JD–16–08
New York, NY

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

VERIZON NEW YORK, INC.

Respondent

and

Cases 3–CA–26036
3–CA–26284
3–CA–26319

COMMUNICATIONS WORKERS OF AMERICA LOCAL 1115,

Charging Party

Ron Scott, Esq., and Jessie Feuerstein, Esq.,
for the General Counsel.
E. Michael Rossman, Esq. (Jones Day), of
Columbus, Ohio, for the Respondent.
Thomas Oakley (CWA Local 115), of Spring Hill,
New York, for the Charging Party.

DECISION

Statement of the Case

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Buffalo, New York, on December 4, 2007. The complaint in Case 3–CA–26036 issued February 28, 2007. The Communications Workers of America (the Charging Party or Union), alleges the Respondent, Verizon New York, Inc., violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by: (1) on or about September 13, 2006, threatening an employee, who is a union officer, that another employee would be disciplined if the Union filed a grievance; and (2) on or about September 20, 2006, issuing a disciplinary warning to its employee, Scott Folts, and docking him a half an hour of pay because Folts engaged in concerted activities on behalf of the Communications Workers of America, Local 1115 (the Union).[1] An amended consolidated complaint, adding Case 3–CA–26284, issued June 29, 2007. It alleged an additional 8(a)(1) violation that on or about April 18, 2007, the Respondent threatened employees with more onerous working consisting of less favorable starting work times because they filed grievances. A second amended consolidated complaint, adding Case 3–CA–26319, issued August 31, 2007. It alleged that on or about April 19, 2007, the Respondent denied the request of its employee, David Pustulka, to be represented by the Union during an interview by supervisors, which Pustulka reasonably believed would lead to disciplinary action against him. In its timely answers to the foregoing, the Respondent denied the material allegations.

[1] All dates are from September 16, 2006, to August 31, 2007, unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Charging Party and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation engaged in providing telecommunication services, has its principal place of business in New York, New York, where it annually derives gross revenues in excess of $100,000, and operates a facility in Olean, New York, where it purchases annually goods and services valued in excess of $5,000. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Parties

The Respondent's relevant operations involve its New York State western region. The western region includes approximately 20 garages from which field technicians and telecommunications technical assistants (TTA) are dispatched in trucks to field assignments.[2] The relevant facilities include garages located in Arcade, Olean, Wellsville and East Aurora. John Boyd is the area manager. Local managers, including Paul Zandi, Charles Konesky, and John Clendening, supervise the field technicians. Amy Walker serves as a global positioning systems (GPS) manager.[3] Thomas Oakley and Mark Rumfola are field technicians assigned to the Arcade garage. Scott Folts is a field technician assigned to the Olean garage.

The Union's jurisdiction covers a geographical area that includes the area south of Buffalo, New York. Oakley serves as the Union's local vice president. Rumfola serves as the area representative for the East Aurora and Arcade garages. Since the 1960's, the Union or its predecessors have been the exclusive bargaining representative for field technicians, TTAs, office technicians, and certain clerical employees employed by the Respondent and its predecessors. The collective-bargaining agreement between the parties includes, at Article 11, a grievance process. Pursuant to that process, the Union has filed many grievances each year.[4]

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[2] TTAs and field technicians perform similar job duties, but TTA's have additional responsibilities and are compensated at a higher hourly wage rate. (Tr. 29, 191–192.)

[3] The Respondent concedes that Boyd, Zandi, Konesky, Clendening and Walker functioned, at all relevant times here, as statutory supervisors and/or agents under the Act.

[4] The Respondent provided statistics that, over the past 10 years, the Union has filed grievances against the Respondent in New York State on an annual basis ranging from 8,200 to 32,000. There was no breakdown as to the portion attributable to the western region, but the suggestion was that many are filed each year. (Coulton Tr. 151–152.) The Union, on the other hand, introduced evidence that, in 2006, 31 grievances were filed by field technicians or other employees assigned to the Wellsville, Arcade, and Olean garages. (GC Exh. 2.) While introduced for the purpose of showing the Respondent's alleged discriminatory motive against field technicians in the Wellsville garage, discussed *infra*, grievances filed by field technicians from the three aforementioned garages appear to be a relatively minor fraction of the overall number of grievances filed by the Union against the Respondent on a statewide basis.

B. The Folts Tour Change

Field technicians regularly work an 8-1/2 hour tour, which includes a required one half-hour lunch break. On or about September 11, Oakley received complaints from several Olean employees assigned to the 7:30 a.m. to 4 p.m. shift that management permitted Scott Folts, a field technician on that shift, to change his tour during the previous Saturday to 7 a.m. to 3 p.m. The hours worked meant that Folts skipped lunch and worked an 8-hour tour—something that would constitute a work rule violation if not previously approved by management.[5]

Oakley did not speak with Folts about the matter at that point.[6] Instead, he contacted Konesky, his Arcade supervisor. Oakley asked Konesky whether Paul Zandi, the Olean supervisor, allowed Folts to change his scheduled hours on September 9. Konesky did not know, but said he would ask Zandi. Konesky contacted Zandi, who denied any knowledge of a schedule change. Konesky reported this information to Oakley during a follow-up call by the latter on September 13. Oakley doubted the accuracy of that information and requested a grievance number in order to file a charge that management, by allowing Folts to change his tour, improperly used the "call list." It was Oakley's contention that the collective-bargaining agreement required management, any time it changed a tour, to offer it first to the employee at the top of the call list. Konesky reiterated Zandi's denial that management permitted Folts to modify his schedule, but asserted that the collective-bargaining agreement permits the Respondent to alter work schedules.[7]

Konesky also passed along Zandi's statement that he would discipline Folts if Oakley filed a grievance. Konesky was referring to a work rule prohibiting employees from changing their tour schedules without supervisory approval.[8] Oakley responded that such a threat violated the Act. In any event, Konesky gave Oakley a grievance number. Oakley then filed a grievance.[9]

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[5] Oakley was concededly vague as to the date ("I think it was the previous weekend"), but indicated the alleged tour change occurred on a Saturday. (Tr. 34–35, 46, 50.)

[6] I did not credit Oakley's uncorroborated hearsay testimony that another union official approached Folts on or about September 3 and was told to "mind your own business." (Tr. 16.)

[7] Oakley and Konesky agreed as to this part of the exchange. (Tr. 14–15, 161.)

[8] Although no document was introduced to support this assertion, the parties essentially agreed that employees are prohibited from changing their tours without management approval. (Tr. 16–17, 161, 172.)

[9] I based the finding that Konesky relayed Zandi's threat to Oakley on Oakley's credible testimony. (Tr. 17, 31–32.) Zandi and Konesky, on the other hand, provided inconsistent explanations of the events that transpired between September 11 and 18. While Oakley and Konesky were not specific as to the date of the alleged Folts' tour change, Zandi testified that, prior to the September 18 grievance session, he thought the date of the alleged infraction was September 9. He allegedly determined *after* September 18 that the date of the infraction was actually September 3. He met with Folts, confirmed that was the case, and disciplined him. I find it incredible that Zandi did, *after* the September 18 grievance session, what he could have done *before* that date—met with Folts and determined that he changed his tour on September 3. (Tr. 169–172, 182–184.) Even more confusing, the credible evidence indicates that the alleged tour change occurred on a Saturday, but September 3 is a *Sunday*, not a Saturday. Konesky was also present at the September 18 meeting and made no reference to a misunderstanding as to the date of Folts' tour change. (Tr. 162–164.) Lastly, Konesky's testimony supports the notion that Zandi did not investigate the facts prior to September 18. He testified that Zandi simply told him that no one had been given permission to change his/her tour and made no reference to

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On September 18, 2006, the Respondent and the Union held a first-step grievance meeting. Konesky, Zandi, and Oakley attended. Oakley reiterated his contention that the Respondent permitted Folts to change his work hours on September 9. Oakley also alleged, for the first time, that Zandi permitted the entire Olean crew to work through lunch on September 9. Zandi denied the allegations. The Respondent denied the Union's grievance at the conclusion of this first-step meeting.[10]

After the grievance meeting, Oakley spoke with Folts. Folts confirmed that he did not have management approval to change his schedule on September 9. As a result, Oakley withdrew his grievance. Zandi, on the other hand, met with Folts and each member of the Olean's crew. Folts, accompanied by a union representative, admitted he was the only crew member to admit that he changed his work hours on September 9. He also conceded that he did so without supervisory approval. As a result, on or about September 20, Folts received a verbal warning and his pay was reduced by one-half hour because he unilaterally altered his schedule. In addition, Zandi held a subsequent meeting to reiterate that employees are prohibited from working through lunch without permission.[11]

C. Zandi's Conference Call

As previously noted, Zandi supervises the 19 field technicians who report to the Arcade, Olean, and Wellsville garages for the 7:30 a.m. to 4 p.m. shift. His office is located in the Olean's garage. On a typical day, Zandi receives constant telephone calls with questions from field technicians during the first half-hour of the shift. Frequently, they cannot reach him because he is busy or on the telephone, many times with other field technicians. This has created problems for some field technicians in those three garages. In addition to complaining to Zandi, some have even filed grievances.[12]

Subsequently, Zandi discussed ways to increase his accessibility with field technicians and union officials. As a result, he provided employees with his cellular telephone number and told them they could reach him as early as 6:15 a.m. He also installed a fax machine in his office so they could reach him through fax communications. When possible, Zandi also initiated conference calls to the Arcade and Wellsville garages inquiring whether any field technicians had questions. The communications problems persisted, however, and he continued to receive telephone calls after the group conference calls.[13]

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having conducted an investigation. (Tr. 160–162.)

[10] No documentation was provided regarding the grievance and its disposition. (Tr. 35–36, 162–164, 171.)

[11] Folts did not testify and, as such, we are left with only Zandi's testimony as to the alleged tour change. As previously noted, I do not credit Zandi's statement that the alleged tour change occurred on September 3, a Sunday. (Tr. 34, 171–174.)

[12] It is not disputed that field technicians frequently have trouble contacting Zandi and that, as a result, grievances have been filed. (Tr. 62–63, 67, 73, 80, 90–91, 98, 102, 108, 174–175.) Richard Coulton, a labor relations specialist for the Respondent, explained that the Respondent does not hold its managers accountable for the number of grievances filed in their areas. (Tr. 152–153). That may be the view of upper management, but the facts conveyed a volatile relationship between the parties' local representatives – Oakley and Zandi.

[13] These facts are not disputed. (Tr. 173–179.)

On April 18, 2007, Zandi conducted a group conference call to all three garages. Approximately 20 employees participated in the conference call, which lasted about 15 minutes. Zandi discussed several items during the 15-minute conference call, including the accessibility issue. On that issue, he noted that grievances had been filed as to his lack of accessibility and that, if it continued to be a problem, he was considering changing the starting times at the three garages to 7:00, 7:30, and 8:00 a.m. To further illustrate his point, he suggested Olean's employees would start at 7:00 a.m., the start time for Arcade employees would remain at 7:30 a.m., and the start time for Wellsville staff would change to 8:00 a.m. Zandi further explained that such an approach would provide each garage's employees with a half-hour period of time to reach him at the beginning of their shift.[14] No questions were posed or comments made on this subject during the conference call. Zandi had no idea of the extent as to whether employees favored earlier or later starting times. After the meeting, however, Zandi was approached by several employees, who expressed preferences for different start times. Some wanted to start earlier than 7:30 a.m., while others wanted to start at 9:30 and 11:00 a.m. In any event, the proposal was never implemented.[15]

D. The GPS Review

Since 2006, the Respondent has equipped most service trucks used by field technicians and TTAs with global positioning system (GPS) devices. A GPS device transmits information to the Respondent's database regarding that truck's locations and the time it took to move between locations during the workday. The Respondent uses that information, in conjunction with the employee's time records, to identify problems with employee performance and productivity, and process inefficiencies. Productivity issues include field technicians taking too

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[14] The credible evidence indicates that Zandi mentioned filed grievances as a reason why he was considering staggered start times for the garages. Zimmerman, the Wellsville field technician, vaguely testified, in response to leading questions, that Zandi proposed staggered start times at some point during the conference call. On cross-examination, he could not answer whether Zandi presented the change as a proposal or a certainty. (Tr. 54–56, 63.) Brinkman was the most credible of the General Counsel's witnesses on this point. He testified that Zandi referred to the grievance and said that if it became a problem again, the start times would change to 7:00, 7:30, and 8:00 a.m. for the three garages. (Tr. 68, 74–75.) Arcade employee Todd Lester testified that Zandi said that he might have to stagger start times because of all the grievances that were filed. He did not recall, however, the specifics of the staggered schedule. (Tr. 99–100.) Olean field technician Patrick Smith also testified that Zandi referred to staggered start times as something that "might happen" and that he related it to the filing of grievances. (Tr. 106–107, 113.) Rumfola agreed, in response to a leading question, that Zandi's proposal to stagger start times related to grievances that have been filed. (Tr. 82.) On cross-examination, he clarified that Zandi was merely throwing out possibilities. (Tr. 91–93.) Zandi conceded that part of his motivation in proposing staggered start times was due to the grievances that had been filed. (Tr. 179.) He also did not refute the assertions by several witnesses that he referred to the garages specifically when he threw out a possible schedule for staggered start times. (Tr. 178.)

[15] Given the collective testimony of the General Counsel's witnesses that no one asked questions or made comments about Zandi's proposal, I find that any comments made to Zandi were made after the conference call. In any event, his contention that there were some employees in favor of later start times was conceded by Brinkman, the Wellsville field technician. (Tr. 75, 181.) More importantly, while Zimmerman and Brinkman testified that most field technicians preferred earlier start times, there was no proof offered that Zandi knew or was told that during the conference call or at any other time. (Tr. 56, 68–69.)

long to leave their assigned garages, taking coffee breaks before finishing the first assignment of the day, or returning to the garage too long before the end of his or her shift. Since 2006, the Respondent has conducted more than 100 GPS reviews. GPS reviews typically involve two managers, who review an employee's previous workday's GPS data, drive the work route that the employee traveled, and meet with the employee to discuss the data. When a GPS has uncovered performance or productivity problems, the Respondent has responded with efficiency-related training or by assigning the employee to ride with a more senior technician.[16]

To date, the Respondent has not disciplined employees as a result of information uncovered through GPS reviews. The subject of discipline was initially discussed on February 7, 2006 when Angelo Grande, the Respondent's representative, rolled out the GPS review process during a union-management meeting. Grande stated that employees would not be disciplined as the result of information obtained from GPS reviews. Attempting to alleviate the Union's concerns, Grande provided examples of employee time abuse uncovered through GPS reviews, which did not result in discipline.[17] Nevertheless, the Respondent has not ruled out discipline as the result of information obtained through a GPS review.[18] In fact, in a March 20 memorandum about GPS reviews to garage managers, John Boyd, the area manager, stated, in pertinent part:

> My call with Joe DeMauro went well this morning. I was prepared, and he was appreciative of our efforts at improving our productivity. He asked that we not let up and ramp up more quickly.
>
> Your reviews are getting better. I still need some of you to dig a little deeper and not let the tech lead you down their 'victim" alley so easily. Push back and press on excuses that lend themselves toward blaming the DRC, Cal, or GPS. While some of these may be valid, we need to focus on those things that we control. Improving our inefficiency and holding the associate accountable for their days work is the key to our improving. Using questions such as, how do you account for the 45 minutes at the Xbox? What were you doing out of district? What took so long at the customer location? What did you do while you were there?
>
> That being said going forward my expectation is that you ride the route of the field technician's prior day, and conduct the interview that afternoon or at the latest the next morning. This minimizes the memory loss affect. Begin including the SABIT activity report. In fact have it available for your ride and meeting with the tech. It gives more detail on the movement of the vehicle.

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[16] There was evidence to dispute the Respondent's contention that the primary purpose of the GPS system was to identify problems and inefficiencies. (Tr. 189–195, 207–208, 220, 230, 234; GC Exh. 3.)

[17] Grande's assertion at that meeting regarding the interrelationship of a GPS review with the disciplinary process was not refuted and is corroborated by the written agenda. It is also noted that, as explained by Podyma, minutes are not kept at such meetings. (R. Exh. 1; Tr. 204–205.)

[18] Boyd and Clendening denied that information obtained from a GPS review could lead to discipline. (Tr. 220, 230.) However, Podyma, the Respondent's executive director and person who oversaw development of the GPS review process in 2006, conceded that such information could result in and lead to discipline if it constitutes a violation of the Respondent's code of conduct. (Tr. 191–195, 199–201, 204.)

> Remember this is a process. *This becomes the first step in what may become further action if you choose to do so.* [Emphasis supplied][19]

The "action" that Boyd was referring to included discipline. The Respondent's policy in this regard, as articulated by Jim Podyma, its executive director, is that GPS information can be used for disciplinary purposes, but only *in addition to* a code of conduct violation directly observed by a manager in the field.[20] Examples of situations where GPS information could be used for disciplinary purposes, if also observed by a manager, include employees taking an excessive amount of time for lunch, or being at home or an entertainment venue, instead of working.[21]

On April 19, 2007, Clendening and GPS Manager Amy Walker conducted a GPS review of work performed on April 18 by David Pustulka, a TTA assigned to the East Aurora garage and a former union shop steward. In accordance with the GPS review protocol, Clendening and Walker reviewed Pustulka's GPS information and work performed, and traversed the same routes that he traveled on April 18. Later that day, at approximately 3 p.m., Clendening and Walker visited Pustulka in the field to discuss the GPS information. At the time, Pustulka was on a ladder repairing telephone wires. As they approached him, Clendening complimented Pustulka as to his safe work approach and told him they were there to perform a GPS review. Clendening informed Pustulka that he and Walker were conducting a "GPS followup" of his previous day's work. Pustulka was familiar with GPS reviews, as Clendening conducted an earlier one with him a few months earlier.[22]

Pustulka descended from the ladder and they engaged in some brief, friendly conversation. Clendening previously supervised Pustulka at the East Aurora garage and they had a good working relationship. After Clendening spoke, Walker proceeded to read information about Pustulka's movements the day before. Pustulka confirmed the accuracy of the information. Either Walker or Clendening then asked Pustulka why particular movements between assignments took so long. Pustulka responded to the question, but asserted they should have called his supervisor for that information and were wasting the Respondent's money. Clendening responded that he was the "enforcer," while Walker added that Pustulka's productivity was the lowest in the garage. Pustulka then asked whether he would need union representation. Clendening said that he did not need representation, as a GPS review was "not disciplinary." Pustulka started to walk away, but returned after Clendening stated that a refusal to cooperate would be considered insubordination. The interview proceeded briefly, but Pustulka remained belligerent. Eventually, Pustulka took out a telephone and stated that he was

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[19] GC Exh. 3.

[20] This finding is based on the statement in Boyd's memorandum and Podyma's testimony that such action could include discipline under certain circumstances. (GC Exh. 3; Tr. 206–207.)

[21] Podyma's explanation of the distinction between the Respondent's code of conduct and workplace rules was not challenged. The code of conduct is a companywide publication that addresses major issues such as drugs, alcohol, and violence in the workplace. Local workplace rules are implemented by each of the Respondent's districts that address day-to-day activities. (Tr. 198–200, 202–203.) However, Podyma also explained that GPS information showing that an employee "spent the entire day at a strip club or spent the entire day at his house rather than in the workplace," or took "excessive lunch time" would constitute a code of conduct violation if it was directly observed by a manager. He added that, "in this case, it's done as a post ride." (Tr. 202–203, 205–206.)

[22] Pustulka and Clendening each confirmed that Pustulka had a prior GPS review. (Tr. 122., 221.)

calling a union steward. Clendening asked whether Pustulka was using a company telephone. Pustulka acknowledged that it was and Clendening directed him to hand it over. Pustulka complied, at which point Clendening told him to pack up his equipment and return to the garage. As Pustulka packed up his truck, Clendening opened the truck door and placed Pustulka's telephone on driver's seat.[23]

Pustulka returned to the garage a few minutes before 4 p.m. However, the job that Pustulka was working on was not finished and he had been approved for 2 hours of overtime that day.[24] Shortly after arriving at the garage, Pustulka encountered John Boyd, the area manager. He approached Boyd and asked him, "Can we talk? Find out what's going on here." Boyd, whom Clendening had discussed the GPS review incident a short while earlier, simply told Pustulka to go home. As a result, Pustulka did not work the previously authorized 2 hours of overtime work.[25]

III. Analysis

A. Zandi's Alleged Threats

The General Counsel alleges that the Respondent violated Section 8(a)(1) when it conveyed unlawful threats to employees on the following two occasions: (1) Zandi's statement to Oakley, through Konesky, that Folts would be disciplined if Oakley grieved that management improperly permitted Folts to change his tour; and (2) Zandi's statement to field technicians from the Arcade, Olean, and Wellsville garages that he would stagger their starting times because employees filed grievances that they had been unable to reach him at the beginning of their tour. The Respondent denies making such threats.

It is an 8(a)(1) violation for an employer to engage in conduct which reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights to self-organization, to form, join, or assist a labor organization. *Alliance Steel Products,* 340 NLRB 495

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[23] I relied mostly on Clendening's version of his encounter with Pustulka on April 19 (Tr. 222–224.), as Pustulka's testimony strongly suggests that he became antagonistic. Pustulka conceded as much when he testified to telling Clendening and Walker that "I can't believe they sent you all the way out here to ask me something neither one of you knew about." He also "thought it was unusual" that they would come out to his job, noted that he had "a lot of stock with Verizon" and told them "this doesn't seem very efficient, sending two people all the way out to Bliss to ask me about something that they could have made a phone call to my boss and got the answer for." (Tr. 123–128, 137–138.)

[24] Pustulka's assertion that he had approval for 2 hours of overtime was not effectively refuted by Clendening, who had a good recollection of the other events of that afternoon, but could not recall whether Pustulka told him that. (Tr. 119, 128, 224.) Moreover, I found Clendening less than credible and evasive when asked whether he had ever seen the March 20, 2006 memorandum from Boyd. (Tr. 226–227; GC Exh. 3.)

[25] Boyd testified that Pustulka approached him in the garage and asked if there was anything they needed to speak about. Boyd responded by asking Pustulka if "he was done for the day." Pustulka allegedly said "yes" and Boyd told him to go home. (Tr. 231–232.) Pustulka simply testified that he wanted to speak with Boyd, but the latter told him to just go home. (Tr. 128.) Given the fact that Pustulka had already been sent back to the garage, the lateness in the day, and the distance and time in returning to the Bliss location, this discrepancy has no bearing on my finding that Pustulka had not yet finished his work when Clendening told him to go back to the garage.

(2003); *Philips Petroleum Co.,* 339 NLRB 916 (2003); *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); and *American Freightways Co.*, 124 NLRB 146, 147 (1959). In making this determination, the Board uses an objective standard as to whether the statement reasonably tends to coerce the employee. *Smithfield Packing Co.*, 344 NLRB 1, 2 (2004). As such, the employer's motive for the inquiry, or the success or failure of the coercion, is irrelevant. *American Tissue Corp.,* 336 NLRB 435, 441 (2001).

Oakley told Konesky that he wanted to file a grievance asserting that management unilaterally changed work hours by permitting Folts to change his tour without first going to the seniority list. Konesky advised Oakley that Zandi would discipline Folts if Oakley insisted on filing a grievance. Oakley filed a grievance anyway and Folts was disciplined. Konesky's statement constituted an unlawful threat in violation of Section 8(a)(1). *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); *Palms Hotel & Casino,* 344 NLRB 1363, 1387 (2005). As noted by the General Counsel, the fact that the threat was directed to the employee-grievant, rather than the disciplined employee, does not vitiate the violation. *Schrock Cabinet Co.*, 339 NLRB 182 (2003).

With respect to Zandi's conference call to the field technicians on April 18, there was not much dispute as to what he said. Zandi addressed the accessibility issue and noted that grievances had been filed. He explained that he was considering changing the starting times at the three garages to 7:00, 7:30, and 8:00 a.m. Zandi also provided an example consisting of the Olean's employees starting at 7:00 a.m., Arcade employees starting at 7:30 a.m., and Wellsville employees starting at 8:00 a.m. He also explained that staggered starting times would give each garage's employees a half hour to communicate with him. The only issues here are whether (1) Zandi's reference to Wellsville employees starting at 8:00 a.m. imposed a less favorable working condition on the field technicians from that garage and, if so, (2) whether employees could reasonably construe such comments as retaliation for those complaints.

It is true that Wellsville employees filed most of the grievances in 2006. However, there was no proof as to the extent to which Wellsville employees, in particular, complained about accessibility. Moreover, the testimony was mixed as to whether the employees in the conference call preferred earlier, the same or later starting times. From an objective standpoint, Zandi's proposal cannot be construed as coercive or a threat. There was no evidence to refute the notion that staggering start times was a logical approach to the accessibility problem. More importantly, however, it is far from certain that a later start time for the Wellsville field technicians would be less favorable to them. Accordingly, this charge is dismissed.

B. The Respondent's Denial of Pustulka's Request for Union Representation

The General Counsel alleges that the Respondent violated Section 8(a)(1) on April 19 by denying Pustulka's rights pursuant to *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256–261 (1975). The Respondent denies that Pustulka had *Weingarten* rights during the GPS review.

An employee has a right to union representation during an investigatory interview if the employee has a reasonable belief that the interview will result in discipline. *Southwestern Bell Tel. Co.,* 338 NLRB 552 (2002). The request is also valid if it is raised as a question. Clendening responded to Pustulka's question by telling him that a GPS interview was not disciplinary in nature. Such advice by a manager significantly to a long time employee and former union official weighs heavily in favor of what a reasonable employee would have believed under the circumstances. *Spartan Stores, Inc. v. NLRB*, 628 F.2d 953, 958 (6th Cir. 1980).

There was evidence and testimony exposing the Respondent's belief that, under certain circumstances, it could take disciplinary action based on information gained from a GPS review. There is no indication, however, that such a belief was known or made known to the Union or any of its members. To the contrary, the Respondent addressed this issue at the February 7, 2006 union-management meeting and provided a specific example to illustrate that information of employee misfeasance of worktime would not lead to discipline. This scenario presents an interesting situation where, in spite of the Respondent's beliefs, the evidence, from an objective standpoint, did not support a reasonable belief on Pustulka's part that his answers to a GPS interview could lead to discipline. The fact that Pustulka may or may not have been aware of the Respondent's assurances at the February 7, 2006 meeting is not determinative. The assurances were conveyed to his labor organization. Those meetings have an important role in the labor-management relationship and, as such, it is not unreasonable to attribute knowledge obtained during such meetings to the Union's members. Notwithstanding some subjective beliefs on the part of management to the contrary, its assurances to Union officials at formal meetings are all we have to rely on in *this* case. The irony here is that, while such testimony may have ramification for future GPS reviews, it does not change the determination that Pustulka, under the facts, did not have a reasonable belief that he could be disciplined by virtue of his cooperation in a GPS review. Accordingly, this charge is dismissed.

C. The Respondent's Disciplinary Actions

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) by: (1) issuing a verbal warning to Folts and docking his pay because Oakley filed a grievance on September 13 claiming that management permitted Folts to modify his tour schedule on September 3; and (2) denying Pustulka overtime pay on April 19 because he requested union representation. The Respondent denied the material allegations. It contends that the Folts discipline was imposed in accordance with the Respondent's work rule prohibiting employees changing their tours without management approval. With respect to Pustulka's request for union representation, the Respondent contends that Clendening sent Pustulka back to the garage because Clendening thought he had finished his work and believed Pustulka was insubordinate for not cooperating in a GPS review.

Section 8(a)(3) provides, in pertinent part, that it is "an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish that an employee engaged in protected concerted activity, the employer was aware of that activity, and the activity was a substantial or motivating reason for the employer's action. See also *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). If the General Counsel establishes its prima facie case, the burden of persuasion shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste, Inc.* 346 NLRB 494 (2006). Simply presenting a legitimate reason for its actions is not enough. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 966 (2004); *T&J Trucking Co.*, 316 NLRB 771, 771 (1995); *GSX Corp. v. NLRB*, 918 F.2d 1351 (8th Cir. 1990).

Most of the *Wright Line* factors cannot be disputed. Oakley filed a grievance, which constitutes knowledge on the part of the Respondent, as well as protected concerted activity. *LB & B Associates, Inc.*, 340 NLRB 214, 216 (2003); *Prime Time Shuttle International,* 314 NLRB 838, 841 (1994). As discussed above, Zandi's unlawful threat, as conveyed by Konesky, constitutes compelling evidence of motivation to discipline Folts if Oakley filed a grievance.

Finally, the Respondent took adverse action against Folts by verbally warning him and docking his pay.

Since the General Counsel established a prima facie case, the burden of persuasion shifted to the Respondent to prove, by a preponderance of the evidence, that it would have disciplined Folts even in the absence of Oakley's union activity. *Monroe Mfg.*, 323 NLRB 24 (1997). To meet its burden of persuasion, the Respondent was required to do more than show that it had a legitimate reason for its actions. *Hicks Oil & Hicksgas,* 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991). It did not do so. Zandi had 7 days before the Step 1 grievance meeting to investigate the facts, but did not do so. Instead, he waited until after the meeting to interview Folts about the allegations. Moreover, I also found that the investigation he did conduct was not a credible one, since he testified that the day of the alleged tour change was a Sunday, when in fact it occurred on a Saturday. As such, we are left with the clear implication from Zandi's unlawful threat that, in the absence of a grievance, Folts would not be disciplined. Based on the foregoing, I find that the Respondent disciplined Folts in violation of Section 8(a)(3) and (1).

With respect to Pustulka's *Weingarten* charge, Pustulka became belligerent and was uncooperative throughout the GPS interview. During the discussion, Clendening and Walker referred to Pustulka's productivity, but that apparently arose within the context of Pustulka's commentaries questioning their function that day. Pustulka asked whether he would need union representation. Clendening assured him that the GPS review was "not disciplinary." The interview continued, but only after Pustulka was threatened with a charge of insubordination. However, Pustulka remained combative and eventually began to make a cellular telephone call to a union representative. After confirming that Pustulka was using a company telephone, Clendening confiscated it and directed Clendening to return to the garage. Pustulka complied and returned to the garage around the regular end of his tour—4 p.m. Once there, he encountered Boyd, who told him to go home. As a result, Pustulka did not work the previously authorized 2 hours of overtime work.

Pustulka was directed to return to the garage and, thus, denied the opportunity to perform previously authorized overtime work. Clendening ordered him to do that because he was using a company-owned cellular telephone to call his union representative. However, as previously noted, Pustulka did not have a reasonable expectation that the GPS review could lead to discipline. He simply did not want to answer any more questions and resorted to calling his union representative. Under the circumstances, Pustulka was not engaged in protected concerted activity as he attempted to call a union representative. Accordingly, this charge is dismissed.

Conclusions of Law

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

2. By threatening Oakley on September 13 that it would discipline Folts if Oakley filed a grievance, the Respondent violated Section 8(a)(1).

3. By disciplining Folts because Oakley filed a grievance, the Respondent violated Section 8(a)(3) and (1).

4. By engaging in the conduct described above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

5. The Respondent has not violated the Act in any other manner.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily warned an employee and docked him for a half hour of pay, the Respondent must remove any reference from its files to such disciplinary action and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Verizon New York, Inc., New York and Olean, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining or otherwise discriminating against any employee because the Union or an employee has filed a grievance.

(b) Threatening an employee that it will discipline an employee if a grievance is filed.

(c) 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) Make Scott Folts whole for any earnings and other benefits lost on or about September 20, 2006 because we disciplined him.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful warning issued to Scott Folts and, within 3 days thereafter, notify the employee in writing that this has been done and that the suspension will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

(d) Within 14 days after service by the Region, post at its Olean, Arcade and Wellsville, New York, facilities copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure 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 facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 13, 2007.

(e) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., March 19, 2008

Michael A. Rosas
Administrative Law Judge

[27] 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.

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discipline or otherwise discriminate against any of you for filing a grievance or otherwise engaging in protected concerted activity.

WE WILL NOT threaten you or any other employee with discipline if you file a grievance.

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

WE WILL make Scott Folts whole for any earnings and other benefits, lost on or about September 20, 2006, plus interest, because we disciplined him,.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline of Scott Folts, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension will not be used against him in any way.

VERIZON NEW YORK, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

130 S. Elmwood Avenue
Suite 630
Buffalo, New York 14202
Hours: 8:30 a.m. to 5 p.m.
716-551-4931.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.