Technology Service Solutions *and* International Brotherhood of Electrical Workers, AFL–CIO, Local 111. Cases 27–CA–13971 and 27–CA–13971–3

October 31, 2000

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On February 2, 1999, Administrative Law Judge James M. Kennedy issued the attached supplemental decision. The General Counsel and the Charging Party (the Union) filed exceptions and supporting briefs, the Respondent filed an answering brief and cross-exceptions, and the General Counsel and the Union filed reply briefs. Additionally, LPA, Inc., and the Council on Labor Law Equality filed briefs as amicus curiae.[1]

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

The Board has considered the supplemental decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleged that the Respondent violated Section 8(a)(1) of the Act by refusing, in July 1995, to provide the Union with a list of names and addresses of bargaining unit employees "where there was no reasonable alternative means for the Union to communicate with the Unit employees." The complaint also alleged that, in June 1995, the Respondent, through Customer Service Manager Rod Leonard, violated Section 8(a)(1) by threatening to discipline an employee (Dennis Phillips) if he called other employees regarding unionization, promising him a pay increase if he refrained from union activity, and threatening to withhold the pay increase if the Respondent's employees selected a union as their collective-bargaining representative. Following close of the General Counsel's case at hearing, the Respondent moved to dismiss the complaint. The judge adjourned the hearing and, after submission of briefs, issued a decision granting the motion and dismissing the complaint.

The General Counsel and the Union filed exceptions, and the Board subsequently vacated the judge's decision and order dismissing complaint and remanded the case to him for completion of the hearing and issuance of a supplemental decision.[2] Following a hearing on remand, the judge issued a supplemental decision[3] in which he dismissed the entire complaint, largely on the basis of his credibility resolutions discrediting the General Counsel's principal witnesses.[4]

We adopt the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) by refusing to provide the Union with a list of names and addresses of bargaining unit employees where there was no reasonable alternative means for the Union to communicate with the employees, but, as discussed below, we do not adopt all of the judge's findings or reasoning. However, we reverse the judge and find, for the reasons set forth below, that the Respondent violated Section 8(a)(1) when Customer Service Manager Leonard "cautioned" employee Phillips against sending messages to other employees regarding unionization.[5]

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] *Technology Service Solutions*, 324 NLRB 298 (1997). Chairman Truesdale and Member Hurtgen did not participate in this decision.

[3] The judge found, in fn. 20 of his supplemental decision, that his initial decision, issued on September 20, 1996, was not a "decision" as defined in Sec. 102.45(a) of the Board's Rules and Regulations but rather a "dismissal" under Sec. 102.35(a)(8) of the Board's Rules. The General Counsel has excepted to this finding, and we find merit in this exception. On November 27, 1996, the Board issued an unpublished Order addressing the General Counsel's motion that sought clarification as to the appropriate rules to follow in appealing the judge's initial decision. In its Order, the Board found that the judge had issued a decision and that, therefore, the appropriate procedures to follow in excepting to findings contained in that decision were the procedures set forth in Sec. 102.46 of the Board's Rules. Sec. 102.46 governs exceptions from Board decisions issued under Sec. 102.45. Thus, the Board's Order found, in effect, that the judge's September 20, 1996 decision was a decision issued under Sec. 102.45. Accordingly, the judge's finding that his initial decision was not a decision as defined in Sec. 102.45(a) is contrary to the law of the case.

Additionally, consistent with his view that his 1996 decision was not a decision, the judge titled his February 2, 1999 decision simply as "Decision" rather than "Supplemental Decision." For the reasons explained above, we find this to be erroneous. Moreover, this title is inconsistent with the Board's decision remanding the case to the judge, as that decision ordered that, following completion of the hearing on remand, the judge was to prepare and issue a supplemental decision. For these reasons, we deem the judge's February 2, 1999 decision to be a supplemental decision.

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

In addition, some of the General Counsel's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the General Counsel's contentions are without merit.

[5] No exceptions were filed to the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(1) by promising Phillips a pay increase if he refrained from union activity and by threatening to withhold the pay increase if the Respondent's employees selected a union as their collective-bargaining representative.

1. As the relevant facts pertaining to the Union's request for the unit employees' names and addresses are set forth in considerable detail in the judge's initial and supplemental decisions,[6] we summarize them only briefly here. The Respondent installs, services, and repairs computer systems nationwide. Its employees who perform computer installation, maintenance, and service work are called customer service representatives (CSRs). In its south-central region, covering Colorado, New Mexico, Oklahoma, Kansas, Missouri, Arkansas, and parts of Nebraska and Wyoming, the Respondent employs 236 CSRs. The Respondent's headquarters for the region is located in Englewood, Colorado, a Denver suburb. CSRs are geographically dispersed and do not report to work at any one location. Rather, they typically work out of their homes or vehicles and spend most of their time at customers' locations.

Starting in late 1994 and continuing into 1995, the Union, at CSR Phillips' request and with his assistance, attempted to organize the Respondent's CSRs in the State of Colorado. Although the CSRs were scattered throughout the State and, to some extent, worked separately from each other, the Union, with diligent effort, obtained enough signed authorization cards to establish a showing of interest supporting its representation petition. Following a hearing, the Regional Director on June 9, 1995,[7] issued a Decision and Direction of Election in Case 27–RC–7557, finding that the CSRs in each of the Respondent's two territories within Colorado constituted an appropriate bargaining unit. The Respondent provided the Union with the *Excelsior*[8] list containing the names and addresses of the 63 CSRs in the two units. A mail-ballot election was held in each unit, but the ballots were impounded, as the Respondent filed a request for review of the Regional Director's decision, which the Board on July 20 granted. In its unpublished Decision on Review and Order, the Board found that the bargaining units established by the Regional Director were not appropriate and that the only appropriate unit was one covering all the Respondent's 236 CSRs in its south-central region.

On July 25, the Union sent a letter to the Respondent contending that, due to the Respondent's centralized organization and wireless dispatch system, the Union lacked access to the Respondent's CSRs in it south-central region, and this lack of access interfered with and restrained the CSRs in the exercise of their Section 7 rights. Therefore, the Union requested that the Respondent provide it with the names and addresses of all CSRs in the south-central region. On July 31, the Respondent denied the Union's request.[9]

In contending that the Respondent's denial of the Union's request to provide it with the CSRs' names and addresses violated the Act, the General Counsel invokes by analogy the inaccessibility exception to the general rule, set forth in *Lechmere*,[10] that an employer may lawfully prohibit nonemployee union representatives from trespassing on its property to engage in organizational activity. The inaccessibility exception to this rule requires that an employer must allow such trespass in rare instances when "the location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them."[11] The General Counsel contends that, due to the Respondent's operational structure, the unit employees are so widely dispersed over a large area and so isolated from each other that they are effectively beyond the reach of reasonable union efforts to communicate with them. Therefore, according to the General Counsel, the Respondent was obligated to grant the Union's request for a list of the employees' names and addresses, as providing such a list would be less intrusive than allowing nonemployee union representatives to enter onto private property.

In adopting the judge's finding that the Respondent did not violate the Act by refusing to provide the Union with the CSRs' names and addresses, we find, based on the credited testimony, that the General Counsel simply fell short of proving his contention that the Union had no reasonable means of communicating with the bargaining unit employees unless the Respondent provided it with their names and addresses.[12] The judge found that, after

[6] The statement of facts in the Board's prior decision in this case was based, as indicated there, on the evidence adduced in the General Counsel's case at hearing, inasmuch as the hearing at that point had not been completed and the judge had not made credibility determinations with respect to some of the witnesses. See 324 NLRB 298. As the judge correctly observed in his supplemental decision, the findings in our prior decision were based on viewing the General Counsel's case in the light most favorable to it for the purpose of reviewing the judge's grant of the Respondent's motion to dismiss.

[7] All subsequent dates are in 1995, unless otherwise indicated.

[8] *Excelsior Underwear*, 156 NLRB 1236 (1966).

[9] The Union also filed a motion with the Regional Director to lower the showing of interest requirement for the expanded unit. The motion was denied. As the Union notes, the judge erred in finding that the Union failed additionally to ask the Regional Director for an extension of time to satisfy the expanded showing of interest requirement. The Union sought such an extension, but its request was denied. This factual error is insufficient to affect our result.

[10] *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

[11] Id. at 533–534, quoting *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 112 (1956).

[12] The judge affirmatively found that the unit employees outside of Colorado were accessible and could have been contacted if the Union had tried to do so. It is unnecessary for us to pass on this finding.

the Board's ruling in Case 27–RC–7557 that the appropriate unit included CSRs in all the Respondent's south-central region, the Union, despite its possession of the *Excelsior* list, failed to contact any of the 63 Colorado CSRs other than Phillips to inquire whether they could put the Union in touch with any of the unit CSRs outside Colorado. Many of the CSRs were former IBM Corporation employees, some of whom knew each other from their employment at IBM. Additionally, Colorado CSRs occasionally met CSRs from elsewhere in the Respondent's south-central region at training sessions conducted by the Respondent. Consequently, there was reason to believe that some Colorado CSRs would know or at least possess names and addresses or telephone numbers of unit CSRs outside of Colorado. In any event, the Union failed to explore this possibility. Additionally, although the Union had come in contact with two New Mexico CSRs during its organizing efforts in Colorado, it failed to contact them again after the unit was expanded to include New Mexico (among other States). In failing to inquire of the CSRs whose names and addresses it did possess whether they could help the Union identify and contact unit CSRs outside of Colorado, the Union failed to pursue an obvious possible means for it to reach the non-Colorado unit employees. Indeed, the Union's earlier success in identifying and contacting a sufficient number of CSRs to obtain a showing of interest for its desired Colorado unit was accomplished, in large measure, through information provided by CSRs. Consequently, as the Union did not attempt to use this obvious possible means, the General Counsel was unable to demonstrate, as a factual matter, that the Union had no reasonable means to communicate with bargaining unit employees outside of Colorado.

The dissent finds fault in our applying *Lechmere's* "no reasonable alternative means" exception to this case. Rather than applying the *Lechmere* standard, the dissent would apply an ill-defined, more lenient standard, which would require the Respondent to supply the employees' names and addresses to the Union even in circumstances when it is not shown that the Union lacks a reasonable means to communicate with the unit employees. The dissent contends that this new standard is warranted because of the assertedly "unique" characteristics of the bargaining unit that, according to the dissent, largely isolate the employees and restrict them from exercising their organizational rights.

Contrary to the dissent, the "lack of reasonable alternative means" standard is, in our view, the appropriate one in the present case. Under existing case law, an employer has no obligation to provide the names and addresses of its employees to a union that wishes to organize them. Unless ordered as an unfair labor practices remedy,[13] an employer's provision of its employees' names and addresses to a union is required only when, following the union's filing of an election petition accompanied by a sufficient showing of interest, the Board directs an election or approves the parties' consent-election agreement. *Excelsior Underwear,* supra. Nevertheless, in the present case, even though no election had been directed or agreed to, the General Counsel alleged that the Respondent violated the Act by denying the Union's request for the Respondent's employees' names and addresses "where there was no reasonable alternative means for the Union to communicate with the Unit employees." By using this language, the General Counsel invoked the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and its precursor, *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), which generally permit an employer to bar nonemployee union organizers from trespassing on its property unless there is no reasonable alternative means for the union to communicate its organizational message to the employer's employees.

In the present case, as in *Lechmere*, nonemployee union representatives sought to organize an employer's employees. In *Lechmere*, the union organizers, claiming that they lacked alternative means to communicate with the employer's employees, sought to enter on the employer's premises to spread their message to the employees. In the present case, as the employees work at many locations, most of which are not on the Respondent's property, the Union's obtaining access to the Respondent's premises would not aid it in communicating with the employees. Therefore, rather than seek access to the Respondent's premises to aid its organization efforts, the Union here sought access to something else within the Respondent's possession—a list of the Respondent's employees' names and addresses. As noted above, however, under existing case law, an employer, prior to the direction of an election, has no obligation to provide the names and addresses of its employees to a union that wishes to organize them. Nevertheless, the General Counsel argues that the Respondent's refusal to provide the Union with the employees' names and addresses here "where there was no reasonable alternative means for the Union to communicate with the Unit employees" violated the Act. Thus, the General Counsel's theory, at

Rather, we find that the General Counsel simply failed to meet the burden of showing that the unit employees were *not* accessible.

[13] See, e.g., *Audubon Regional Medical Center*, 331 NLRB No. 42 (2000).

least implicitly, is that the Union is entitled to access to the Respondent's employees' names and addresses as a substitute for the access to the Respondent's premises to which it would otherwise be entitled under *Lechmere* but for the fact that access to premises would not aid the Union in communicating with the Respondent's employees under the circumstances here. Accordingly, as the theory of the violation is grounded in *Lechmere*, it is appropriate for us to apply *Lechmere's* "lack of reasonable alternative means" standard in determining whether a violation occurred.

The General Counsel, however, contends in his reply brief that his theory of the violation is not strictly premised on a *Lechmere* standard, as the weight afforded the list of employees' names and addresses here should not be as great as that afforded the employer's property interest in *Lechmere*. To be sure, in this case, unlike *Lechmere*, the Union does not seek to enter on the Respondent's land and thus the Respondent's rights in its real property are not at issue. Nevertheless, the Union's request for the names and addresses of the Respondent's employees implicates another significant right, the employees' right to privacy.[14] Of course, the deference accorded employees' privacy interests in nondisclosure of their names and addresses varies depending on the particular circumstances and the strength of the countervailing interests favoring disclosure. As noted above, after the Board directs an election or approves a consent-election agreement, the Board's *Excelsior* rule requires that the employer provide the unit employees' names and addresses to the union. In those circumstances, the need for an informed electorate outweighs the employees' privacy interest in this information. *Textile Workers v. NLRB*, 388 F.2d 896, 906 (2d Cir. 1967). As the Board in *Excelsior* stated: "Such legitimate interest in secrecy as an employer may have is, in any event, plainly outweighed by the substantial public interest in favor of disclosure where, as here, disclosure is a key factor in insuring a free and fair electorate." 156 NLRB at 1243. Likewise, requiring an employer to provide its employees' names and addresses to a union as a remedy to dissipate the coercive effects of especially severe unfair labor practices stands on a different footing than would ordering such disclosure in the absence of such unfair labor practices. See, e.g., *Audubon Regional Medical Center*, supra; *Wallace International de Puerto Rico,* 328 NLRB 29 (1999); *Marlene Industries Corp*., 166 NLRB 703 (1967), enf. denied in relevant part sub nom. *Decaturville Sportswear Co. v. NLRB*, 406 F.2d 886 (6th Cir. 1969); *J. P. Stevens & Co*., 163 NLRB 217 (1967), enfd. as modified sub nom. *Textile Workers v. NLRB*, above.

Accordingly, we find application of *Lechmere's* "no reasonable alternative means" standard to be appropriate here. Indeed, application of a lesser standard, under which the Respondent would be required to supply a list of its employees' names and addresses to the Union even when it is not shown that the Union lacks a reasonable means to communicate with the employees, would tend to undermine the careful balance drawn by the Board's *Excelsior* decision, which, as discussed above, requires employers to provide such a list only after an election has been directed or agreed to.[15]

The dissent further contends that, even under the *Lechmere* standard, we err in finding no violation here, because, according to the dissent, the "Union's reasonable attempts to identify and communicate with the bargaining unit employees through the usual channels of communication will necessarily be ineffective." This is so, according to the dissent, because of factors such as the geographic dispersion of the unit employees, their scattered work locations, and their limited knowledge of coworkers. The dissent, however, overlooks the fact that these factors prevailed within the Colorado portion of the bargaining unit as well as elsewhere in the unit and that, despite these factors, the Union succeeded in making contact with enough of the Respondent's Colorado CSRs to establish a showing of interest in the desired Colorado unit. Given the Union's success in obtaining a showing of interest in its desired Colorado unit, we, unlike our dissenting colleague, cannot conclude that the Union's attempts to identify and communicate with unit CSRs outside of Colorado, where the same factors apply, would "necessarily be ineffective."

The dissent additionally contends that, in finding that the General Counsel did not meet his burden of proof because the Union failed to ask CSRs whose names and addresses it possessed whether they could help the Union

[14] In this instance, where it is the Respondent from whom the employee names and addresses are sought, only the Respondent can act to protect the employees' privacy interests.

[15] Member Hurtgen observes that the courts have declined to order the supply of names and addresses (in a non-*Excelsior* context), even as a remedy for substantial unfair labor practices. See *Decaturville Sportswear Co. v. NLRB*, 406 F.2d 886, 888; *Textile Workers,* supra. A fortiori, there should be no such order in the absence of such unlawful conduct.

Member Hurtgen also notes that, in the *Excelsior* situation, the Board has directed an election, and thus has its own vital interest in having an informed electorate. This interest outweighs the privacy interests concerning the names and addresses. By contrast, there is no comparable governmental interest in helping the Union in its initial organizational efforts. See *Textile Workers*, supra.

Finally, although Member Hurtgen agrees that there are privacy interests with respect to the names and addresses, he also notes that the Respondent owns the list of names and addresses, and thus there is a property interest in that document as well.

identify and contact unit CSRs outside of Colorado, we are adding an unwarranted threshold requirement, using a subjective approach, and compelling the Union to undertake a futile act. We do none of these.

In its effort to organize the desired Colorado unit, the Union asked unit CSRs with whom it had come in contact to supply the names, addresses, and telephone numbers of other Colorado CSRs. Once the unit was expanded to include all the Respondent's south-central region, however, the Union declined to further employ this technique. That is, the Union failed to ask the CSRs who it knew to supply the names, addresses, and telephone numbers of unit CSRs outside of Colorado. As the Board has previously held, where, as here, a union has "achieved a fair measure of success in communicating with the [employees by using certain methods] in the past . . . it is particularly necessary for a showing to be made that, in the organizing campaign at issue here, these methods were attempted or that they would have been futile." *SCNO Barge Lines*, 287 NLRB 169, 171 (1987), review denied sub nom. *National Maritime Union v. NLRB*, 867 F.2d 767 (2d Cir. 1989). Given the Union's success in Colorado in asking CSRs with whom it had come in contact to supply the names, addresses, and telephone numbers of other unit CSRs, it is hardly a subjective approach for us to require that the General Counsel show that the Union attempted to employ this previously used method in contacting unit CSRs outside of Colorado or that such an attempt would have been futile. Further, absent an effort to use this technique to identify and communicate with unit CSRs outside of Colorado, we can hardly presume that such an effort, if attempted, would have been futile.[16]

Accordingly, on this basis, we adopt the judge's dismissal of the complaint allegation that the Respondent's failure to provide the names and addresses of the unit employees violated Section 8(a)(1).[17]

2. The credited testimony concerning Customer Service Manager Rod Leonard's alleged threat to discipline employee Dennis Phillips if he called other employees regarding unionization is as follows. According to Leonard, during a meeting on June 1, lead CSR George Montano complained that he "had received a message [on his brick] from Denny [Phillips] about the Union, and it was during working time, and it's not something that he wanted to have happen." Leonard "thought" that Montano had also told him that others had complained to him about receiving similar messages.[18] Leonard told Montano that he would follow up on his complaint. Subsequently, according to Leonard, he spoke to Phillips on the telephone and told him that "I had a complaint from an employee and basically the complaint was that they were receiving messages from him and that he shouldn't send those messages." Leonard further told Phillips "to make sure if he was going to send a message that it's something that someone wants to receive." Phillips replied that "he had not sent any messages that anybody didn't want to his knowledge." Leonard further testified that he did not indicate to Phillips the nature of the message that the complaint concerned. Nevertheless, according to Leonard, Phillips "mentioned that he hadn't sent any union messages to anyone."

In dismissing the 8(a)(1) complaint allegation concerning this conversation, the judge noted that Leonard had not even mentioned the Union to Phillips in the conversation and that, if the Union had been Leonard's concern, he would have said so. Rather, the judge found that "Leonard was more concerned about the fact that the brick was being used for personal messages which had distracted a lead employee, and perhaps another, from his work." While acknowledging that Phillips perceived Leonard's statement as an "admonishment not to engage in Union related conversations on the PT," the judge found Phillips' interpretation to be an "overreach" because Phillips had conceded that Leonard had never told him that he could not use the brick to discuss the Union.

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[16] The dissent additionally contends that the three "classic example" cases noted in *Lechmere* where the inaccessibility exception was found to apply, *NLRB v. S & H Grossinger's, Inc*., 372 F.2d 26 (2d Cir. 1967); *Alaska Barite Co*., 197 NLRB 1023 (1972); and *NLRB v. Lake Superior Lumber Corp*., 167 F.2d 147 (6th Cir. 1948), all involved obstacles to communication less restrictive than those in the present case. We do not agree. Those three cases involved employees who, for the most part, lived and worked on their employers' property at isolated locations and thus were largely inaccessible to unions. The present case is not comparable, as here the employees do not live on the Respondent's property at some remote site. Rather, they live and work among the general population, albeit at dispersed locations.

[17] In adopting the judge's dismissal, we do not rely on the judge's finding that Phillips or any other CSR could have used a company issued personal terminal (PT or brick) or the Respondent's CAD (computer-assisted dispatch) terminals to help the Union make contact with other unit CSRs. We also find it unnecessary to pass on the judge's finding that CSRs were accessible to the Union at various parts locations in cities where multiple CSRs started their workday, and we make no finding regarding whether the Union could have distributed union literature to CSRs at such locations. Additionally, we find it unnecessary to pass on the judge's finding that the evidence is inconclusive regarding the Union's capability of reaching the unit CSRs by newspaper, radio, and television advertising. Moreover, while, as the General Counsel and the Union contend, the judge erred in finding that more than one map of the Respondent's facilities was presented in the representation case, and thus was available for the Union to use in its organizing efforts, this error is insufficient to affect our result.

[18] Montano testified that the message he received on his brick from Phillips "said something to the effect of 'please help us support the Union'" and that he told Leonard that a couple of CSRs had complained to him about receiving Leonard's messages during a normal workday.

Concluding that Leonard, in telling Phillips not to send unwanted messages on the brick, was "actually interested in preventing irritating behavior which disrupted work no matter what the subject matter was," the judge found the General Counsel's proof to be insufficient to make out the alleged violation.

Contrary to the judge, we find that the Respondent violated Section 8(a)(1) by Leonard's statement to Phillips that Leonard "had a complaint from an employee . . . that they were receiving messages from him and that he shouldn't send those messages" and "to make sure if he was going to send a message that it's something that someone wants to receive." Leonard made this statement to Phillips after he learned that Phillips had been sending pro-union messages to other employees on his brick. While Leonard did not specifically mention the Union, Phillips reasonably could (and did) understand Leonard's prohibition to be directed at, or at least to include, his prounion messages. Moreover, when Phillips mentioned the subject of sending union messages, Leonard did not indicate to him that such messages were not among the ones that Phillips "shouldn't send." Additionally, although the judge found that, in making his statement to Phillips, Leonard was "actually interested in preventing irritating behavior which disrupted work no matter what the subject was," Leonard said nothing about work disruption or distracting employees to Phillips. In any case, the standard that applies in determining whether an employer's conduct interferes with or restrains employees in the exercise of their Section 7 rights is an objective one.[19] Thus, Leonard's subjective intent in making his statement to Phillips—whether it was to prevent work disruption or to prevent prounion messages—is irrelevant.[20] As indicated above, Leonard's statement, viewed objectively, reasonably could be understood as prohibiting Phillips from sending prounion messages to other employees on his brick. Phillips' sending of prounion messages to other unit employees was conduct protected by Section 7 of the Act.[21] Accordingly, we find that Leonard's statement to Phillips—that Leonard "had a complaint from an employe . . . that they were receiving messages from him and that he shouldn't send those messages" and "to make sure if he was going to send a message that it's something that someone wants to receive"—reasonably tended to interfere with Phillips' exercise of his Section 7 rights in violation of Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Technology Service Solutions, Englewood, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees who send prounion messages to other employees that they should stop sending messages and that they should be sure that the intended recipient wants to receive their message before they send it.

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

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

(a) Within 14 days after service by the Region, post at its Englewood, Colorado facility copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 27, 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 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 June 1, 1995.

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

MEMBER FOX, dissenting in part.

I join that portion of the majority opinion finding that Rod Leonard's statement to Phillips reasonably tended to interfere with Dennis Phillips' exercise of his Section 7 rights in violation of Section 8(a)(1) of the Act. I do not

[19] See, e.g., *Westwood Health Care Center*, 330 NLRB 935, 940 fn. 17 (2000).

[20] See, e.g., *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997); *Williamhouse of California, Inc*., 317 NLRB 699, 713 (1995).

[21] See, e.g., *Willamette Industries,* 306 NLRB 1010, 1017 (1992). While the Respondent has a policy prohibiting the use of its equipment and information systems for nonbusiness purposes, the Respondent did not cite this policy as the basis for Leonard's statement to Phillips. Moreover, the Respondent concedes that this policy is not enforced against routine daily personal messages.

[22] 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."

agree, however, with my colleagues' application of *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), to the issue of whether the Respondent violated Section 8(a)(1) by refusing to provide the Union with a list of names and addresses of bargaining unit employees, nor do I agree with their conclusion.

At the outset, it is worth noting how it came to be that the Union undertook to organize the bargaining unit at issue here. The Union initially sought to represent a unit of customer service representatives (CSRs) in the State of Colorado. Following a hearing, the Regional Director directed elections in two separate units, which he found to be appropriate, encompassing organizational groups within Colorado (and small portions of south-central Wyoming, western Nebraska and northeastern New Mexico). The Board subsequently reversed the Regional Director, agreeing with the Respondent that the only appropriate unit was one covering all the Respondent's 236 CSRs in its south-central region (covering Colorado, New Mexico, Oklahoma, Kansas, Missouri, Arkansas, and parts of Nebraska and Wyoming). Thus, the unit determined to be appropriate was not that sought initially by the Union and was substantially expanded in size and scope by the Board at the request of the Respondent, to include people scattered over eight different States who share no geographically centralized place of work.

In my view, the unique characteristics of the bargaining unit in this case present circumstances in which Respondent's refusal to provide the Union with a list of names and addresses of bargaining unit employees unjustifiably interferes with Section 7 organizational rights. Here, the bargaining unit includes individuals who, for the most part, work alone without a commonly shared workplace, who are geographically dispersed over the expanse of eight States, who have little or no knowledge of, contact with, or ways to communicate with their coworkers, and who are largely unknown to union organizers who might seek to inform them of the advantages of organization. In other words, the structural isolation imposed on these individual employees who comprise the bargaining unit in this case greatly restricts both "the right of employees to organize for mutual aid without employer interference," *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 798 (1945), and "the ability of employees to learn the advantages and disadvantages of organization from others," *Central Hardware Co.*, 407 U.S. 539, 543 (1972).

Historically, more typical employment settings have consisted of a commonly shared workplace or, at least, a location at which the employees gather on some regular basis. These more typical employment settings, by their structure, foster opportunities for the exercise of the employees' organizational rights. The collective gathering of employees found in more typical employment settings, by their structure, also allows nonemployee union organizers to attempt multiple methods of identifying and communicating with employees about the advantages of organization.

Consequently, when dealing with more typical employment settings, the Board has not required an employer to provide a list of the names and addresses of bargaining unit employees prior to the time an employer is required to file an election eligibility list under *Excelsior Underwear,* 156 NLRB 1236, 1239–1240 (1966).[1] The structure of the bargaining unit in the present case, however, is an outgrowth of the ongoing changes in the American work force and the continuing creation of new and varied forms of workplaces in response to advances achieved by American business and technology. The unique characteristics of this bargaining unit, which largely isolate these employees and restrict them from exercising their organizational rights, call for a different result. Under these circumstances, allowing an employer to refuse to provide a union with a list of names and addresses of bargaining unit employees is unjustified, particularly in light of the fundamental organizational rights which are at risk.

Instead, in addressing this question, my colleagues ignore the important organizational rights at stake in this case and, without a reasoned analytical basis, extend the inaccessibility exception of *Lechmere* to find that the Respondent's refusal to provide the list did not violate Section 8(a)(1). Specifically, the majority finds that the General Counsel failed to meet his burden of proof that without the list the Union would have "no reasonable means of communicating with the bargaining unit employees." Slip op. at 2.

The *Lechmere* burden of proof, however, "is a heavy one" because it is based on the balance struck by the Board and the courts between a union's organizational rights and the employer's right to exclude nonemployee union organizers from its property. *Lechmere,* supra at 535; *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978). There is no comparable conflicting legitimate property interest in this case to balance against the employees' organizational rights. In assuming otherwise, my colleagues overlook that in *Excelsior Under-*

[1] In the preelection context, the Board, however, has at times required an employer to provide a list of names and addresses of bargaining unit employees as a remedy for unfair labor practices committed during a union campaign. See, e.g., *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540–541 (5th Cir. 1969); *Blockbuster Pavilion,* 331 NLRB No. 65, slip op. at 2 (2000).

wear, supra, the Board declined to find that an employer had a property interest in the secrecy of its employment list, stating:

> A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with his employees—an interest we see no reason to protect).

156 NLRB at 1243. Moreover, to the extent that some courts have taken a contrary view, e.g., *Decaturville Sportwear Co. v. NLRB,* 406 F.2d 886, 889 (6th Cir. 1969), the property interest they have asserted is not comparable to that of the landowner's right to exclude trespasser which the Supreme Court considered in *Lechmere*. Were it otherwise, there could be no *Excelsior* rule. See *Steelworkers v. NLRB,* 646 F.2d 616, 628 (D.C. Cir. 1981) (noting that, under the Board's *Excelsior* rule, unions excluded by trespass laws from the employer's property are provided with employer lists of employee names and addresses).

Nor do I agree with my colleagues that use of the *Lechmere* standard is warranted because the Respondent is entitled to champion the interest of its employees in maintaining the privacy of their names and addresses. In *Excelsior Underwear,* supra, the Board's finding that employers have no significant interest in the secrecy of employee names and addresses took into account the privacy and other interests of employees. 156 NLRB at 1244–1245. However, the asserted interests of the employees, like those of employers, were not considered of sufficient magnitude to require the Board to consider "the existence of alternative channels of communication before requiring disclosure of that information." Id. at 1245. In my judgment, a similar approach is warranted here.

In any event, even if the *Lechmere* inaccessibility exception were the correct standard to be applied, the conclusion reached by the majority is otherwise contrary to law. In *Lechmere*, the Supreme Court reaffirmed the principle of *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 112–113 (1956), that an employer's property rights may be required to yield to the trespass of nonemployee union organizers where "the location of a plant and the living quarters of the employees place the employees beyond the reach of the reasonable union efforts to communicate with them." *Lechmere*, 502 U.S. at 533–534 (quoting *Babcock*, 351 U.S. at 113). The Court aptly explained that this principle is applicable "where 'the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.'" Id. at 537 (quoting [*Babcock*] 351 U.S. at 112). In other words, the Court's "reference to 'reasonable' attempts [in *Babcock]* was nothing more than a commonsense recognition that unions need not engage in extraordinary feats to communicate with inaccessible employees." Id. at 537.

Most of the "usual channels" that nonemployee union organizers historically have attempted to use to communicate with employees about the advantages of organization, however, would be wholly ineffective in reaching the employees of this bargaining unit. This is because the usual channels of communication either rely on a model of a commonly shared workplace for reaching otherwise unidentified employees—such as distributing leaflets by hand near their place of employment, talking with them on nearby streets, placing signs on nearby public property, advertising in local newspapers, or recording license plate numbers of cars parked in nearby parking lots—or they are applicable only if the union already knows the names, addresses, or telephone numbers of employees–such as mailing literature to employees, talking with them over the telephone, or driving to their homes and talking with them there. See *Lechmere,* 502 U.S. at 530, 533, 540; *Babcock,* 351 U.S. at 107, 107 fn. 1.

Here, in contrast, there is no commonly shared workplace or other place that the employees regularly gather, nor are the names, addresses, or telephone numbers of the 173 non-Colorado CSRs known to the Union. Therefore, few, if any, of the usual channels are available under the facts of this case, and accordingly the Union's reasonable attempts to identify and communicate with the bargaining unit employees through the usual channels of communication will necessarily be ineffective within the meaning of *Lechmere.*

Moreover, the three cases noted in *Lechmere* as "classic examples" of situations where the inaccessibility exception has been found to apply, see 502 U.S. at 539–540, all involve obstacles to the usual channels of identification and communication that are less restrictive than those present in this case. For example, at the mountain resort hotel in *NLRB v. S & H Grossinger's, Inc.,* 372 F.2d 26 (2d Cir. 1967), the court enforced the Board's order requiring the employer to permit nonemployee union organizers onto its property where about 60 percent of its employees, depending on the season, lived and worked on the premise, and the remaining 40 percent who lived in a neighboring village were difficult or impossible to distinguish from hotel guests. Id. at 29–30. Considering that all of these mountain resort employees worked at a common location and that 40 percent of them lived in a neighboring village, the union in *S & H Grossinger* no doubt had a far greater opportunity to

identify and communicate with employees than does the Union in this case.

Similarly, in *Alaska Barite Co.,* 197 NLRB 1023 (1972), enfd. mem., 83 LRRM 2992 (9th Cir), cert. denied 414 U.S. 1025 (1973), the employer's denial of property access to nonemployee union organizers was found to violate Section 8(a)(1) where the employees spent the workweek living at the employer's mining facility located on a small offshore island but spent weekends in a nearby Alaskan town where many of the employees had homes. Considering that most of the mining employees could be found on weekends in the nearby Alaskan town, the usual channels of communicating with employees were necessarily more effective in that case than this one where the employees are dispersed over eight states. Additionally, the usual channels of communication would have likewise been more readily effective in *NLRB v. Lake Superior Lumber Corp.,* 167 F.2d 147 (6th Cir. 1948), where the employer had placed various time and place restrictions on the visits of union organizers to its logging camp where the employees both lived and worked. Id. at 148, 151–152. In contrast, the Union here has had no such opportunity to meet with the non-Colorado unit employees.

The majority's finding under the *Lechmere* inaccessibility exception is also contrary to law because it applies a more stringent burden of proof than has been recognized under *Lechmere.* Specifically, the majority finds that the General Counsel failed to meet his burden of proof because the Union did not ask "the CSRs whose names and addresses it did possess whether they could help the Union identify and contact unit CSRs outside of Colorado," and that therefore "the Union failed to pursue an obvious possible means for it to reach the non-Colorado unit employees." Slip op. at 3. The majority's approach incorrectly adds a threshold requirement that a union must actually try all "obvious possible means" of communication, no matter how futile, before the Board will engage in the objective assessment required by *Lechmere.* The subjective approach taken by the majority opinion is unsupported by *Lechmere,* would needlessly create delay and additional expense, and would force unions to undertake futile efforts in order to secure a favorable Board determination.

Accordingly, I dissent from that portion of the majority opinion, which misapplies the *Lechmere* balancing test to this case. Given the unique structure of the bargaining unit in this case, I would find that the Respondent's refusal to provide the Union with a list of the names and addresses of bargaining unit employees was unjustified and constituted interference with organizational rights in violation of Section 8(a)(1).

APPENDIX

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

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

WE WILL NOT telling employees who send prounion messages to other employees that they should stop sending messages and that they should be sure that the intended recipient wants to receive their message before they send it.

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

TECHNOLOGY SERVICE SOLUTIONS

Wanda Pate Jones, Esq., for the General Counsel.
S. Richard Pincus and *Jeffrey Beeson, Esqs. (Fox & Grove),* of Chicago, Illinois, for the Respondent.
Victoria L. Bor, Esq. (with Sue D. Gunter on brief) (Sherman, Dunn, Cohen, Leifer, & Yellig), of Washington, D.C., for the Charging Party.

DECISION

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Denver, Colorado. It originally opened on July 22, 1996. After 3 days of hearing I dismissed it after the General Counsel's case-in-chief for failure to make a prima facie case. On August 22, 1997, the Board remanded the matter for further hearing (324 NLRB 298), having deemed that a prima facie case had been established with respect to two allegations. The matter was resumed on February 10, 1998, for 3 additional days.[1] The complaint, by the acting Regional Director for Region 27, was issued on May 9, 1996, and is based on unfair labor practice charges filed on August 2, 1995, by the International Brotherhood of Electrical Workers, AFL–CIO, Local 111 (which, together with its parent International Union is called the Union).[2]

As noted in my order dismissing, the complaint "contains two discrete allegations. It first asserts that Technology Service Solutions (Respondent), acting through Customer Service Manager Rod Leonard, violated Section 8(a)(1) of the Act in June by threatening an employee (Dennis Phillips) with discipline if

[1] The transcript, particularly for the last 3 days, is rife with errors. The parties have filed stipulations to correct, which only partially deal with the problem. I hereby approve the stipulations and also grant Respondent's unopposed motion to correct other errors. Those corrections have been made manually by interlineation. (For that reason the electronic files found on the computer diskettes should be relied upon only after being checked against the corrected hard copy.) Fortunately the facts are not in so great a dispute as to require rehearing on the remaining matters erroneously transcribed.

[2] All dates are 1995 unless otherwise indicated.

he called employees about union organizing, and 'by implication' both promising him a pay increase if he refrained from organizing activity and threatening to withhold a pay increase from him if a union became the employees' bargaining representative." Second, it asserted that Respondent's July 31 denial of a prepetition list of names and addresses of its employees violated Section 8(a)(1) of the Act solely because "there was no reasonable alternative means for the Union to communicate with [Respondent's south-central region] employees." Those are the only two allegations of the complaint. Indeed, aside from the facts adduced in support of these allegations, there is no contention that Respondent has violated the Act.

The Board's remand directed me to resume the case for the purpose of allowing the General Counsel to present evidence with respect to the circumstances under which one of Respondent's attorneys questioned Phillips during the drafting of a statement which was inconsistent with his testimony. The Board was concerned that those circumstances may have resulted in my discrediting Phillips. It also ordered a resumption of the prepetition list issue finding that the General Counsel had made out a prima facie case, which Respondent was obligated to meet. Member Higgins added that he believed the case raised a number of issues, which he believed would be best decided upon the basis of a full record. All parties have filed briefs, which have been carefully considered.[3] Based on the entire record, including my observation of the demeanor of the witnesses, and after taking the briefs into account, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that during material times, it was a partnership of subsidiaries of IBM Corporation and Eastman Kodak Company.[4] It is headquartered in Wayne, Pennsylvania, and has offices/locations throughout the country from which it provides computer repair and warranty services to commercial customers. It annually provides services valued in excess of $50,000 in States other than Pennsylvania and Colorado, the State where this matter first arose. Accordingly, Respondent admits and I find it to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits, and I find, the Union to be a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Factual Background

By way of background, the facts as described in the preremand record have not changed significantly. For that reason I shall not burden this decision with the detail described there. I will introduce each issue with a short synopsis of those facts and then treat with the evidence adduced after the remand. However, where appropriate I will quote my earlier findings.

In this regard, the case arose with the following background as set forth in the dismissal:

This entire matter arises against the background of a representation petition, filed by the Charging Party on April 26, 1995 [footnote omitted] (the second petition), entitled *Technology Service Solutions*, Case 27–RC–7557. That petition sought a representation election in a proposed bargaining unit composed of Respondent's "customer service representatives . . . in the State of Colorado." As a result of that petition the Regional Director conducted a hearing and on June 9, issued a decision and direction of elections, finding as appropriate voting units two separate organizational groups within Colorado (and small portions of south-central Wyoming, western Nebraska and northeastern New Mexico) known as "Territory E" and "Territory X" (Colorado for convenience).

Respondent delivered a list of the names and addresses of the employees in those two voting units pursuant to the requirement of the Board's *Excelsior* rule to the Regional Director. It also filed a request for review with the Board asserting that these were inappropriate units, and that the only appropriate unit was one composed of all eight of its territories in its south-central region, an organizational group covering eight States or portions thereof.* The election proceeded by mail ballot and the ballots were impounded pending the Board's ruling. The Board granted the request for review, eventually reversing the Regional Director on July 20. [Unpublished order; unofficially published at 149 LRRM 1302 and 1995 Lexis 891.] It agreed with Respondent that the appropriate voting unit should consist of customer service representatives (CSRs) employed throughout the south-central region. As a result the matter was remanded to the Regional Director for further proceedings; the ballots were not counted. He advised the Charging Party that its showing of interest in the larger unit was insufficient to warrant an election, but did grant additional time to allow it to obtain more signatures. The Union, instead, filed a motion dated July 31 to lower the showing of interest requirement. Respondent filed an opposition and on August 2 the Regional Director denied the motion. The Director thereupon dismissed the petition. The Union then filed with the Board a request for review of the dismissal, reasserting its motion to lower the showing of interest requirement. Respondent filed an opposition. On September 5 the Board denied the request "as it raises no substantial issues warranting review."

* Colorado, New Mexico, Kansas, Oklahoma, Missouri, Arkansas, south-central Wyoming and western Nebraska. See Jt. Exh. 6 for a map of all the territories."

B. Dennis Phillips

I discredited Phillips after the General Counsel's case-in-chief because of multiple inconsistencies in his testimony. These inconsistencies included having given a statement to one of Respondent's attorneys, Joshua D. Holleb, on June 12, 1996, in a face-to-face meeting. In that statement he essentially repudiated everything he had said to the Regional Director's investigator, who had only spoken to Phillips by telephone. Fur-

[3] Respondent has filed a motion seeking leave to file a reply brief. The motion is denied as reply briefs are traditionally disallowed and in any event would not add to my understanding of the facts.

[4] During the hiatus between the first portion of the hearing and the second portion, IBM purchased Eastman Kodak's interest in its entirety. Respondent is now a wholly owned subsidiary of IBM.

thermore, the statement to the Board investigator was somewhat inconsistent with notes which Phillips had made to himself only a short time before. On his first cross-examination he fared poorly and the General Counsel's attempt to rehabilitate him, in my opinion cause him to tell a fib. He claimed he hadn't been able to read the statement drafted for him by Holleb, because he had neglected to bring his reading glasses. As I pointed out previously, he had made and initialed interlineal corrections on that statement, something he would not have done had he been unable to read the statement. He also sought to color the Holleb interview by claiming Holleb had conducted the interview unfairly by asking leading questions. He was unable to support that contention at all, citing only direct questioning. Those two items clearly undermined Phillips as a credible witness. I could not overlook his inconsistencies; he has an agenda which renders him incapable of objective testimony.

It was at that point that I concluded his testimony was not reliable and I saw no need to concern myself with inquiring very deeply into whether or not Holleb had failed to provide the safeguards of *Johnnie's Poultry*, 146 NLRB 770 (1964). Facially, they had been. The safeguards had been referenced twice in the two documents comprising the declaration, once by an attachment and once in the body. Moreover, Phillips had corroborated that the safeguards had been uttered when he conceded that he knew the entire meeting was voluntary and that he could have left at any time, yet chose not to do so. The evidence clearly pointed to the conclusion that the taking of the declaration was without coercion and I ruled accordingly.

In the remand order, the Board stated its concern that the circumstances under which Phillips gave the statement to Holleb might have led Phillips to say something different. During the remand both Phillips and Holleb testified about what happened. Phillips asserts that Holleb did not preface the meeting by advising him of the *Johnnie's Poultry* safeguards, that they were added at the end of the conversation. Holleb says that he had brought two things with him, a form which he commonly used before interviewing employee witnesses (setting forth the *Johnnie's Poultry* safeguards), which Phillips later signed, and an outline of questions which he intended to ask. He testified that he told Phillips he was there to investigate "this matter which is pending before the NLRB." Holleb says he used the form as an outline to advise Phillips orally that he had those rights before he began his questioning. He says the questioning was conversational in form; Phillips did not disagree. The safeguards were included in the handwritten statement which Phillips signed. Phillips also signed the form itself which Holleb appended to the statement. It does appear that the form in its final version was filled out at the end of the conversation.[5]

Phillips complains that he was "under stress" during the interview but does not really describe from what source. In context his stress may have preceded the interview. He also says that he felt "pressure" to participate in the interview, though he never describes anything which Holleb or his supervisor, Leonard, did to cause him to feel pressure, except for the fact of the interview and his initial ignorance of its purpose, which, under a reasonable man standard, should have been dissipated immediately after Holleb explained what he was going to be doing. I regard his testimony here as a transparent effort to artificially buttress his credibility. Not only does that effort fail, it reinforces my conclusion that he has developed an agenda.

I find that the circumstances under which Phillips gave the June 12, 1996 statement to Attorney Holleb were noncoercive and had no untoward effect on Phillips as he attempted to tell Holleb what he knew about the facts. I therefore reaffirm my earlier finding discrediting Phillips on the basis that he has told too many varying and inconsistent versions of the facts to credit the one which supports the complaint.[6] I need make no effort to determine why Phillips was so inconsistent, only that he was, and that he cannot be relied upon with respect to any of the 8(a)(1) allegations. Thus, first he was inconsistent and second, he developed a purpose.

His credibility is also in issue with respect to a second issue, whether his personal terminal (PT or brick) in 1995 had been configured to prevent him from communicating with Respondent's employees in territories other than those in Colorado. That question will be discussed further, infra.

Not giving up on the 8(a)(1) questions raised by the complaint, the General Counsel and the Charging Party now look to Customer Service Manager Rod Leonard's testimony during the remand, asserting that he has made admissions which amount to proof of the allegations in the complaint. A review of the pertinent testimony fails to convince me. The facts revolve around a so-called complaint made by employee George Montano to Leonard during a routine annual evaluation being conducted by Leonard about June 1.

According to Montano, in May he and two other employees (Bob Green and John [last name unknown]) who all worked at

[5] Following the format of the form, Holleb had advised Phillips: (1) He had no obligation to speak to management; (2) He was free to terminate the conversation at any time; (3) No reprisals would be taken against him if he declined to participate; (4) Nothing he said in the course of the interview would be used against him; (5) He would receive no benefit for participating; and (6) He would not be asked any questions regarding his feelings, sympathies or activities about or on behalf of any union and that subject matter was not the purpose of the discussion.

[6] In her brief, counsel for the General Counsel defends the use of telephone affidavits. I do agree that telephone affidavits can be accurate, but there is no doubt that face-to-face interviews are preferable if for no other reason than that a professional, experienced, investigator can get a better feel for the proper lines of inquiry and better convince the witness to tell the truth. Experienced investigators ordinarily pursue the facts past the opening presentation of a witness's first factual presentation, not accepting it at face value, but exploring a variety of possibilities with professional skepticism. Telephone interviews do not lend themselves to that type of care. Furthermore, misunderstandings can be directly and promptly addressed and corrected in a face-to-face interview, instead of awaiting mail service turnaround and reliance on the bare hope that an interviewee will recognize errors and make corrections on his own. If the interviewee does not make those corrections the investigator will never know of the error and the Regional Director may well rely on the error in determining the merits of the charge. The General Counsel is clearly aware of all those shortcomings. Therefore, in the event that the General Counsel chooses to direct his investigators to perform their job by telephone, he will have to live with the risks inherent in that procedure.

the IBM facility in Boulder had earlier received some messages from Phillips on their bricks which had caused some concern. The testimony:

> Q. (By Mr. Pincus) Would you, to the best of your recollection, describe what that message was over the brick?
>
> A. (Montano) I do recall it was from Denny Philips, and it said something to the effect of please help us support the Union. I can't tell you exactly what it said, but it was a pro-Union message. [7]

Montano says Green and John had asked him if something could be done to stop the messages. He replied he did not know. He did nothing until several weeks later when Leonard conducted the annual appraisal interview. Montano describes his June 1 conversation with Leonard during the appraisal conference: "It was something to the effect that I [sic] [uh] a couple of CSR's come to me with a complaint about receiving this during a normal workday, that they get enough messages, and they don't have time to be dealing with this type of stuff, and I asked him could we do anything about it." [Bracketed material supplied to clarify testimony.] Montano says Leonard told him he would follow up on the matter.

Leonard's testimony is consistent with Montano's version:

> Q. (By Mr. Pincus) And in connection with that meeting, did Mr. Montano register any complaint with you relative to any message or messages that he and/or others had received over the brick?
>
> A. (Leonard) Yes, he did.
>
> Q. And what was the complaint that he registered to you?
>
> A. George told me he had received a message from Denny about the Union, and it was during working time, and it's not something that he wanted to have happen, so he made that complaint to me.
>
> Q. Did he indicate to you whether in addition to himself others had registered complaints that you can recall?
>
> A. No, I don't remember if anyone else registered. They didn't register it with me.
>
> Q. I'm asking you if George told you that others had complained to him?
>
> A. Yes, I think so. I think there were some other issued [sic] (issues?) there.
>
> Q. Now, what, if anything, did you tell George that you would do about his complaint?
>
> A. I told him that I would take the complaint forward, that I would follow up on it [—] on his complaint—
>
> . . . .
>
> A. I told him [Montano] that I would take the complaint forward, that I would follow up on it on his complaint.
>
> Q. And did you follow up on it?
>
> A. Yes, I did.
>
> Q. And who—did you contact Mr. Philips?
>
> A. Yes, I did.
>
> Q. And by what means did you contact him?
>
> A. Initially a PT message to—so I could talk to him. I sent him a PT message to ask him to give me a call, or I call him. I don't remember too well which way.
>
> Q. You talked to him over the phone?
>
> A. Yes. It was over the phone.
>
> Q. And what did you say to him, and what did he say to you?
>
> A. I told him that I had a complaint from an employee and basically the complaint was that they were receiving messages from him, and that he shouldn't send those messages. I told him to make sure if he was going to send a message that it's something that someone wants to receive.
>
> Q. And what was his response?
>
> A. That he had not sent any messages that anybody didn't want to his knowledge.
>
> Q. Did you indicate to him the nature of the message about which you had received a complaint that it was about?
>
> A. No, I did not.
>
> Q. Did he say anything about—was there any statement about the Union in that conversation?
>
> A. Yes. He mentioned that he hadn't sent any Union messages to anyone, something to that effect.
>
> Q. Now, as of that point in time when you had this conversation with him—strike that. Did you, in the course of that conversation or at any other time, tell Mr. Philips that he could not use the brick to send messages about the Union?
>
> A. No. No, I did not.
>
> Q. Did you tell Mr. Philips either in that conversation or any other conversation that he could not speak to employees over the telephone about the Union?
>
> A. No, I did not.
>
> Q. Do you recall any discussion in that conversation about you having a vacation and perhaps having to postpone it or delay it because of the possible Union election?
>
> A. At that conversation, no, I don't remember that.
>
> Q. What about any other time?
>
> A. Yeah, another time. It was later that month. [Leonard is certain that the discussion about a possible delay of his vacation, scheduled around the July 4 holiday, occurred during the face-to-face annual evaluation which occurred on June 27, 1995.]

Cross-examination did not really shake Leonard from the version he gave on direct. In fact, he asserted that during his telephone conversation with Phillips that he never even mentioned the word "union," that it was Phillips who brought it up, as described in the above quote. He also says that during the Phillips's June 27 evaluation session he said nothing whatsoever about Phillips's use of the brick. That conversation had been on the phone earlier and was long since over.

In evaluating Leonard's testimony, I do think one can, by stretching, view the matter as being aimed at interfering with Phillips's organizing conduct. Yet there is no credible evidence that Leonard ever even mentioned the Union, but was more

[7] This is in contradiction to Phillips who insists that he simply queried the fellow employee if it would all right to speak to him/her at home in the evening and asking for a telephone number.

concerned with complaints that Phillips had been using the PT is such a manner as to distract others from doing their work. Leonard was responding to a lead employee's complaint that Phillips's messages were a distraction, and although Leonard apparently knew the message was about union organizing, because that could be determined from Montano's report, Leonard was more concerned about the fact that the brick was being used for personal messages which had distracted a lead employee, and perhaps another, from his work. If the Union had been his concern, he would have said so. He did not, and although Phillips perceived the interdiction to be because of the Union, that is not clear.

Phillips contends that his message was entirely inoffensive and innocent, that he only asked the employees for whom he left messages if it would be ok to call them at home and asking for that telephone number. Montano contradicts him, saying it was some sort of prounion message. If it had been a neutral message, it is unlikely that Montano would have much cared. He would have replied "yes" or "no" to Phillips's question and that would have been the end of it. Instead the message, even if of a legally protected character, annoyed Montano sufficiently that, when added to a similar complaint made to him by another, he decided to ask Leonard to see what could be done.

Yet, Leonard only told Phillips that he was not to send "unwanted" messages to employees on the brick. I suppose it may be difficult for an employee in Phillips's shoes to determine whether some types of messages are "unwanted" because one has to make an initial contact to find that out. Yet, Phillips agrees that Leonard was referring to some sort of bothering of fellow employees, saying he couldn't allow "harassment."[8] If that is what Leonard was trying to deal with, his advice to Phillips makes perfect sense. All he may have been saying was, "Take care to avoid antagonism when you are dealing with fellow employees." Phillips did not perceive the statement in that light, but viewed it as an admonishment not to engage in Union related conversations on the PT. Phillips's interpretation, however, seems to be an overreach, because he conceded in the June 12, 1996 statement that Leonard never told him he couldn't use the brick to discuss the Union. And, he conceded that Leonard never told him he couldn't call employees at home regarding the Union.[9] It is reasonable, therefore, to conclude that Leonard was actually interested in preventing irritating behavior which disrupted work no matter what the subject matter was. Given the admitted absence of any reference to the Union during this caution,[10] I find the General Counsel's proof to be insufficient to make out the alleged violation. Accordingly the 8(a)(1) allegation that Leonard prevented him from talking to fellow employees via the brick or the telephone must again be dismissed.

The conclusion must be the same with respect to the wage promise allegation as well. Here, however, no new evidence was adduced, save for the General Counsel's effort to attack the June 12, 1996 declaration. As I have found Holleb's taking of that statement to have been performed fairly and noncoercively, and because there is no actual evidence that Leonard promised Phillips a wage increase if he voted against the Union that aspect of the complaint again must be dismissed. Similarly, the evidence of a threat to take away a wage increase if they voted in favor of union representation is inadequate.

I have discussed this evidence in detail in my earlier order dismissing, and simply quote it here:

Paragraphs 5(b) and (c) are both connected to the pay matter. These, too, arise from Leonard's conversation with Phillips on June 15 (or shortly thereafter). Phillips thinks it all happened in the same conversation but concedes that the pay discussion may have been a week later because of the presence of another employee. Whatever the sequence, he remembers Leonard telling him that pursuant to an earlier conversation which they had had in May, Leonard confirmed that his raise would be effective July 1. Phillips went on to remark about pay in connection with the Union. He said:

> And he [Leonard] mentioned that—he said, "Hopefully" you know, I guess he said something about, you know, "What can the union do for you that we can't do," you know. And he said, "You know, we give you raises; We—you know, we here is a salary increase that won't be taken away from you." . . . . And then he said, "Unless the union takes over; then I can't"—he said, "We won't take it away." But he said, "Depending on the negotiations, I don't know whether you will keep it or not; . . . that will be up to union negotiation." So

[8] During his testimony Leonard did not actually use the word "harassment." I recognize that in some circumstances an employer's so-called prevention of "harassment" can be used to mask an effort to interdict employee organizing, but do not find that to be the case here.

[9] As before, I find Phillips's inconsistencies so serious as to warrant rejection of the General Counsel's contentions. Among the most serious is his omission from his contemporaneous notes of the supposed threat to discipline him if he continued to use the brick or the phone to contact employees about the Union. This shortcoming is discussed in detail in the original dismissal and I reaffirm it here.

[10] Clearly "caution" is an appropriate description. In the remand Phillips testified about the supposed discipline or threat of discipline allegedly levied upon him by Leonard for sending the message on the brick. After reflecting about the situation and company practice Phillips testified that he told Holleb:

> A. (PHILLIPS) Oh, Joshua [Holleb] asked me if I had been disciplined by Rod, and I told him that I had, and then he asked me if there was anything on my appraisal about being disciplined on my, you know, I said no. And then they kind of talked about.
>
> Q. They who?
>
> A. Rod and Joshua. If you had been disciplined, there would be something on your appraisal, or you would be on a, I don't know what it is, well, you'd be on a six-month.
>
> JUDGE KENNEDY: Some kind of record?
>
> THE WITNESS: Yeah, yeah, you know, a record saying hey, you know, you either shape up or you're out.
>
> JUDGE KENNEDY: Some sort of warning?
>
> THE WITNESS: A warning thing if you don't conduct yourself in a—you know, shape up or whether this disciplinary action would occur. So after we talked about that, then I agreed. So I wasn't really disciplined. I was just kind of talked to.
>
> Q. BY MS. JONES: Did Mr. Holleb ask you about whether you'd been threatened with discipline.
>
> A. Well, yes, we talked. He asked me if I'd been threatened, and basically I said no, that Rod had just—had just told me that it better not happen again.

> that is all I remember. [Quotation marks and punctuation inserted for clarity.]

His NLRB affidavit is not as complete. He does refer to Leonard informing him of a 5-percent raise, and to Leonard's remark "What can the Union do for you that we can't do?" After answering that the Union could get him a contract, which would allow him to keep the raise and give him security, he agrees that Leonard told him he was not going to take the raise back. The reference to what might happen during negotiations was not mentioned.

In his 1996 statement, he simply said, with respect to paragraph 5(b), "Rod never, directly or by implication, promised me a pay increase if I refrained from Union activity." Similarly, with respect to paragraph 5(c), he said: "Rod never, directly or by implication, threatened to me, or to my knowledge, to any other CSR, that pay increases would be withheld if a union were selected as a collective bargaining representative for TSS employees. The only thing that Rod said was that if the union was voted in wage increases would be subject to bargaining between TSS and the union."

Phillips's testimony during the remand did not add to the General Counsel's allegation. Phillips testified that in response to Holleb's questions he said:

> What he [Leonard] said was if the Union got in and we were a collective bargaining unit, we may only not retain the raise that was effective—due in that year.
>
> So there was no threat. It was just a statement that made. You have this raise. If the Union gets in, it may be there or it may not. We would have no way of knowing what the collective bargaining unit can come up with. There was no threat.

None of the versions rises to a violation. All of them eventually end up with Phillips agreeing that his recently acquired annual wage increase would be left in place no matter how the election turned out. The only caveat was that if the Union did win, there was always the possibility that the collective-bargaining process might later result in an agreement to lower the wages. The latter is not a threat but an accurate description of an unpredictable process and protected by Section 8(c) of the Act. It is not unlawful. See generally *Hasa Chemical*, 235 NLRB 903, 908 (1978); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. 810 F.2d 638 (9th Cir. 1982); *Regency Manor Nursing Home*, 275 NLRB 1261 (1985); and *Reno Hilton*, 320 NLRB 197, 209 (1995). I reaffirm my dismissal of these allegations for failure to make out a prima facie case.

C. The Union's Demand for a List of Employee Names and Addresses

The issue regarding the Union's July 25 demand for a list of names and addresses of all CSRs in Respondent's south-central region has been discussed in detail in my earlier dismissal order. I summarized the pertinent portion earlier in the quotation at the end of subsection A.

Respondent on June 26 filed a timely request for review of the Regional Director's June 9 decision and direction of election. Simultaneously, it provided the Regional Director with an *Excelsior* list, a list of the names and address of all the Colorado voters deemed eligible by the Regional Director. He turned that list over to the Union, which used it to contact the employees during its preelection campaign. The Regional Director, on July 6, 1995, began a mail ballot election, but was obligated to impound the ballots due to the Board's granting the request for review. The Board, on July 20, reversed the Regional Director, holding that the only appropriate bargaining unit would be all of Respondent's CSRs in its southcentral region, an organizational unit covering five additional states and about 170 more employees. The ballots, of course, were never counted. The Board remanded the petition to the Regional Director for further action. The Union immediately recoganized its petition was in jeopardy, because it did not have a showing of interest (30 percent of the proposed voting unit) sufficient to warrant an election in the larger unit. On July 25, 5 calendar days (but only 3 business days) after the Board issued its decision, International Organizer Rosemary Sheridan wrote Respondent Regional Manager Tom Shackelford the demand letter under scrutiny here. In it she asserted:

> The Employer's highly centralized organization and its use of the Dallas computerized, wireless dispatch system has resulted in a lack of access by those CSRs interested in organizing a union to other CSRs of the Southcentral Region. Said lack of access is interfering with and restraining the CSRs of the Southcentral Region in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act. The Union, therefore, requests that the Employer remedy this circumstance by providing to the Union forthwith:
>
> 1. The names, addresses . . . of all the CSRs of the Southcentral Region.

As this was occurring, the Regional Director advised the Union, as it had no doubt predicted, that its showing of interest in the larger voting unit was insufficient. He granted the Union some additional time to obtain more signatures. It responded to the request for more signatures by filing a motion on July 31 to reduce the showing interest requirement. It did not ask for more time. Also on July 31, Shackelford replied, denying, inter alia, the Union's July 25 request for the list of employee names and addresses.

One of the matters which I was directed to address in the remanded portion of the hearing (part of Respondent's defense) was the issue of whether the Union made any effort at all to reach CSRs employed in the five States other than "Colorado."[11] Sheridan had testified in the first portion of the hearing that after the Board expanded the unit she had spoken to 20–25 CSRs in Colorado to try to find some way to reach the CSRs in the other five States. I neither credited nor discredited that testimony, although she conceded she never advised the Board investigator of what steps she had taken within Colorado to find non-Colorado CSRs. She claims she did tell the investigator that she had tried to find the names of CSRs outside territories E and X. She also says she continued to make phone calls for that purpose. In the remanded portion of the hearing the parties presented the appropriate telephone bills[12] covering

[11] "Colorado" as used in this case includes south-central Wyoming and western Nebraska, for a total region of eight States.

[12] Both Union and Sheridan's personal telephone billings.

the period in question. Those records show no toll calls/ long distance telephone calls made to any CSR (except Phillips) during the period in question. There is also evidence that the telephone company does not keep records of local calls. From that I deduce that if calls were made at all, they must have been local. There were 63 names on the *Excelsior* list, and there is no evidence whatsoever that Sheridan contacted any of the remaining 38 employees about their knowledge of CSRs in the other five States.

Indeed, given Sheridan's quick reaction to the Board's decision, asking for the list within 2 or 3 days of having learned that the unit had been expanded, closely followed by the motion to reduce the required showing of interest, and the fact that apparently not one of the supposed 20–25 CSRs she said she tried to reach lived far enough away from her Fort Collins situs to incur a toll charge, I am not inclined to believe her. Moreover, the evidence is undisputed that neither she, nor any of the 15 other organizers assigned to the drive, ever traveled to any of the other States to try to find more CSRs.[13] Her only effort was to look in the yellow pages for some of the cities to see if Respondent was listed, to call for assistance from the International, which seems to have done nothing, and to contact some sister Locals in those states to ask if whoever she spoke to had heard of Respondent. Therefore, I specifically find that she made no serious effort, aside from contacting Phillips, to reach Colorado CSRs who might have known how to reach CSRs in the other states. No real legwork seems to ever have been contemplated, much less performed.

Her efforts with Phillips seem circumscribed as well. He testified that in 1995 he attempted to use the brick to find out the names, phone numbers, or any useful information but his brick was thwarted for reasons he doesn't fully understand. He concedes, however, that at the time of the 1998 remand hearing, his brick was fully functional and could raise identity information about the territories in the additional five States. Respondent adduced testimony from several CSRs that the system in 1995 remained unchanged in 1998 and that at all times they were able, had they so wanted, to find out identities and other information of individuals in territories other than their own in the south-central region. One of those witnesses, Dennis Squires of the Kansas City office, was particularly credible in that regard. He even gave a real time demonstration regarding how such a search would be done, observing that his 1998 demonstration utilized the same equipment available in 1995. He is corroborated by John Zweig, a CSR from Springfield, who has actually done what Phillips said he could not. Zweig also described how a CSR with access to Respondent's CAD computer system could obtain the information that way.[14] The CAD terminals were generally available to CSRs if they wanted to use them while visiting the larger parts locations. Moreover, there was no rule in place barring their use for that purpose. Although Phillips knew about the CAD system, he did not have access to it for there was no CAD terminal in Grand Junction where he worked. Yet it would have been possible for a friendly CSR in Denver, Boulder or Colorado Springs to have acquired the information through CAD as those locations did have terminals.

Why is it that Sheridan never found out about the CAD system when she was asking about CSRs in the other five states? Surely when she asked the 20–25 Colorado CSRs about how to find CSRs in the other States, one of them would have mentioned it. Yet she never learned the system existed. That, too, raises doubts about the veracity of her testimony regarding the calls she supposedly made.

Clearly there were means by which an employee organizer could have obtained the sought-for information. Phillips, I find, could have used his brick. I do not credit his testimony that it did not work. And, if it did not, someone else might well have been able to use his or hers. Certainly there is no evidence that Respondent did anything to bar Phillips or anyone from using the brick to find the information. The CAD system may have been a little more problematic, for it was not universally available to all CSRs, there was a small learning curve for its effective use, and because there was not clear authority for using it in the fashion the Union would have liked. Even so, the authority to use it for that purpose was hardly any different from the authority to use the PT for that purpose. Why didn't Phillips suggest it? Why didn't Sheridan find out about it?

Turning to the next question which the Board wishes answered, whether the employees were so divorced from regular communication channels that it should order Respondent to turn over their names and addresses to the Union, I again refer to my dismissal order for a full explication of the facts. A short synopsis will be presented here.

Respondent's computer repair work is generally performed at a customer's site. These sites are everywhere, from business offices to factories, from brokerage houses to rural locations, no doubt including home offices. To service these units CSRs are found, in varying numbers, in the same places as the customers. In larger towns they often have some "place" to begin their workday, though they don't necessarily do so. That may be characterized as principally a parts depot or an "office,"[15] al-

[13] The Union knew from evidence submitted in the representation case that there were clusters of Respondent's CSRs in Albuquerque, Kansas City, Little Rock, Oklahoma City, Springfield (MO), and Wichita. Indeed, in Wichita Respondent's facility is only 4 or 5 blocks from an IBEW Local's office. About 10 CSRs work out of that location, plus another 10 or 11 who work at the Boeing plant also frequent it. The facility, however, is not particularly visible, being located within a Burnham Storage warehouse and having only a small sign outside.

[14] CAD was connected to the same data base as the PTs. Its terminals had full size screens, rather than the two line brick, and more information could be displayed. The commands were not greatly different. I have no doubt that persons having the computer skills the CSRs possess could have used it effectively.

[15] The General Counsel and the Charging Party have argued in their briefs that Respondent's evidence regarding so-called "offices" is a de facto repudiation of the stipulation describing the nature of the business. I do not agree. The fact that some employees can start their day at some sort of permanent facility having a mail cubbyhole or a place to hang one's hat does not convert that location to a business office. They are certainly not territorial or "branch" offices as those terms are normally used and were used in the stipulation. These places are primarily for parts storage; some do have work benches and many have training equipment such as TV/VCRs and computers on which training programs can be run. They may be headed by a lead CSR (group leader, team leader), but unless it is a district or territorial office that person is not a supervisor.

though not a true office, such as a district or territorial office. Many more work from their homes with a company vehicle, receiving daily assignments from the dispatch office by brick and then driving to the job location. These CSRs have a variety of parts locations available to them, depending on the arrangement made for their town. Some, like Phillips, have rented public storage spaces. Others use their homes. Some have small company arranged spaces in Burnham Storage warehouses or a similar facility. Others are free-standing.

Insofar as the CSRs have the ability to communicate with one another on a daily discourse basis, that opportunity is greater in cities or towns where multiple employees work. These individuals are clearly not prevented from socializing with each other on at least a weekly if not daily basis. Squires in Kansas City describes the fact that the 16 CSRs who work from that location cross paths several times a week. Zweig reports that the two full-time and nine part-time CSRs in Springfield were in the location about 30 minutes each day. John Wilson, of the Del City (Oklahoma City) office said about 12–15 CSRs worked out of that office in 1995 and frequently spent time there. He said 90–95 percent of the time there was at least one CSR in the facility and usually more than that. In addition, some employees are assigned to the Hertz Car Rental headquarters there. Jim Dinkel the lead in Wichita says there are 10 or so CSRs assigned to the Burnham Storage location and all are in and out every day picking up and dropping off parts. Those assigned to the Boeing plant see each other regularly. Dinkel also says that he occasionally communicates by PT with Isadore "Izzy" Cranon of the Denver office. He has Cranon's name in his "nickname" file on the brick, and doesn't even have to specially look him up to send messages. According to Cranon, now a lead CSR in Denver but who in 1995 was regular CSR, the Denver office operated in much the same fashion. Cranon not only communicated by PT with Dinkel, but also another CSR in Kansas City regarding a client, the United Missouri Bank, which had a branch in the Denver area.[16] John Penrod, in 1995 the team leader for territory K in Arkansas was head of the Little Rock office. He had about nine CSRs who worked out of that office in similar fashion. He had another 10–14 who worked in various towns both north and south of Little Rock, some from offices and others from homes. He conducted territory meetings three to four times each year. Those in the southern portion of the State were brought to Little Rock for the meetings, while those in the northern portion were brought to Fayetteville for a repeat meeting.

Penrod had one duty which brought him into contact with nearly all the CSRs in the south-central region. He had learned that there were a large number of accounts receivable which were overdue. Their lateness was attributable to the fact that CSRs were not correctly filling out a business report called a QSAR. Without the information contained on those reports the customers, particularly IBM, would not pay for the services which had been rendered. Penrod began working on the problem, training CSRs how to properly fill them out and helping those to correct the erroneous ones. Initially his work involved communicating with between 70–80 percent of the CSRs in the south-central region, almost entirely by PT. His interest eventually became a training procedure which took him all over region. As a result of his communicating by brick, and later in person, he became familiar with nearly everyone in the region.

Similarly, Squires in Kansas City had training duties which took him around the region and sometimes outside the region. Squires's 1995 training duties were extensive, particularly with CSRs whose duties involved work on the Risc 6000 computers. He describes those duties in the footnote.[17] Moreover, Wilson

[16] Cranon is one of the many CSRs who participated in various training programs in places such as Chicago, Atlanta, Raleigh, and Pennsylvania, with CSRs from all over the country, including the south-central region.

[17] Q. (By Mr. BEESON) Now, do you—let's talk now about other face to face contact that you have with CSR's outside of the state. Are there occasions other than assisting a CSR where you meet face to face with other CSR's?

A. (SQUIRES) I teach software classes at the IBM Austin plant for CSR's, and I teach approximately, in 1996, I taught ten weeks, and in 1997, I taught ten weeks at the plant in Austin.

Q. What about in 1995?

A. In 1995, I believe I taught four weeks. As we were coming into the RISC product was new into TSS at that time, those classes weren't readily developed at that time.

Q. How many CSR's attend one of those classes?

A. One—in each of those classes, the classrooms are set up for ten CSR's.

Q. How long is each particular session?

A. In 1996, we were running two sessions per week, so I would put through 20 CSR's in one week. In 1997, we changed the class structure, and the class is now five days long, so it cuts that in half. I put through ten students in each session.

Q. What is the geographic location from which the CSR's came for those training sessions?

A. The large majority of them, 90 percent or maybe a little better, came from the United States. Occasionally, I would get students from other countries as well.

Q. And the CSR's from the south central region attended this training session?

A. Yes. I put through a large number of the RISC CSR's from the south central region.

Q. Can you quantify that in some way?

A. In 1995, to the best of my recollection, there were 17 dedicated RISC CSR's in the south central region. And of those, I probably put through 70 percent in the skill blending classes in Austin. I tried to arrange it when I was trying to help coordinate the education so they would go while I was teaching. That allowed me to meet them and talk to them.

Q. Did you conduct other training seminars other than these ones in Austin?

A. Yes. In the spring of 1995, I took a road show, on the road if you will, where we took machines, and we visited—I put on a weeks worth of seminars in Tulsa, a week's—two or three days worth in Wichita. We also visited—we did them in Kansas City as well, and we also brought them out to Denver.

Q. Let's take those one at a time. When was the training seminar session in Denver?

A. They were in the April, May timeframe.

Q. Of 1995?

A. Of 1995.

Q. How long was the training session?

A. The training session lasted two and a half days, and we did two sessions in a week.

of Oklahoma City, had additional skills, for which he was used as a consultant. He is skilled in both RISC 6000 and in Automated Data Processing (ADP), a system used by brokerage houses. His ADP skills frequently put him into contact with territories other than his own Oklahoma R territory. He testified:

> Q. (By Mr. BEESON) Do you communicate with CSR's throughout the south central region on the ADP paperwork?
>
> A. (WILSON) Yes.
>
> Q. What means do you use for this communication?
>
> A. The PT is the initial communication. If it's something that is short, quick and sweet that a PT message can take care of and be clarified well enough, we'll just use a PT.
>
> A. lot of times we send a message that says hey, give me a call. I need to talk to you about da-da-da, whatever we need to discuss.
>
> Q. Where are some of the CSR's located that you've communicated with on—
>
> A. Tulsa quite frequently, Colorado within the Denver area, I communicated with them, New Mexico, Amarillo, Texas, those are the main ones.
>
> Q. How frequently do you have those communications outside your group with other CSR's?
>
> A. Not on a regular basis, maybe once every other month.
>
> Q. How do you know how to communicate with the CSR's that you wish to contact or locate outside of your group or territory?
>
> A. By their—either by their employee number—if you don't know them by name, then you can go to the system and retrieve their territory number and communicate with them in that fashion.

Two concerns can be seen from this testimony. In his last paragraph he clearly acknowledges that in 1995 the PT had the capability of communicating across territory lines. He knew how to do it and often did. Second, that capability actually put him in touch with fellow employees outside his home territory, including employees in Colorado. Likewise, as a consultant it may be readily seen that at least some south-central CSRs knew him and undoubtedly called him on their PTs to consult with him. Some of those were in Colorado. Indeed, from the earlier session we know that CSRs in Colorado handled the ADP clients in that State. Phillips has even serviced such a customer in Crested Butte, although he does ADP work only infrequently.

This evidence was adduced by Respondent in presenting its defense after the remand. It remains true that many of Respondent's CSRs are spread throughout the south-central region, being geographically dispersed and who usually work alone. Even so, it is apparent, as it was from the pre-remand evidence and the representation case evidence that there were parts locations in cities where multiple CSRs often started their workday. Yet, somehow this evidence became pushed to the background of cognizance due to the stipulation regarding a lack of "offices" in most of its locations. It would seem that this has become some sort of semantic hook upon which the Union and the General Counsel wish to hang the hat of obfuscation by Respondent. Yet the Union has always known that Respondent has had parts locations which serviced more than one CSR. Indeed, it knew from actual organizing that numerous CSRs were working out of the 330 Vallejo Street[18] address in central Denver, the parts location for that area. (Cranon testified there were approximately 35 CSRs at that location in 1995.) Were things likely to be any different in the many cities shown on Joint Exhibits 2 and 3, which were also part of the representation case proceeding? The stipulation is clearly accurate insofar as the many towns where only one or two CSRs are located. It is also accurate in towns where multiple CSRs work from the same parts location, even though a misunderstanding seems to have arisen regarding its meaning. There appears to be a distinction between parts locations and "offices" such as territorial or regional offices where administrative work is performed which the parties apparently thought they were resolving but did not.

Thus, in major cities (Albuquerque, Kansas City, Little Rock, Oklahoma City, Springfield, and Wichita) such locations having large numbers of CSRs working from a single parts

---

> Q. How many CSR's attended?
>
> A. It depended. On—the ones in the Denver session, I believe we had approximately five in each one.
>
> Q. Where were those CSR's from?
>
> A. Those CSR's were from Denver, and I believe there were one or two that came from surrounding areas. I don't remember exactly where from.
>
> Q. You had—you ran a training seminar in Tulsa also?
>
> A. Yes.
>
> Q. Now, was that in 1995 also?
>
> A. Yes. All of these were within the same six or eight week period.
>
> Q. Were they for the same length of time per session?
>
> A. Yes, yes.
>
> Q. How many CSR's approximately attended the Tulsa session?
>
> A. We had approximately five CSR's attend each of the two Tulsa sessions, and those CSR's were from Tulsa. They were also from Arkansas and Southern Missouri. Since that's a generally remote area, they pulled them in.
>
> Q. You indicated you also had a similar training session in Wichita?
>
> A. Yes, sir.
>
> Q. How many CSR's approximately attended that one?
>
> A. I believe we had about six. We only ran one session in Wichita. We ran it on a weekend.
>
> Q. And where were the CSR's from?
>
> A. They were from Wichita, and I believe there was one that had come in from Goodman or someplace out in remote Kansas.
>
> Q. How frequently do you personally conduct training seminars?
>
> A. Well, when I'm out with the CSR's assisting, I do a lot of skills transfer then. But to actually put on a formal seminar, I do maybe two or three a year, but I haven't gone outside of Kansas City with any of those since this set in 1995.

[18] Misspelled as "Boleyo" Street in the transcript.

location, and even some smaller cities (see footnote)[19] it would not have been difficult to find those addresses if the Charging Party had made the effort to look. It knew, or should have known, from the representation case record that there was some sort of center comparable to the Denver Vallejo Street location. It even knew, from the same evidence, roughly how many CSRs were there. The information it needed, after the Board remanded the petition to the Regional Director, could well have been obtained at the Vallejo Street parts location. Many of its card signers must have been from there and could have been queried, not only about names of CSRs in those cities, but location addresses and whether and how one could communicate with them. They might even have used the CAD system there. Yet there is no credible evidence that any Union organizer sought their assistance. The evidence instead is only that promptly after receiving the Board's grant of the request for review that Sheridan began seeking procedural shortcuts to obtaining information about the CSRs in the other states. She first demanded the list of names and addresses from Respondent. Then she sought to obtain a waiver from the Board of its showing of interest rule. And, while she no doubt consulted with Phillips about what he knew, he was a poor resource, being both ignorant of company communication procedures and isolated from his Denver area colleagues, living in Grand Junction. The one thing she did not want to do was to travel to those cities and perform additional legwork. And, she did not, but instead bet on the demand letter.

Based on the evidence adduced in both the pre- and post-remand sessions, I am persuaded that organizer Sheridan did not take reasonable steps to determine if she could organize Respondent's CSRs outside Colorado. I do not credit her testimony that she (or organizers under her direction) called the 25 CSRs she claimed to shortly after the Board expanded the voting unit. The opinions of both the Board majority and Chairman Gould seem to have found as fact (in their remand order to me, 324 NLRB 298) that she had done so. I specifically had withheld a determination of that question because first, I was aware that the testimony was under challenge and second, because my granting the order to dismiss was based on grounds which did not require such a finding.[20] I believe, therefore, that the Board's findings in this regard were based on considering the General Counsel's case in the best light only for the purpose of the motion to dismiss, as I had not made findings of fact sufficient to support a Decision and Order. That being the case, I am obligated to make findings of fact at this stage. It is awkward, I think, that the Board did not clarify the reason it accepted Sheridan's then unrebutted testimony regarding her having contacted the 25 CSRs, but my obligation was then and is now, clear: to make credibility findings only when contentions warrant. They were not warranted then, but are now. Even in the preremand order I had expressed doubt about the sufficiency of Sheridan's effort to reach CSRs in the other five states.[21] That doubt did not require me to weigh her credibility. Now, however, the remand has required me to do so and I find there is simply no reason to accept it. All of the objective evidence is inconsistent with her contention and there are no records demonstrating that she made a single call to any of the 25 she says she did, much less any of the remaining 38, except for Phillips. Accordingly, I specifically find that after the Board remanded the representation petition to the Director for further action, the only steps she took were to immediately demand the list and to ask for a modification of the showing of interest rule.

In this regard, the case is no different from any of the thousands of representation cases, which have been dismissed because of the petitioner's failure to support the petition with an adequate showing of interest. It was quite properly dismissed.

Thus, the claim made in the complaint here, that Respondent unlawfully denied the Union a list of names and addresses in the expanded unit, relies on a claim, which is made of whole cloth. This Union has never made an effort to organize the CSRs in the other five States. It simply wants the Board to provide it with a list, never having tested its organizing capability outside Colorado. I suggest that had it actually made the 25 calls, visited the Vallejo Street parts location, talked to any of the other 38 (friendly or not), utilized the maps presented in the representation case, and assigned some of the 16 organizers to the legwork, it might well have been able to "network" itself into a very substantial number of the other south-central region CSRs. It was certainly able to do so in Colorado. Yet it never tried to do so anywhere else.

I conclude, therefore, that the General Counsel, relying on misrepresentation by the Union, has failed to lay the predicate even to reach the theory which it propounds: that the Union is entitled, under Section 8(a)(1) to a list of names and addresses of Respondent's south-central CSRs because of the scattered

[19] Augusta (OK), Hutchinson (KS), Jefferson City (MO), Joplin (MO), Roswell (NM), Santa Fe (NM), Springdale (AR), Topeka (KS), and Tulsa (OK).

[20] That order was not a decision as defined in Board Rule 102.45(a), but a dismissal under Rule 102.35(a)(8). It could not have been a Rule 102.45(a) decision because the dismissal occurred before any defense was offered and a full record had not been made.

[21] I make one more observation about the General Counsel's case. It relates principally to the nature of the Union's efforts to reach Respondent's CSRs in states other than Colorado. Sheridan is an organizer for the International assigned to the Charging Party. She had available the assistance of at least five other International organizers in Colorado and the help of about ten people from the Local. [Footnote omitted.] She also had available the entire resources of the International's organizing department. Despite all this, none of them actually traveled to any other state; thus no one from the Union ever tested its capability in the other states. Sheridan decided it was too difficult and instead sought to have the Board modify its showing of interest requirement. Had the Union tried in the other states, it might have succeeded or it might have failed. Indeed, we know that Sheridan had early found at least two New Mexico CSRs who were ignored. With those facts in mind, I quote from the Fourth Circuit Court of Appeals: "A union with a highly professional organizational department should make at least a serious attempt to organize a company before it can complain about lack of access to the employer's property. It seems improbable, moreover, that a union could achieve organizational success with lackadaisical efforts such as are in evidence in this case." *Hutzler Bros. v. NLRB*, 630 F.2d 1012, 1017 (1980). It may be that the court's comment is a little too harsh to apply to the Charging Party, but an essential kernel of truth lies within it. The Union never properly pursued the remainder of the unit established by the Board. If it doesn't make the effort, the law will not. Unlike the remote worksite cases, these people are not inaccessible. Slip op. at 15.

nature of their locations, or because they often work alone at customer sites. Many of them do know one another, do work out of the same parts locations and are susceptible to being found if only one would look for them. Indeed, the claim that the PT or "brick" is incapable of assisting in this regard has been demonstrated to be erroneous. Some CSRs have even placed coworkers who worked in different territories on their PT "nickname" list, meaning they could send messages at the push of a button.

In sum, the CSRs in the south-central region outside Colorado were not inaccessible. The case will be dismissed on that basis.

D. Reasonable Alternative Means of Communication

The Board did ask, in its remand order, that a full record be made regarding the use of "reasonable alternative" means of communication, another part of Respondent's defense, which relies in large part on the Supreme Court's commentary in *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), as more fully developed in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). Yet, in view of my findings above, that issue has become nondispositive. That issue depends entirely on a finding that the CSRs are not easily reached by traditional means. I have found that they are reachable by traditional means and point to the evidence relied upon above. Thus, while the General Counsel has made a lengthy and somewhat grand argument about the need for a union to communicate with employees it seeks to represent, nothing in this record requires me to deal with it, since the Union never actually attempted by actual conduct to demonstrate the truth of the contention that the employees were inaccessible. They were certainly accessible in Colorado; they are equally accessible in the other five states.

Nonetheless, to comply with the remand order, and to apply Respondent's defense to the complaint, I shall discuss briefly the so-called "alternative means" of communication contention and the rebuttal.

Assuming, therefore, that the CSRs are inaccessible because they are geographically dispersed, work at customers' locations, irregularly frequent the parts locations and drive unmarked company vehicles, the evidence is inconclusive regarding the Union's capability of reaching these individuals by alternative means. Those alternatives are principally newspaper, radio, and television advertising.[22] Respondent first looked to the Union's assets as set forth in the annual LM-2 reports (R. Exhs. 11 and 12, initially rejected, but received on February 12, 1998), which the International and Local 111 respectively filed with the United States Department of Labor.[23] It also observes that the International had participated in and funded extensive media campaigns in other parts of the country (Portland, Oregon; Chicago; Boston; Atlanta, and Memphis). To be sure these campaigns were aimed at creating general good will toward the IBEW rather than to organize employees by advertising. Moreover, in some instances the ads may have been funded by sources other than union assets, i.e., industry promotion funds. Even so, they tend to show the costs of the spots themselves.

Respondent presented expert testimony from Robin Roberts, president of National Media, Inc., of Washington, D.C., a media strategy and planning firm. The Charging Party sought to rebut Roberts's testimony with the expert testimony of Jon Hutchens, president of Media Strategies and Research of Evergreen, Colorado, one of Roberts's direct competitors. Each witness was asked a slightly different question by its client and, accordingly, came up with widely differing views on the cost of an advertising campaign aimed at Respondent's employees in the other five south-central States.

The basic difference between the two experts was whether the target employees, Respondent's CSRs in the major South-central Region advertising markets,[24] could be reached with a message which would inform them about the Union or which would convince them to contact the Union. Respondent's view was that to inform them about the Union, using all three media, would cost slightly less than $100,000. That figure would not be too different from the $96,000 spent on the Atlanta, Chicago, San Diego, Portland, Boston, and Memphis "image improvement" campaigns. The Union's expert, on the other hand, asserting that a simple message would not be enough, asserts that the minimum expenditure sufficient to cause an individual to contact the Union would require a three media campaign in the south-central region markets costing $1,288,000. That figure is almost 13 times the amount believed necessary to reach the market as estimated by Respondent's expert.

I cannot say that either expert has it wrong. They were asked to do different things. Nor can I say that either is unreasonable given the differing objectives. Moreover, I do not read the cases as preferring one over the other in determining reasonableness. Indeed, it is conceivable that a sympathetic CSR might call the Union in the first hour of Roberts's type campaign, allowing for cutting off all further expenditure shortly after the campaign begins. It is equally conceivable that after a Hutchens-recommended campaign not a single CSR would respond. Frankly, I think the concept of a "reasonable alternative means of communication" in this context is whatever one wants it to be. In one way, spending $100,000 would satisfy the legal definition; in another it would not. Certainly it is valid for Respondent to argue that "reasonable" merely means comparing what the Union can both afford, (observing the $8 million cash on hand), and has actually spent ($96,000 on a not too dissimilar media campaign in other parts of the country). From its point of view, $100,000 is only 1-1/4 percent of the Interna-

[22] There is evidence that many of Respondent's employees have access to the Internet, and Respondent has adduced evidence that the International Union and many of its Locals have web pages on the Internet which could be viewed by any CSR if he wished. Many of those pages have e-mail capability ("Contact Us") whereby a dialogue could be begun. Nonetheless, this means of communication requires the CSR to search on his own for information, rather than allowing an organizer to find him. For that reason I do not find this evidence particularly helpful to the accessibility issue and do not discuss it further.

[23] The International showed during the 1994–1995 reporting period net assets ranging from $146 million to $160 million, including $8 million in cash; for a similar period, the Local showed net assets ranging from $227,000 to $314,000.

[24] Kansas City, Tulsa, Wichita, Kansas, Albuquerque, New Mexico, Springfield, Little Rock, and Oklahoma City.

tional's available cash, hardly a drop in the bucket, and a good investment in the long term if it succeeds in organizing this unit of 236 employees. That the Union eschews that expenditure does not make it less reasonable. Moreover, it observes, nothing in the case law determines reasonableness on how effective the communication is. It need not convince anybody to contact the Union, for even a good message with good saturation might not convince anyone to contact the Union. All "reasonableness" requires is that the message be heard.

The Union's view, also logical, is that a media campaign must be one which persuades CSRs in that area to act, to call, to respond. And, it observes, even if the campaign is well crafted there is no guarantee that anyone will do so, no matter how much it spends. Therefore, the minimum expenditure it believes is required, $1.3 million, cannot be perceived as anything but a waste of money.

I must say that it is not my province, nor do I think it is the Board's, to tell any union how it should spend its money or what priorities it should place on expenditures. Five hundred dollars might be too much to spend on a campaign for an impoverished union; others more flush might choose to spend millions. What is parsimonious or, oppositely, extravagant to some might seem reasonable to others. I think it is best for every union to determine for itself what it should spend on an organizing campaign.

All agree that face-to-face, organizer-to-employee or employee-to-employee dialogue is the most ideal way of conveying the Union's message. Respondent points to the evidence cited in subsection C above as reason that such discourse is available if only the Union would actually take steps to begin it. After all, it says, the Union succeeded in organizing Colorado in exactly that way. Surely it could do so in the rest of the unit. It is certainly not for the Board to supply a shortcut when the Union has made no effort to find out what it actually needs to spend in traditional door-to-door organizing.

III. ANALYSIS AND CONCLUSION

In that regard, I find myself in agreement with Respondent. As I see it, the Union was caught by surprise by the Board's determination that territorial bargaining units were inappropriate and that a regionwide bargaining unit was the only appropriate unit available. At that point it determined that it would go no further on the ground, and did not. Instead it sought shortcuts from the Board. First, the demand for the list of names and addresses and second, the motion to reduce the showing of interest. It simply became stubborn and would not take any further steps of its own. Either Respondent or the Board would make it easy or the Union would go no further. Sheridan's own inaction makes that clear. I have found she did not ask, except for Phillips, a single Colorado CSR about the capability of contacting CSRs outside Colorado. She had early met two New Mexico CSRs, but didn't pursue them. She never spoke to any of the Denver Vallejo Street CSRs to see how they could help her. Except for Phillips, she asked no one about the brick's capability to contact other territories. If she had actually contacted the 25 CSRs she claims to have, surely she would have asked one of them if his PT operated differently than Phillips's. At least one Vallejo Street CSR was in contact with CSRs outside the territory and the CAD system was in place there (and in Boulder and Colorado Springs) and not against the rules to use. Nor did she utilize the maps which Respondent had presented in the representation case. She needed to send some of the 15 other field organizers she had available into the multiple CSR cities, but did not.[25] Rather clearly Sheridan, or her superiors, simply balked at the Board's decision and refused to go outside Colorado unless the way was made easy. It may not have been easy for the Union to take the steps required, but organizing is not easy in any event. The one thing, which is clear is that the non-Colorado employees could have been contacted if the Union had tried to do so. They were accessible.

Based on the foregoing findings of fact and attendant analysis, I issue the following

CONCLUSIONS OF LAW

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

2. The Charging Party and its parent International Union are labor organizations within the meaning of Section 2(5) of the Act.

3. During 1995 Respondent's CSRs employed in its south-central region were not inaccessible from union organizers.

4. Respondent has not committed the unfair labor practices of which it is accused in the complaint.

[Recommended Order for dismissal omitted from publication.]

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[25] I recognize the Board does not believe the maps to be of much use. I respectfully disagree I believe if it notices that the Vallejo Street location and the other central locations operate in the same fashion, it will understand that centers such as these cannot be, and are not, secret. Somewhat hard to find? Maybe. But except for Kansas City, Albuquerque, and greater Oklahoma City, these are not big towns. And, Vallejo Street CSRs could have been of great assistance, if only to find out the addresses of the other locations. Moreover, city records such as business licenses could have been checked. None of those steps was taken, no doubt because they required legwork.