as their representative.

WE WILL jointly and severally with the Employer make whole all help desk technicians for any and all union-security payments made by those employees to the union directly or indirectly by payment to the Employer pursuant to a collective-bargaining agreement's union-security language, with interest.

ROCHESTER TELEPHONE WORKERS ASSOCIATION

Beth Mattimore, Esq. and *Nicole Roberts, Esq.,* for the General Counsel.

Richard M. Reice, Esq. and *Gregory B. Reilly, Esq. (Brown Raysman Millstein Felder* and *Steiner LLP),* of New York, New York, for the Respondent Frontier Telephone.

Michael T. Harren, Esq. and *Michael A. Sciortino, Esq. (Chamberlain, D'Amanda, Oppenheimer* and *Greenfield),* of Rochester, New York, for the Respondent Rochester Telephone Workers Association.

Mark Gaston Pearce, Esq. and *Josie K. Lipsitz, Esq. (Creighton, Pearce, Johnson,* and *Giroux),* of Buffalo, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. These consolidated cases were heard before me in Webster and Parma, New York, on October 21–25, 30, and 31, December 16–20, 2002; February 11, 12, and 14, and March 11–13, 2003, pursuant to an original charge filed in Case 3–CA–23502 on February 28, 2002, by the Charging Party, the Communications Workers of America, AFL–CIO (CWA), against Frontier Telephone of Rochester, Inc.[1] (Frontier); on April 3 and 22, and June 24, 2002, the CWA filed amended charges in this case.

On March 27, 2002, CWA filed an original charge against Frontier in Case 2–CA–23535; the CWA filed amended charges in this case on March 29, April 8 and 19, 2002.

On April 24, 2002, an individual Charging Party, Daryl R. Albright (Albright), filed an original charge against Frontier in Case 3–CA–23575 and the Respondent, Rochester Telephone Workers Association (RTWA), in Case 3–CB–7932; the charge in Case 3–CA–23575 was amended by Albright on June 24, 2002.

On July 3, 2002, the Regional Director for Region 3 of the National Labor Relations Board (the Board) issued her Order consolidating the aforementioned cases for hearing and issued a consolidated complaint against both Frontier and RTWA with a notice of hearing originally scheduled for September 9, 2002.

The consolidated complaint alleges that Frontier violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act) on numerous occasions and that RTWA violated Section 8(b)(1)(A) of the Act.[2]

On July 12, 2002, Frontier timely filed a responsive answer essentially denying the commission of any unfair labor practices. On July 19, 2002, RTWA answered the charges against it, denying the commission of any violations of the Act and asserting certain affirmative defenses to the complaint allegations.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. On the entire record, including my observation of the demeanor of the witnesses and after considering the posthearing briefs filed by the General Counsel, the CWA, Frontier, and RTWA, I make the following[3]

FINDINGS OF FACT

I. JURISDICTION—THE BUSINESS OF THE RESPONDENT FRONTIER

Frontier Telephone of Rochester, Inc., a New York corporation, with offices and places of business in Rochester, New York, including Rochester facilities located at 1225 Jefferson Road, and 180 South Clinton Avenue, has been engaged in providing local exchange telephone services throughout the Rochester metropolitan area. Frontier annually purchases, and receives at its Rochester facilities, goods valued in excess of $50,000 directly from points outside the State of New York. Frontier admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] In the original charge and subsequent charges, Frontier Telephone is described as Frontier Communications, and Frontier Communications, a Subsidiary of Citizens Communications Company. As will be explained later herein, the Respondent, its different appellations notwithstanding, will be referred to as Frontier Telephone of Rochester, Inc. or Frontier.

[2] On October 8, 2002, the General Counsel filed a notice of intention to amend the consolidated complaint and petition for injunction. See GC Exh. 1(ee). For purposes of the instant matter, the General Counsel at the hearing sought to add the names of Clifford Edington, human resource representative, and Gail Noyes, manager of human relations, to par. VI(a) of the complaint; substitute Gail Noyes and Clifford Edington for Gregg Wergin in par. VII(f); and substitute Respondent Frontier for Respondent RTWA in par. XI(a), L. 2. I approved these amendments during the hearing.

[3] Counsel for the General Counsel's motion to correct transcript, dated July 2, 2003, is granted.

II. THE LABOR ORGANIZATIONS

A. The Respondent RTWA

It is admitted (by the parties), and I find and conclude, that Rochester Telephone Workers Association has been a labor organization within the meaning of Section 2(5) of the Act.

B. The Charging Party CWA

It is admitted, and I find and conclude, that Communication Workers of America, AFL–CIO has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT FOR COLLECTIVE BARGAINING

The parties admit that the employees, whose occupations are represented by the wage schedules attached to the current collective-bargaining agreement between Frontier and RTWA, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.[4]

A. The Nature of the Complaint Allegations

The consolidated complaint at its core owes its genesis to what may be described a singular event—Frontier's agreement to recognize the RTWA as the exclusive collective-bargaining representative of its Internet help-desk technicians as an accretion to the existing RTWA bargaining unit on February 26, 2002. The charges brought by the Charging Parties here—CWA and an individual, Daryl Albright, one of the help-desk technicians—stem from this recognition. So to a significant extent and degree, this allegedly unlawful accretion, as opposed to the other instances of alleged illegal conduct by either or both Frontier and RTWA, forms the matrix or an epicenter of sorts for this litigation.

Accordingly, Frontier is charged with rendering unlawful assistance and support to the RTWA by acceding to its demand for recognition of the help-desk employees and entering into a memorandum agreement incorporating, applying, and enforcing generally the terms of the existing collective-bargaining agreement to these employees. RTWA, obversely, is charged with unlawfully receiving assistance and support from Frontier by accepting the recognition when it allegedly did not represent an uncoerced majority of the help-desk technicians; entering into the memorandum agreement; and accepting dues and/agency fees deducted from help-desk employees' wages pursuant to the accretion in violation of Section 8(b)(1)A of the Act.

Frontier is also charged with a number of 8(a)(1) violations stemming from certain statements and actions allegedly made and done by its agents and supervisors prior to and after the accretion. Additionally, Frontier is charged with two violations of Section 8(a)(3) of the Act by dint of its having discharged two employees (postaccretion) essentially because they joined or otherwise assisted the CWA's efforts to organize the Internet help-desk workers.

Thus, as will become clearer, this case boiled to the essence is about a competition between two unions to represent a select group of employees at the Respondent's Jefferson Road facility or, as it will often be referred to hereafter, the call center.

B. Historical Background[5]

1. Frontier Telephone of Rochester, Inc.

The Respondent Frontier, since at least 1980, was called Rochester Telephone Company and its principal business was providing basic telephone (voice) service to business and residential customers in Rochester and its surrounding communities. As such, Frontier was what is described in industry parlance as an LEC or local exchange company. Rochester Telephone was a separate corporate entity, not a subsidiary of any company. Sometime in 1994, by virtue of Frontier's purchase of the local telephone network, Rochester Telephone became Frontier Telephone. During 1999–2000, another telecommunications company, Global Crossing, purchased Frontier. In June 2001, Global Crossing sold certain of Frontier's corporate assets, in particular the LEC component, to Citizens Communications Company (Citizens); however, Global Crossing retained ownership of Frontier's long-distance telephone network. Thus, as of June 2001, Citizens owned (the Frontier) local telephone service as well as associated networks and thereby provided the local dial tone for its residential and business customers. As part of this acquisition, Citizens also became owner of Frontier's Jefferson Road call center, which figures prominently in this litigation.

Citizens operates nationally on a regional basis. Prior to its June 2001 acquisition of Frontier, Citizens' business was concentrated in the Western part of the United States with some presence in the Midwest. With the acquisition of Frontier, which had a large presence on the East Coast, Citizens provided a nationwide telecommunication service. Presently, Citizens is divided into the West Coast, Central, East Coast, and Rochester regions. Citizens maintains six centers located in Rochester,

[4] The collective-bargaining agreement in question is contained in GC Exh. 2. This agreement, with an effective term of January 26, 2000, through February 28, 2003, includes the following occupations or job classifications along with their wages schedules (omitted):

Group Coordinator	Draftsman
Senior Draftsman	Service Assistant
Consumer Affairs Representative	Communications Center Coordinator
Observer Commercial	Service Observer
Unirep	Composite Machine Operator
Credit/Collection Coordinator	Special Clerk
Special Account Representative	Senior Operator
Coin Box Collector	Office Clerk
Systems Engineering Coordinator	Operator
Systems Support Administrator	General Clerk
Media Operator II	Clerical Assistant
Representative	Traffic Administrator
Directory Listing Coordinator	

It should be noted that the Respondent Frontier denies the appropriateness of this unit to the extent that occupation/classification Internet help-desk employees employed at its Jefferson Road facility is not included. Of course, this matter is a material issue in this litigation.

[5] This part of the decision will relate matters that are not seriously or at all disputed by the parties. I have considered pertinent testimony, the pleadings of the parties, and have drawn reasonable inferences therefrom in setting out this history. To the extent these findings are inconsistent with other evidence of record, I have discredited any such contrary or inconsistent evidence.

Gloversville, and Monroe, New York; Kingman, Arizona; Burnsville, Minnesota; and Sacramento, California. Thus, as a consequence of the June 2001 acquisition of the Frontier local telephone exchange, Citizen/Frontier now provides a fairly sizeable amount of local telecommunications service nationwide.

2. Union representation at Frontier; the Jefferson Road call center

Both the RTWA and CWA have represented Frontier's employees for nearly 30 years. RTWA traditionally has represented what may be described as the "inside" employees, workers performing clerical, technical, sales, billing collection, operator services, and similar tasks at the call centers or other facilities. CWA, on the other hand, has traditionally represented employees performing "outside" occupations and job functions, such as linemen, plant engineering, construction, and installation of telephone lines and equipment.[6] During the times material to the instant litigation, RTWA represented about 750 clerical and technical employees at five Frontier call center sites, including those at the Jefferson Road call center. Prior to February 26, 2002, RTWA represented about 150 of the 350 employees working at Jefferson Road. CWAs represented employees are not physically located at the Jefferson Road call center but are called in to install or service telephone equipment or lines.

3. The Frontier Internet help-desk function; and its installation at the Jefferson Road call center

With the advent of the Internet or the worldwide web, many telecommunications companies witnessed a sea change in their traditional role as pots (plain old telephone companies) providing local and long-distance services to their customers. Many companies like Frontier responded to the new communications modality by introducing Internet services to their residential and business customers. In the early 1990s, Frontier had no Internet product. However in 1994–1995, responding to the popularity of the Internet and, of course, having existing line capability to deliver the service, Frontier began providing dial-up Internet service to its customer base. Over time as the Internet's popularity grew and the technology to access the Internet developed, Frontier expanded its Internet product beyond the slower dial-up service and included high-speed digital subscriber line (DSL) service.[7]

As one would expect with a new and sophisticated telecommunications system, customers may and do experience problems getting the Internet services to work for them. Frontier responded to this essentiality by establishing in 1994–1995 an Internet help team at its 180 South Clinton Street call center. Customer service was provided by what the Company called the Internet team. The team was comprised of RTWA represented consultants whose duties and responsibilities included selling and providing customer (including technical) support and services with respect to the high-speed Internet access from Internet providers (IP), such as America On Line (AOL).[8] For example, if a customer was faced with an Internet installation problem with the installation discs provided by Frontier, the Internet team member would walk him/her through the program to accomplish the Internet connection.

During the early years, the Internet team performed primarily a customer sales and support service for Frontier's nascent Internet product; however, they also performed telephone-related customer services.[9]

The Internet team was in existence for about a year, perhaps longer. Around 1996, however, Frontier sought to transform the Internet team into the Internet help desk (IHD), which was to be staffed with consultants hired from outside sources as well as from within Frontier's work force. The new IHD position requirements were changed by Frontier to mandate not only more technical knowledge, computer language, external computer systems, and Internet applications, but also additional training to meet the demands of Frontier's new upgraded Internet service, "Frontier net." Frontier decided that the new team would not perform any telephone sales and service work but only answer technical service questions about the installation and use of Frontier net.[10] The IHD representatives were to be designated help-desk technicians and would not be part of the RTWA bargaining unit. They were to be considered part of a lower level group of managers called "individual contributors" because Frontier's management viewed the Internet product as part of its information technology (IT) function.[11] Historically, employees serving in IT were not represented by any collective-bargaining representative.

[6] Respondents Frontier and RTWA have introduced inside/outside appellations to the discussion. They are not formal descriptions and, in my view, are simply useful to give some flavor to the types of employees the RTWA and CWA have historically represented. By no means have I considered these shorthand designations dispositive of the issues herein.

[7] Frontier dial-up Internet services are available to businesses and residential subscribers. The dial-up service uses the same access lines relied upon to provide customers with a dial tone. The DSL Internet customers are provided the service by means of a separate high-speed telecommunications line to the customer's home or place of business. Notably, DSL service was not introduced by Frontier until early 2000.

[8] The team was officially called to the Internet/ISDN team, recruited from, and comprised of 13 RTWA residential and business office representatives. As members of the Internet team, they were described as "service consultants." Notably, these workers were either trained in-house by Frontier management or by outside consultants.

[9] The Internet team members spent about 90 percent of their time doing Internet sales and support and about 10 percent doing regular telephone-related work. (See GC Exh. 5.)

[10] Frontier's management determined that having Internet help-desk technicians perform telephone sales and service functions was problematic in that Internet-related calls often took longer to handle than the Public Service Commission mandated 20 second call/answer time. By the same token, Frontier's Internet product was not PSC regulated. Accordingly, this rationale was a prime ingredient in the Company's decision to transform the Internet service operations and eliminate the telephone sales and service component therefrom.

[11] Frontier considers certain employees to be individual contributors and part of its management team. They are not part of any bargaining unit. According to Frontier's system, individual contributors have no supervisory authority; that is, they have no hire/fire authority, do no scheduling, have no policymaking authority, and cannot direct or transfer employees; they report to a manager.

Frontier established the new IHD sometime in 1996 and effectively disbanded the old Internet team whose original 13 members were absorbed in other jobs in the call center at South Clinton Avenue.[12]

The new IHD technician jobs were posted within the Company as well as with outside sources. The RTWA-represented members of the old Internet team, along with any other RTWA-represented employees, were entitled to bid on the new tech jobs. In the end, none of the former Internet team members transferred into the new IHD, although around four other call center representatives applied for and were accepted as help-desk technicians. By 1997, the IHD employed about 20–30 individual contributor technicians who, in the main, were hired from outside sources.[13] The new IHD originally supported only the Rochester area Internet customers but, over time, took on the Internet support of Frontier's other regions.

Sometime between 1997 and 1999, as the popularity of and resulting demand for Internet access grew, Frontier purchased a company, Global Center located in Phoenix, Arizona. Global Center's primary business was providing Internet products and support. Global Center actually operated an Internet call center in Phoenix. Consequently, Frontier's management decided to take advantage of Global Center's competencies and moved the IHD function to Phoenix in 1999, disbanding the Rochester based IHD.[14] Rochester IHD technicians were offered relocation packages to Phoenix, but few, if any, accepted and were absorbed in other jobs at Frontier. The new Phoenix-based IHD techs also were not represented by any union.

As noted earlier, Global Crossing had purchased Frontier and, more particularly, the Phoenix IHD function. Global Crossing then sold certain of Frontier's assets to Citizens Communication. However, Global Crossing did not include the Phoenix IHD operation in the sale, leaving Frontier/Citizens with an Internet product but no help-desk operation to service it. Notably, by May 9, 2000, Frontier had opened the Jefferson Road call center. Ultimately, Frontier's management determined that the IHD function should be centralized in Rochester and, in November 2000, Frontier began hiring for help-desk positions at the Jefferson Road facility; by December 2000, the Jefferson Road IHD became operational.

[12] The IHD moved to several locations in Rochester over a period of years. In 1997 (98), the IHD moved from South Clinton Avenue to West Henrietta Road; then, from West Henrietta Road to Plymouth Avenue; and, then, ultimately back to South Clinton.

[13] According to RTWA president, Rodgers, as part of the quid pro quo for removing the help-desk functions from the RTWA bargaining unit, RTWA unit members were allowed to bid on the current and future IHD positions and several job titles in the bargaining unit were upgraded in pay. However, there was no written memorialization of this agreement.

[14] It should be noted that the term of then current collective-bargaining agreement between RTWA and Frontier was 1997 through August 2000. Negotiations for the current contract began in November 1999. The current contract, to be discussed later herein, commenced on January 26, 2000, and expired on March 5, 2003. By the time the new contract was negotiated, the IHD had been transferred to Phoenix. Consequently, the IHD (and the Internet team) jobs were no longer in existence and, therefore, were not subject to any negotiations between RTWA and Frontier.

4. Frontier's recognition of the RTWA as the collective-bargaining representative of the IHD technicians

On January 26, 2000, RTWA and Frontier entered into a collective-bargaining agreement[15] wherein, inter alia, Frontier recognized the RTWA as the exclusive representative of the unit employees for collective-bargaining purposes.

On February 26, 2002, based on a written demand[16] by the RTWA on February 15, 2002, Frontier agreed to include the IHD function in the existing RTWA-Frontier labor agreement and to recognize RTWA as the exclusive bargaining agent for the functions performed by the IHD.

On March 13, 2002, RTWA and Frontier entered into a memorandum of agreement which, inter alia, formalized the February 26 agreement, identified, and clarified the coverage and application of a number of the provisions of the existing collective-bargaining agreement. The memorandum agreement essentially brought the IHD employees in various help-desk technician job classifications under the existing collective-bargaining agreement.[17] As a result of the agreement, about 120 Internet technicians were included and "accreted" within the RTWA's existing 750-employee unit.

C. The Accretion Issue: The Applicable Legal Principles

The complaint, as noted, basically charges RTWA and Frontier with violations of the Act by recognizing the Union and agreeing to accrete or add the IHD function and the associated help-desk technicians to the existing bargaining unit covered by their collective-bargaining agreement. The complaint charges the Respondents with incorporating, applying, and enforcing the allegedly unlawful accretion to and against the Internet help-desk technicians when RTWA did not represent an uncoerced majority of these employees. The Respondents both contend that the accretion was appropriate and lawful.

It would be helpful in my view to discuss applicable accretion principles under Board (and circuit court) decisions before examining the parties' respective positions.

Under the Act (in Section 9(a)), generally a union must be "designated or selected for purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." The accretion doctrine is an exception to this statutory requirement.

The accretion doctrine ordinarily applies to new employees who have common interests with members of an existing bargaining unit and who would have been included in the certified

[15] The entire agreement is contained in GC Exh. 2. This agreement, as noted, expired on March 5, 2003.

[16] The demand letter, supposedly sent by RTWA President Maria Rodgers on February 15, 2000, was not produced at the hearing. Rodgers indicated in an affidavit she submitted to the Board agent investigating the charges that she sent this letter to Frontier. (See GC Exh. 5.) Frontier's vice president of operations at Jefferson Road, Angela Christian, testified that Rodgers told her days before that the demand letter was going to be sent to the Company. According to Christian, she was informed of the letter demand by Frontier's vice president of labor relations, Michael Wieborzyski, that he had received the letter from Rodgers. I have credited Rodgers and Christian regarding the existence of the letter, its sending, and receipt prior to February 26, 2002.

[17] The memorandum of agreement is contained in GC Exh. 3.

unit or are covered by a current collective-bargaining agreement. *Renaissance Center Partnership*, 239 NLRB 1247 (1979), cited with approval in *King Radio Corp.*, 257 NLRB 521 (1981).

Thus, the additional employees are then absorbed into the existing unit without first having an election and are governed by the unit's choice of bargaining representative. *Consolidated Papers, Inc. v. NLRB*, 670 F.2d 754 (7th Cir. 1982).

The Board follows a restrictive policy in determining whether an accretion has occurred because the accreted employees are not able to decide for themselves whether to be represented by a labor organization, and the Board seeks to insure that the employer's rights in this regard are not improperly foreclosed. *Towne Ford Sales*, 270 NLRB 311 (1984), affd. sub nom. *Machinists District Lodge 190 v. NLRB*, 759 F.2d 1477 (9th Cir. 1985).

Accretion promotes the policy of industrial stability by allowing adjustment 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. However, accretion can preclude self-determination and therefore should be narrowly applied to situations where the smaller group has lost its separate independent identity. *Local 144 (Brooklyn Hospital Center) v. NLRB*, 9 F.3d 218 (2d Cir. 1993).

Accordingly, the Board will find a valid accretion "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 interests with the preexisting unit to which they are accreted. *Safeway Stores*, 256 NLRB 918 (1981).

Said another way, where the two groups of employees can be classified appropriately into separate viable bargaining units, an accretion is not permitted. Factors considered by the Board in determining whether employees should be accreted into an existing bargaining unit without an election include the following: (1) geographic proximity, similarity of skills and functions, similarity of conditions of employment, centralization of the employer's administration, managerial and supervisory control, interchange between the employees, functional integration of the employer, and bargaining history, *Stevens Ford*, 773 F.2d 468, 473 (2d Cir. 1985); (2) size of the group to be accreted relative to the size of the existing unit, id.; (3) whether the group to be accreted was in existence at the time the existing bargaining unit was recognized, id. at 474; (4) whether the existing group is the result of prior accretions, id; (5) views of the employees to be accreted, id; and (6) an independent determination "whether the group of employees to be accreted constitutes an appropriate unit." Id. at 473. If the group to be accreted does not constitute its own appropriate unit, then the employees should be accreted so long as the accretion does not cast into doubt the majority status of the bargaining representative. Id. Where the group does constitute a separate bargaining unit, the employees of that unit have a right to choose whether or not they wish to elect a different bargaining representative or no representative.

It should be noted that the Board and the Courts have given certain factors more weight than others. For instance, the size of the group to be accreted relative to the size of the existing unit is considered of crucial importance because the larger the size of the accreted group, the more doubt there is or may be as to the wishes of the employees in the enlarged unit. *Universal Security Instruments, Inc. v. NLRB*, 649 F.2d 247, 255 (4th Cir. 1981), cert. denied 454 U.S. 965 (1981). Another factor often dispositive of the issue is whether the group to be accreted was in existence at the time the existing bargaining unit was recognized. If the group was in existence and excluded from an election, then an accretion should normally not be permitted. *Laconia Shoe Co.*, 215 NLRB 573, 576 (1974); *Caesars Palace, Inc.*, 209 NLRB 950 (1974); *King Radio Corp.*, 257 NLRB 521 (1981).

Another factor given seemingly more weight than others is the degree of interchange of employees between the employees of the existing unit and the accreted employees. *Mac Towing, Inc.,* 262 NLRB 1331 (1982). Moreover, the Board will accord no weight to a claim that interchange is feasible when in fact there has been no actual interchange of employees. *Combustion Engineering*, 195 NLRB 909 (1972).

The Board also assigns significant importance to the day-to-day supervision of employees, that is whether the day-to-day supervision of employees is the same in the group sought to be accreted. *Save-It Discount Foods*, 263 NLRB 689 (1982); *Weatherite Co.*, 261 NLRB 667 (1982). This element takes on added significance since daily problems and concerns on the job among one group of employees may not necessarily be shared by another group of accreted employees. *Renzetti's Market*, 238 NLRB 174 (1978). However, on balance, the Board in at least a recent case has emphasized that employee interchange and common day-to-day supervision are the two most important factors. *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001).[18]

In addition to its factor analysis approach, the Board will be sensitive to any evidence of what it perceives to be a conscious manipulation of the accretion factor by unions or employers to justify the accretion. *Safeway Stores*, supra.

The Board has long held that in public utility industries a systemwide unit is optimal. *New England Telephone & Telegraph Co.*, 280 NLRB 162 (1986); *New England Telephone & Telegraph Co.*, 90 NLRB 639 (1950); *TRT Telecommunications Corp.*, 230 NLRB 139 (1977). See also *Baltimore Gas & Electric Co.*, 206 NLRB 199 (1973); *Gulf States Telephone Co.*, 118 NLRB 1039 (1957). In *Baltimore Gas & Electric*, the Board stated:[19]

> That judgment has plainly been impelled by the economic reality that the public utility industry is characterized by a high degree of interdependence of its various segments and that the public has an immediate and direct interest in the maintenance of the essential services that this industry alone can adequately provide. The Board has therefore been reluctant to fragmentize a utility's operations. It has done so only when there was

[18] Citing *Towne Ford Sales*, 270 NLRB 311 (1984); *New England Telephone & Telegraph Co.*, 280 NLRB 162 (1986).

[19] 206 NLRB at 201.

> compelling evidence that collective bargaining in a unit less than system-wide in scope was a "feasible undertaking" and there was no opposing bargaining history.

On balance then, the test for a valid accretion can be stated as follows:

> Whether a community of interests exists between the employees of each of the separate [occupations] and the existing bargaining unit or whether the employees had a separate group identity sufficient to be considered a separate bargaining unit. *Sara Lee Bakery Group v. NLRB*, 296 F.2d 292 (4th Cir. 2002).

Notably, the Board also rejects accretion unless two prerequisites have been satisfied: (1) the Board must find that the new employees have an insufficient group identity to function as a separate unit; and (2) it must find an "overwhelming community of interest," such that the accreted employees have interests [that] are so closely aligned with those of the preexisting bargaining unit that the Board can safely assume that the accreted employees would opt into the unit if given the opportunity. *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426–427 (4th Cir. 2001).

Thus, the Board employs a balancing test to determine whether a smaller group of employees share an overwhelming community of interest with the preexisting unit of employees so as to warrant their joinder. The factors identified above are utilized to arrive at this conclusion.

D. Contentions of the Parties

As an initial preliminary matter, as noted previously herein, Frontier's RTWA-represented employees are organized into a number of job classifications. For purposes of the accretion issue here, the dispute revolves around the addition of the Internet help-desk technicians (techs) into the existing bargaining unit by virtue of the Frontier and RTWA agreement and whether the techs shared a community of interest (with no separate identity) with other customer service representatives (CSRs) in the bargaining unit.[20] Accordingly, the discussion to follow the parties' respective positions on the validity of the accretion will treat only with techs vis a vis the CSRs, and not the other job classifications covered by the collective-bargaining agreement between Frontier and RTWA.

Furthermore, it should be noted that the techs and the CSRs' share a single building at Jefferson Road. The building itself was at one time a retail establishment in a strip mall. Frontier leases this 50–55 thousand square-foot facility which was converted by the lessor to Frontier's call center requirements.

Anticipating a need to expand the operation there, Frontier, at the time it acquired the site, also secured a right of first refusal to lease adjacent space in the same building. The adjacent space originally was used as a health club and was separated from the larger building by a fire wall.

Frontier's plan was to use this additional space to house the call center's Internet operations, which were ultimately situated in the health club space. On this point at the hearing, Frontier adduced a building schematic and explanatory testimony from Angela Christian, vice president of the Jefferson Road call center and operator services.[21] The schematic and the testimony of Christian show certain essential characteristics and accouterments of the Jefferson Road site. The call center has a primary entrance that is used by the majority of the center employees who gain access with an identification/security badge. All employees, irrespective of where they work in the facility, use this badge to access the building. The majority of Frontier's employees, including the techs, use this primary entrance; other entrances of the building are used by employees at their discretion. Frontier does not require employees to use one entrance or the other, nor are there company rules restricting their using any particular entrance.

The Jefferson Road center has several conference and training rooms (located in a central portion of the building), which are available to and used by any call center working groups, including the IHD, RAO, and BAO groups. The center has a common cafeteria which may be used by all employees during its hours of operation—7:30 a.m. to 2 p.m.; there are also vendeterias or snack room facilities for all employees.[22] Call center bathrooms are available to all employees without restriction. However, as with the employee entrances, many employees use restroom facilities that are most conveniently located. The center has one supply room from which various and sundry office supplies are dispensed to all employees working at the center.

The BAO group of employees is divided into three separate BAO groups located on the left side of the main entrance to the building towards the front; the RAO group is on the same side but toward the back part of the building. The IHD techs are located on the right-hand side of the primary entrance. The area utilized by the techs is separated by a fire wall so that some techs are on one side of the area; others are on the other side. There is a doorway connecting the two areas, and there is

[20] Frontier calls its customer service representatives "consultants." Customer service employees are divided administratively and operationally into three groups—the residential accounts office employees (RAO); the business accounts office employees (BAO), and the save team. The particular functions of these employees will be discussed later in this decision. It should be noted that actually there are two "Save Teams" at the Jefferson Road call center. One save team works with customers to avoid cancellation of service, and the IHD save team works with Internet customers who have special service Internet-related problems

[21] The schematic is contained in R. Exh. 13; it reflects the call center's layout during February 2002. Christian was a highly credible witness in my view. First, she has been working for Frontier (originally as a Rochester Telephone Company worker) for many years; she worked her way through the ranks, starting as a repair clerk and CSR in 1980 and was promoted to her current position in 2001. She presented as a very knowledgeable and competent historian of the call center. She was consistent in her testimony and testified in a matter-of-fact and businesslike way. Her testimony was in the main unrebutted, especially in the area of call center history, layout, and operation.

[22] Frontier's normal business hours are 7 a.m. to 6 p.m.; the help desk, however, is a 24-hour/7-day per week operation. Accordingly, techs who work in the evening and early morning shifts do not have access to the company cafeteria and use the vendeteria and snack rooms for their breaks. RAO/BAO workers generally work only the normal 7 a.m.–6 p.m. shift.

a common entrance to the area from the parking lot.[23] The save team is located in a rearward area adjacent to the RAO group.

The RAO, BAO, and IHD employees all work at cubicle-like workstations with low walls and similar dimensions in their respective work areas.

All in all, the Jefferson Road call center has common entrances, conference and training rooms, cafeterias, breakroom, bathrooms, and supply rooms, all of which call center employees are at liberty to use without restriction.

In my view, the call center is a common facility which the IHD techs share with the RTWA-represented employees and, more particularly, the CSRs.

It is also noteworthy as a preliminary matter that the parties are not in disagreement that many of the alleged unfair labor practices here turn on the legality of the accretion of the Internet techs to the preexisting RTWA bargaining unit. Specifically, if the accretion is deemed valid, then Frontier cannot be found in violation of Section 8(a)(2) and (1) of the Act by recognizing the RTWA as the exclusive bargaining representative of the techs; nor could the RTWA be in violation of Section 8(b)(1)(A) by accepting that recognition. *Fountain Care Center*, 317 NLRB 1286 (1995). By the same token, Frontier, in such a case, cannot be deemed to have violated Section 8(a)(3) and (1) by executing and maintaining the pertinent collective-bargaining agreement (the memorandum agreement)—not otherwise alleged to be illegal—which requires the techs, as a condition of their employment, to pay to RTWA periodic union dues; RTWA would not, in turn, have violated the Act (Section 8(b)(1)(A)) by agreeing to apply the collective-bargaining agreement to the techs. *Hi Temp, Inc.,* 203 NLRB 753 (1973), enfd. 503 F.2d 583 (7th Cir. 1974).

We turn to the contentions of the parties regarding the issue of whether the accretion of the techs was lawful. Consistent with the factors utilized by the Board in resolving the issue, the parties have asserted that the accretion was either lawful or unlawful based on each party's application of the pertinent factors. Therefore, each factor, as identified and discussed by the parties here, will be discussed. My findings and conclusions will follow based on the evidence of record.

1. Employee interchange

The General Counsel contends that the Respondents have offered, in her words, absolutely no evidence of employee interchange and further submits that the techs and CSRs have such fundamental differences in their skills and functions that preclude each from filling in for the other.[24]

The Respondents, Frontier and RTWA, counter that the RTWA-represented employees have multiple contacts with the techs throughout the typical business day. Frontier submits that IHD coaches provide training to both techs and residential and business office CSRs; its IHD manager and CSR manager fill in for one another; its escalation coaches fill in for both tech and CSR problematic situations; moreover, that CSRs, over time, have migrated over to tech positions.

The Evidence

The parties presented a substantial number of employee witnesses, i.e., CSRs, techs, and managers, to establish their respective positions on the relevant accretion factors. Essentially, the witnesses testified about what their job duties and responsibilities entailed. The credible evidence gleaned from this testimony discloses the following regarding the employee interchange factor associated with accretion.

CSRs—RAO and BAO—employees specifically provide support for inbound calls from residential and business customer calls to establish initial service, move service, and answer questions regarding services or their telephone bills. CSR employees handle calls from customers to set up Internet service accounts—dial-up and DSL; they ensure that databases are correct; they obtain certain information from the customer, e.g., what type of computer he has, the computer's memory capacity, and specific information about the customer's account. The CSR then enters information into the Company's billing system and other databases. The CSR assigns telephone numbers and user names and, in general, gets the customer on board for regular telephone service and Internet service.

The help-desk employees have as their primary responsibility receiving inbound calls from business and residential customers from all of Frontier's nationwide call centers and resolving their problems about and with the Company's Internet products.

The save team employees are, as the name suggests, responsible for saving or maintaining customer accounts that are in danger of being lost because of the customer's dissatisfaction with the service she is receiving. The save team has at its disposal certain marketing tools to preserve those accounts such as discounted rates coupled with continued service commitments. The save team is administratively located within the RAO and consists of about 12 RTWA-represented employees.

The CSRs, help-desk techs, and the save team employees have a functional interrelationship or interdependence, which is best illustrated by the following scenario.[25]

A customer with established Internet or DSL service calls the RAO (or BAO) with a complaint or problem with the established service or even a question about his account. The CSR attempts to resolve the problem by employing certain troubleshooting queries, e.g., personal computer type, software type, memory capacity, and talking the customer through the process. The CSR may, through the process, resolve the customer's issues. However, if the CSR is not successful because, for instance, the customer's problems center on computer/Internet

[23] The techs, as noted earlier, are located in the formerly separate health club building, which has its own entrance. Many techs use this entrance out of personal convenience. The fire wall in question was part of the original structure and use of the two buildings and had to be retained by Frontier to satisfy local building codes.

[24] Interchange generally connotes accreted and existing bargaining unit employees filling in for each other, or being capable of filling in for each other, or *having regular contact between the groups* (emphasis added). Notably, the CWA concedes that there is slight interchange between the CSRs and the techs. *Towne Ford Sales*, 270 NLRB 311, 312 (1984). *Safeway Stores, Inc*., 256 NLRB 918, 929 (1981).

[25] These scenarios were provided by the various management and employee witnesses by way of examples of how each performed his/her job and how business is conducted generally at the call center.

technicalities, the customer is then transferred to the IHD. CSRs, as noted earlier herein, under New York PSC rules must answer 85 percent of all inbound calls within 20 seconds. Accordingly, while dealing with the customer issues, the CSR consults a display called a Simon Board which is available in all customer service departments to determine how many customers are waiting online (queue) and if the CSR is spending too much time with the customer, he is transferred to another department for resolution of the issue.

However, as in the usual case, where the CSR cannot resolve an Internet-related problem, the customer is transferred "warm" to the IHD. The IHD tech then attempts to resolve the customer's problem. In the course of resolving the problem, the tech may suggest to the customer that one of the Company's other services may be advisable and helpful for better utilization of the Internet product the customer is using. In this instance, the tech may then make a warm transfer back to the CSR to establish the additional service.

In the event the customer is not satisfied with the tech's efforts to resolve the problem and appears adamant about canceling the service, the tech will then transfer the customer to the save team CSR who will attempt to mollify the customer to retain the business. The save team representative may in turn bring the IHD tech on the line to help the customer and salvage the account.

Then there is the scenario wherein the IHD is initially called through the IHD's direct telephone number by a customer seeking technical Internet assistance. The customer may have questions relating to his account—nonpayment, billing mistakes, upgrade of service. In such a case, the IHD tech will transfer such queries to the RAO/BAO consultants.

Regarding training of the CSRs and IHD techs, such training has occurred in groups or "classes" comprised of both groups of employees, especially for joint training on the Company's Internet products.

CSRs and IHD techs have only occasional face-to-face contact or interaction. Both groups of employees are assigned nearly identical work cubicles in specific areas of the call center facility and as a general proposition perform their job functions on individual or personal computers and by telephone; CSRs and IHD techs use headsets and take inbound calls.

However, CSRs and IHD techs do not work in isolation from each other. First, all center employees are free to use and do use, at their discretion and convenience, all employee parking lots and entrances irrespective of their particular assigned place in the facility; they are also free to use any of the employee bathrooms. Center employees may use a common employee cafeteria and vending area[26] and have access to the center conference room. Center employees also frequent a nearby bar/restaurant.[27] While there is a "fire wall" separating the IHD from the RAO/BAO, this wall is simply part of the preexisting part of the architecture of the facility and does not operate to segregate in any meaningful way the IHD employees from the CSRs; employees may freely (without a key) enter and exit the area through a doorway.

CSRs and IHD techs also utilize in a coordinated way the Company's Simon Boards to keep tabs on customers calling into the call center. The information contained on these real time displays alert the CSRs and techs to the amount of time customers have been in the service queue. In the event there appears to be a long wait for Internet service, the CSRs will not transfer a call to the help-desk techs.

CSRs and IHD techs receive overlapping training to do their respective jobs. CSRs receive about 8 weeks of training and techs receive around 2 weeks. CSRs and techs have been trained together on occasion, especially regarding Frontier's Internet product.[28]

CSRs and IHD techs have never filled in for each other; but there have been a number of transfers of CSR employees (six) to the IHD tech position;[29] there have been no transfers of techs to CSR positions.

2. Common supervision

The General Counsel (and the CWA) contends that although the IHD techs and CSRs answer to a common upper management, there is no common management or supervision at the lower level supervisory level; that different supervisors supervise the CSRs and the techs on a day-to-day basis. The General Counsel asserts that under Frontier's management plan, the IHD techs are separately interviewed, hired, evaluated, promoted, and disciplined by direct supervisors who deal with problems and concerns unique to them. She argues that accretion of the techs under this evaluative criterion is inappropriate.

Frontier and RTWA essentially contend that the CSRs and IHD techs share not only common management but also centralized and local management in the call center, with one central manager acting as a single monolithic supervisory entity for the entire call center, namely Angela Christian. Frontier concedes that Christian's subordinates handle the day-to-day administration of the pertinent departments—BAO, RAO, and the IHD—but that all of these managers report to her. Christian is directly involved in promotions, wage increases, employee discipline, labor relations, and collective bargaining in the call center. The Respondents submit that placing the techs in a different bargaining unit with a separate bargaining unit would be unworkable. On the other hand, the Respondents submit that the centralized managerial and operational system at the call center augurs well for the decision to accrete the IHD techs into the existing bargaining unit and should be validated.

[26] The employee cafeteria is open for only a limited period during the workday—7 a.m. to 2 p.m. Employees who work late afternoon and midnight shift do not have access to the cafeteria. However, the vendeteria is open and accessible during those irregular shifts.

[27] This bar is known as Tully's and is located very close to the call center. It seems to serve as a social outlet for the center employees and a place to celebrate employee special events such as going-away parties.

[28] IHD coach Londa Jericho (called by Respondent Frontier) and former IHD tech Kitty Maier (called by the General Counsel) testified credibly about their providing joint training of CSRs and IHD techs on the Internet products offered by Frontier.

[29] See GC Exh. 36, which shows that between December 4, 2000, and March 18, 2002, six CSR employees transferred from RAO to the IHD.

The Evidence

Ultimate management authority at the Jefferson Road care center resides in Angela Christian (see Respondent Frontier Exh. 12) who serves as vice president of customer care at the call center. Below and directly reporting to her are Mike Canova, the director of technology and reporting. Gregg Wergin, the manager of technical support and the highest-level supervisor of IHD, reports directly to Canova. Jean Hogan serves as the director of customer care. Pam Nebbia and Reva Jones serve as managers of the RAO and BAO, respectively.[30] Hogan for the RAO/BAO operation and Canova for the technology side are primarily responsible for the day-to-day management of their respective departments.

Administratively, the CSRs and IHD techs are directly supervised by lower-level managers or supervisors described by Frontier as coaches; CSR coaches report directly to Nebbia (RAO) and Jones (BAO). IHD coaches report to Wergin.

The personnel or human resources component of Frontier's operations at the Jefferson Road center is not physically located there. Rather, this function operates out of the Company's 180 South Clinton Street headquarters in Rochester. Gail Noyes and Cliff Edington are the human resources representatives assigned to the call center; Noyes is the primary human resources liaison for the call center.

Christian testified about her role as the highest-ranking manager of the call center. According to Christian, the RAO, BAO, technical staff, and the IHD are all under her administrative purview. She is responsible for preparing and presenting annual budgets for each of their departments and reporting on budget activity for each on a monthly basis to her superiors.[31]

Regarding personnel matters, Christian, in consultation with Canova and Hogan, establishes staffing levels for the center and works with them to create pools of prospective employees for the CSRs and IHD techs and other employees. Christian consults with Noyes and works with her and other responsible managers about employee-related issues, including recruitment and terminations. In the latter case, Canova and Hogan consult with her and brief her on employee problems that, because of their repeated or recurring nature, may require a serious job action, including but not exclusively termination; Christian stated that she charges Wergin and Canova with lesser disciplines. She also stated that although she consults with human resources regarding terminations, she does not always follow its recommendations.

Christian's duties also include determining employees' terms and conditions of employment, establishing measurement standards for employee accountability and evaluation, and setting the employee dress code for the center. Additionally, her responsibilities include wage and salary issues.[32] Regarding represented employees, Christian stated that she participates in all negotiations covering these workers, which include the CSRs and recently the IHD techs.

Christian stated that regarding employee promotions, she is informed by her managers but is not ordinarily directly involved with the associated interviews. She stated that regarding hiring, she may minimally review resumes, ask questions, and occasionally sit in on interviews. Christian further stated that she approves employee leave, including leaves of absence for the CSRs and IHD techs. Conceding that she does not directly supervise RAO/BAO and IHD employees, Christian says she nonetheless monitors their calls from customers very frequently for quality control.

Christian noted that she has regularly scheduled meetings with Canova, Hogan, and other managers involved with the RAO/BAO and IHD; some of their meetings are one-on-one with these managers to deal with special issues of their respective departments.

According to Christian, during Wergin's tenure as manager of the IHD, she has probably met with him once per day to deal with employee and/or customer issues, along with general questions concerning the Internet product. Christian stated that Wergin and Canova are her primary management resources on the help desk. Christian stated that Wergin and Hogan have stood in or covered for each other. She conceded that a RAO/BAO coach rarely covers for an IHD coach and vice versa. According to Christian, managers from the RAO/BAO side have authority to discipline help-desk employees observed engaging in improper conduct; IHD managers, likewise, are similarly authorized to discipline RAO/BAO workers.

Canova testified that as director of technology and reporting, he is primarily responsible for managing the technology for all of Frontier's call centers, including installation of new technological applications and equipment. He also is responsible for all capacity planning within the Company and financial reporting for all call centers, including the RAO/BAO and IHD.[33]

Canova stated that the management of the call center is as a practical matter centralized, with specific managers assigned to various operational components. The managers in question have responsibilities that cover both the RAO/BAO and the IHD. Canova, directing himself to a Jefferson Road call center organization chart, cited certain examples of the centralized management approach: Rene Thornton, listed as coach for workforce administration, coordinates all capacity planning for Rochester and the other call centers across the country; she reports to Canova. Thornton's responsibilities extend to the BAO/RAO, IHD, and save team and entails scheduling the workforce and determining the "head count" needs for these departments. Thornton is assisted by Mary Napoli, who handles the IHD component, and Scott Bird, who manages the

[30] Canova and Wergin both testified at the hearing. Hogan, Nebbia, and Jones did not.

[31] Christian is also responsible for the preparation of call center business plans affecting the RAO/BAO and IHD. These plans include dealing with expense reviews and approvals for the entire call center such as office supplies, travel expenses, and capital purchases of the RAO/BAO and IHD, as well as the clerical and technical (now IHD) staff and other management employees.

[32] Christian noted that for nonrepresented and management employees, she approves their salaries and increases in consultation with her superiors and managers consistent with the center budget.

[33] Capacity planning entails the scheduling and forecasting of employee/ workforce needs based on call volume and distribution (frequency and length of calls) coming into the call centers.

RAO/BAO; Cindy Brennan supervises a team that controls and manages the "Aspect" system.[34] Darcy Graham manages the financial and performance measurements aspects of the call center. Graham analyzes basic call center performance criteria, including calls per hour handled by CSRs or techs, their availability to take calls, work to be done after completing a call within the Company's billing or ticketing system, and general schedule adherence of the CSRs and techs.

According to Canova, all center employee groups are required to "punch in," that is to log in and out of the Aspect system, and all groups are amenable to the technical measurements which include observations and monitoring by both the CSR and tech coaches.[35]

Wergin testified that during the relevant period and currently, he was and is the manager of the IHD. Wergin stated that he supervises directly about 11 to 12 supervisors, including about 7 coaches who, in turn, supervise about 84 help-desk technicians. According to Wergin, the coaches are his "eyes and ears" with respect to the help-desk techs and serve as the first line of management's contact with them.

Wergin said that before he assumed his current position of managing the IHD at the Jefferson Road center, he served first as a coach (first-level supervision) in the BAO and supervised CSRs and then later became a manager of the BAO side and held that position until 1999. As the BAO manager, Wergin was also responsible for Frontier's Internet help desk function as it existed at the time and supervised both CSRs and help-desk staff for about a 2-year period.[36] Wergin confirmed that as manager of the IHD, he often receives directions about job-related matters from Christian and speaks to her daily about call center day-to-day activities covering such areas as employee discipline and coach salaries.

Gail Noyes testified that she is employed by Frontier as a human resources manager and has been so employed for about 30 years; she has her office at 180 South Clinton Street in Rochester. According to Noyes, her duties and responsibilities extend company-wide and include dealing with day-to-day labor relations with the two bargaining units at the Company—the CWA and RTWA; she handles all collective bargaining and grievance matters relating to the two unions.

Noyes stated that with reference to the Jefferson Road center, she handles human resources functions for all (bargaining unit and nonbargaining unit) employees there and specifically interfaces with and supports Christian in all human resources matters[37] and has conducted meetings with employees and supervisors regarding various employment-related issues, e.g., compensation and benefits at Jefferson Road.

Londa Jericho testified she has worked for Frontier about 5 years, hired originally as a Tier One help-desk tech, then promoted to the highest tech position—lead tech—and then to her current position as training manager. Jericho stated that she started her employment with Frontier in Arizona but was relocated by the Company to Rochester in November 2000 and charged with setting up the help desk. According to Jericho, her duties and responsibilities as training manager include all initial training of help-desk techs and RAO/BAO consultants on any and all Internet products offered by the Company as well as other non-Internet-related products.[38] Jericho stated she reports to Wergin.

3. The functional integration of operations[39]

The Respondents argue that the RTWA-represented CSRs and the accreted help-desk techs essentially perform the same function—providing customers (potential and existing) the kinds of telecommunication services they desire and are willing to pay for. The Respondents submit that inasmuch as both the CSRs and IHD techs take inbound customers calls, determine the customers' needs (e.g., a specific service or problem with existing service or product), and address/resolve the customers' needs with the goal of establishing or maintaining the customers' businesses, although utilizing different modalities, in a functionally integrated way, they are performing the same function. The Respondents submit that this functional integration validates the accretion.[40]

The General Counsel concedes that there is, in her words, "limited" functional integration between the help-desk techs and the CSRs and that there may be a kind of product integration, but that these employees do not perform the others' work and that, on balance, the work of one group is not so dependent on the work of the other, that one could not effectively function without the other (GC Br., p. 60). The General Counsel submits that the accretion of the techs was more in the way a matter of administrative convenience; that the help-desk function is

[34] "Aspect" is the call center's automatic call director system that receives customer calls and distributes them to the appropriate groups—CSRs or IHD techs or save team for handling.

[35] Canova stated that Frontier utilizes a system called "Witness" to observe and monitor employees who are given scores with regard to their dealings with customers. Both CSRs and techs are observed about five calls each per month by their coaches for other managers.

[36] Wergin was responsible for the Internet help-desk function when it was located in Phoenix and later relocated to Rochester. Wergin stated that he physically was located in Rochester at this time and worked through a subordinate manager in Phoenix.

[37] Cliff Edington, another human resource manager employed by Frontier, testified at the hearing; he has been employed by Frontier for about 4 years. Edington basically corroborated Noyes in terms of his role and function as a human resource manager. He also stated that managers meet regularly (about every other week) with call center operational personnel—managers and staff—regarding benefits, compensation, collective bargaining, and other like issues. Edington stated that he and Noyes are colleagues and have met with employees both singly and together on occasion.

[38] Jericho did not indicate that she actually supervised CSRs directly when she trained them; that is she did not evaluate them or direct their day-to-day work. However, as a tech coach, she performs these types of duties and evaluates techs weekly on a one-on-one basis, and gives them their annual evaluations.

[39] Functional integration of operations means in the context of an accretion that the work of one group of employees is functionally dependent upon or closely related to that of a preexisting unit. *Progressive Services Die Co.*, 323 NLRB 183, 186 (1997).

[40] Respondent RTWA also notes that even the product line of Frontier is integrated, since the CSRs provide sales and service assistance to the Internet product, while the IHD techs provide technical assistance and on occasion may facilitate additional product sales in the course of providing technical advice.

both fungible and transferable and could easily be moved to anywhere in the country and still function as it does on its own.

The Evidence

If the record is clear on no other point, it abundantly established that, as attested by managers and employees alike, Frontier's business is to provide the consuming public a service-telephone and Internet access service in particular. The telecommunications industry is highly competitive and Frontier's response to the marketplace has been to put in place a business plan to attract and keep its customers. Pursuant to this plan, Frontier's work force—the CSRs and the techs—work in tandem. I have previously discussed the interaction of the CSRs and the IHD techs which basically outlined their functional relationship. Essentially, in order to provide Frontier's customers with service, the CSRs receive the calls and make the sale-telephone installation and other features, dial-up Internet or DSL Internet, handle accounts, and troubleshoot within their purview. Where the CSR cannot handle the customer issue because of time constraints or its technical nature, CSRs hand these customers over to the techs. Techs then troubleshoot the customer's problem and, if successful, are encouraged to sell an appropriate product to the customer.[41] If the tech is persuasive and makes the sale, he refers the customer back to the CSRs who finalize the deal. In the event, the tech cannot solve the customer's problem and the customer wants to discontinue service, the tech will refer or hand off the irreconcilable and/or irate customer to the save team. The save team may mollify the customer and, in turn, hand the customer back to the tech to resolve a technical issue or offer incentives to the customer to remain with Frontier. Through this essentially team concept or function, Frontier attempts to attract customers and build on its customer base and reduce attrition through customer dissatisfaction.

4. Similarities in the hours and types of work, skills, execution, and training of the CSRs and IHD techs

The Respondents argue that the CSRs and IHD techs share essentially the same or similar working conditions. The General Counsel concedes that the two groups do share certain working conditions but that these are limited. The General Counsel submits that there are in contradistinction far larger differences between the working conditions of the CSRs and the techs, which make the accretion invalid.

With regard to training, the Respondents assert that CSRs and techs receive similar, if not identical, training to perform the service function each is assigned. The Respondents submit that tech and CSR positions require similar education and experience, at least a modicum of customer service experience, and a high school diploma.

The Respondents also argue that irrespective of the fact that each group performs tasks that are distinguishable in some degree, both groups, by design, are set up to provide service to Frontier's customer base.

The General Counsel agrees that while both groups service Frontier's customers, this is not a compelling reason to support the accretion in that every one of its employees can be said to be service providers. Further, she contends, techs perform in the main a specialized technical function—troubleshooting Internet connectivity problems for customers—and are grouped in a specialized team to accomplish their mission. In contrast, a CSR's primary job is to sell Frontier's products and services and meet certain sales objectives, as well as handle account management and billing issues. Accordingly, she argues that the qualifications, training, and skills of the techs and CSRs are very different. The General Counsel submits that techs are trained to handle technical aspects of establishing rules and Internet connections and e-mail for the customer. CSRs are trained to handle customer complaints or questions regarding bills, rates, or available services and, of course, to sell product, which is a major component of their job at Frontier. Techs, she asserts, are not required to sell product.

The Evidence

The working conditions of the CSRs and the IHD techs in some aspects are fairly identical and where, not identical, are very similar. As noted earlier, both the CSRs and IHD techs work out of cubicles and use personal computers, similar software, and telephone headsets to perform their basic job functions. Both groups take inbound calls from customers, have similar break procedures and, with only minor deviation, must conform to the same dress code.[42] Both groups are subject to the same employee handbook and must follow the Company's "Acceptable Use" policy.[43] CSRs and IHD techs both consult the Company's Simon (or banner) Board to track call volume; both groups are subject to call monitoring by their respective managers and supervisors for quality control purposes, using the same computer (Witness) software. Both groups are subject to the Company's TCS system, a monitoring program that tracks call length and assists in scheduling personnel.

CSRs and IHD techs also are issued security identification badges with which they enter and use the secured parts of the call facility; and both CSRs and techs account for time and attendance by logging in and out of the call center's Aspect system. CSRs and IHD techs receive similar pay and health benefits.

Additionally, CSRs and IHD techs have similar work hours, noting, however, that the IHD techs work on a 24-hour, 7-day week basis (three shifts) and, to cover holidays, "rotate" in their assignments. CSRs generally work Monday through Friday, 7:30 a.m.–6 p.m. and, on Saturdays, 7 a.m. to 5 p.m.; they generally do not work on holidays when the center is closed.

Regarding job requirements, in practice CSRs and IHD techs must have at a minimum a high school diploma and some customer experience; as a general matter, the employees in both groups have the same or similar educational background and

[41] Through Frontier's "Take the Lead" incentive program, techs receive a bonus commission if they sell a company product.

[42] Although not altogether clear, CSRs may be allowed to dress differently from the standard "business casual" on certain days. The techs, it seems, are required to follow the business casual code on all workdays. This is an insignificant difference in my view.

[43] This policy will be discussed in more detail later in this decision. Essentially, the Acceptable Use Policy governs all center employees in the use of the facility and Frontier's equipment and property at the Jefferson Road call center.

have worked other jobs providing some prior customer service experience.[44]

Each group receives training to perform their job functions; techs receive 2 weeks and CSRs 6 to 8 weeks. Notably, there is some overlap in the training each receives. For example, both groups receive instruction regarding the technical aspects of their respective job, including software applications, modem availability and line hookups, and both groups receive "trouble shooting" training, with the techs' training placing particular emphasis on Internet connectivity problems and CSRs receiving training heavily emphasizing Frontier's total product line and ancillary matters dealing with customer accounts and billing. As noted by Christian, the training received by the two groups is similar but because CSRs must have more information and be more familiar with Frontier's entire operation, they receive more extensive training.

Presently, the CSRs and IHD techs are subject to different leave and benefit policies. Techs receive 19 paid time off (PTO) days annually, which may be used for vacation, personal days, and sick leave at their discretion. CSRs' leave and benefits are subject to the collective-bargaining agreement. The leave benefits, as contained in the agreement, are very different from those of the techs. For example, CSR employees may receive up to 5 weeks paid vacation, depending on years of service, and have as many as 11 paid holidays.[45]

In terms of compensation, techs receive wages, at least as of the time of the accretion, ranging from $13.56 to $17.56 per hour and receive no commissions or extra pay except for monies earned through the "Take the Lead" bonus program. CSRs receive wages training from about $11.68 per hour as basic pay but may receive commissions of up to 10 percent of their hourly rate based on their level of sales, consistent with the wage rates contained in the collective-bargaining agreement, and additional monies may be earned through a contract-sanctioned "pay for performance" program. As such, the compensation formula for each group is fundamentally different although both CSRs and IHD techs are both evaluated, in significant part, on call availability and calls per hour. Techs, unlike CSRs, are required to take tests showing technical proficiencies in order to be promoted to the next tier or level. Both CSRs and techs can participate in the Company's "Take the Lead" program, which provides bonuses for employees whose efforts result in additional sales for the Company.

[44] The job description for a Tier II tech (GC Exh. 42) indicates Frontier's preference for an associate's degree and/or applicable job-related experience. Techs also must posses 1 to 2 years of customer service experience. The job description for CSRs requires a high school diploma or equivalent but notes that 2 or more years of posthigh school education is preferred. Customer service experience and ability are emphasized. (See GC Exh. 41.) Frontier management, as attested by Christian and Wergin, gives greater weight to customer service experience, as opposed to formal education and technical competence for both CSRs and techs.

[45] Actually, the collective-bargaining agreement, as noted by the General Counsel, has contained a veritable plethora of benefits and policies of benefit to the represented CSRs. I would agree with the General Counsel's assessment that in terms of benefits, the techs and CSRs are worlds apart.

5. Size of group to be accreted relative to the size of existing unit

The General Counsel contends that Frontier failed to meet its burden to show that the size of the group to be accreted (the techs) was not larger than the existing unit—the CSRs and the RTWA-represented employees. Accordingly, she submits that this failure invalidates the accretion.

The Respondents submit that at the time of the accretion, the RTWA-represented about 750 clerical and technical employees working at Frontier call centers around the country; that of these, about 100–120 were IHD techs stationed at Jefferson Road and about 200 were CSRs located at that call center. The Respondents argue that the 120 IHD techs accreted to the existing unit of over 600 CSRs clearly does not jeopardize the majority status of the existing Union, and that on this score, the accretion was valid.

The Evidence

CSRs are situated at several call centers located around the country and perform their job functions on a local or regional basis; all IHD techs, by comparison, have a national coverage; they are merely physically located at Jefferson Road. Therefore, the record clearly shows that at the time of the accretion, approximately 120 IHD techs were accreted to one existing unit of around 600 or more CSRs.[46]

6. Bargaining history

The General Counsel contends that the RTWA had no bargaining history covering the IHD techs at the Jefferson Road call center as they (the techs) existed in 2002, the year of the accretion, and that the techs presently have never been included in the RTWA unit. Citing the history of the RTWA vis a vis the help-desk operation at Frontier over time, she asserts that the bargaining history does not support the accretion.

The Respondents counter that the collective-bargaining history discloses that the RTWA has been the "inside" collective-bargaining representative for Frontier's employees for 30 years and that, as such, Frontier acted properly to RTWA's demand to accrete the "inside" working IHD techs.[47]

The Respondents submit that, historically, in the early years of the Internet at Frontier, the RTWA represented consultants who performed essentially the same jobs as the IHD techs perform today. They argue that only because of certain vicissitudes, including public service commission rules, changes in corporate ownership, relocations of the help-desk functions, and complexities associated with the advent and evolution of

[46] Christian and Edington of Frontiers' human resources department credibly provided these employee estimates. Christian testified that there were about 350 workers employed at Jefferson Road. Edington testified that there were about a "couple hundred" CSRs and about 100–120 IHD techs.

[47] Recognizing that Board law requires the party seeking accretion to make its demand prior to the expiration of any existing collective-bargaining agreement, the IHD was restarted at Frontier in December 2000 and the applicable bargaining agreement's term was January 26, 2000, to February 28, 2003. RTWA's demand for recognition was, as noted, made on about February 15, 2002, a year before the expiration of the agreement.

the Internet, did this situation change. Nonetheless, the Respondents contend that at no time did any other union represent the IHD employees, nor were these employees ever excluded from the existing unit, although they concede that there was a period when the employees providing Internet services were considered "management" and not represented by any union. The Respondent contends that a bargaining history does not exist and, on balance, supports the accretion.

The Evidence

The bargaining history between Frontier and the RTWA was comprehensively and credibly related by the president of RTWA, Marie Rodgers.[48]

Rodgers testified that in 1995, Frontier established the ISDN (integrated subscriber digital network) Internet team to sell and provide customer services, including technical support for the Company's new high speed Internet access service. The Internet team was to be comprised of employees who were to concentrate on the Internet product, to sell and service it. However, this team also would be required to perform regular telephone-related work. According to Rodgers, these workers were to work 90 percent of their time on the Internet product and 10 percent on telephone work. Frontier posted these positions internally, and approximately 180 RTWA-represented employees bid on the positions. Ultimately, 13 employees were selected for the team, all of whom were covered by the then current collective-bargaining agreement. These employees were all located at the company headquarters at South Clinton Street along with the other bargaining unit employees and were paid on the same scale as the CSRs.

Rodgers stated that the collective-bargaining agreement between Frontier and RTWA covering the period January 1997 through August 2000 included the Internet team employees as bargaining unit members who continued performing the Internet and ISDN work, selling residential customers a second telephone line for the high speed Internet service, and assisting customers installing the Internet programs on discs provided by Frontier by walking them through the installation program. The Internet team also continued selling telephone services such as call waiting and dealt with disconnections and billing disputes.

According to Rodgers, in late 1998, Frontier's management informed RTWA that the requirements of the Internet team positions were to be expanded and that employees were to possess more technical knowledge of the Internet and have more training so as to service the Company's new Internet service dubbed "Frontier net," which was to compete with other Internet pertinent service providers such as America On Line (AOL). Frontier advised her that in order to implement and properly service Frontier net, the tech employees would have to answer technical service questions about the Internet and be able to assist the customer with installing the new system. Thus, the employees would have to be knowledgeable about computer languages and Internet computer systems. According to Rodgers, these employees were to be called Internet help-desk technicians and organized into a group of six to eight employees. They would be deemed (low level) management, as opposed to bargaining unit employees.

Rodgers stated that the RTWA agreed ultimately with Frontier to the assignment of some of these Internet functions outside of the bargaining unit to these unrepresented employees. However, according to Rodgers, the RTWA struck a deal with Frontier which included principally the Company's agreement to allow RTWA employees to bid on the new tech positions[49] then open and in the future, and to upgrade several bargaining unit position/titles resulting in higher pay for the affected positions.[50] The Internet team members (13) were allowed to remain in the call center and assumed the normal duties of CSRs, including selling Internet and telephone services and handling customer billing and other inquiries. In the end, RTWA and Frontier came to no agreement that the RTWA could or would seek to have the Internet function returned to the unit at a later date.

Rodgers stated that the 1997–2000 contract due to expire in August 2000 was, by agreement, reopened for negotiation by RTWA and Frontier in November 1999. The new contract thus went into effect in January 2000 with a March 5, 2003 expiration date. However, Rodgers noted that the entire help-desk function had by then been moved to Phoenix as part of Frontier's purchase by Global Crossing and, therefore, there was no ISDN/Internet job description or position to negotiate for this latest contract.

In May 2000, Frontier's call center operation was moved from the South Clinton address to Jefferson Road. In due course, Rodgers stated that she was advised by Frontier that a former health center adjacent to the call center was to be occupied by the new Internet help desk but she had no idea of the number of techs planned for the center.[51]

According to Rodgers, in late 2000, the help desk was relocated back to Rochester at Jefferson. RTWA employees were advised that they could bid on the help-desk positions; positions were also advertised in the local newspaper.[52]

By June 2001, Rodgers noted that Frontier had been acquired by Citizens. By around July 2001, she became aware of the IHD techs' concerns about possibly seeking unionization through Albright, a tech who e-mailed her, stating that he had spoken to about 30 techs who were receptive to either joining

[48] Rodgers has held this position since 1981 or 1982. She is also a CSR and has been in this position since 1974 and works at the Jefferson Road call center. The General Counsel called Rodgers as one of her witnesses. I have included Rodgers' affidavit given to the Board agents as part of her testimony. See GC Exh. 5. I note that in making my credibility findings regarding Rodgers' testimony, the record evidence as whole, and specifically the testimony of Angela Christian, corroborates her version of the relationship between Frontier and the RTWA.

[49] Rodgers stated that none of the existing ISDN/Internet Team members transferred to the IHD. However, four call center CSRs did obtain jobs on the help desk.

[50] As noted, the parties' entire agreement was not committed to written form.

[51] Rodgers stated that at about the time the new help desk function was relocated to Phoenix, there were about 13 techs working this desk.

[52] Rodgers noted that some RTWA-represented CSRs applied for and were accepted in the new IHD tech jobs.

or starting a union because of issues surrounding their terms and conditions of employment at the IHD.[53]

Rodgers stated that she replied to the e-mail, indicating her willingness to speak to the sender about unionizing but that she would consult with the RTWA attorney before taking any steps.[54] Rodgers said she spoke with the RTWA attorney who advised that she make demand on Frontier to accrete the techs or, failing in that regard, file a unit clarification petition with the Board.[55]

Rodgers said that she underwent surgery in August 2001, and was unable to pursue the matter until late August 2001, when she approached a management representative, Pam Preston, vice president of human resources, and requested Frontier's recognition of RTWA as the techs' representative. According to Rodgers, Preston refused the request initially but later said that the Company could not respond at that time because of the recent acquisition of Frontier by Citizens; Preston indicated that she would have to confer with the new management.

Rodgers said that she became aware of the IHD techs' interest in the CWA in January 2002, at a meeting with a tech whose name she could not recall. However, any interest in the CWA was not discussed generally around the facility. Rodgers said she did not discuss the CWA with management but did speak with a representative of the IBEW in mid-February 2000. Through this discussion, Rodgers said she learned that if she were to renew her demand for recognition by Frontier, the Company would accede to an accretion of the techs.[56]

Rodgers stated that RTWA made a formal demand for recognition by letter on February 15, 2002, and, on February 27, Frontier agreed to recognize her Union. On March 13, 2002, RTWA and Frontier negotiated a memorandum agreement with respect to the inclusion of the IHD function into the parties' existing labor agreement.

7. The manipulation of the accretion issue

The General Counsel argues that Frontier knew that the techs wanted the CWA to represent them and, moreover, that Frontier was opposed to the CWA's representation. She submits that this point is established by Frontier's recognizing RTWA a day or two before the CWA filed its representation petition with the Board. The General Counsel also notes that Rodgers admitted that she knew of the CWA's interest in the techs in January 2002 and further that, in fact, word of the CWA's campaign was widespread at the center in early February 2002. The General Counsel contends that Frontier had a strong motivation to accede to the RTWA's demand in that the CWA was viewed as a strong union, while RTWA was viewed as weak. Thus, Frontier harbored an animus against the CWA, or at least a strong preference for the RTWA to represent the techs. The General Counsel submits that Frontier lacked good faith in agreeing to the accretion and that essentially the accretion came about through a manipulation.

The General Counsel also submits that Frontier exhibited bad faith in that Frontier's management never consulted the techs about terms and conditions of employment before the accretion was accomplished. She also submits that Frontier acted on the accretion with no apparent deliberation and actually in a rush motivated by its knowledge that it was facing an imminent demand for recognition or the filing of a petition with the Board by the CWA.[57] In short, the General Counsel contends that Frontier and RTWA essentially manipulated the accretion to avoid the CWA's efforts to represent the IHD techs and to frustrate the desires of the techs to choose their own collective-bargaining representative.

The Respondent Frontier argues that, first, it was unaware of CWA's organizing campaign because the CWA's plan, as the hearing testimony disclosed, was to keep it a secret or under wraps; second, that comments about union organizing appearing on the Company's message board in early January 2002, did not mention CWA except with respect to a reference to a link to that Union's website.[58] The Respondent asserts that any suggestion of manipulation of the accretion is merely based on speculation and conjecture of the General Counsel's witnesses, whose biased claims that Frontier's managers were aware of the CWA campaign were emphatically denied by those self-same managers.

Regarding the issue of CWA's majority support, Frontier asserts that this was not established on the record before the accretion. Frontier asserts whatever level of support the CWA had did not manifest itself until after the accretion because authorization cards were not distributed until mid-February 2002, and not collected until the end of February. The final tally was unknown, although claimed by the CWA to be minimum for a card check.[59] However, even this, Frontier asserts, has not been established.

Frontier submits that the General Counsel's contentions about its alleged manipulation of the accretion does not rest on hard facts but mainly on theoretical possibilities and speculation. Frontier maintains that the reality is that it was in the dark

[53] Rodgers acknowledged receiving an e-mail from IHD lead tech, Alan Costa (see RTWA Exh. 2), on July 2001, in which he, among other things, mentioned concerns about working conditions for techs at the call center and sought her counsel about how the RTWA and unions in general could help resolve these issues.

[54] Rodgers' reply also expressed her concerns about confidentiality, her fears that Frontier may retaliate against him, and not running afoul of any "boundaries" that could be used against them to halt the proceedings. I note that this documented concern undermines any argument that the RTWA and Frontier were in any sweetheart arrangements or manipulations regarding the techs' representation matter.

[55] According to Rodgers, Frontier's management learned of RTWA's interest in the techs and mounted an antiunion campaign. Little, if anything further, was adduced at the hearing on any alleged antiunion campaign by Frontier.

[56] Rodgers stated that she did not know what the IBEW's source of information was and did not ask.

[57] The Charging Party in his brief makes a similar "good faith" argument basically echoing the General Counsel's point that the timing of the recognition is suspicious and suggests that Frontier knew of the CWA organizing drive prior to February 26, 2002, the accretion date, and that both the RTWA and Frontier knew that the techs themselves wanted the CWA to represent them.

[58] Respondent also notes that the United Auto Workers (UAW) was mentioned in the chatter on the message board, but that Union had no part in the organization of the techs. See. GC Exh. 25.

[59] The CWA authorization cards were not adduced at the hearing.

about the CWA campaign and agreed to the accretion of the techs only for good and lawful reasons.

Discussion and Conclusions Regarding the Accretion Issue

At the end of the day, after examining the relevant accretion factors and the evidence adduced at the hearing, we arrive at some inescapable conclusions. Jefferson Road is a singular call center whose primary purpose and premise is providing telecommunications service of the modern variety to its customers. Frontier provides the service essentially by taking calls (on an incoming basis) from customers. As such, the call center is an integrated facility wherein all employees in various capacities work toward achieving the Company's goals and objectives—mainly keeping, maintaining, and increasing its customer base through the provision of state-of-the-art telephone and Internet service. I believe that Frontier expresses my view of the accretion best in its brief as follows:

> The Call Center employees work together in performing [customer service] using inter alia, the same equipment, under [essentially] the same working conditions, with similar skills, education and comparable training, common management and labor relations all at the same location. The Call Center is [an] integrated facility where the [CSR] consultants and the IHD [techs] work hand in glove to perform [the Company's] raison d'etre, customer service [at page 84].

In my view, the accretion of the techs did not violate Section 8(a)(1)(2) and (b)(1)(A) of the Act. I would recommend dismissal of this aspect of the complaint.[60]

E. The Remaining Unfair Labor Practice Charges

1. The 8(a)(1) allegations

The complaint in paragraph VII lists six separate violations of Section 8(a)(1) of the Act by alleged agents and supervisors of Frontier during the period covering the end of January 2002 through around April 10, 2002. They will be discussed as follows:

a. Stephanie Rodgers' direction to employees to contact the RTWA as opposed to the CWA

The General Counsel called current IHD tech Marc Pergolizzi to establish this charge.[61] Pergolizzi stated that he became aware of the CWA organizing campaign around December 2001, or possibly January 2002; he also said that he attended CWA organizational meetings in January and February 2002.

According to Pergolizzi, sometime near the end of January 2002, he spoke to Stephanie Rodgers[62] who he knew to be the daughter of RTWA president, Marie Rodgers, as they were passing each other in the center hallways; there was no other person present.

According to Pergolizzi, Stephanie said that she had heard a rumor that the techs were looking into the CWA but that she did not think this was a good idea. Stephanie suggested that the techs should speak with the RTWA before going any further. Pergolizzi said that Stephanie also said that if the CWA did take over or if the techs chose the CWA, the IHD would be transferred to a different call center. Pergolizzi stated that he interpreted the comment to mean that the techs would lose their jobs.

According to Pergolizzi, Stephanie also said in this conversation that the RTWA was a better union and suggested that he (Pergolizzi) should have someone speak to her mother and mentioned that "someone" could be Alan Costa.[63] Pergolizzi said the conversation with Stephanie ended with discussions of matters of a personal nature. However, Pergolizzi said that he later spoke with Costa and related Stephanie's conversation to him and suggested that it may be in our (the techs') best interest to look into the RTWA.

The General Counsel also called Stephanie Rodgers as her witness.[64] Stephanie acknowledged knowing Pergolizzi as an acquaintance who worked as a tech and that he spoke to her about being represented by the RTWA in July 2001.

Stephanie stated that Pergolizzi approached her around breaktime and asked about the RTWA. According to Stephanie, she told him she could not give him any information and that he should speak to her mother; but that neither the CWA nor any other unions were discussed. Stephanie stated that Costa's name did not come up and, in fact, she did not know him. Stephanie said that Pergolizzi said that he had someone "on his side" who was interested in the RTWA and what did she (Stephanie) know about that Union.

Stephanie stated that she was not sure why Pergolizzi was questioning her but acknowledged that she was sometimes viewed or may have been viewed as a member of management by the employees.[65] Accordingly, she told him to speak to her mother, as she could not address his questions. Stephanie said that the balance of her conversation with Pergolizzi covered small talk and general inquiries about how each was doing in their jobs.

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[60] I note in passing that I specifically do not find that Frontier or RTWA in any way manipulated the accretion either individually or in their negotiations with one another to arrive at the agreement to recognize the RTWA as the exclusive collective-bargaining representative of the techs and the resulting memorandum of agreement.

[61] Pergolizzi has been employed by Frontier for about 4 years and started as a CSR; he is now a tier 3 lead tech.

[62] I will refer to Stephanie Rogers henceforth as Stephanie to avoid confusion with her mother, Marie, previously referred to (as is the Board's custom) solely by her last name.

[63] It may be remembered that Costa is the tech who initially contacted Marie Rodgers on July 27, 2001, and made inquiries about organizing the techs.

[64] I permitted examination of Stephanie Rodgers as a 6(11)(c) witness. I note that she appeared not forthcoming and very reserved, if not openly hostile to the General Counsel's questions.

[65] Stephanie is a current 10-year employee, serving at the time of the hearing as a CSR since March 11, 2001. From July 27, 2002, however, she occupied the position of statistical coordinator, a salaried nonbargaining unit position. Stephanie is alleged to be an agent or apparent agent of Frontier within the meaning of Sec. 2(13) of the Act. This matter will be discussed later. Of note, the General Counsel stipulated in agreement with Respondent Frontier that Stephanie was not a supervisor at any time material to this litigation within the meaning of Sec. 2(11) of the Act.

Discussion and conclusions

I would agree with the General Counsel that statements made by a statutory agent or supervisor to an employee directing him to contact one union over another and at the same time warning of a loss of his job or closure or relocation of his department were he to select the disfavored union poses a possible violation of the Act, as this kind of speech could reasonably lead employees to conclude there would be detrimental results, i.e., loss of their jobs and/or relocation, if they selected the CWA over the RTWA. *Palagonia Bakery Co.*, 339 NLRB 515 (2003).[66]

In resolving this charge, the first question is whether Stephanie made the statements in question. I would find and conclude that she did indeed make the remarks. Stephanie, in my view, did not present as a credible witness. As noted earlier, she was not forthcoming and somewhat evasive when examined by the General Counsel, and her denials did not seem sincere. Pergolizzi, on the other hand, struck me as giving an honest and straightforward version of his encounter with Stephanie in the hallway. Therefore, it seems unlikely to me that Pergolizzi would distort a casual conversation he had with his friend. Stephanie acknowledged that she and Pergolizzi were friends or acquaintances and it certainly is within the realm of plausible experience that Stephanie would tout her mother's Union over the CWA. I note that Pergolizzi seemed to have divided loyalties with respect to the two Unions, supporting the CWA but also lending some support to the RTWA. All in all, I would credit his testimony regarding the hallway encounter with Stephanie in January 2002.

The second question relates to Stephanie's alleged statutory agency status. There is little or no dispute between the parties that Stephanie's job at the crucial time—statistical coordinator—entailed basically keeping statistics on CSR individual and team sales performance and making and reporting on sales investigations covering CSR claims of entitlement to compensation for sales of Frontier's products; that she supervises no employees and received a salary; and that she was considered by management as an unrepresented management employee (an individual contributor) that as a statistical coordinator, she trained and advised CSRs regarding the company policy on claiming commissions and new Company sales progress.[67]

The General Counsel contends that Stephanie was a statutory agent and, in the alternative, was imbued with apparent agency by dint of her role and functions as a statistical coordinator as well as her employment history at Frontier.

The Respondent contends Stephanie was in no sense a statutory agent nor could she be viewed as having apparent agency status so as to bind Frontier for her statements to Pergolizzi. The Respondent also contends that even if, arguendo, Stephanie were found to be its agent, her statement was an isolated speech made in a casual conversation with a fellow employee and could not reasonably be interpreted as a sentiment or action of the Company. The Respondent asserts that the conversation was a one-time event between low-level employees who happen to have been friends, without Frontier's knowledge or ratification. That neither Pergolizzi (nor any other employee) could or would reasonably believe that Stephanie was speaking and acting for or on behalf of management.

The Board applies common law principles of agency when examining whether an employee is an agent of the employer in the course of making a particular statement or taking a particular action. Under those principles, the Board may find agency based on either actual or apparent authority to act for the employer. *Tim Foley Plumbing Services*, 332 NLRB 1432 (2000). "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in questions." *Cooper Industries*, 328 NLRB 145 (1999); *Southern Bag Corp.*, 315 NLRB 725 (1994), and cases there cited. See also *Alliance Rubber Co.*, 286 NLRB 645, 646 (1987). Under Board precedent, an employer may have an employee's statements attributed to it if the employee is "held out as a conduit for transmitting information [from management] to the other employees." *Debber Electric*, 313 NLRB 1094, 1095 fn. 6 (1994).

With regard to Pergolizzi's conversation with Stephanie, first, as he credibly stated, he knew that she was a management employee but, as he said, she was not to him supervisory. She was not a union member, rather a management employee; but she was not his or anyone's boss. He realized that at Frontier some employees were not bosses but also not members of the Union. Second, Pergolizzi acknowledged that he viewed the conversation as simply one between friends.

Thus, at least for Pergolizzi, it cannot be gainsaid that the Respondent held her out as a conduit for transmitting information (about a preferable union) from management.[68] As to other employees, there was no other testimony adduced as to how they may have regarded her. Accordingly, it would appear that the very person to whom she spoke did not regard her as having authority to speak for management.

In spite of Stephanie's former job as a hiring coordinator[69] at Frontier some years before she assumed the statistical coordinator job, there does not seem to be a reasonable basis of record

[66] The General Counsel acknowledges that the statement predicting the relocation of the call center was not alleged in the complaint. It is also noteworthy that the statements could also be violative of Sec. 8(a)(2) of the Act as they clearly show the employer's preference for one union over another. Respondent was not charged with this violation either.

[67] By a stipulation, the General Counsel concedes that Stephanie is not a statutory supervisor. Gail Noyes, Frontier's human resources manager, testified that Stephanie, as a statistical coordinator, was a "management" employee and considered as a nonexempt employee who manages no other employees, had no authority to hire or fire employees, and had no authority to establish company policies or interpret policies, and had no authority to bind the Company by contract. She claims that "management" is generally applied to employees not represented by a collective-bargaining representative. I would find and conclude that Stephanie is not a statutory supervisor.

[68] It should be noted that Stephanie did transmit information to CSRs, but it was part of her job to convey limited information about CSR entitlements.

[69] Respondent concedes that Stephanie's former hiring coordinator job may satisfy the Act's requirement for supervisor.

to believe that Frontier authorized—which it clearly did not—her to speak on its behalf and thereby be bound by her statements. For purposes of an unfair labor practice finding, I would find and conclude that the offending statements were made by Stephanie but that the General Counsel has not established that she was a statutory agent, nor was she imbued with apparent agency by virtue of her then job as statistical coordinator—a basically clerical function in my view—nor because of other so-called management jobs she held with Frontier. I would recommend dismissal of these charges.[70]

b. Londa Jericho's alleged threat on February 8, 2002, at Tully's Bar to discharge employees selecting a union

The General Counsel called current employee and former employee Dmytro Skrlnyk and Adam Shepard, respectively, to establish these charges.

Skrlnyk[71] testified that on about February 8, 2002, he and about 12–14 fellow techs attended an initial CWA organizational meeting at which 12–14 techs interested in union representation by the CWA were present.[72] Skrlnyk said that he and a fellow tech, Adam Shepard, decided to go to a local bar/restaurant, Tully's, for some refreshments after this meeting at around 9:30 to 10 p.m. At Tully's, which is located near the call center and is frequented by call center employees, Skrlnyk said that he saw one of the supervisor/coaches, Londa Jericho, and a number of other Frontier employees seated at a table. Shepard and he asked to join the group and sat with them.

According to Skrlnyk, Jericho mentioned the poor economy and that several techs were beating down her door trying to get jobs at the call center. She mentioned essentially that most people who no longer work at the center were terminated, that very few had left of their own volition. According to Skrlnyk, Jericho said that the burnout rate was 6 months and that was a good time to replace them.

Shepard testified that when he and Skrlnyk joined the group,[73] there was a general conversation, but that Londa Jericho did most of the talking. According to Shepard, Jericho related stories about her experience as a tech in Arizona and concluded that the Arizona techs were better and more knowledgeable workers; and that the Rochester techs never would have been hired in Arizona.

Shepard described Jericho's tone in the conversation as abusive. Shepard said that Jericho stated that the economy was so bad that people should be thankful for the jobs they have, that she had 18 people banging on her door for jobs, and that if people don't like it (at Frontier) they can leave. According to Shepard, Jericho complained that she had never known a bigger bunch of whiners at one place. Shepard stated that he believed that Jericho said that she had heard rumors that techs were considering organizing and, with a very sarcastic tone, went on to say that the techs could go ahead and organize, they will lose their jobs that much faster; they (the techs) do not know how expendable they are. Jericho then said let them organize, let them have their little meetings.[74]

Jericho was called by Frontier to meet the allegations in question.

Jericho acknowledged knowing Skrlnyk and having trained him as a tech; but she denied having coached him. Jericho also stated that she knew Shepard but never had a discussion with him because she did not care for him and avoided him whenever she could. Jericho also acknowledged conversations in which she participated at Tully's bar in the presence of Skrlnyk and Shepard.

Jericho explained how the conversation came about. According to Jericho, a fellow coach, Jeff Brown, had decided to quit Frontier and return to Phoenix. Brown had been employed at Frontier in Phoenix, as was she, and when the Company decided to relocate to Rochester, Brown was offered a coaching position in Rochester. Around March 1, 2002, Brown made clear his intentions to leave Rochester and return to Phoenix. Because Brown was popular among the Frontier employees, he had about three going-away parties between March 1 and 15, his anticipated departure date which happened to coincide with coaches receiving their scheduled annual bonuses.

In any event, Jericho said that she attended two of the three parties, both of which took place at Tully's, the local hangout for Frontier workers. One of the parties took place on March 8, and there were a lot of people in attendance, including Shepard and Skrlnyk.

Jericho explained that on March 8, she and Brown were talking about his quitting his job and leaving for Phoenix with no job prospects there. To her, Brown was quitting in the face of a bad economy and would have had a hard time finding a job. According to Jericho, she and Brown were talking along these lines while Skrlnyk and Shepard were standing there, saying nothing but simply apparently listening to her conversation with Brown. Jericho said that she, Dave Alton (another Frontier coach) and Brown decided to go to another table. The three of them (Brown, Jericho, and Alton) continued to talk about her comments about Brown's leaving without a job in hand. In the meantime, Shepard and Skrlnyk approached the table uninvited, asked to sit with her and Alton, and did so without waiting for their answer.

[70] I note in passing that my recommendation to dismiss is heavily influenced by the nature of conversation in question, plainly a rather personal conversation between work friends and acquaintances. The Act, in my view, would not be served by finding conversations of this genre to be actionable as there was no interference with rights of employees not privy to the conversation. Notably, Pergolizzi did speak to Costa about the RTWA but Costa had already talked to Marie Rodgers in July 2001, and had made his decision to go with the CWA by January 2002, and was actively working for that Union.

[71] Skrlnyk was hired on January 23, 2001, by Frontier and holds an IHD tech, tier 2 position at Jefferson Road. He works currently Monday through Friday on the 12 midnight–8:30 a.m. shift.

[72] The meeting took place at a church in the Rochester area.

[73] Shepard identified by name Frontier employees Dave Alton and Phillip Plowe also to be in the gathering. Neither Alton nor Plowe testified at the hearing.

[74] Notably, Skrlnyk did not provide nearly as detailed a picture of the meeting and Jericho's alleged statements. As to the threat to discharge the techs, Skrlnyk merely said that Jericho said something to the effect of let them organize and we will fire them faster if they do. Skrlnyk identified David Alton and two other men as being at the table when Jericho was speaking.

Nonetheless, she continued to speak with Jeff Brown about his plans to leave. According to Jericho, she told Brown that she had people from the help desk in Phoenix calling her in Rochester about job availability and asked him how he expected to find a job in Phoenix.

At this juncture in the conversation, Skrlnyk and Shepard joined the party and, according to Jericho, she ceased talking because she did not like Shepard and had no desire to talk about anything in his presence.

Jericho said in the course of the conversation with Brown, he stated that at least part of his motivation to leave was the tech burnout rate, which he said was 6 months. According to Jericho, she disputed this, saying the industry standard for tech burnout—techs getting sick and tired of answering the phones daily—is about 18 months.

Jericho emphatically denied discussing unions—any unions at all—in the presence of the group and specifically denied saying anything to the effect of "go ahead let them organize a union, they will lose their jobs that much faster, they don't know how replaceable they are." Jericho also said she had no idea of union meetings on any of the days she was at the bar celebrating Brown's departure and denied saying that "most techs get fired."[75]

Jericho and Skrlnyk/Shepard's versions of the events occurring at Tully's bar are at great variance; hence, credibility looms large in resolving the charge in question.

Jericho's supervisory status under the Act is not disputed and is, in fact, admitted by Frontier. The record clearly shows that, based on her job responsibilities and functions as the training manager in the technical support department, she is a statutory supervisor, and I would so find and conclude. In my view, if Jericho made the statements regarding the threat to discharge employees for selecting a union as their collective-bargaining representative, a violation of the Act would be made out.

The General Counsel submits that Shepard and Skrlnyk testified credibly and memorialized the meeting in separate e-mails they sent out on the Yahoo union mailing list to which they subscribed.[76] She contends that both e-mails implicate Jericho in this violation as charged. The General Counsel argues that Jericho's denials should not be credited for lack of corroboration—David Alton, Frontier system administrator, nor Jeff Brown for that matter was not called. Accordingly, she submits that a violation of the Act should be found.

The Respondent asserts that Shepard and Skrlnyk were not credible. As to Shepard, the Respondent notes that he was a problematic employee who had been disciplined for improper conduct and later discharged for abusive behavior to a customer.

Frontier also notes that the affidavit[77] Shepard provided, possibly several weeks after the incident, touching on the Jericho conversation does not mention the e-mail or that Jericho said, "let them organize, let them have their little meetings."

As to Skrlnyk, Frontier argues that in his e-mail, he does not corroborate his testimony regarding Jericho's having said, "Let them organize and we will fire them faster if they do."

On balance, Frontier submits that both Shepard and Skrlnyk were either lying or were victims of both drinks and frenzied imaginations stemming from their enthusiasm for the CWA.

On the other hand, the Respondent argues that Jericho testified plausibly and in clear detail about Brown's resignation and her concerns about his not having a job lined up in a bad economy; that unions were not in any way connected to this conversation. On the latter score, Frontier submits that if Shepard and Skrlnyk are to be believed, Jericho, one day after Edington of human resources advised coaches to be neutral in any union organizational effort, made threats in an open discussion in the presence of the two employees. The Respondent also points to Jericho's having been a member and supporter of the CWA in Arizona and that the accusation of her harboring a general union animus is simply not credible.

If one were to perform a numerical exercise to resolve credibility issues in unfair labor practice cases, the General Counsel's two witnesses in the instant case outnumber the Respondent's one and, given the unlawful nature of the offending statements attributed to Jericho and the Respondent, the violation would be found. However, the process is not that simple.

First, Jericho was an impressive witness—confident, sure of her dates, and candid—she readily admitted she did not care for Shepard and generally answered all questions posed to her without hesitation or evasion. There is nothing of record to suggest that Jericho was against unions—either CWA or RTWA—except from employees who clearly were enthusiastic CWA supporters and therefore may have a motive to accuse Jericho of making unlawful statements.

This brings me to Skrlnyk and Shepard. On balance, it was clear to me that Skrlnyk was well disposed to answering questions posed by the General Counsel and not quite as forthcoming with the Respondent's counsel. Granted, he is a current employee and testified at some pecuniary risk as the Board recognizes; but he has made it clear that he was a CWA supporter and has experienced nothing adverse on the job because of that support. Skrlnyk's affidavit testimony also reflects some personal antipathy toward Jericho.[78]

Shepard, also a strong CWA supporter, has been discharged by Frontier for conduct-related reasons. Moreover, Jericho clearly did not like him, and probably the feeling was mutual.

[75] Jericho also stated that she at one time was aware of the CWA organizing campaign or activities. Jericho also said that she used to be a member of the CWA when she was in Arizona, which she described as a right-to-work State, and that she voted, paid her dues, and picketed on behalf of the Union. Jericho also noted that she was hired as a tier 1 tech on the IHD by Frontier in Arizona, later promoted to tier II, and ultimately became lead tech. She now serves as a trainer/manager at Rochester and helped set up the IHD there.

[76] See GC Exh. 6. Shepard sent his e-mail on February 9, 2002, at 3:31 a.m.; Skrlnyk, known as "Meachy Me," sent his e-mail on February 9, 2002, at 5:14 p.m.

[77] RTWA Exh. 1. Shepard provided an (undated) affidavit to the Board investigator on, as he says, prior to his termination, perhaps shortly after the incident or in March 2002. He was not sure of the dates on which he made the statements to the Board.

[78] It seems that some of the techs would disparagingly refer to Jericho as coming from her own place or land, "Londaland." See GC Exh. 6 wherein Skrlnyk alludes to this, as does another tech who testified at the hearing.

Then there is the e-mail that Shepard disseminated in the early morning of February 9. The e-mail is not nearly as detailed as his testimony at the hearing and contains much in the way of Shepard's own take on what was allegedly said by Jericho. The only definitive remarks he attributes to her is "let them organize, they will be just fired faster."

On balance, Jericho simply did not strike me as the type of person who would make the type of statements attributed to her among employees who were working in her shop, employees that she was trying to exhort to give better service to the customers. I recognize that Skrlnyk and Costa both testified that the Jericho conversation occurred in February, about a month before Jericho admitted to participating in a conversation with them. That is indeed a great disparity. I also recognize that Dave Alton or Brown was not called to corroborate her version, and no reason was given for the failure. Nevertheless, I paid careful attention to Jericho as she testified because of her involvement in several charges associated with the case and she impressed me and came off as a strong witness. Thus, I cannot conclude that she made the statements in question. The evidence on credibility grounds is in equipoise and, accordingly, the General Counsel has failed in her burden to establish the charge by the preponderance standard.[79]

I would recommend dismissal of this charge.

c. Londa Jericho's alleged threat to discharge employees for engaging in union activities; and d. Jericho's alleged creation of an impression of surveillance of employees' union activities

The complaint alleges that Jericho violated the Act in two separate instances on March 5, 2002, with respect to her dealings with one employee, Alan Costa, on March 5.

Costa testified that he was very active in the cause of union organization at the Jefferson Road call center as early as the summer of 2001.[80] Between the summer and through the accretion in February 2002, he became a staunch supporter of the CWA. According to Costa, he "pretty openly" went around talking to the techs at their workstations; he actually went desk-to-desk soliciting their interests in and concerns for the union issue. Costa stated that before and after the accretion, he openly distributed authorization cards for the CWA and believed that two of the coaches, Mazi Bakari and Sonya Denysenko, saw him circulating the CWA cards at some point.[81]

Costa recalled one day in late February, around the 26th, when the CWA had scheduled a 5 p.m. meeting. Costa, who worked the 12 midnight to 8:30 a.m. shift on Tuesday through Saturday, said that he made a special trip to work before the meeting to distribute authorization cards to techs he believed had not received one in an earlier distribution effort.[82] Costa stated that when he returned to work the next week, on his first day back, Londa Jericho, a supervisor who initially trained him for his tech job at Frontier, took him to her office (cubicle) and began a conversation with, "Alan, Alan what are we going to do with you?"[83] According to Costa, Jericho proceeded to say that he had been observed in the tech support area distributing union pamphlets and cards in working areas and that he was not on duty at the time. According to Costa, Jericho said it was against (union) bylaws to distribute union cards or pamphlets in work areas during worktime. Costa said that Jericho did not identify who had observed him or the specific bylaw to which she was referring. Costa stated that Jericho also said that it was a fireable offense to distribute these items anywhere on company property. Costa said there were no witnesses to this conversation.

Costa stated that the Company allows employees to distribute various items during worktime, including magazines, software, greetings and event cards, as well as candy, and other items sold for school fundraisers; these activities have been conducted on company property during worktime and actually in front (or in the presence of) management. Costa stated that managers themselves have purchased various items. He related a recent signing and circulation of a going-away banner for a departing employee. He also identified one of the coaches, Mazi Bakari, who brought in a catalogue for his daughter's school fundraiser and distributed it around the center.

Jericho was called by the Respondent to rebut the charges.

Jericho readily admitted that she had a discussion with Costa about his distributing union materials around March or April; she was not sure but thought more likely that the conversation took place in April 2002.

Jericho explained her version of the encounter, saying that she called Costa to her cubicle because it had been reported to her that he had come in prior to his scheduled tour and was seen approaching and distributing union fliers to other techs who were on the telephone handling calls.

Jericho, describing the conversation as casual, stated that she told Costa that he should not be distributing anything not work-related[84] on worktime. According to Jericho, Costa stated that he was not on worktime, that he was distributing during his off hours. Jericho said she told Costa that although he was not on worktime, the techs he approached were working; he could not distribute on company time. Jericho said she then proceeded to

[79] There is to me an inherent problem with crediting or discrediting witnesses who by their own admission were at a bar drinking, in all likelihood, alcoholic beverages when the offending conversations allegedly were had. The possibility of exaggeration and memory loss is all too obvious under these circumstances.

[80] Costa, it may be recalled, is the lead IHD tech who e-mailed the RTWA in July 2001, about his interest in having a union at the call center.

[81] Costa conceded that while distributing those cards, he did not go out of his way to be seen by anyone in management—he just did not actually attempt to conceal his activities.

[82] Costa said he had been distributing cards at the IHD from the beginning of the third week of February.

[83] Costa could not pinpoint the actual day he spoke with Jericho but could say it was postaccretion (February 26, 2002), some time during the following week. The first week after February 26, covered the dates March 4–8.

[84] The transcript (at 2179) reads that Jericho said ". . . I told him that he shouldn't be distributing anything *work related* on work time." In my view, this is a mistake in transcription, given the total context of Jericho's testimony and is not consistent with my notes of her testimony on this charge.

explain to Costa that if he wanted to distribute materials, he could do so in the breakroom on noncompany time.[85]

According to Jericho, Costa wanted an explanation as to why he could not distribute the materials. Jericho said that she told Costa that his activity, she believed, was prohibited somewhere in the contract and referred him to a poster in the breakroom listing the things employees could and could not do. For instance, you could not sell gift wrap on company time. She also mentioned that an employee who sold Pampered Chief products did so in the breakroom.

Jericho stated that Costa responded by stating that the reason he was being spoken to was because he was distributing CWA materials. Jericho said that she told him the CWA had nothing to do with the matter, pointing out to him that actually she was a supporter and former member of the CWA and the issue was about his generally engaging in a prohibited activity (nonwork-related) on company time.

Jericho specifically denied telling Costa that his activity was a dischargeable offense,[86] stating that she did not think distributing literature merited such action. However, she stated that she actually did not know whether it was or not.

Jericho recalled only one occasion when an employee selling Girl Scout cookies solicited her. She told the employee she could not sell to the techs on the floor, that the employee should try to sell the cookies in the breakroom. Jericho stated that in her view, their conversation was a simple and casual discussion and contained no warnings about consequences.[87]

The General Counsel contends that Jericho's statements to Costa were unlawfully coercive. She submits that Jericho's telling Costa that his distribution of the CWA materials was a fireable offense in the context of the Respondent's allowing or having allowed distribution of these items by other employees, including at least one manager, poses a violation of Section 8(a)(1).[88] The General Counsel further submits that the coercive nature of the encounter between Jericho and Costa is underscored by her telling him in that self-same encounter that since the Company had moved her from Phoenix to Rochester, had previously moved the help desk from Rochester to Phoenix, that the Company could move the help desk anywhere it wanted, or any department for that matter, and for any reason.[89]

The General Counsel also argues—consistent with the complaint allegation—that Jericho's telling Costa that his union-related distribution activities had been reported to her was unlawfully coercive because it created an impression that Costa was being surveilled by management, which reasonably would lead him to believe that his activities on behalf of the CWA were being closely monitored. She submits that Jericho's statements, in toto, pose a violation of the Act.

The Respondent argues that Jericho's testimony, being more complete and candid and in material part unrebutted, should be credited and Costa's rejected. The Respondent submits that Jericho credibly denied telling Costa that his distribution of the materials was a fireable offense and that in no way did she threaten him with termination; she merely told him to distribute the material during nonworktime and in a nonwork area—the breakroom. The Respondent argues that even Costa acknowledged that no disciplinary action was taken against him by the Respondent. Furthermore, Jericho's credibility was further buttressed by her support of the CWA and her patient explanation to Costa that she harbored no ill will toward the CWA.

By contrast, the Respondent submits that Costa was not credible. First, the Respondent notes that Costa was later terminated by Jericho because she had previously placed him on a formal warning status for poor attendance. At his exit meeting, he called her an unholy concubine. Accordingly, his ill will towards her makes him unworthy of belief in the one-on-one situation presented and established on the record. The Respondent notes that when Costa was called as a rebuttal witness, he did not address Jericho's alleged threats or the surveillance issue.[90]

Regarding the surveillance allegation, the Respondent asserts that it did not create an impression that it was surveilling Costa, but Jericho (and whoever reported Costa's activities to her) was merely doing her job, monitoring the work activities of the tech employees—a lawful prerogative of management.

Credibility, as in the other Jericho-related charges, again is integral to resolution of at least the threat-to-discharge charge. It merits repeating that the Respondent is charged with threatening Costa with discharge for his union activities. The lawfulness of the Respondent's solicitation policy as enunciated by Jericho is not at issue.

Turning to Costa, I believe he, like a number of techs, had personal problems with Jericho and that, for reasons not entirely clear on the record, he seemed to resent her. Perhaps it was because she put him on final warning. I did not find him to be a credible witness regarding his conversation with Jericho.

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[85] Here again, the transcript states that Jericho said, "I explained to [Costa] if he wanted to do [his distribution], it would be something to do in the break room *or* non company time." This is an error; my notes reflect Jericho's saying *on* noncompany time.

[86] The transcript states (at Tr. 2181) "a finable expense." This, too, is an error in transcription. I have substituted what my notes reflect was the nature of the question posed by the Respondent's counsel. The transcript should read "a fireable offense."

[87] Jericho said that part of the conversation with Costa at the time was light discussion about his girlfriend in Canada and his personal health issues, which included an episode involving a collapsed lung.

[88] Mazi Bakari, the manager in question, supervised Costa in 2000 and perhaps in 2001. Bakari testified at the hearing and acknowledged that he openly sold candy for his children's school fundraisers. Bakari said everyone brings candy in to sell to the employees; however, he did not solicit or sell candy when people were working. Evidently, Bakari received no warnings or counseling for his solicitation activities.

[89] The General Counsel concedes this statement was not the subject of a charge. Jericho explained the context of her admitted remarks, saying that in the course of her discussion with Costa, he blurted out, "Could they [the Company] just move the desk, Londa?" Jericho admitted that she told him that the Company could move the help desk, but that was essentially her opinion. Jericho denied that there was any conversation about the anger or frustration of the techs being the reason for their interest in the CWA and that Costa's question was not asked in that context.

[90] When he testified at hearing, the first day in fact, Costa was employed by Frontier. The General Counsel called him back as a rebuttal witness on March 11, 2003. It was disclosed then that Costa had been terminated by Jericho for the reasons stated above.

Thus, I would conclude that the threat to discharge allegation is not established, because I would credit Jericho's denial of the statement attributed to her. As I have indicated, Jericho presented as a strong and forthright witness and not solely when testifying under examination by the Respondent's counsel. She also gave what I consider a fuller more complete version of her actions and those of Costa. Second, it seems likely that in her position, if she truly felt that Costa's actions were serious enough to cause him to be terminated, she would have taken a more formal approach by documenting the violation.[91] I note that Costa said that when he was brought in by Jericho, she said, "Alan, Alan, what are we going to do with you." This does not strike me as a prelude to a threat to fire some one. Rather, it corresponds more to Jericho's testimony that she viewed the meeting as one wherein she merely informed Costa casually of what he should not be doing, but also how he could distribute the CWA materials without running afoul of workplace rules.

I would recommend dismissal of this charge.

Turning to the surveillance charge, established Board law holds that a respondent's surveillance of its employees is unlawful (under Section 8(a)(1)) regardless of whether the employee knows of the surveillance. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *Impact Industries*, 285 NLRB 5 (1987), remanded 847 F.2d 379 (7th Cir. 1988). Also, an employer violates Section 8(a)(1) if it even creates the impression among employees that it is engaged in surveillance. *Link Mfg. Co.*, 281 NLRB 294 (1986), enfd. mem. 840 F.2d 17 (6th Cir. 1988). However, the Board has found no violation of the Act in the case of management's close observation of an employee's activities while the employee was on duty or during break periods during the normal course of business. See *American Medical Waste Systems*, 311 NLRB 77 (1993).

The Board has enunciated the following test for whether an employer has created an impression that it is surveilling the employees.

> [T]he test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that their [sic] union activities had been placed under surveillance . . . . The idea behind finding "an impression of surveillance" as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. [*(Flexsteel Industries*, 311 NLRB 257 (1993).)]

I will be brief in treating with this allegation. Under the circumstances already discussed, I would find and conclude that there was no surveillance or creation of an impression of surveillance by Jericho. I note that Costa stated that he had been circulating cards and pamphlets before and after the accretion, and that he did not "actively" conceal his activities. Thus, he did not seem to fear a supervisor's seeing him handing out the materials.

When he was brought in by Jericho, he was told essentially it had been reported to her that he was engaged in these activities while other employees were working. She thereupon told him that he could not do that but that he could distribute his materials in the breakroom and not on his or other workers' worktime. Thus, in my view, Costa (or other employees) could not reasonably assume his activities were being monitored in a surreptitious and harassing manner. Jericho's statement clearly did not interfere with his rights to distribute the materials to the techs. She merely advised him to distribute in a way consistent with company policy. Moreover, Board law, as recited above, allows the employer to monitor employees to insure they are doing their jobs.

Clearly, Jericho received a report that Costa was approaching employees who were talking to customers and that he, himself, was off duty at the time. Jericho did not identify the person or persons who made the report. The General Counsel seemingly attaches a sinister connotation to this in support of the surveillance charge. However, in my view, under the totality of the circumstances here, the source of the report, in my view, is immaterial. On balance, Jericho had a legitimate business-related interest in bringing to Costa's attention that he could not distribute the CWA materials in his chosen way, which, in Jericho's view, distracted other techs from their work. She advised him and corrected him in such a way that in my mind no reasonable employee should fear that management was peering over his shoulders and taking note of his involvement in union activities. *Caterpillar, Inc.*, 322 NLRB 674 (1996). Accordingly, I would recommend dismissal of this charge.

e. Mazi Bakari's alleged creation of an impression of surveillance

The complaint alleges that admitted supervisor Mazi Bakari created an impression that employees' union activities were under surveillance on or about March 14, 2002.

By way of background, it is undisputed that in early February 2002, near the time of the first CWA organizing meeting on February 7, alleged discriminatee Ron Boulware created an Internet web page, "frontier_union@yahoogroups.com." Boulware created this website for CWA supporters among the Frontier techs so that they could communicate with one another about union issues. Boulware, as webmaster, managed and controlled access to the site and only those he approved of were allowed to subscribe to the mailing list and otherwise participate in discussions. Boulware testified that he never knowingly allowed management access to the site.

The General Counsel called Charging Party Daryl Albright, an IHD tech, who testified about conversations he claimed to have had with Bakari about union issues.[92] Albright stated that in early January 2002, he asked Bakari if he knew the differences between the CWA and RTWA because he was interested

[91] It is not clear exactly when Jericho placed Costa on "final warning" for attendance issues and no documentation was adduced. However, the record is clear that with respect to final warnings, performance improvement programs (PIPs), and other notices of employees' performance and attendance deficiencies, Frontier's managers generate written documents for the problem at hand.

[92] At the time of the hearing, Albright was employed as a tier I, level 2 tech working on the 3 to 11:30 p.m. shift.

in unions at the time. According to Albright, Bakari said it really did not matter because the techs were a part of management and could not have union representation. Albright said this conversation was a general one had to satisfy his curiosity about the two unions. Albright said that he did not tell Bakari that he personally was interested in joining a union; he simply wanted to know the difference between the two.

Albright said that at about the end of February 2002, after the accretion, he and Bakari had a conversation at his (Albright's) cubicle. According to Albright, the conversation turned to the (Boulware's) Yahoo Groups and Bakari said, "Do you think you are the only one who reads the Yahoo Group, Lucifer Prime."[93] Albright stated that Lucifer Prime was his online name and he had not told Baker that he used that moniker.

The General Counsel also called IHD tech Paul Christodoulou, who also subscribed to Boulware's mailing list. Christodoulou related a conversation he had with Bakari and another employee, Jared Coletti,[94] in the help-desk breakroom. According to Christodoulou, Coletti came into the room and asked him what was going on with the two unions and a brief discussion ensued between them. Bakari then came into the room, and Coletti asked Bakari what he thought about the union.[95] According to Christodoulou, Bakari, with "passion," said that he knew about a message[96] Daryl Albright had sent to the Yahoo Groups but that things were very good at the help desk; that when the techs complained about situations, they did not bring these matters to management's attention.

Christodoulou stated that he was surprised by Bakari's knowledge of the Yahoo Groups, which he thought was not accessible by management and was exclusively for the help-desk employees who wanted to discuss the CWA and supported the effort to have that Union represent the techs.

Christodoulou acknowledged that Bakari did not say how he knew what was submitted by Albright and that he assumed that Bakari was referring to a particular message Albright had posted on the site.[97] According to Christodoulou, this conversation occurred about a week before Boulware was fired in March 2002.[98] Christodoulou said that he believed that Bakari wanted to let him and Coletti know he knew something they did not. This was somewhat intimidating to him because it seemed that Bakari knew he was a Yahoo Groups member.

Bakari testified at the hearing. Bakari stated that on a day after the accretion, he arrived at work and was greeted by various employees who said that he was (in effect) the butt of some widely circulating joke. Later, another tech, Daniel Wood, forwarded to him the e-mail that Albright sent to the Yahoo Groups on March 13, 2002.[99] According to Bakari, he had no knowledge of the existence of the Yahoo Groups until that day when he found himself the butt of a joke.[100]

Bakari explained the background to the e-mail and Albright's reference to "Victory is sweet." According to Bakari, Albright, who was on his team, was about to be put on final warning because of some performance and ethical issues. At the meeting were a RTWA representative, Cliff Edington from human resources, Albright, and himself. Bakari said when he saw Albright's e-mail, he thought it was quite amusing but he did not know the CWA was involved. So when Albright said "Victory is sweet, CWA all the Way," Bakari said he was confused, but thought it was a big joke and paid the matter no more attention.

Bakari stated that he was familiar with Internet groups like Yahoo; for example, you can also create a Microsoft group. Bakari knew that anyone can create a group list but the creator has the control of the list and gives access only to those whom he chooses. Bakari said he did not know who set up the group to which Albright subscribed and he, himself, was not a part of it and never attempted to access it. In fact, until Daniel Wood gave him the e-mail, he did not know it existed.

Bakari stated that the e-mail itself identified Albright as Lucifer Prime by reference to "dalbright1@rochester.com," but that he only referred to him as Lucifer Prime on one occasion, sometime in July or August 2002 when he solicited an invitation to a big party Albright was having.

Bakari said that he gave a copy of the Albright e-mail to his boss, Wergin, about a week later, but at no time told anyone in management that he had access to the union Internet list.

Regarding his alleged conversation with Coletti and Christodoulou, Bakari was not examined by Frontier's counsel or any other of the parties. As such, the only evidence of that conversation stands unrebutted.

The General Counsel asserts that Bakari was monitoring employees on the Yahoo site and in these conversations both Albright and Christodoulou (and Coletti) created the impression that he was surveilling them and their union activities. The

[93] Albright provided no particular context for this conversation other than that it occurred and included the question allegedly posed by Bakari. Albright could not recall how the conversation came up.

[94] Coletti was subsequently fired by Frontier according to Christodoulou. Coletti did not testify at the hearing.

[95] Christodoulou said that Coletti did not mention the CWA or RTWA by name in his question to Bakari.

[96] Albright in this message described how he had taped a meeting with management and he thought the taping had protected him from being fired. See CP Exh. 3, an e-mail from Albright a/k/a Lucifer Prime to the Yahoo Groups dated March 13, 2002.

[97] Christodoulou conceded that he did not actually know what specifically Bakari was referring to, saying that, "Well, when Mazi mentioned that he knew about the message, I was assuming that he meant the message that Daryl had posted on the group about the taped conversations . . . Just given the time that's what it seemed like it was." (Tr. 777.)

[98] Christodoulou recalled the accretion because he was called in to a meeting by his boss, Wergin, in early March 2002. However, he is not sure whether the Bakari/Coletti conversation occurred after this meeting.

[99] Bakari identified CP Exh. 3 as the e-mail in question. Bakari said that a tech, Daniel Wood, provided him with a copy of the this e-mail. This e-mail is identical to R. Frontier Exh. 29 except that in the latter the address is whited out. Bakari identified this exhibit also. Daniel Wood testified that he e-mailed this to Bakari on March 13, 2002, at Bakari's request because although he thought the e-mail was funny, Bakari was actually being "bashed" by another employee.

[100] It seemed that Bakari was very friendly with the techs and joked around with them. He said he was somewhat taken aback by this "joke" because he did not know what was going on.

General Counsel submits that Bakari was not worthy of belief because not only was he, in her view, evasive but his testimony regarding how he got the Albright e-mail conflicts not only with Albright and Christodoulou but also with Wood, who was called by Frontier. The General Counsel submits that Bakari's direct reference to the Yahoo Groups, that a CWA supporter created and controlled, would reasonably lead the employees to believe their union activities were under surveillance.

The Respondent argues that there is insufficient evidence to support a finding that Bakari either surveilled or created an impression that he was surveilling employees. The Respondent first attacks Albright's credibility by asserting that he had an axe to grind with Bakari who had placed him on final warning in January 2002, and that Albright admitted that he was not even on speaking terms with him around that time. Frontier also notes that on cross-examination, Albright could not say when the conversation with Bakari occurred, that it could have taken place as late as April 2002, considerably past the accretion and after the CWA had filed its representation petition. Frontier submits that the General Counsel's reliance on Bakari's one-time reference to Albright as Lucifer Prime, under the totality of the circumstances surrounding the matter, is misplaced. Frontier contends that Bakari's version of any conversation he may have had with Albright is more credible. Consequently, no violation should be found.

Regarding Albright's claim that Bakari said, "Do you think you're the only one who reads the Yahoo Group, Lucifer Prime," I would be of the view that this statement could under the extant circumstances constitute an unlawful creation of an impression of surveillance. However, I am not persuaded that Bakari made the statement. First, Albright had a motive to be untruthful about Bakari who had disciplined him and had attended the meeting on March 13. Evidently, Albright's job was on the line. Moreover, Bakari's version of his discovery of the existence of the Yahoo Groups through Wood's providing him with the e-mail and, hence, discovery of Albright's online name seems more plausible. If nothing else, Bakari provided a believable context for the entire matter. Albright's version in a sense comes out of whole cloth and, on balance, given his possible antipathy to Bakari, is not believable. I would recommend dismissal of this aspect of the complaint.

Turning to Bakari's alleged conversation with Christodoulou and Coletti. As I noted earlier, Christodoulou's testimony is unrefuted. I therefore conclude that as he testified, Bakari, in partial response to Coletti's question of what he (Bakari) thought about the Union, said (paraphrased) that he (Bakari) knew about a message Albright had sent to the Yahoo Groups and that things were not very good at the help desk and that when the tech's complained about situations, they did not bring these matters to management's attention. Furthermore, I would find and conclude that these statements in total context could reasonably cause an employee to believe that his or fellow employees' union activities were being surveilled.

I would agree with the General Counsel that it is not of legal significance that Bakari may have obtained knowledge of the Yahoo Groups legitimately from a fellow employee subscriber. The clear message conveyed by Bakari is that management not only knew of the list but its objective, its mission, participants, and the content of the employees' concerns. This reasonably could have a chilling effect on employee/subscribers who thought the list was secure and privileged only to them. Granted, as employee Woods demonstrated, the list was not indeed secure, but the employees like Christodoulou had no actual knowledge that other subscribers were giving management information about the list. Their (and any employees') reaction to Bakari's revelation—intimidation—was normal and reasonable in my view.

Managers like Bakari, in my view, must be very circumspect while speaking to employees about sensitive matters affecting employee rights, even when the information in question is obtained legitimately. By the time of this conversation, which I believe occurred more like sometime after March 14, and well past the accretion, as pointed out by the Respondent, the CWA had filed its petitions, its interest in representing the techs was known. However, the matter was not a dead issue as a number of techs were still very interested in having the CWA represent them. Thus, a fear of surveillance could chill, reasonably so, employees like Christodoulou in the exercise of their Section 7 rights.

I would find a violation of Section 8(a)(1) regarding Bakari's breakroom conversation with Coletti and Christodoulou.

f. Gail Noyes and Clifford Edington's alleged threat to discharge the techs for failure to pay dues and fees to the RTWA on April 10, 2002

After the accretion, Frontier's human resources department held a number of meetings with the techs to explain the accretion and its ramifications to their jobs in view of Frontier and RTWA's having entered into the memorandum agreement on March 13, 2002. The meetings were held shortly after the execution of the agreement, most notably in early April, and were scheduled to cover the three shifts the techs and other employees worked.

The complaint alleges that essentially, at one of these meetings, two of Frontier's human resources managers threatened to discharge employees who did not pay dues and fees to the RTWA.[101]

The General Counsel called a number of employees who testified about what they were told in the April 2002 meetings with Frontier's managers.

Albright said that he met with Edington and Noyes; other techs were present, but no representatives of the RTWA attended. According to Albright, the primary topic presented related to the payment of dues. Albright said he was required to sign a form that would permit an RTWA dues deduction from his paycheck. According to Albright, the forms were distributed, and he was not given any of the alternative payment

[101] This allegation forms the basis for an alleged violation of Sec. 8(a)(2) of the Act by Frontier which is accused of unlawfully assisting the RTWA on April 12, through the memorandum agreement between it and the RTWA. See par. IX of the complaint. The RTWA also is charged with violating Sec. 8(b)(1)(a) of the Act by dint of its receiving support from Frontier by accepting dues/agency fees which were deducted from employees' wages by Frontier pursuant to the memorandum agreement. See par. XI of the complaint. My disposition of the 8(a)(1) violation will per force dispose of these allegations.

options, although at a later time he was told that the dues deduction authorization was not the only way he could pay the dues. Albright stated that Edington and Noyes told him (and the others) at this April meeting that if they did not sign the forms, they would be terminated.[102]

Richard Carno, currently a lead help-desk tech at Jefferson Road, testified that in 2002—he was unsure of specific dates—he attended two meetings along with about 20 other techs attending on each occasion, whereat union deductions were discussed by management representatives. At the second of these meetings, about a week after the accretion, Carno stated that Edington (and possibly Noyes) told the assembled techs that because we were part of the (RTWA) Union if you don't pay dues, the RTWA could have you fired. Carno could not recall Edington's exact words. He also stated that he currently pays his RTWA dues.

Kitty Maier[103] said that she attended a meeting with Frontier's human resources managers, specifically Edington and a woman whose name she could not recall; several techs were also present. According to Maier, Edington explained what a closed shop was, that employees don't have to participate in the Union but have to pay dues. He said that if an employee did not pay her dues, the Union could ask the Company to terminate her. Maier stated that automatic dues deduction forms were distributed, and the employees were given a date on which to return them to management. She also noted that no alternative procedure for paying union dues was mentioned by Edington.

Douglas Daly, currently employed as a tech on the help desk, related a meeting in April convened by management to address the RTWA contact. Daly stated that Edington, along with Noyes and his boss, Wergin, led the meeting. Daly said that the assembled techs were told, among other things, that they were now covered by an addendum to the collective-bargaining contract with RTWA.

Daly stated that someone at the meeting asked about dues and whether the techs had to pay dues. According to Daly, Edington said the dues would be $3.50 per week. Daly stated that he asked Edington whether he could be fired if he did not sign up to have dues taken out or did not pay by other means. According to Daly, Edington said if the RTWA approached the Company and asked for termination for nonpayment of dues, the Company would have no choice but to terminate him because Frontier operated as a closed shop.

Noyes and Edington testified, and both confirmed that in the meetings they held with the techs, the issue of dues and failure to pay them was raised and addressed by them.

Noyes said that she was asked by Wergin to conduct about five meetings dealing with compensation issues with the techs because the Company had just negotiated the memorandum agreement with the RTWA; the meetings were designed to reach both techs and their supervisors on all of the shifts. Noyes prepared a "talking point" memorandum for her and Edington's use to aid them in the presentation of the agreement, which covered wages, holidays, vacations, promotions, and agency shop provisions, including the techs' obligation to pay union dues.

Noyes stated that she told the employees that Frontier was an agency shop company, that covered bargaining unit members of both the CWA and RTWA were obligated to pay dues or their equivalent, and that a payroll deduction procedure was available as one optional way to pay dues. Noyes said that she never threatened to discharge any employees who failed to pay dues and fees to the RTWA; she claimed merely to have informed them of their contractual obligation.

Noyes admitted that she was questioned by the techs regarding the consequences of not paying dues and specifically whether they would be terminated. According to Noyes, she told them if the RTWA came to management and requested termination for nonpayment, the Company would have to look at the issue and consider the request in conjunction with the contract.[104]

Noyes denied (saying she did not believe) that she ever said to the techs that under the contract she would have no choice but to comply with the Union's request to terminate an employee who elected not to pay dues. Noyes insisted that for such an employee, she told the techs that should the Union come forward and request termination for that reason, the Company would have to take a look at the situation pursuant to the contract. Noyes, however, admitted at the hearing that in her view, under the contract, even a good employee could be terminated for a failure to pay dues.

Edington testified and basically corroborated Noyes, with whom he was paired on occasion[105] to make presentations to the techs about the memorandum agreement. Edington says he utilized Noyes' talking points memorandum in his presentation.[106] Edington recalls a question from a tech regarding the failure to pay dues. According to Edington, he recalls explaining to the employees that he really did not know what would happen but that, technically in such a case, either Union (RTWA or CWA) could petition to terminate the nonpaying employee because the contracts for both contained agency shop provisions.

Edington stated that neither he nor Noyes threatened the employees with termination for not paying dues but merely informed them of the pertinent provision of the agreement which

[102] Albright admitted that he taped a meeting with Edington and Mazi Bakari which, he said occurred on April 11, and that a transcript was created of the recording which was shown to and identified by him at the hearing. The transcript was identified by Frontier's counsel as R. Frontier Exh. 3, dated May 20, 2002. Albright agreed that after reviewing the transcript, there was no mention by anyone that he would be terminated if he did not pay union dues at this meeting.

[103] Maier was no longer employed by Frontier at the time of the hearing.

[104] See R. Frontier Exh. 26, summary of memorandum of agreement. Noyes stated that she was involved in the negotiation of this agreement along with company representatives Miles Wolzinski, the Company's labor negotiator, April Christian, and Mike Canova; Marie Rodgers, and Darlene Kelly represented the RTWA.

[105] Edington stated that Noyes joined with him at all but two meetings with the techs.

[106] Edington stated that the talking points memorandum did not serve as a script. It seems that he and Noyes used it to cover questions they anticipated would be asked of them about the coverage of the memorandum of agreement.

required, under agency shop principles, that all unit members be dues-paying participants or pay an equivalent amount. Edington insisted that he did not tell the techs what *would* happen if an employee failed to pay dues, that he said the bridge had to be crossed when they got to it; but that under the agreement, the Union *could* petition to have the employee terminated.

Edington recalled telling employees that the payroll deduction plan for paying dues was available to make payments easier for the employees.

Edington conceded that he (or perhaps Noyes) may have said to the employees that if an employee elects not to pay his dues or an equivalent amount, the Union's president can approach management and ask that the employee be terminated and that he (or Noyes) may have said that they would have no choice because paying dues is part of an agency shop. However, Edington stated that he and Noyes were trying to answer the techs' questions without causing them any alarm. Edington was fairly sure that neither he nor Noyes told the techs in any meeting that the Company would fire employees if they failed to pay dues.

The General Counsel asserts that Edington and Noyes informed the techs that if they failed to pay the RTWA dues, they would be discharged, that their statements constituted an unlawful threat to discharge. The General Counsel submits that, irrespective of the exact words employed by the human resource representative, the employees reasonably concluded that they had to pay the dues or they would be fired for failing to pay them.

The Respondent contends that Edington and Noyes merely informed the help-desk employees that the memorandum of agreement required the payment of dues, and a failure to pay could cause the RTWA to ask Frontier to terminate nonpaying employees. The Respondent asserts that even one of the General Counsel's witnesses—Maier—corroborated Edington and Noyes on the dues issue. Furthermore, the talking points memorandum does not mention that employees would be fired for nonpayment of their dues. Frontier points out that, in addition, RTWA never requested the termination of any employees. The Respondent submits this charge should be dismissed.

It is undisputed that the extant collective-bargaining agreement between Frontier and RTWA contains in article 22 thereof a union-security clause. This clause has not been asserted as unlawful by the General Counsel. It is also undisputed that the memorandum of agreement provides in paragraph 9:

> The provisions of Article 22 Agency Shop [of the RTWA] Contract shall take effect as of the date that the memorandum is signed [March 13, 2002] thus providing 30 days for employees in the job classifications herein to commence paying the Union dues/agency fee.

It is not contended that this provision is unlawful.

The issue, first, is what Frontier's management may have told the gathered employees in terms of the consequences of their failure to pay the dues and fees associated with the agency shop provisions. The employee witnesses (with notable exception of Maier) all testified that Edington and Noyes said they *would* be fired for such failure. If they said this, then, in my view, under the circumstances at the time, a violation of the Act would be made out. It is noteworthy on this point that irrespective of Frontier and RTWAs coming to agreement on the accretion of the techs, there were still a number of employees who supported the CWA, which had by April 10, filed its representation petition. If Edington and Noyes directly or indirectly threatened to discharge employees who elected not to pay dues, then, clearly and reasonably, their Section 7 rights were interfered with in an unlawfully coercive way.

As noted, article 22 of the collective-bargaining agreement essentially states that each bargaining unit member, irrespective of union affiliation, must pay dues or an equivalent amount to the RTWA as a condition of employment rather than 30 days of the member's employment. This provision, often referred to as a union-security clause, according to Respondent's managers, was to be applied to the newly accreted techs. Article 22, by its terms, however, allows employees to revoke their dues authorization and Frontier is authorized to discontinue the takeout and is required to notify the RTWA of the revocation.

The collective-bargaining agreement does not further address specifically or generally what would happen if a unit member declined to pay his or her dues.

Thus, if Edington and Noyes told the techs and other employees that they *would* be fired for failing to pay dues or fees as required by the *contract*, this, in my view, would be a serious misstatement or even a misrepresentation of the contract's terms. Given the context of the employee meetings, including the questions asked by the techs and questions and controversy surrounding the accretion at the time, these statements would be in my mind highly coercive and would constitute a violation of the Act.

However, if Edington and Noyes, in the context of their meetings with the new bargaining unit members,[107] told them that they *could* be terminated by the Company for failing to pay dues if asked to do so by the RTWA, there would be no violation in my view. In such a case, an employee would understand that termination was only a possibility, which, in my view, militates against a charge of unlawful coercion. Employees could, for instance, still support the CWA without fear of discharge if they elected not to pay the dues/fees called for by the contract. Therefore, there is a significant difference between "could" and "would" terminate for failure to pay the dues and fees in issue under the then-extant circumstances surrounding the statements in issue.

It is clear that Frontier, at some point after signing the memorandum of agreement, deemed it necessary to meet with the newly accreted help-desk employees and explain what this meant for them under the collective-bargaining agreement to which they were now subject. Edington and Noyes conducted a number of meetings with these employees toward that end. As one would expect, the employees, not all of whom were pleased about the accretion, had questions based on Noyes and Edington's talks. Notably, the employees evidently raised the questions regarding the failure to pay dues and the human resources managers responded.

I found both Noyes and Edington to be highly credible witnesses. Both were experienced personnel managers—Noyes with over 30 years and Edington with 15 in the field—and testi-

[107] Notably, the techs were not then in a position to have revoked any authorizations but were clearly subject to the union-security clause condition of employment language.

fied candidly and with professionalism. It seems highly unlikely that professionals would simply threaten to discharge employees under any circumstances, but surely not in the course of the meetings, which all would admit were charged with controversy. It also seems highly unlikely that either Noyes, Edington, or both would misrepresent or mischaracterize the original collective-bargaining agreement or the memorandum of agreement. Noyes' talking points memorandum underscores, in my view, their concern for not making mistakes about important parts of the memorandum, including the dues requirement. Regarding the employees who testified that they heard Noyes and Edington say employees would be discharged, I believe they were mistaken. I would credit Noyes and Edington's versions.[108]

Thus, I would find and conclude that Noyes and Edington, in their several meetings with the newly accreted help-desk employees, were merely explaining to them that the payment of dues/fees to the RTWA was a condition of employment at Frontier under the memorandum of agreement and the collective-bargaining agreement.

I do not believe that in so explaining the memorandum of agreement's ramifications for the employees, Noyes and Edington told them that they would be discharged for failing to pay dues. Also, I do not believe that telling the employees that they could be terminated upon request by the RTWA could reasonably be construed by the employees to mean they would be terminated for failing to pay the required dues. I would recommend dismissal of this aspect of the complaint.[109]

2. The 8(a)(2) and 8(b)(1)(A) allegations

The complaint in paragraph IX charges Frontier, in essence, with rendering unlawful assistance and support to the RTWA by virtue of its granting recognition to that Union as the exclusive collective-bargaining representative of the Company's help-desk techs on February 26, 2002. Frontier is also charged with unlawfully assisting and supporting the RTWA by entering into the previously discussed memorandum of agreement on March 13, 2002. Specifically, with regard to the memorandum's agency shop provisions, Frontier is charged with unlawfully assisting and supporting the RTWA by maintaining and enforcing the agreement and applying its terms to the help-desk techs. Frontier is also charged with unlawful assistance and support of the RTWA by deducting dues/agency fees from the help-desk techs' wages and remitting these to the RTWA from about April 12, 2002, to the present. The complaint alleges that these actions were undertaken by Frontier even though the RTWA did not represent an uncoerced majority of the help-desk techs whose accretion to the RTWA unit was not lawful, all in violation of Section 8(a)(1) and (2) of the Act.[110]

In paragraph XI of the complaint, obversely, the RTWA is charged essentially with violating Section 8(b)(1)(A) of the Act by dint of the unlawful accretion; by receiving assistance and support from Frontier; accepting recognition from Frontier[111] as the exclusive collective-bargaining representative of the help-desk techs without representing an uncoerced majority thereof; bargaining for and entering into the memorandum of agreement, and incorporating and applying the agency shop provisions thereof; maintaining and enforcing the memorandum of agreement; requiring the help-desk techs to pay dues/agency fees to the RTWA as a condition of their employment with Frontier; and accepting dues/agency fees deducted by Frontier from the help-desk techs' wages pursuant to the aforementioned memorandum of agreement.

I have previously concluded that based on my review and analysis of the relevant accretion principles and guiding case authority that the accretion of the IHD techs was lawful. The aforementioned violations of Section 8(a)(1), (2), and (3) as well as 8(b)(1)(A) are, at bottom, based upon the accretion. Therefore, I would find and conclude that the General Counsel has failed to establish these charges and, accordingly, I would recommend dismissal of those charges.

3. The 8(a)(3) discharge allegations; Ron Boulware and David Carmer

The complaint in paragraph X essentially alleges that Frontier on about March 21 and 27, 2002, respectively, discharged IHD techs Ronald (Ron) Boulware and David Carmer because of their activities on behalf of and in support of the CWA and/or to encourage employees to join and assist the RTWA; the complaint also alleges that the discharges were based on Boulware and Carmer's being engaged in protected concerted activities.

It is undisputed that Boulware and Carmer were discharged on or about the dates as alleged.[112]

[108] It is of persuasive significance that both Noyes and Edington indicated no leaning towards either the RTWA or CWA in their testimony. In short, there was no animus or bias against or for either the CWA or RTWA that I could glean from their testimony or demeanor. Notably, Noyes, to a greater extent, and Edington, to a somewhat lesser extent, have been dealing with both of the Unions for some time and have probably spoken to many employees over that period about the collective-bargaining agreements and their consequence. I do not believe they would, in this instance, threaten employees while explaining the contract in question.

[109] I note in passing that I have previously found that the accretion was lawful. It follows that the memorandum of agreement was in turn also lawful and legitimate. To the extent the General Counsel argues that the actions of Noyes and Edington were in violation of the Act based on her contention that the accretion was not lawful, I would reject that argument. See, for comparison, *Lanco*, 277 NLRB 85, 96 (1982), where the Board upheld the judge's holding that the employer's unlawful recognition of the union-security clause rendered the subsequent contract unlawful and that the employer's explanation of the terms of the security clause was likewise unlawful.

[110] The Respondent is also charged with violating Sec. 8(a)(3) and (1) through the actions alleged in para. IX. My disposition of the 8(a)(1) and (2) charges will in turn dispose of this allegation.

[111] On October 8, 2002, the General Counsel requested an amendment correcting a clerical mistake in the original charge by substituting Frontier for the RTWA. I granted the amendment.

[112] R. Frontier Exh. 29 indicates that Boulware was terminated on March 19. This exhibit is actually a notice sent by Frontier's security officer, William J. Barnes, notifying the security force that Frontier regarded Boulware and Carmer as persona non grata, and cites their termination dates and reasons for termination. It is not in my view a personnel action-type of document. Boulware credibly testified that he was terminated on March 20, 2002.

It is also undisputed on this record that both employees were IHD employees who supported the CWA's bid to represent the techs at the Jefferson Road call center before and after the accretion.

The General Counsel argues that both were terminated disparately because of their support of the CWA and for activities they engaged in on behalf of that Union. The Respondent (Frontier) insists that both employees were fired for legitimate reasons unrelated to any union-related activities or support on their part. Furthermore, the Respondent contends that the General Counsel did not meet her initial burden to show that Boulware's and Carmer's union activities and the Company's hostility—animus—to the Union were the reasons for their termination.

Applicable Legal Principles

In cases where employers are charged with violations of Section 8(a)(3)[113] and (1)[114] of the Act, the Board set forth its test of causation in the case of *Wright Line*, 251 NLRB 1083 (1980), enfd. F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under this test, for determining, as here, whether an employer's discharge of an employee was motivated by hostility toward union membership or union activity, the General Counsel has the burden of persuasion to show that protected conduct was a substantial or motivating factor in the employer's decision. *Buckeye Electric Co.*, 339 NLRB 334 (2003).

A prima facie case is made out where the General Counsel establishes union or protected activity, employer knowledge of that activity, animus, and adverse action against those involved, which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

If this initial burden is met, then the burden of persuasion shifts to the employer to prove its affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity.[115] If the reasons advanced by the employer for its action are deemed pretextual, that is, if the reasons either did not exist or were not in fact relied upon, it follows that the employer has not met its burden and the inquiry logically ends. Where an employer asserts a specific reason for its action, then its defense is that of an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of protected conduct. Thus, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place. *Kellwood Co.*, 299 NLRB 1026, 1028 (1990).

Notably, the Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. [Fn. omitted.] *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

It is well settled under Board precedent that the timing between the employer's action and known union activity can supply reliable and competent inherent evidence of unlawful motive for purposes of the *Wright Line* analysis. *Whirlpool Corp.*, 337 NLRB 726, 739 (2002). *Grand Rapid Press*, 325 NLRB 915 (1998); *Kinder Care Learning Centers*, 299 NLRB 117 (1990); *Alson Knitting, Inc.*, 301 NLRB 758 (1991). Also, where an employer accelerates a discharge or layoff of an employee in close proximity to union activity, this, too, may supply evidence of unlawful motive. *IMAC Energy*, 305 NLRB 728, 736–737 (1991); *American Wire Products*, 313 NLRB 989 (1994).

With the foregoing serving as a backdrop, we turn to the charges involving first Ron Boulware and then David Carmer.

a. Ron Boulware's termination

Boulware testified at the hearing about events and circumstances leading to his discharge. Boulware began his employment with Frontier on December 4, 2002, as a tier II lead tech and by the time he was discharged on March 20, 2002, had risen to a tier III lead tech. Boulware was hired by Wergin and supervised over his time with Frontier by several supervisors or coaches, namely Jennifer Fioc, Jeff Brown, Mazi Bakari, and Londa Jericho.

Boulware claimed that he became involved in the CWA organizing effort around January 2002, attending meetings, discussing organizing with his fellow techs, wearing CWA buttons, and posting a small CWA sign on his cubicle wall.[116] Boulware also created on his personal web sever an Internet web, frontier_union@yahoogroups.com, on about February 8, 2002, to promote discussion regarding the unionization of the Internet help desk. Boulware's user name was "Bitzer." Boulware said he also engaged in certain other activities in support of the CWA, including distributing and collecting CWA authorization cards, which activities were conducted mostly at his workstation.[117]

Regarding his Yahoo Groups website, Boulware stated that he alone governed access to this site, that it was password protected. Anyone could gain access to the web page but unless the person had requested membership to the list and had been approved by him, Boulware stated access would be denied

[113] Sec. 8(a)(3) of the Act (29 U.S.C. §158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

[114] Sec. 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of the Act."

[115] The protected activity includes not only union activities but also invocation and assertion of rights guaranteed employees under Sec. 7 of the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Interboro Contractors*, 157 NLRB 1295 (1966).

[116] See GC Exh. 15, a button that declared "CWA Yes!" which Boulware said he pinned to his shirt or tie or his book bag and wore at work. Boulware said he had a jar of these on his desk. According to Boulware, the sign was on the outside wall of his cubicle (facing the aisles or walkways used by employees) and said, "If Union; why not CWA . . ." (See GC Exh. 16.)

[117] Boulware identified a diagram indicating where his work area was located in the call center, as compared to the entrance of the call center, and an area frequently used by techs called the "war room." See GC Exh. 14.

beyond the home page.[118] Boulware said that he has declined membership to only one person during the time the site has existed because the requester would not identify himself. Boulware stated that he never admitted anyone from management to the site and that the persons on the mailing list are all techs employed by Frontier who had concerns and questions about union organizing.

Boulware stated that on March 13, 2002, he created a CWA mission statement website to inform the help-desk techs about the need for representation by the CWA. Boulware said that he, as a member of the CWA organizing committee, established the site for techs who were unable to attend meetings. The mission statement was broached and discussed and drafted by the committee.

Interested techs were invited to add their names to the mission statement both at the meeting and, after he created the website, online.[119] According to Boulware, the site was accessible through the Internet; one merely had to type in the web page address, http://www.bitzer.org/CWA, to gain access to the site. According to Boulware, he never gave anyone from Frontier's management access to the site.

Boulware acknowledged that he was placed on a performance improvement plan (PIP) by his supervisor, Jeff Brown, on February 1, 2002,[120] because he was deficient in terms of his availability (to handle calls) statistics, which had fallen below the Company's goal of 95 percent availability. According to Boulware, he improved his availability within the month[121] and received his yearly review from Brown on March 14, 2002.

Boulware also admitted that in January 2002, he began e-mailing (forwarding) work-related mail to his personal account at his residence. Boulware stated that around March 4, he was approached by Jericho around 4 p.m. (at the beginning of his shift) as to why he had been at work since 2 p.m. Boulware said he told her then that he forwarded e-mail he received at work to his residence when he was not at work. According to Boulware, Jericho told him not to do this. Boulware said he told her he would cease the practice that same evening. However, according to Boulware, he experienced a systemic problem with having the forwarding feature removed from his computer and went to the mail server department at Frontier to resolve it; however, that department could not help him.

Boulware said that, eventually, Jericho gave him some information to remove the feature. Even with her input, Boulware said that he was not able to resolve the problem without causing additional problems. Boulware explained that if he removed the forwarding feature, the system responded by deleting all of his e-mails. So if the forwarding was turned off, he received no e-mails at work.

Boulware said that he recontacted the mail server department on March 14, and there spoke to an individual, John Blum, to whom he explained the problem. However, as it happened, his annual review was also scheduled for March 14, so he had to break off with Blum to attend the review meeting. Boulware said that he told Blum he would call him back and then set out to tell Jericho about the actions he was taking to resolve the problem; Jericho's office was near the conference room where his annual review was to take place.

According to Boulware, when he got to Jericho's office, he observed her looking at his CWA mission statement web page while on the telephone describing it to someone and revealing the names of those listed on the site as supportive of the CWA. According to Boulware, Jericho said she would e-mail the web page address of the mission statement and began typing in the web address.[122]

Boulware stated that he told Jericho that he was going to a meeting and would call the mail server department afterwards regarding the e-mail forwarding problem.

Boulware said that he went to the review meeting with Brown who explained how he could resolve the e-mail forwarding problem. Following Brown's instructions, Boulware said that he was able to turn off the forwarding feature. Boulware said he then e-mailed Jericho, telling her of his success on March 14.[123] According to Boulware, at no time did Jericho indicate that he would be disciplined for the e-mail forwarding matter.

Boulware stated that even before he became actively involved in the unionization efforts at Frontier, there were concerns about unions expressed by employees. Boulware explained that the Company used to maintain an internal web message site for all employees, who could speak about almost any topic of choice; e.g., building temperatures, troublesome customers, gripes about management, dress codes, professional responsibility, and general employee conduct. Boulware stated there was in addition much in the way of random discussion about unions, and that managers utilized the message board.

[118] See GC Exhs. 18 and 19. GC Exh. 18 shows Boulware's website that one would access on the Internet. GC Exh. 19 shows the website after a subscriber gained full access to the site and, thus, could participate in the discussions of the moment and generally browse the site.

[119] The mission statement is contained in GC Exh. 17. It includes its stated mission and purpose, lists the organizing committee members, and provides an on-line submission form for persons desirous of adding their names to the effort. According to Boulware, he included the names of the techs listed in the exhibit because they had signed on earlier, others were added later as they signed on by submitting their names online.

[120] See Exh. 21, the performance improvement plan signed by Boulware and Brown. The PIP required Boulware to improve his performance over the next 60 days or face additional action, including termination.

[121] It should be noted that Boulware's evaluation for the month of February 2002, given him by his then-supervisor, Londa Jericho, showed that he had improved his availability to 98.03 percent. Jericho's comments regarding his availability statistics states that Boulware did an "awesome job." Boulware's performance in other areas ranged from "premier" (the highest rating) to unsatisfactory (the lowest). See GC Exh. 22. Boulware stated that at this time the CWA organizing drive was in full swing. (Tr. 1062.)

[122] Boulware said Jericho's back was to him as he made these observations as he walked into her office. She was viewing the site, scrolling the page interactively. According to Boulware, the Company used a "Witness" system, which enabled it to take a screen shot of any computer's ongoing programs. However, Boulware stated that Jericho was using the website as if she had gained complete access to it, and not just taking a screen shot.

[123] Boulware identified GC Exh. 24 as a copy of the e-mail he sent Jericho on March 14, at 6:06 p.m.

Boulware cited Jericho and another supervisor, Andy Cramer, who also participated in discussions on the message board.[124] Boulware noted that the techs had a web page of their own and there were a series of links that connected that page to this message board which was not password protected.

Boulware stated that on February 3 or 4, 2002, although the Company erased the contents of the message board, he and other employees continued to use it. Boulware claimed that there was a reference to the CWA on the message board prior to February 5, 2002, through a link to the CWA's national home page.[125]

Boulware recalled the March 20, 2000 meeting at which he was terminated. Boulware said that Edington, Jericho, Rick Harvey for the Company, and Art Keeler representing the RTWA were present at the meeting.[126]

Edington began by asking him about the mail forwarding issue and stated that he (Edington) had been told that Boulware was told to stop the practice but had not. Boulware told Edington that the matter had been resolved for over a week; he had discontinued forwarding his e-mail. After some discussion among themselves, the management representatives, according to Boulware, seemed satisfied that he had ceased forwarding his e-mail home and the issue was dropped.

However, Edington then raised another topic and told him that it had been brought to his attention that Boulware had sent proprietary information beyond the Company's network security—fire wall—system. Boulware said he denied this, whereupon Edington asked if he had sent information on the message board to the Yahoo Groups. Boulware admitted that he had, but that he did not consider anything on the message board proprietary.[127]

According to Boulware, Edington said that Frontier considered the message board's contents proprietary and that by sending its contents to an outside source, he had violated the company policy. Edington asked him if he were familiar with the Yahoo Groups and whether he knew Don DePerma. Boulware said he acknowledged being familiar with the Yahoo Groups and knowing Don DePerma as a CWA organizer helping the techs with the organizing campaign.

Boulware said he also told the assembly managers that he forwarded the message board's contents to the Yahoo Groups because a Board agent investigating matters at Frontier wanted to attempt to obtain those parts of the message board that had been erased and see that which remained. Boulware told the managers he felt that since he was acting pursuant to the Board investigation, it was okay to send the message board's contents. Boulware said that he also told them he did not think there was anything of consequence (to the Company's interests) in the submission. According to Boulware, the managers did not really respond to his proffered Board investigation rationale. However, according to Boulware, Harvey stated that since a both customer user's name and a web-based service utility used by the Company were mentioned in the messages, that these were important from the Company's point of view.

According to Boulware, Edington asked him (Boulware) whether he knew about the Company's Acceptable Use Policy (AUP) and what was his understanding of the policy. Boulware said that he responded at some length about his understanding of the policy, along with some of his concerns he had raised with Wergin months earlier regarding its application and effect on the normal tech job functions. According to Boulware, he acknowledged at the hearing that he generally understood that the AUP required employees to keep non-Frontier communications separate from company-related communications and prohibited employees from using the Company's computer system to violate any other corporate policy. Boulware realized that violations of the AUP could result in termination.

Boulware, however, told Edington (and the others) that he did not believe the proprietary information restrictions contained in the policy applied to techs because techs, in simply doing their jobs, violate the policy by installing customer software systems on their computers to resolve problems with the Internet. Boulware said that he brought this problem to his boss' (Wergin) attention months before he was made aware of the new AUP in January 2002. Boulware said that he told Wergin that techs do any number of things to perform their jobs that technically violated the AUP. Boulware stated that after getting verbal assurances from Wergin that there was no problem, he signed the AUP on January 7, 2002.[128] Boulware said that he explained his views of the policy at some length to the meeting participants.

At the hearing, Boulware, however, acknowledged receiving an e-mail from Wergin to the coaches on January 22, 2002, reminding the tech teams in very strong language that the techs had signed a document clearly stating anything on their computers would have to be "corporate standard" and that games and other inappropriate "stuff" should not be on their computers. The e-mail warned that violations would be punished by final warnings or termination based on Wergin's earlier warning on the subject on May 24, 2001.

Boulware said that the PIP was not mentioned at the March 20 meeting, nor was there any mention of his being disciplined because of e-mail forwarding.

Boulware claimed that Frontier's supervisors had, on occasions themselves, violated the AUP, but with little or no consequence to his knowledge. Boulware stated that shortly after he started at the help desk, Jericho made available to the techs a program called Secure CRS which allowed the user to communicate with a server to perform certain network functions; e.g.,

[124] Boulware identified GC Exh. 25, which appears to be a series of anonymous messages covering dates from October 20–December 27, 2001, and January 2–February 8, 2002, as part of the contents of the employees' message board.

[125] Boulware recalled that the CWA website appeared on the message board http//www.CWA–Union.org and that he visited the site to verify that it was that Union's web page.

[126] Boulware stated that prior to this meeting, he asked management whether he could have a CWA representative. He was told he could not. He also noted that at the time of this meeting, the CWA organizing drive was ongoing; authorization cards had been distributed and collected, buttons and shirts were being worn in the workplace, and meetings were being held every week.

[127] Boulware identified GC Exh. 26 as the message board information he sent to the group on March 7, 2002, and which was the subject of the meeting.

[128] See R. Frontier Exh. 8.

testing computer connectivity. According to Boulware, Jericho also provided them with another program that would allow them to avoid the registration requirement that would permit authorized (licensed) use of Secure CRS. Boulware said that, in his mind, Jericho's use of unauthorized computer software violated the AUP. Boulware also stated that Bakari violated the AUP when he played "pirated" movies on the Company's computer screens in the "war room" area of the center. However, according to Boulware, Bakari's boss, Wergin, permitted Bakari to do this as long as he did so in the evening.

Boulware said that regarding the e-mail forwarding issue, Frontier's managers allowed him to forward work-related items home. He identified a DSL escalation form that he created for use by the techs on the floor as an example of an item he e-mailed to his home, worked on it there, and then sent it back to work with the knowledge and approval of supervisor Andy Crane and Jericho.[129] Boulware said that former coach Jeff Brown told him he had forwarded his e-mail home, but Boulware could provide no dates for this.[130]

Boulware said that at the March 20 meeting he admitted that he could see the Company's point of view regarding the forwarding of the messages to the Yahoo Groups and apologized for violating the policy because he was trying to save his job. Boulware stated that he may have said as a consequence, "it was my major fault here." Boulware noted that at the end of the meeting he was terminated.

The Respondent called several management witnesses to rebut the claim that Boulware was unlawfully terminated.

Gregg Wergin, the help-desk manager, testified about the Company's Acceptable Use Policy. Wergin said that first, the AUP is of such importance that all coaches and employees at the call center are made aware of it, asked to read it and understand it, and then sign a document indicating that they indeed had these understandings. Additionally, all employees are provided with the document as part of their initial training. Wergin viewed adherence to the policy as very important and considered the AUP the law of the call center, a point he said he had made clear to all of the techs.

Wergin said that at least as early as June 5, 2001, he sent a security awareness letter to the techs outlining his concerns about techs installing unauthorized operating systems on their company computers. According to Wergin, installing unlicensed software, instant messages, or any software used for chatting without authorization, misusing the Company's messaging (e-mail) system, playing games, shopping by computer, or visiting inappropriate sites exposes the Company to large fines or other liability. Wergin said that the message he tried to convey was that the network system was to be used for Frontier business only and that misuse compromised network security; that violations could result in discipline, including termination. Wergin stated that employees were required to sign AUP forms as early as 2001, based on these concerns and his notices.[131]

Wergin also noted that Frontier's employee handbook[132] expressly deals with use of company e-mail, Internet access, and the Company's intranet. Wergin specifically referred to the following provisions of the handbook at pages 26–27 to underscore his concern about compliance with the AUP:

> 3. Inappropriate Use
>
> Inappropriate use of email, internet access and intranet access by employees is prohibited. Examples of such use include but are not limited to:
>
> b. Transmitting internet bulletin boards, chat rooms, and other public forums, individuals, business or organizations that are not affiliated with the Company information from or about Citizens Communications that is sensitive, confidential, restricted, proprietary or that has not been made available to the public.
>
> 4. Copying Information
>
> Distribution of any Company information through the internet or intranet, email and messages systems, bulletin board systems, public or private newsgroups or other means is strictly prohibited unless authorized by an appropriate official of Citizens Communications. Without prior approval, employees are not authorized to contribute or post material to or through the internet under Citizens Communications' name and may not use Citizens Communications' facilities for these purposes.[133]

Wergin could not recall having a specific conversation prior to March 2002, with Boulware about the AUP. Rather, he communicated with techs as a group via e-mail and instructed

[129] See GC Exh. 13, an exhibit, "bitzer's 1337 DSL Escalation form."

[130] Alan Shepard testified and claimed to have on many occasions forwarded work and nonwork-related e-mails to his home from work. In the fall of 2001, in a casual conversation with a coach, Eric Saxe, Shepard said that Saxe did not seem to have any problem with e-mail forwarding and seemed neutral on the matter. Shepard conceded that no one from management, including Saxe, actually permitted the forwarding of e-mails and there was no company policy that would permit forwarding. He admitted that company policy actually prohibited sending information obtained at work beyond the fire wall. Shepard said, however, e-mail forwarding was a common practice at Frontier and that to his knowledge, only Boulware and another employee, Kevin Justice, were disciplined for the infraction. Notably, Saxe testified at the hearing and said that he could not recall any employee telling him of their forwarding e-mails to their home to work on company matters there.

[131] See R. Frontier Exh. 14, an e-mail to call center employees dated June 5, 2001, advising them that several employees were not following the AUP and advising that a copy of the policy had been delivered to their desks, and was also available online. The exhibit also included a security awareness article dated August 6, 2001, from what appears to be Frontier's newsletter. The article outlines a number of impermissible uses of the Company's computer network. Wergin notes that this security awareness article or its contents were issued on June 5, 2001.

[132] See R. Exh. 15, a copy of the handbook Wergin said was in use at Frontier since January 2000. According to Wergin, the handbook is revised and updated occasionally but remained in effect for the years 2000 through 2002. Wergin could not definitely say it was distributed in hard copy to all employees but that it was available online on the Company's internal network. He could not say with certainty whether all employees signed the acknowledgment form on the last page of the handbook.

[133] These provisions of the handbook are in accord generally with part II of the AUP that Boulware signed in January 2002. Neither the handbook nor the AUP are alleged as unlawful.

them to follow it "exactly;" no one was permitted not to follow the AUP.

Turning to events leading to Boulware's discharge. Wergin identified the documents that were shoved under his door by an unknown person on March 7 or 8, 2002,[134] which said:

> Gregg, this was done on company time and was taken off the message board and posted to Yahoo Groups which then is forwarded to the CWA and other techs that have signed up. Doesn't this violate company policy.

Wergin noted that the address portion of the document clearly identified that Boulware had sent it to a website, frontier_union@yahoogroups.com, on March 7, 2002, at 7:14 p.m., and the contents of the document originated from the Company's internal message board.[135] Wergin said that once he saw the documents, he went to the message board site and personally viewed the comments. Later, he showed the document to corporate security and Jericho, Boulware's coach. Wergin said he also later spoke with Boulware about the matter with specific reference to the AUP. However, Wergin said that he did not attend Boulware's termination meeting.

Jericho testified about Boulware's termination and other matters regarding his employment at Frontier.

Jericho said that she knew Boulware as one of the first hired help-desk employees; and she trained him personally. He reported to her for about 1-1/2 months of his total time with the Company.

Jericho said that in February 2002, Canova, Christian, and Wergin decided to have the techs report to one coach to deal with extensive problems surrounding the techs' availability and calls per hour statistics. Jericho said she selected herself to be one of these coaches. Her job was basically to whip the techs into shape. She became Boulware's coach after this fashion.

Jericho said, however, that she knew that Boulware had had job performance problems, especially when he reported to coach Jennifer Fioc, who advised her that Boulware's credibility was at issue because he stretched the truth regarding his whereabouts and performance during the workday.[136]

Because of his problems, Boulware was placed on a PIP in February 2002 because of his poor availability and calls per hour statistics.[137] Jericho admitted that during the time she coached Boulware his performance improved quite substantially.

Jericho also addressed the issue of the Company's alleged permissive use of unauthorized software at the call center.

Jericho said that she was familiar with Secure CRS, a software program one could use remotely to connect with a computer or another server; for example, a home computer. Jericho said that right before Boulware was terminated he approached her and said, "out of the blue," that he was extremely concerned about the Company's using unauthorized or illegal software at the center. Boulware mentioned specifically the Company's possible unlicensed use of Secure CRS.

Jericho said she explained to him that Frontier had applied for a license to use Secure CRS and had gotten approval from Frontier's information technology department through Christian to make the purchase for around $22,000. However, later the Company cancelled the order because one of the Company's programmers (John Morrisey) advised her of downloadable and free programs equal to Secure CRS available on the Internet for use without a license. Jericho said that based on this, the Secure CRS order was cancelled; the Company stopped using Secure CRS around the end of March or early April 2002.

Jericho said that she became aware of Boulware's forwarding his e-mail in early March 2002, by virtue of her discovery that he was e-mailing work-related tips to a help-desk mailing list (tech info) in the morning and early afternoon when he was not scheduled for work; Boulware's scheduled tour of duty was 4 p.m. to 12:30 a.m. According to Jericho, she advised him that such forwarding violated company policy and ordered him to remove the forwarding feature from his computer. According to Jericho, on about March 6, Boulware questioned her and demanded to know the specific policy prohibition. Jericho responded by sending him an e-mail that included the company policy and the appropriate company office (FTS Security) to answer additional questions he might have.[138] However, according to Jericho, Boulware did not remove the feature and, in further discussions with him, Boulware said others, including coach Jeff Brown, continued to forward their e-mail.[139]

Jericho said that because she felt that Boulware was not following her instructions, she drafted an employee conversation note on the forwarding issue on March 13.[140] Jericho says she

[134] Wergin identified R. Exh. 17 as the 16 pp. of comments taken from the Frontier message board. Wergin said that these pages were the entirety of the documents shoved under his door.

[135] Wergin noted that the message board was not part of roc.info, roc.lead, or roc.talk websites. Rather, the message board was established to allow the techs to make comments on and about the Company's web page and as such was part of the Company's link on the IHD support page.

[136] The Respondent called Jennifer Fioc, a coach who supervised Boulware from December 2000 through September 2001. Between February 18, 2001, and September 6, 2001, Fioc wrote Boulware up numerous times regarding his job performance, ultimately threatening him with termination if he did not improve. (See R. Frontier Exh. 31–37.) According to Fioc, Boulware's main problems were schedule adherence, availability, and not following instructions. It should be recalled that Boulware was put on the PIP by coach Jeff Brown, who succeeded Fioc as Boulware's supervisor.

[137] Jericho noted that other techs had been placed on PIPs because of similar performance issues. Jericho also stated that at the time she had no knowledge of CWA organizing activities, and that the PIP, in his view, had nothing to do with his support for the CWA or any union.

[138] Jericho identified R. Frontier Exh. 9 as the e-mail she sent to Boulware on March 6, 2002. Notably, in the "email string," Boulware states that he could not find a direct reference to the forwarding matter in the AUP. Jericho's response included a copy of the text of the policy that addressed his concern.

[139] Jericho recalled that Wergin at some point reprimanded Brown for forwarding e-mails because Brown told her that he had gotten in trouble for doing this.

[140] A conversation note is a document employed by Frontier's managers to express their concerns about an employee's performance. The conversation note is contained in R. Frontier Exh. 36 and is dated March 14, 2002. In this document, Jericho sets out her conversations with Boulware and the actions he had supposedly taken to eliminate the

wrote the note out of frustration with Boulware's apparent refusal to follow her instructions regarding the removal of the forwarding feature and to document what she viewed as his insubordination, as well as his violation of company policy. Jericho felt that Boulware was also telling her a "made up bunch of stories" when he really was not sincerely taking care of the problem. Jericho said that Boulware sent her the e-mail on March 14, indicating that he had resolved the problem itself about 2 hours after she had the last discussion with him.

Turning to Boulware's violation of the AUP on March 7. Jericho said that Wergin gave her a copy of the e-mails (along with the interoffice envelope) that Boulware had sent to an outside website, advising her that it had been pushed under his office door; Wergin asked her to investigate the matter. Jericho said she was familiar with the contents, that the e-mail messages were copied and posted from the internal message board and were evidently sent to the Frontier Union's Yahoo website by Boulware on March 7, 2002.

Jericho stated that Wergin instructed her to consult with the Company's human resources department; she spoke with Edington about her concerns on the telephone.

According to Jericho, her conversation with Edington was very lengthy (about an hour) because he was unfamiliar with some of the technical (language and concepts) aspects of the documents taken from the message board and could not understand why Boulware was sending internal documents beyond the corporate fire wall. While on the telephone with Edington, she directed him to Boulware's own website (as it appeared on the documents), Ron[Bo]ulware<bitzer@frontiernet.net, so that he could see for himself some of the information Boulware was disseminating from the call center. Jericho also directed Edington to another of Boulware's websites.[141] Jericho said she explained to Edington that these websites provided possible reasons why Boulware might have sent the message board contents beyond the fire wall. She also related to Edington some of the disciplinary problems Boulware was experiencing.

Jericho stated that while she was speaking to Edington, Boulware appeared at her cubicle and probably overheard her conversation but that her back was to him. In any event, a meeting was convened with Boulware by management to discuss the forwarding of the messages.

Jericho stated that Boulware, Richard Harvey (director of the Network Operations Center, NOC), Edington, and she met on March 20. Jericho said that she (and Harvey) asked Boulware if he wanted a union steward to be present. Boulware said that he wanted a CWA representative. Jericho said she refused this request, telling Boulware that the RTWA was his union representative.

According to Jericho, Boulware was asked if he knew why he was called to the meeting. Boulware responded that the meeting possibly related to his having some unauthorized software on his computer. Jericho said that after about a 15-minute discussion, Boulware was told this was not the reason.[142] Boulware then raised the e-mail forwarding matter and spent 15 to 20 minutes explaining his side of the matter, with Jericho interceding to present her version. Jericho said that Boulware was then told that e-mail forwarding was not the reason for the meeting.

At that juncture, Boulware was told that the meeting was called because he took proprietary internal documentation and posted it outside of the corporate firewall on March 7, 2002. According to Jericho, Harvey explained to Boulware the seriousness of sending matter such as a customer user's name, one of Frontier's proprietary databases, or any type of proprietary internal document outside of the Company, that such action posed a serious threat to the security of the (network) infrastructure.[143]

According to Jericho, Boulware was extremely apologetic and said he did not realize what he was doing, that he was asked to send the materials by someone whose identity he did not disclose.

Jericho said the decision to terminate Boulware was made not simply for one reason, but encompassed a number of problems with him over his tenure with the Company. This latest incident, according to Jericho, was the straw that broke the camel's back. However, factored into the decision was the e-mail forwarding matter and Boulware's failure to follow instructions of coaches (Fioc) as well as herself, which she viewed as insubordination.[144]

Mazi Bakari testified that he played movies on call center equipment very early on in his employment, around 2001. The movies included a martial arts movie and others whose titles he could not recall, which he viewed on the Company's big screen television monitor. Bakari said he told Wergin that he was viewing the movies and was told to stop. According to Bakari, he played the movies only for about 2 weeks.

Bakari stated he never discussed playing movies with Boulware and that the movies he played were not pirated but were

forwarding feature. Jericho notes that her investigation disclosed that while Boulware had represented to her that he had provided three "trouble tickets" to FTS security to resolve the matter, only one actually related to e-mail issues and that this ticket had only been initiated after her follow-up conversation with him on March 14. The last page of this exhibit contains the ticket number Boulware says he submitted to resolve the problem. Only the last ticket, 660722, actually related to the forwarding.

[141] Jericho stated that another document had been dropped off at her desk with an instruction, "Take a look at this particular website," that was also owned by Boulware. Jericho did not provide a specific web address to this site.

[142] Jericho identified GC Exh. 29 as an e-mail Boulware sent to Bakari on February 11, 2002, in which he expressed concern about certain software installed on his computer. Jericho says Bakari asked her about the software and she told him that Boulware required the various software programs to do his job as a lead tech and permitted the use.

[143] Harvey did not testify at the hearing. The documents that Boulware sent to the Yahoo Groups included a specific user name of an existing Frontier Internet customer user's name, as well as one of the Frontier databases by name in a March 6, 2000 message. I have not included the names of either in the interest of customer privacy and Frontier's business confidentiality. (See GC Exh. 26, p. 1.)

[144] Frontier's counsel at the hearing stipulated that Boulware's sending the message board contents beyond the fire wall was the *principal* reason for his discharge. Counsel also volunteered that if Boulware had not done this, in spite of his other transgressions and problems, Boulware, in all likelihood, would not have been fired.

available commercially. Bakari denied showing the movie "Lord of the Rings," because he did not care for it. However, Bakari said that Boulware downloaded the movie evidently at home and brought it in to work to show everyone he had it before it was released to general audiences.

Discussion and Conclusions

There is no serious dispute that the Respondent allowed its employees, managers, and techs to post comments on its intranet (internal) message board, the contents of which, it seems, were erased periodically by the Company because of space limitations. It seems equally clear that the message board was linked to the help desk's home page; that discussions covered any number of topics, not all work-related; that employees, managers, and techs could elect to post their messages anonymously; and that the site was not password protected.

While the internal message board was originally designed by managers to garner feedback and suggestions from the help-desk techs and managers regarding the techs' support page, it is clear that management knew and permitted other types of messages from the participants, so they could "blow off steam" for example. According to Frontier's managers, some of the message contents were even inappropriate in the Company's view, and some messages were known by management to be union-related.[145] Thus, for all practical respects, it seems that the IHD message board functioned as a high-tech bulletin board.

As a preliminary matter, it is important to note early on in this discussion the actions for which Boulware was not fired.

First, he was not fired for simply posting any messages on the internal message board. Second, he was not fired for spamming or threatening to spam any employees or managers.[146] The Respondent contends that Boulware was fired principally for sending the contents of its proprietary internal message board beyond the fire wall it erected to protect itself against unwanted information from without and improper disclosures from within in contravention of the AUP.

The General Counsel argues that Boulware was first terminated because of his union activities and because he engaged in protected activities including sending union-related messages and discussions among the techs to an outside website, which happened to be one connected to the CWA and its organizing effort.

As noted previously, the General Counsel must establish the initial requirements of *Wright Line*. Regarding the Respondent's knowledge of Boulware's union activities or involvement with the CWA, it is very evident that prior to his discharge, Jericho knew firsthand of Boulware's CWA support and the website that he had established towards that end. Second, the 16-page document sent by Boulware, allegedly offensive to the AUP, specifically the e-mail header and subject (Frontier–Union) message board as well as the messages contained therein, points to Boulware's connection to his union activities and support. Third, the note prompting Wergin's investigation expressly mentioned that the message board contents in question were posted to Boulware's Yahoo Groups site and then forwarded to the CWA and other techs. Wergin acted on this information, considering it a possible violation of the AUP. Clearly, the Respondent knew both indirectly and directly that Boulware was engaging in union-related activities, and specifically activities on behalf of the CWA. Thus, in my view, the General Counsel clearly established that Frontier knew of Boulware's union activities. At the same time, the General Counsel established clearly a connection between Boulware's union activities and his discharge.[147]

The question next becomes whether Boulware was engaging in statutorily protected activities when he sent the contents of the message board beyond the fire wall to another website, considering that he himself was only a limited participant in the specific forwarded message and was essentially merely reporting "here is what's on the message board now."

The General Counsel asserts that the message board and the Yahoo Groups site both were used by a number of the techs for union organizing and to discuss their terms and conditions of employment. She argues further that Boulware sent the message board contents to a Board agent to assist in the Board's investigation of the matter which, in fact, led to the charges here.

An examination of the messages Boulware forwarded reveals discussions, rather than comments, from participants about a number of topics, including the temperature of the tech working area, problems with the network, gripes about people spending too much time writing messages on the message board, books and movies, criticism of the techs' promotional test, and the quality of communications between the leads and the techs.[148] The messages also included rather extensive discussions about unions.

Regarding the union-related discussions, the following (sometimes excerpted) comments are illustrative.

[145] The internal message board was not part of other interactive sites such as roc.info, roc.lead, or roc.talk. In fact, roc.talk was shut down by the Company in June 2002, because Wergin felt it was being abused by the participants.

[146] This latter point relating to spam occupied much discussion in the hearing, and its relevance to Boulware's termination was and is unclear to me. Spam, of course, is basically unsolicited and often unwanted e-mail; it has nothing to do with the food product from which the e-mail derives its name. In any event, depending on one's point of view, spam is either a good or bad thing that came about with creation and growth of the Internet. Presently, several states (e.g., Virginia) and the Congress of the United States have taken or are taking steps to control or eliminate the negative aspects of spamming. One may recall that Boulware spoke of excessively spamming RTWA President Rodgers in the series of messages involving Carmer on March 13. However, Boulware had already been terminated by March 27, when, in my view, his spam comments first came to light.

[147] The General Counsel argues that the Respondent know of Boulware's union (CWA) activities early on in the CWA's organizing program, perhaps as early as January 2002. However, Boulware and CWA organizer Don DePerma and other techs involved in the organizing effort acknowledged that at the outset their plan was to keep the matter secret or beneath Frontier's radar. Frontier's managers denied knowledge of the CWA drive activities until some time after the accretion. Therefore, I do not find that Frontier knew of the CWA campaign in January 2002, or at any time before the accretion.

[148] It would appear that Boulware made one cryptic remark on February 26, 2002. See GC Exh. 26 at p. 6.

A participant calling himself "Jim Hoffa" wrote the following comments on March 2, 2002.

> Well spoken Joseph. I am one of those people who is actively involved with the CWA movement, and I can tell you that from where I sit, I see this thing reaching a dangerous boiling point. Whether you are for CWA, RTWA, or no union at all, nobody, and I do mean nobody, has the right to act in an unethical, unprofessional manner in the workplace. I myself might have been as guilty of this as the next person, but it's going to end now. I can't speak for our Management team or those above them, but as far as everyone on the floor is concerned, let's do our best to keep our composure, and keep a professional attitude while in the workplace. No one, regardless of how deep their involvement in the union movement is, has the right to be derogatory toward co-workers, management, fellow techs, or company property. We STILL have a job to do. Bitterness and resentment have no business walking through the front door with you when you come to work. We didn't start this process to seek retribution, we didn't do it because we wanted less work and more money, and we didn't do it because we wanted the freedom to do and say whatever the hell we please without the threat of being fired. We did it because there were people here being treated unfairly, people who weren't getting recognition where some was deserved, and because of the tremendous amount of stress and pressure being created that simply wasn't necessary. You don't help your own cause by creating friction points within the workplace. So continue to do your job, follow the rules, and be respectful to you [sic] fellow man. [R. Frontier Exh. 17, pp. 2–3.]

"Jim Hoffa" was responding to the following comment by another participant, Joe Rounsville, on March 2, 2002.

> The tension in this desk is high enough without inflammatory comments like the one below. It is one thing to be passionate about your stand but quite another to rant without being aware of the facts. I was called into the conference room along with others for a frank, informational meeting with Greg. There were no union reps and there was no "sales pitch" from any union. Only Greg telling us exactly where things stand at this moment. Statements like the one below are doing nothing more than attempting to stir paranoia, resentment and hostility. This is more apt to drive me away from your stand. Let's keep this civil so that the techs may make the best choice possible when the time comes without undue influence one way or another. [R. Frontier Exh. 17, p. 3.]

An anonymous participant made the following comment on March 1, 2002.

> why are union reps in the breakroom? regardless, why is it a one sided solicitation? shouldn't both sides of an argument be represented?

Another anonymous participant made the following (undated) comment.

> nothing covert about the techs decision to organize, matter of fact everyone knew this was coming. ill [sic] have to agree with the fact that no you dont [sic] have a choice as to being in a union now, but in light of the overwhelming response to unionization, management had to try and stop us, on another note, with the union desired by the majority of us on the floor (and i say that with extreme confidence) you do have a voice. when we hammer out a contract you can have your say when we decide what issues we want our contract to cover. with the union forced on us rtwa we will see no change for 1 year, i find this unacceptable. besides the techs decision to attempt to unionize was completely legal, the methods used to prevent or deter us from accomplishing this task may not be. i cant [sic] say that the law was broken here but i do believe it to be unethical. i say this wont just go away. Another fun week wont [sic] distract us, nor will promises of fair an[d] honest representation of an appointed UNION. [R. Frontier Exh. 17, p. 4.]

On February 28, 2002, an anonymous commentator wrote:

> Anyone else feel like this whole union business took an entirely unwelcome turn. I didn't think I wanted one in the first place, then suddenly I have no choice. Personally, I feel like I'm the individual best suited to represent my needs and wants at my job. However, I wasn't even given the option to voice that opinion. I'm suddenly thrust in a position where I have to accept the unsatisfactory situation that I've been assigned a union, when I never really wanted one in the first place. Now I have to either lay down and accept the fact or fight for an alternate union, as it's the only other choice I've been presented with. I think some frank, open discussion with all parties involved could lead to a better situation. The sneaky, covert nature displayed by both management and the techs has made everyone suspicious of each other. It may be too late, but I think we need to get this out in the open and deal with it head on.

An employee, Kevin Justice, wrote the following on February 14, 2002 (excerpted), at page 9 of Respondent Frontier Exh. 17.

> Is it me or did the union not protect the Enron employee's who were union employee's:
>
> The most poignant aspect of Enron's failure is the damage to its own employees. "People have had their total savings disappear," says William Miller, business manager of the International Brotherhood of Electrical Workers union local In Portland, Ore. which represents employees of Enron's Portland General Electrical Co. subsidiary. "Some lives have been pretty well destroyed." Enron flew high, but when it fell, it fell hard.
>
> Enron since it was a power company did have Union employees.
>
> If a Company goes bankrupt as Enron or Global Crossing with or without a Union it does not Legally protect against a bankruptcy. Since a Union or its Employees are an unsecured debtors Collective Bargaining does not work in this situation.

A commenter calling him/herself "Switzerland" wrote (at pp. 12–13 of R. Frontier Exh. 17).

> The debate could go on forever about whether or not a Union would be good or bad for the people in this department. There are obvious drawbacks to Unions. Paying dues, dealing with union beaurocracy [sic], contract negotiations, strikes, etc. etc. There are also some advantages I'm sure, such as increased job security, better wages and benefits, and business practices that are more fair and honest are some of the obvious ones. I don't think that the nay sayers [sic] are wrong in their opinions about Unions in general, nor do I think that the people interested in learning more about them are wrong and should feel guilty for doing so. To generalize Union workers as being lazy and overpaid is ridiculous and ignorant. In fact, the entire post[ing] regarding the UAW sounded like something a 15 year old wrote for his high school newspaper. The fact is lazy people are lazy in or out of a union. In fact, if we put all of the employees in this department, and I do mean ALL, under a microscope to find the inefficiencies and inconsistencies, guess which ones would appear a lot like the ones mentioned in the UAW example? Right on. Also, union membership is not mandatory. It's something you choose to do. If Union isn't for you, you also have the right to find employment elsewhere. The bottom line here is free will. Nobody wants to go looking for a job if they don't have to, especially when they already have one that pays them a fair wage, has good benefits, and a fair shot at advancement. So if a Union is the answer to gray hair, ulcers, and frothing at the mouth, I say let's see what they have to say God bless America!

This message was based on the February 5, 2002 extensive commentary on unions written by an anonymous person, with particular emphasis on the UAW.

> For a bit of history, labor unions were formed in response to corporations taking advantage of the workers. For the first part of the 20th century, this was quite true. Many of the large businesses paid the workers extremely low salaries and made them work long hours with no overtime. They did this because they could. There were no labor laws that prevented them from doing these things.
>
> However, things have changed. We now have labor laws that require employers to have safe working environments, pay overtime for any work over 40 hours a week, and we even have minimum wage laws! So, why are unions needed? So the workers can get away with poor work results, low efficiency, and general laziness that would get any other employee fired on the spot.
>
> My favorite union to hate is the UAW (United Auto Workers) union. Now these guys are a bunch of losers.
>
> In general, unions are always against the "big bad corporation" and all of those "evil rich people" trying to take advantage of you. They are always complaining about other countries importing their products. Well, people buy the imported products because they are cheaper and better. If the union workers would get off their collective butts and start doing some real work, they might be able to compete. But, instead, they choose to have strikes and complain to the government.
>
> Unions are just corrupt organizations that do very little for the average worker and kill the company's ability to effectively compete internationally. Unions were useful 80 years ago when they helped develop our currently labor laws, but in our modern day of a worldwide economy, they only hamper our country's competitive edge. Unions should be outlawed. My general stance on labor and employment is that if you don't like your job, or you don't like the working conditions, QUIT! "But it's the only job in town". Well, get off your lazy butt and move. There are areas of the country that are starving for people to fill their open positions. If you moved to where the demand is, you could make twice as much and actually enjoy your job. If you don't want to move, start your own business. [R. Frontier Exh. 26 at p. 16.]

Based on these illustrative messages, the General Counsel argues that the message board was clearly used in part by the employees, with the Company's permission and knowledge, to disseminate their views about unions and the possibility of organizing the help desk.[149]

I would agree with the General Counsel on this point. Accordingly, I would find and conclude that the tech participants, including Boulware, used Frontier's internal message board to discuss workplace conditions as well as unionization, and that the Company knew that the message board was being used in this fashion and allowed it.

Thus, in my view, Boulware and his coworkers were engaging both in union-related activities and protected concerted activities, and the message board served as the instrumentality for giving vent to these activities.[150] *Time Keeping Systems, Inc.*, 323 NLRB 244 (1997). The question remains whether Boulware's forwarding of the message board contents to the Yahoo Group's website can be construed as an act in furtherance or support of activities deemed by me to be protected.

The General Counsel submits that Boulware's Yahoo website was a medium of communication like the message board; Boulware established his site to facilitate an open communication of Frontier's employee's views and opinions on unions and job conditions. Implicit in her argument is the notion that Boulware merely viewed and copied the contents of the internal message board, a permissible act, and distributed these com-

[149] It is clear that Wergin knew that the message board was being used for discussion of unions and, in fact, scheduled a meeting for his managers of the help desk on February 6, 2002, to discuss unions and union-related issues as well as management's role in this environment. Cliff Edington also admitted that human resources knew about general comments and opinions about the Union on the message board in early February 2002. In fact, Jericho and Andy Cramer (a supervisor) made comments on the message board.

[150] While Boulware testified that he sent the message board contents to a Board agent investigating the CWA charges, Jericho testified that he did not mention this reason in the termination interview. This matter is serious because if Boulware was terminated for providing evidence to the Board, a violation of Sec. 8(a)(1) could be found. However, this was not charged in the complaint and no evidence, short of Boulware's uncorroborated testimony, was adduced to establish this point; nor was there a request to amend the complaint to include this as a charge. Accordingly, I have not credited Boulware's testimony in this regard.

ments to another bulletin board for the information and edification of other Frontier employees. The General Counsel likens the message board and Boulware's website to electronic forums for group meetings between employees. The clear thrust of her argument is, nowadays, the Internet and other modern communication modalities make physical gatherings of employees unnecessary. Employees can gather and speak to one another online and do not have to view and retrieve messages and notices physically from the old-fashioned bulletin board.

It occurs to me that since Frontier permitted its employees to use the message board to discuss practically anything among themselves, and even allowed managers to contribute to the discussion, this is in practical effect no different in purpose and form from the types of group meetings that Frontier convened to serve other business-related needs. For instance, when the accretion took place, Frontier convened meetings with the techs and explained to them the ramifications of RTWA representation and entertained comments and questions from the employees. Certainly, if the attending employees passed along this information given at and gathered from these meetings—and it is a good bet this actually happened—Frontier could not be heard to complain about the dissemination of this information. This was the purpose of the meeting. Similarly, Boulware participated in the permissible discussions of the techs and then electronically passed the discussions along to another group of employees. Thus, I would agree with the General Counsel and conclude that Boulware's forwarding of the message board contents to the Yahoo Groups was a material part and in furtherance of concerted activity on his part to advise or inform other fellow employees about the concerns, thoughts, and opinions of other techs regarding unions and union organizing and the terms and conditions of employment for the techs. Therefore, I would find and conclude that his forwarding of the message board was protected under the Act.[151]

Turning to the animus element, the General Counsel submits that Frontier did not like CWA and, because Boulware was a major supporter of that Union, the Company fired him pretextually for forwarding the message board's contents to his Yahoo site.

The General Counsel points to a statement allegedly made by Bakari to help-desk tech Richard Carno before the accretion, around Valentine's Day 2002, as proof of Frontier's animus for the CWA. According to Carno, Bakari said, "What's going on with the CWA, you guys are going to price yourselves out of a job." Former employee Maier also related a conversation between Bakari and Costa she more or less walked in on during the late summer of 2001, wherein Bakari said that Wergin could handle the RTWA but the CWA was another matter, that Wergin would just [defecate] (if the Union came in).[152] Costa, himself, testified about his conversation with Bakari in late summer 2001 in which Bakari and Wergin said that the Company was not afraid of dealing with the RTWA because they had no real power and Frontier's chief concern was for larger unions. Costa could not recall whether the CWA was mentioned by himself or Bakari, but that "we both seemed to be talking about the same Union—CWA." Costa could not recall anyone else being present, but claimed that the conversation took place in or around his cubicle. He specifically had no recollection of Maier's being present at the time.

Maier also testified that during a conversation with her coach, Jeff Brown, at Tully's bar on the occasion of his imminent (his last day at work) departure from Frontier around the end of March 2002, Brown said he was absolutely against unions and that he knew someone in management who said that the help desk would not be here by the end of the year if the CWA came in.

The General Counsel also submits that Frontier's animus is indirectly demonstrated by the timing between Boulware's discharge and its discovery of his connection to the CWA mission statement site. She argues that in spite of Wergin's claim that he discovered Boulware's apparent breach of the AUP on March 8, he was not terminated until March 20, about a week after Jericho was observed viewing his CWA site and in spite of Boulware's having received his annual performance evaluation which did not mention any policy violations. She contends that Frontier pretextually seized upon Boulware's forwarding of the message board comments after it became apparent that the CWA campaign was gaining momentum and that Boulware was a leading supporter of the CWA cause.

The General Counsel also contends that Frontier's reasons for terminating Boulware shifted from "there isn't one reason" for terminating him to the forwarding of the message board contents as the principal—or straw that broke the camel's back—reason for firing him, coupled with his insubordination regarding the e-mail forwarding matter. The General Counsel submits these shifting explanations for Boulware's termination further supply the animus required to establish an unlawful discharge under *Wright Line*.

Regarding the animus issue, I would find and conclude that, based on the timing between Boulware's discharge and the Respondent's discovery of the CWA mission statement on Boulware's website, the requisite animus for purposes of the *Wright Line* test exists. In my view, the discovery by the Respondent of the CWA site is significant because by March 14, the RTWA accretion had been accomplished. However, at the same time the CWA campaign was moving full throttle in spite of the Respondent's recognition of the RTWA.

As set out earlier in the decision, Frontier made a deliberate decision to recognize the RTWA for the reasons already dis-

[151] I am mindful that Frontier's security analyst, Joseph Aina, testified that the release of customer user's (identification) names beyond Frontier's fire wall may affect the Company's reputation for security of private information and could cause customer losses and possible lawsuits. However, in the messages forwarded by Boulware, there was only one user name mentioned. Weighing the rights of the employees against this singular breach, I would consider the security risk negligible.

[152] Maier said the conversation she overheard took place in the center of the techs' work area called the war room, that both Bakari and Costa were laughing, and Bakari said how powerful the CWA was, a national union with thousands of numbers. Maier said that she stayed to participate in the conversation for perhaps a minute. Bakari specifically denied having the conversation with Costa or making the statements attributed to him by either Costa or Maier.

cussed. By March 14, the die was not only cast but the Company had entered into an interim agreement with the RTWA to deal with the terms and conditions of the tech jobs, and clearly was moving toward settling the matter with a permanent agreement. In short, the Company had decided that the RTWA would represent the techs. However, in spite of this, the CWA campaign to represent the techs was in high gear and, as Frontier discovered on March 14, Boulware was evidently a leading adherent. As pointed out by the General Counsel, Wergin knew of Boulware's breach of the AUP and the CWA connection thereto on March 8; however, no direct action was taken between March 8 and 13, during which time Boulware received his annual performance evaluation which did not mention the AUP infraction. However, on March 14, Jericho discovered Boulware's connection to the CWA mission statement, and with that the AUP violation seemingly took on more importance. I would agree with the General Counsel that the timing between Frontier's discovery of Boulware's evident leading role in the CWA organizing effort and his discharge for violation of the AUP on March 20 suggests animus on the part of the Company to either his support of the CWA or his engaging in otherwise concerted protected activity.[153]

Accordingly, I would find that the General Counsel has met her initial burden under *Wright Line*.

1. The Respondent's defense to Boulware's discharge

Frontier essentially asserts that it terminated Boulware for legitimate, nondiscriminatory reasons unrelated to his union activities. The Respondent submits that Boulware's termination was basically a culmination of problems that he experienced throughout the time he was employed at the call center; that his admitted violation of the AUP was the straw that broke the camel's back.

The Respondent notes that Boulware received numerous employee conversation notes (disciplines) from his first coach (Fioc) and was warned by her of a possible termination if he did not shape up. Boulware's coach (Brown) was compelled to put him on a performance improvement plan, to which he was subject actually up to the time of his discharge. Further, although Boulware's last coach (Jericho) noted his improvement under her supervision, she nevertheless experienced problems with him regarding the e-mail forwarding issue, including ignoring her instructions, being insubordinate, and even lying to her. The Respondent submits that, ultimately, Jericho had to direct Boulware to remove the e-mail forwarding feature, which Boulware took 10 days to comply. The Respondent argues that the e-mail issue "illustrates" a twofold problem with Boulware—he not only repeatedly forwarded e-mail beyond the network fire wall in contravention of the AUP, but also lied to his coach about the steps he had taken to correct the problem.

The Respondent further submits that it is with this background in mind that Boulware's forwarding a portion of the message board beyond the Company's network fire wall, an act it labels not only a serious breach of the AUP, which Boulware signed and understood, but also an act of disloyalty. Boulware was responsible for maintaining the confidentiality of company information. He failed to do this and was appropriately discharged.

The Respondent contends that Boulware's union activities on behalf of the CWA were not implicated in its decision to terminate him, and notes that other techs supportive of the CWA, either by wearing buttons or signing the mission statement, remain employed with the Company.

The Respondent asserts that Boulware was not dealt with discriminatorily because there was no other employee who had his singularly poor work record.[154] On balance, the Respondent argues that it had more than sufficient grounds to terminate Boulware, but "principally" for sending the contents of the message board to his Yahoo site.

I am persuaded that Boulware, charitably, was a problematic employee. The Respondent presents a clear case of an employee who could have and should have been terminated for any number of reasons: repeated poor performance regarding availability and schedule adherence, not following instructions, insubordination, and even surliness over a fairly long period of time. He was even on the PIP when his coach, Jericho, felt that he lied to her about his handling of the forwarding issue. The Respondent, in spite of these rather serious infractions, however, elected not to discharge him. The Respondent admitted that it did not take action against him because it viewed him as talented and highly competent tech, which evidently more than made up for his surliness and insubordination.

Notably, in spite of all of his documented problems—and as will be explained later herein, the Respondent did not know by half the problems Boulware had created for them—the Company decided to fire him "principally" for what I have determined to be conduct protected under the Act.

It bears repeating that in the modern age of telecommunications, the old forms of employee interchange and exchange—breakroom meetings, casual meetings on smoke breaks, bulletin boards—may be going the way of buckboards and buggy whips. Today, it is the Internet, its mailing lists, and chat

[153] In finding animus based on timing, I have rejected the General Counsel's other claimed grounds in support of animus. First, I did not credit Costa's and Maier's testimony regarding Bakari's remarks. Moreover, even if Bakari did make the remarks, it seems he was expressing his opinion about what someone else said or thought about the CWA vis-a-vis RTWA. I cannot conclude that these hearsay remarks constituted legally sufficient evidence of animus by Frontier. Also, I have not credited Maier's testimony regarding comments allegedly made by Jeff Brown. In finding animus, it should be noted that the animus I speak to goes to Frontier's antipathy toward Boulware and his concerted activities. I do not find that Frontier had any specific animus against the CWA, a union with which it has a 30-year relationship.

[154] The General Counsel argues that the Respondent tolerated comparable behavior from other employees. For example, Shepard admitted he forwarded e-mail to his home computer with no consequence and even had obtained the permission of a coach, Eric Saxe. Boulware testified that coach Jeff Brown forwarded his (Brown's) e-mail; Jericho encouraged the alleged use of unlicensed software; and Bakari played pirated or bootleg copies of videos in the call center. I would agree with the Respondent that these alleged infractions by the employees in question to the extent it was proven they occurred—and that is debatable—are not comparable to the combination of proven problems Boulware had on the job and which were brought to management's attention.

rooms that are replacing the usual forms of employee get-togethers. Employees now may simply sit at their computers and screens and "assemble" to discuss matters of consequence about their jobs and unions.

Frontier, a premier modern telecommunications employer, is emblematic of this change in workplace dynamics. Accordingly, by design, it set up the message board and allowed, if not encouraged, the techs to engage in conversation, there were few restrictions imposed by the Company regarding the subject matter or contents that the techs could discuss.

Having established the internal message board to allow the techs fairly unrestricted expression on issues of importance to them and the Company, the Respondent, in my view, was not at liberty to take any action that would thwart or frustrate these employees in the exercise of their Section 7 rights.[155] Boulware, as a tech, was authorized to participate on the message board—he could post a comment or read comments of others. It follows then that if he or other employees chose to discuss their comments with others, but not utilizing Frontier's online facilities, the Respondent could not lawfully interfere with him or them. However, Boulware took the contents from the company message board, electronically disseminated them, and was discharged because his actions violated the AUP, on its face a valid and lawful exercise of management's prerogatives.

However, given the Respondent's role in setting up the message board for the largely unrestricted use of the techs, I believe that the AUP was unlawfully applied to Boulware. In short, by discharging Boulware "principally" for sending the protected message board messages to his website, the Respondent, in effect, discharged him unlawfully for engaging in union or other protected conduct. I would find and conclude that Boulware's discharge, given these facts and circumstances, was unlawful.

2. A postscript to the Boulware discharge

During the hearing of this matter, Frontier served a subpoena duces tecum on Boulware personally, requesting company documents believed to be in his possession. As a result, Frontier learned that Boulware had taken, by way of mail forwarding, about 22,000 pages of company records which included proprietary and confidential information such as customer internal account passwords, user names, and credit card information.

I personally examined some of these purloined documents and on the record indicated that the documentation included what I viewed as possible private and/or proprietary information. It also seemed clear to me then that in forwarding these proprietary records to his home computer, Boulware had violated the AUP. In point of fact, based on my observations of the records in question, limited as it was, I saw no records indicating protected activity. These seemingly were business records that Boulware, for reasons known only to him, saw fit to forward to his home computer.

The Respondent argues that Boulware's actions, which it candidly acknowledges were not discovered until the hearing, nonetheless, should disqualify him both for backpay remedies, from the date of discovery of what Frontier views as a theft of its property, and reinstatement.[156]

The Board in the case of unlawful discharge attempts to restore the affected worker to the status quo ante and pursuant to that objective employs its conventional remedies of reinstatement and backpay. However, in cases of serious misconduct rendering the employee unfit for employment, the Board will deny the remedies. The Board looks at the nature of the misconduct and denies reinstatement in those flagrant cases "in which the misconduct is violent or of such character as to render the employee unfit for further service." *C-Town*, 281 NLRB 458 (1986). Notably, the Board takes into account whether the misconduct was an "emotional reaction" to the employer's own unlawful discrimination against the employee. *Alto–Shaam, Inc.*, 307 NLRB 1466, 1467 (1992), citing *Blue Jeans Corp.*, 170 NLRB 1425 (1968); and *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965).

In the instant case, on the one hand Boulware engaged in serious misconduct in misappropriating a significant volume of Frontier's records. He also showed a callous disregard to the lawful restrictions placed on him as an employee under the AUP on the other. It seems that for whatever reasons, compliance with the Company's rules and regulations simply were not on his agenda. In my view, it would not only be inappropriate but unconscionable to return him to his former employment. He seemingly was incorrigible and his reinstatement could easily undermine the Company's effort to maintain order and discipline at the call center, especially through the AUP. Moreover, in taking the records, he exhibited disloyalty to the Company and subjected it to possible loss of customers and lawsuits. If Frontier had discovered his actions prior to discharging him on March 20, for sending the contents of the message board beyond the network security wall, it seems clear he would have been fired irrespective of his having engaged in protected activity. I believe that Frontier has more than sufficiently met its burden of showing that its after-acquired knowledge of Boulware's actions would have warranted termination.

Accordingly, I will not recommend that Frontier be ordered to reinstate Boulware. I would recommend that the Respondent's liability for backpay be limited to that period of time between Boulware's discharge and the Respondent's discovery of his misconduct. *Aldworth Co.,* 338 NLRB 137 (2002); *Hadco Aluminum & Metal Corp.*, 331 NLRB 518, 520 (2000); *Marshall Durbin Poultry Co.*, 310 NLRB 68 (1993); and *John Cuneo, Inc.*, 298 NLRB 856 (1990).

[155] In my view, the internal message board, for all intents and purposes, was like a company bulletin board on which employees post notices of news or events. The electronic message board also is analogous in function to a place where employees gather on company property and discuss various and sundry matters, a place(s) like the breakroom, the cafeteria, the parking lot, or the water cooler.

[156] In its brief, the Charging Party, evidently recognizing the seriousness of this after-acquired information, indicated that Boulware would (and does) waive his right to reinstatement. However, the Charging Party requests that Boulware be awarded full backpay and that an appropriate notice be posted. Boulware did not submit a verified and sworn statement waiving his statutory rights. Accordingly, I cannot find that he waived these rights knowingly, intelligently, and voluntarily.

b. David Carmer

David Carmer testified that he began his employment with Frontier in February 2001. Carmer said he became aware of the CWA organizing campaign in February 2002, and decided to join the effort.

Carmer stated that he demonstrated his support for the CWA during a period covering March 13–26, 2002, by wearing CWA buttons to work every day, signing onto Boulware's online CWA mission statement, and distributing authorization cards.

Carmer said that he was given access to the frontier_union@yahoogroups.com by Boulware and claimed that he made comments on the site.[157] Carmer said his only worksite union activity was wearing buttons and that he wore the buttons in conversations with his supervisors, Wergin, Jericho, and Brown.

Carmer admitted that he participated in a series of e-mail conversations around March 13, 2002, with members of the frontier_union@yahoogroups.com; however, he sent his response from his home computer and did not use Frontier equipment. Carmer explained that he was actually having a conversation on March 13, with Boulware and Albright whose user names were "bitzer" and "Lucifer prime," respectively; Carmer said his user name was "cave man."

According to Carmer, Albright was writing about his experience dealing with an irate customer who had demanded to speak with a supervisor about a problem she was having with her computer, the customer was not receiving satisfaction from another tech who had attempted to resolve the problem. Albright was complaining that Bakari would not accept the call from the customer, whom he (Albright) was having much difficulty pacifying. Ultimately, the customer, herself, called Bakari and complained about the service she received from Albright. Albright was later called in and reprimanded by Bakari for telling the customer that he could no longer deal with her problem because he (Albright) had a quota to meet. Albright felt that the supervisors were not doing their jobs, were passing the buck, and were not supporting the techs to the detriment of the customer, the techs, and the Company as a whole.

Carmer said that he and Boulware responded to Albright's comments with a series of messages. On March 13, Carmer replied first as follows:

> "David Carmer"<caveman@f…> wrote:
> To all
>
> He was written up and put on probation for this, After spending Hr with this customer. Who's problem was herself and her computer. He did everything he could to help her, and got it shoved up his ass. On the word of a customer, who was lame to begin with. This is outrageous.

Carmer said that Boulware responded as follows to his message on March 13, at 12:31 p.m.

> I say we fucking spam marie rodgers with bitch-fest style emails about this whole sorted cherade. she should soon regret "absorbing" such a pissed off group of people who have the means to cripple mail servers.
>
> *cackles with insane glee*
>
> --rb

Carmer then responded as follows on March 13, at 7:11 p.m.

> Cripple Email, , Hell we could bring down the Corp network, and the ISP if we all put our minds to it . . . . HEHEHEHE, I got this Linux trojan that, , , , ,

Carmer also admitted that he authored another comment to the Yahoo Groups 2 minutes later on March 13, at 7:13 p.m.

> Well hey, the corp network runs like shit any way, if we took it down it would probably be a improvement, , , , HAHAHAHA[158]

Carmer said on March 26, while at work, Wergin asked to see him in his office. Upon arrival at Wergin's office, he met with Wergin and Frontier's head of corporate security, William (Billy) Barnes.

At the meeting,[159] Carmer said he was asked about the March 13 e-mails and he admitted that he had sent them but they were merely meant to be jokes as indicated by the laughter language contained in the messages; that Boulware and he were joking with each other and just blowing off steam.[160]

Carmer said he asked Barnes where he had obtained the e-mails; Barnes said he did not know. Carmer said that Wergin told him that he posed a threat to the corporate network and corporate security. At the end of the meeting, Carmer said he was terminated.

According to Carmer, he had joked with managers, mainly Brown and Jericho, about the network "quite a bit," saying on those occasions that it would be doing the Company a favor if it were taken down, the Company would have to start over. On those occasions, everyone just laughed. Carmer said that he was not reprimanded for these "jokes" which he had made (before the offending e-mails were sent) during periods when the network was having substantial problems.[161] Carmer said that

[157] Carmer said he established another message online group, Tech support union @yahoogroups.com, about 3 days before he was terminated. Carmer said that he controlled access to this site and screened members, much in the same way as Boulware.

[158] The comments are contained in GC Exhs. 8 and 9.

[159] Carmer said he gave his consent to Wergin to tape record the meeting. Carmer also acknowledged that Barnes and Wergin told him he had a right to have a RTWA representative present at the meeting. He declined the offer.

[160] To underscore the joking nature of his remarks, Carmer said that with regard to "Linux Trojan," he does not believe that there is a Trojan, a virus introduced into a system disguised as something else, that would work in the Linux operating system, that he had never seen a Linux Trojan although he conceded Trojans could be introduced on Microsoft systems.

[161] Interestingly, on the issue of jokes, Jericho testified that on the day of his termination, she and Carmer were taking a smoke break together and Carmer appeared upset and rattled over Boulware's termination. According to Jericho, Carmer, whom she described as plain-spoken, said he was so irritated about Boulware's termination that he would bring down the network. Jericho said she told him not to joke about this. Carmer said it was not a joke. However, Jericho said she did inform management about his comments because she knew he was

he acknowledged to Barnes that it was possible to view his comments as threatening, and that at the time Frontier was at a heightened state of security in the aftermath of "9/11."[162]

Carmer said that the Yahoo Groups' mailing list was a website where techs could talk privately about issues going on in the workplace. Carmer said, therefore, his e-mail conversation was meant only for members of the site, that no one from management was to have access to it.

Carmer stated that Boulware's name came up in the meeting with Wergin and Barnes who asked if he knew Boulware and whether Boulware was angry about something.

Regarding his union activity, Carmer conceded that no one from management ever asked him to remove his CWA buttons, nor was he ever threatened with discipline for wearing the buttons. Carmer knew of no other CWA supporters among the techs who were ever disciplined for wearing buttons and most, to his knowledge, were still working for Frontier.

Carmer conceded that he was aware of and signed the AUP and that the policy covered and prohibited the conduct contained in the offending e-mails.[163]

Wergin testified about Carmer's discharge.

Wergin stated that copies of the Carmer e-mails, like those of Boulware, were put under his office door by an unknown person—he believed perhaps about a week after March 13.[164] In response, Wergin said he contacted both Frontier Internet security personnel as well as Corporate Security Director Barnes. Wergin stated that he took the threats contained in Carmer's e-mails very seriously[165] because he did not think it was a joke, and coincidentally the corporate computer network did go "down" for about a day, one day before he received Carmer's messages,[166] which included the "bring down the network" language. According to Wergin, Frontier had not determined why the system went down, and Carmer's e-mails heightened his concerns that someone may have sabotaged the system.

Wergin said the matter was investigated by corporate security, IT security, and himself. Wergin said he discussed the matter with Barnes of corporate security but the local police were not contacted. Wergin said Carmer was terminated because of his threats to bring down Frontier's network.

Barnes[167] testified that he was requested to conduct a formal interview of Carmer on March 27 by Wergin who provided him with a copy of the messages Carmer was thought to have e-mailed.

Barnes and Wergin met with Carmer on March 27. Barnes stated that Carmer was told of the formal nature of the meeting and the investigation and his right to union representation, which Carmer declined; and that the interview would be taped. According to Barnes, Carmer initially denied receiving an e-mail from Boulware and, once shown the e-mail message, agreed that he had received it from Boulware and replied as it appeared on the e-mail.

Barnes confirmed that Carmer said that the messages were just a joke, that he was just kidding, and that Frontier was making a mountain out of a mole hill. Barnes said that he told Carmer that it was not a joke to him—it was a very serious threat against the Company and one suggesting a conspiracy between two people to do damage to the Company. Barnes stated that his former law enforcement experience, as well as the events in the aftermath of 9/11, influenced his thinking.[168]

Barnes stated that, to him, Boulware was speaking of crippling the system and Carmer was providing the weaponry, the Trojan, to accomplish the deed. Barnes said he told Carmer he did not believe he was joking and Carmer agreed that he (Carmer) could see his point of view. Barnes said that Carmer told him he initially denied the e-mail to see what information Barnes possessed.

Barnes stated that Wergin did not tell him where or how he obtained the e-mails. However, Barnes thought the source of the e-mail was not important and did not inquire about this. Barnes agreed that Carmer told him he had sent the e-mail from his residence, to which Barnes said he attached no significance; Barnes said that his concern was that Carmer had escalated Boulware's (spam) remarks to a definite threat against the Company.

Barnes stated that Carmer was terminated by Wergin and he personally was asked to escort him from the call center. Later, Barnes said he prepared and distributed to corporate security a flier, with Boulware's and Carmer's pictures, declaring them persona non grata and barring them from the premises.[169] Barnes said that Boulware was included in the notice because he believed that Boulware was a co-conspirator with Carmer.

Barnes stated that he did not know prior to Carmer's termination whether Carmer had any affiliation with the CWA.[170]

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to have a disciplinary meeting to discuss the matter. On rebuttal, Carmer denied having any such conversation with Jericho on the day he was terminated.

[162] This date refers to the September 11, 2001 attack on the World Trade Center Buildings in New York City and the Pentagon in Virginia.

[163] Carmer signed a copy of the AUP on January 22, 2002. (See R. Exh. 6.) Part 4 of the AUP generally prohibited interference with or disruption of Frontier's network and specifically described propagation of worms and viruses as a prohibited act, as well as providing assistance to another to do this. Carmer said he had also signed a similar AUP when Global Crossing owned Frontier.

[164] Wergin identified GC Exhs. 8 and 9 as copies of the e-mails from Carmer. Wergin said that he queried his management teams whether they had seen someone place anything under his door; no one evidently saw anything.

[165] Wergin at the hearing emphatically stated his concern by saying in response to counsel's query whether he took the e-mails seriously, "Oh you better believe it, darn right, especially after September 11."

[166] Wergin said that the network goes down perhaps four to five times per year, but he could not explain why this happened.

[167] Barnes described himself as Frontier's manager of investigations whose responsibilities include investigations of security-related matters affecting the Company. Barnes' previous occupation was detective for the Rochester Police Department, a position he had held for 25 years.

[168] Barnes referred to reports after 9/11 that an FBI agent's warnings were not taken seriously prior to the attack. Barnes stated that it was his view that had they been taken seriously, 9/11 may have been prevented.

[169] See R. Exh. 27, Barnes' memo/flier to Burns Security. Barnes said that the Company also denied the pair access to the Frontier network.

[170] On cross-examination, Barnes said that at the time of Carmer's termination he was aware that something was going on regarding a union campaign and because there were only two Unions at Frontier,

Barnes volunteered that until the hearing he had not even noticed that Carmer's e-mail header referred to Frontier union Yahoo groups; he did not read the complete header but concentrated on Carmer's name and the message for purposes of the investigation he conducted.

The General Counsel contends that at the time of his discharge, Carmer was a known supporter of the CWA, having signed onto Boulware's CWA mission statement, www.bitzer.org/CWA, which declared the signer's support for CWA representation of the help-desk employee; and that Carmer overtly showed his support for that Union to Frontier's managers before he was discharged. In agreement with the General Counsel, I would find and conclude that prior to and at the time of Carmer's discharge, Frontier was aware of his support for the CWA or unions in general. First, I would credit Carmer's testimony regarding his demonstrated support for the CWA at the workplace, including his wearing of buttons in the presence of supervisors and handing out cards. Notably, also, the CWA campaign at the call center was a highly visible matter around March 13, 2002. Additionally, the headers on the Internet messages between Boulware and Carmer prominently declared "cwa bitzer" frontier_union@yahoogroups.com. and clearly indicated a CWA or union connection between Carmer and Boulware, and these messages form the basis for Carmer's discharge.[171]

The General Counsel argues that Carmer's comments on the Yahoo Groups' website in question were protected by the Act because this site was, like the message board, used by him for union organizing and to discuss terms and conditions of employment with fellow subscribers and union supporters. Further, unlike the message board, the Yahoo site was not owned or operated by Frontier. Carmer considered the Yahoo site a private communications forum for employees and supporters of the CWA organizing effort at the call center. Moreover, she submits, Carmer made and received the communications from his residence. The General Counsel submits that the Yahoo Groups was a forum created and used by Frontier employees for protected behavior and accuses the Company of an unlawful surveillance of private e-mails which led to Carmer's discharge.

In agreement with the General Counsel, I would find and conclude that Carmer, like Boulware, engaged in protected activity in their discussions on the Yahoo site. However, in disagreement with her, I would not find any evidence of surveillance by the Respondent regarding its general knowledge of Carmer's comments. Wergin credibly explained how he received Carmer and Boulware's comments. Evidently, there were members of the Yahoo Groups or some other person(s) with access to the site. Seemingly, they were not sympathetic to Carmer's cause and provided the messages to Wergin. Clearly, Carmer was discharged for the comments he made in the context of protected activity. Therefore, in my view, the General Counsel has established a connection between protected conduct and the adverse action of Frontier.[172]

As with Boulware, the timing of Carmer's comments suggests animus by Frontier against his support for the CWA after the accretion, if not the CWA itself. Accordingly, I would find that for purposes of *Wright Line*, the General Counsel established a prima facie case of violation of the Act.

Turning to the Respondent's defense of its discharge of Carmer, the Respondent contends that Carmer's comments to "take down" or disable its network were facially threatening to the Company and, as its cyber security expert Joseph Aina testified, could result in no less than a complete catastrophe for its operation.[173]

Furthermore, given the post 9/11 atmosphere, the Respondent submits that Wergin took Carmer's comments seriously and consulted with no less than three of its network security components and later, along with its security chief met with Carmer to discuss his e-mail.

As a result of the interview with Carmer, the Respondent argues that it justifiably determined that Carmer's threat constituted punishable misconduct and that he, as an employee with direct access to its computer system, could no longer remain with the Company. The Respondent asserts that Carmer's termination was based solely on his threat to the network.

With respect to the Carmer discharge, I will be brief.

In my view, it is beyond any serious doubt that Carmer's e-mail comments, irrespective of where they originated (his personal residence not withstanding) could reasonably be construed to be of a threatening nature by anyone reading them. Although if one were of a liberal mind, one could view the comments as a joke—the General Counsel's position. However, it goes without saying that humor, to the extent it can be found, derives its quality or jocular effect from the context in which the so-called humorous statement or act is made. In the context of the aftermath of the 9/11 attack on the United States which includes, even as I write, a much heightened concern for security—we are on a war footing if not in a declared war—

the RTWA and CWA, he deduced they would be involved. Barnes recalled some union activities a couple of years before in the context of an attempt by one of the unions, as he put it, trying to take over another union.

[171] It should also be noted that Mazi Bakari, on or about March 13, had given Wergin a copy of Wood's e-mail received from Albright which, inter alia, proclaims "Victory is sweet, CWA all the way." Albright's e-mail header included frontier_union@yahoogroups.com. This e-mail also spoke of a CWA general membership meeting on March 18.

[172] I should note that the offending message or comments in question by Carmer are fairly commingled with or in response to clear work-related "terms and conditions" comments from Albright.

[173] Summarized, Aina outlined the following possible consequences of an interruption of its network operations:

> 1. If 9–1–1 [emergency] service is disabled, then customers will be unable to contact law enforcement agencies, paramedics and fire departments. This can literally cause life or death harm.
>
> 2. Frontier could be sued for any deaths, injuries or property damage that may result from service interruptions.
>
> 3. Frontier stands to lose revenue if its customers cannot rely on its services, and they switch to a competitor.
>
> 4. Customers could be lost and/or Frontier sued if customers' private information stored on Frontier's network is released to the public.
>
> (5) Frontier could have to pay substantial fines imposed by the Public Service Commission for service interruptions. [R. Frontier's Br. p. 124.]

Carmer's comments, in my view, were, if not irresponsible, highly ill-advised.

Carmer's comments, simply said, were not funny and, based on his conversation with Jericho, he may well have not been joking. Notably, Barnes, a man with substantial experience dealing with criminality, credibly testified that Carmer's conduct, along with Boulware's threat to spam Rodgers, was conspiratorial and that Carmer, by virtue of his job, has not only the means but also ample opportunity to disrupt, at the least, the Company's network. Barnes and Wergin viewed the matter seriously from a security perspective and concluded that Carmer's comments were threatening. I would find and conclude, given the extant circumstances, their response was reasonable.

The General Counsel contends that Frontier permitted joking banter threatening of company property or persons on other Frontier e-mail listings such as rock.info and roc.talk. She contends that techs, speaking in their own lingo called "elite speak," often spoke with bravado of hacking into company computer network and used language that suggested threats to the system. Further, that management was aware of this and tolerated the comments. By discharging Carmer for similar conduct, she contends the Respondent treated him disparately. The General Counsel asserts that Frontier's reasons for discharging Carmer are pretextual.

I have considered the evidence of jokes asserted by the General Counsel on this point and, in all candor, these communications between the techs and other employees are rather silly contextually and substantively. In my view, these remarks in no reasonable way could be construed to be threatening to Frontier's security or other interests. In fact, some appear to reflect a friendly competition between tech teams to provide more and better service to Frontier's customers. This, of course, is beneficial to the Company. On the other hand, I cannot find that Carmer's comments, in context, were the equal of the rather playful banter the General Counsel argues demonstrates disparate treatment and pretext.

In conclusion, I would find and conclude that the Respondent has met its *Wright Line* burden, clearly establishing that it would have discharged Carmer for the comments in question irrespective of his having engaged in union or other protected activity. I would recommend dismissal of this charge.

CONCLUSIONS OF LAW

1. The Respondent Frontier is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By creating an impression among its employees that their union activities were under surveillance, the Respondent violated Section 8(a)(1) of the Act.
3. By discharging Ronald Boulware because he engaged in union and other protected activity, the Respondent violated 8(a)(3) and (1) of the Act.
4. The aforementioned unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. The Respondent has not violated the Act in any other manner or respect.

REMEDY

Having found that the Respondent Frontier has violated Section 8(a)(1) and (3) of the Act, which action warrants a remedial Order, I shall recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged Ronald Boulware, I shall recommend that the Respondent Frontier be ordered to make him whole for any loss of earnings and other benefits he may have suffered by virtue of the discrimination practiced against him, but only consistent with my findings and conclusions regarding his discharge and its aftermath herein; mainly, that any loss of earnings and benefits that he may have suffered be reckoned from the time of his discharge to the date of the Respondent's discovery of conduct on his part not protected by the Act.

I shall further recommend that the Respondent be ordered to expunge from its records any reference to Boulware's unlawful termination and to give Boulware written notice of such expunction and to inform him that its unlawful conduct will not be used against him as a basis for any future personnel-related actions. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]