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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CHARTER COMMUNICATIONS, LLC  
Respondent

and

Case 07-CA-140170

JONATHAN FRENCH, an Individual  
Charging Party French

and

Case 07-CA-145726

RAYMOND SCHOOF, an Individual  
Charging Party Schoof

and

Case 07-CA-147521

JAMES DEBEAU, an Individual  
Charging Party DeBeau

**RESPONDENT CHARTER  
COMMUNICATION, LLC'S BRIEF  
IN OPPOSITION TO THE GENERAL  
COUNSEL'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S  
DECISION**

RESPONDENT'S BRIEF IN OPPOSITION TO  
THE GENERAL COUNSEL'S EXCEPTIONS

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1 **I. INTRODUCTION**

2 Respondent Charter Communications, LLC (“Charter”), pursuant to Section 102.46(d) of  
3 the Board’s Rules and Regulations, files the following Brief in Opposition to the General  
4 Counsel’s (the “GC”) Exceptions to the Decision of Administrative Law Judge Arthur J.  
5 Amchan, JD(SF)-108-16 (the “ALJD”).

6 **II. STATEMENT OF THE CASE**

7 Charter incorporates by reference and relies upon the facts and arguments in Charter’s  
8 Brief In Support of Exceptions to the ALJD, filed on December 16, 2016.

9 **III. ARGUMENT**

10 **A. The General Counsel’s Exceptions Are Based on Incredible and Discredited  
11 Testimony.**

12 The General Counsel bears the burden of proving each of the Complaint’s allegations.  
13 See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that the General Counsel  
14 did not meet its burden of proof where testimony supporting and opposing the allegations were  
15 equally credible). In his attempt to do so, the GC actually presented the snake pit from Raiders  
16 of the Lost Ark: a writhing, jumbled mass of irreconcilable evidence that could never be  
17 straightened out. And now, the GC’s exceptions are based on that inconsistent and unreliable  
18 evidence.

19 Indeed, the ALJ correctly observed credibility problems among *all* of the GC’s witnesses.  
20 The sole constants among the GC’s witnesses are their utter disregard for the truth and their  
21 dramatically different stories. Rather than try to address these lies—because he cannot—the GC  
22 simply ignores them and mischaracterizes the record evidence by cherry picking testimony from  
23 the multiple contradictory stories told by his witnesses.

24 Most of the GC’s exceptions are supported solely by the testimony of T.J. Teenier—a  
25 former Charter supervisor and the ringleader of the very misconduct that Charter was  
26 investigating. Teenier clearly has an axe to grind against Charter—after Charter terminated him,  
27 he filed an unfair labor practice charge against Charter (which he subsequently was forced to

1 withdraw when the Region refused to pursue them). Undeterred, after the close of the hearing  
2 (when he believed his credibility was no longer at issue), he filed a civil lawsuit against Charter,  
3 alleging that he was wrongfully terminated in violation of the Family Medical Leave Act. He  
4 makes these claims despite that fact that he repeatedly and consistently testified at the hearing  
5 that he was fired in an effort by Charter to “cover up” its union animus *and never once*  
6 *mentioned during the hearing that he believed his termination had anything to do with the*  
7 *FMLA*. Teenier’s testimony disingenuously reflects the animus he has against Charter. Not  
8 only did Teenier contradict the testimony of the GC’s other witnesses during the hearing, he  
9 contradicted his own testimony and the testimony he provided in his sworn affidavit. The GC  
10 has based his entire case on the testimony of an individual who repeatedly showed himself to be  
11 unreliable and dishonest. The ALJ clearly did not credit Teenier’s testimony, and that holding  
12 must stand.

13 Charter terminated the five employees at issue because each witness told Stephanie  
14 Peters, Charter’s investigator, a different version of events. Charter, acting through Peters,  
15 concluded that the employees were lying in an effort to cover up their wrongdoing, retaliate  
16 against Robert Lothian for reporting their misconduct, or both. As detailed in Charter’s prior  
17 briefing, these employees repeated this deceit when they testified at the hearing; unaware of how  
18 others had testified and unable to corroborate their versions of events, they continued to tell  
19 disparate versions of the various events and in many cases *admitted that they withheld from or*  
20 *manufactured information* for Peters during the course of her investigation. Against this web of  
21 lies, the GC offers no evidence that Charter’s decision to terminate the employees—especially  
22 Raymond Schoof and James DeBeau—was motivated by union animus. The findings of the ALJ  
23 in favor of Charter must hold for this reason alone.

24 **B. The ALJ Correctly Found Charter Did Not Terminate DeBeau or Schoof for**  
25 **Perceived Involvement in Union Activity.**

26 The ALJ’s conclusion that Charter did not terminate DeBeau or Schoof for perceived  
27 involvement in union activity is fully supported by the record. ALJD 17:32-33, 18:10-13, 18:25-

1 26. Contrary to the GC’s baseless claim that “ample evidence” supports its allegations (GC Brief  
2 at 32: 10, which noticeably lacks any citation to the record), there is *no* evidence that either  
3 DeBeau or Schoof engaged in any union activity or that anyone at Charter believed that they did  
4 so. There is not a whiff of discriminatory motive and the ALJ correctly rejected this allegation.

5 **1. There Is No Credible Evidence That Charter’s Decision to Terminate**  
6 **DeBeau Was Because of Any Union Activity.**

7 There is no evidence that would allow a reasonable person to draw an inference that  
8 DeBeau’s discharge was related to any protected activity—because he did not engage in any.

9 First, it is undisputed that DeBeau did not engage in union activity. DeBeau himself  
10 testified that he was not involved in any union activity at Charter. 1098:1-25.

11 Second, the remaining theory advanced by the GC—that Charter *believed* DeBeau was  
12 involved in union activity or otherwise supported a union—is not believable. DeBeau testified  
13 that, as far as he knew, no Charter manager or supervisor ever thought he was engaged in union  
14 activity at Charter. 1098:1-25.

15 There is also no evidence that Charter, and particularly anyone involved in the  
16 investigation, was aware that DeBeau was involved in union activity or otherwise supported a  
17 union. The *only* evidence that anyone at Charter even considered that DeBeau was engaged in  
18 union activity is testimony by Teenier that an unnamed technical manager identified DeBeau as  
19 “involved” with the union. 385:1-19. Teenier’s testimony on this point, like the bulk of his  
20 testimony, simply is not credible. He never identified the manager and, despite the fact that the  
21 GC elicited testimony from several other participants in the conference calls, no one else  
22 corroborated Teenier’s testimony. Indeed, Teenier testified that despite what was allegedly said  
23 on the conference calls, he never believed DeBeau was involved with union activity and he never  
24 heard anyone at Charter say that it needed to fire DeBeau because of his union activity. 502:1-5,  
25 512:3-5; 515:13-517:3. There is not a shred of evidence of animus toward DeBeau based on his  
26 feelings about the Union. Accordingly, Teenier’s testimony that an “unnamed manager”  
27 identified DeBeau as a union supporter (385:10-19)—which Teenier himself later contradicts

1 with his own testimony (512:3-14)—is wholly insufficient to overcome the ALJ’s conclusion  
2 that Charter did not believe DeBeau supported a union.

3 Charter also demonstrated that it would have discharged DeBeau notwithstanding any  
4 purported protected activity because, as DeBeau admitted, he performed non-Charter work on  
5 company time at the haunted house run by Jozeska, and Charter did not believe he was honest  
6 during his interview with Peters about laying sod at Schoof’s home. *Wright Line, A Div. of*  
7 *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980); *APX International v. NLRB*, 144 F.3d 995 (6th  
8 Cir. 1998).

9 Indeed, DeBeau conceded his dishonesty during the investigation. DeBeau admitted that  
10 he omitted information from his interview with Peters: he did *not* tell Peters that he worked at  
11 Schoof’s house on two consecutive days—instead of just one—and he did *not* tell Peters that  
12 Felker had visited Schoof’s house while he, Schoof, and Teenier were laying sod. 1124:11-13,  
13 1134:23-25, 1142:4-6, R. Ex. 9 at 8-9. Like the other employees who were terminated,  
14 DeBeau’s dishonesty is especially troubling because he was part of the TQA Department and,  
15 therefore, responsible for auditing and reporting unauthorized services. It was imperative for  
16 Charter to feel that it could trust these employees and it did not.

17 In any event, whether DeBeau actually lied is irrelevant; Peters had a logical and  
18 legitimate reason to believe that DeBeau was not being truthful with her. Any *perceived*  
19 misconduct (as opposed to DeBeau’s nonexistent union activity) is a legitimate reason for his  
20 discharge. *Auto Workers*, 514 F.3d 574, 585 (6th Cir. 2008); *Chinese Daily News*, 346 NLRB  
21 906, 946 (2006); *Affiliated Foods*, 328 NLRB 1107, 1107 & n.1 (1999). Peters’ reasonable  
22 belief was based on the findings of her investigation—an investigation during which DeBeau  
23 admitted that he performed non-company work on company time and provided inaccurate and  
24 inconsistent information.

25 Accordingly, the ALJ correctly found Charter terminated DeBeau’s employment because  
26 it reasonably believed he performed non-Charter work on company time and for giving  
27

1 misleading information in the course of its investigation, not because of any alleged involvement  
2 in protected activity. ALJD 17:34-37.

3           **2. There Is No Credible Evidence That Charter’s Decision to Terminate**  
4           **Schoof Was Because of His Union Activity**

5           Similar to DeBeau, there is no credible evidence that Schoof engaged in union activity or  
6 that Charter was aware that Schoof was involved in union activity or otherwise supported a  
7 union. Again, the only evidence introduced by the GC that Charter believed Schoof supported a  
8 union is testimony by Schoof that Teenier allegedly asked Schoof his position on unions and  
9 Schoof told Teenier that he supported them. 1243:24-1244:16. However, the GC’s own witness,  
10 Teenier, did not corroborate that conversation:

11                   Q. Mr. Teenier, did you ever have any conversations with Ray  
12                   Schoof about the Union?

13                   A. With Ray? Not that I can remember.

14           458:11-13.

15           Given that Teenier told numerous other lies in his misguided attempt to impose liability  
16 against Charter, the fact that he *denies* having this conversation is particularly telling. Instead, as  
17 he did with DeBeau, Teenier claims yet again that an unnamed technical manager identified  
18 Schoof as “involved” with the union. 385:1-19. Nonetheless, Teenier himself did not believe  
19 that Schoof was involved in union activity. 512:6-8. Teenier further admitted that no one in  
20 Charter management ever said that Charter needed to fire Schoof because of his union activity or  
21 make plans to fire Schoof. 502:6-10. Again, as was the case with DeBeau, this inconsistent and  
22 contradictory testimony is not sufficient to prove *by a preponderance of the evidence* that  
23 Charter believed Schoof supported the union or that Charter harbored any animus toward Schoof  
24 because of this supposed protected activity. Therefore, the ALJ’s decision to reject this  
25 allegation is supported by the evidence and should not be disturbed.

26           Even if there was evidence of discrimination against Schoof because of his “alleged”  
27 support for the union—and there is none—the ALJ correctly found Charter would have  
discharged Schoof notwithstanding any protected conduct. *Wright Line*, 251 NLRB 1083; *APX*

1 *International v. NLRB*, 144 F.3d 995 (6th Cir. 1998). Charter discharged Schoof because it did  
2 not believe he was honest during his interview with Peters about laying sod at his home on  
3 Charter time. ALJD 19:6-7, 19:15-16, 20:24-28. As discussed above, companies have the clear  
4 right to discharge an untruthful employee. *6 West Ltd. Corp. v. NLRB*, 237 F.3d 767, 778 (7th  
5 Cir. 2001) (quoting *EEOC v. Total System Services, Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000)).

6 Charter's conclusion about Schoof's honesty was confirmed by Schoof's own testimony  
7 at the hearing. Schoof ***admitted that he was not honest*** in his interview with Peters and wiped  
8 out any credibility he might have left when he testified that "[I] felt that I needed to come up  
9 with a story I guess to not lose my employment." 1195:21-22. For example, Schoof did not tell  
10 Peters that Felker showed up at his house while he was laying sod and he also told her that he  
11 was working 10-hour days at the time of the sod laying (even though he was not sure whether or  
12 not that was true).<sup>1</sup> That the GC came forward at the hearing—more than a year after Schoof's  
13 termination—with "evidence" that Schoof might have been working an eight-hour shift on the  
14 day he laid sod at his house is irrelevant to determining Charter's motivation at the time it  
15 decided to terminate Schoof's employment. Peters had to make her decision based on the  
16 information provided to her at the time, and at the time, Schoof gave her incomplete information  
17 and evasive answers to her questions.

18 Like the other employees who were terminated, Schoof's dishonesty is especially  
19 troubling because he was part of the TQA Department and, therefore, responsible for auditing  
20 and reporting unauthorized services. It was imperative for Charter to feel that it could trust these  
21 employees and it did not.

22 As with DeBeau, whether Schoof actually lied is irrelevant; Peters had a logical and  
23 legitimate reason to believe that Schoof was not being truthful with her. Any ***perceived***  
24 misconduct (as opposed to Schoof's alleged union activity) is a legitimate reason for his  
25 discharge. *Auto Workers*, 514 F.3d at 585; *Chinese Daily News*, 346 NLRB at 946; *Affiliated*

26 \_\_\_\_\_  
27 <sup>1</sup> DeBeau also testified that he believed that Schoof was on a 10-hour shift the day they laid sod together and that they both only worked eight hours on the day in question. 1071:23-25, 1073:8-20, 1074:23-1075:4, 1181:4-1182:1. Schoof testified that he was not sure whether he worked the full 10-hours. 1182:6-1183:6; 1275:19-1277:1.,

1 *Foods*, 328 NLRB at 1107 & n.1. As the ALJ properly concluded, Peters’ reasonable belief was  
2 based on the findings of her investigation—an investigation during which Schoof admitted he  
3 provided inaccurate and inconsistent information because he knew that his job was in jeopardy.

4 **3. The ALJ Properly Disregarded Irrelevant Evidence.**

5 Absent any evidence of union animus by Charter, the GC resorted to confusing the record  
6 by drowning the record with irrelevant and inaccurate evidence. The ALJ properly declined to  
7 consider any of this purported “evidence” offered by the GC. *First*, while the GC proffers  
8 evidence of so-called disparate treatment (GC Brief at 35-39), none of the examples provided are  
9 on point. Indeed, this investigation into Teenier and the co-conspirators was unprecedented at  
10 Charter in scope and complexity. None of the examples offered by the GC constitute appropriate  
11 comparators that could support a finding of disparate treatment.

12 *Second*, the GC’s contention that Charter departed from past practice (GC Brief at 39) is  
13 a red herring. Teenier admitted that for years he ran the TQA department as his own personal  
14 fiefdom; he knowingly disregarded company rules and policies, and his former supervisor, Dave  
15 Slowik, took a hands-off approach. 482:4-483:1. In February of 2013, Greg Culver took over  
16 for Slowik and Teenier was held to account. Completely unrelated to any union activity—  
17 because there was none at the time--Culver directed Teenier to start following company rules and  
18 policies. 484:4-11. Culver’s expectation of strict compliance in February 2013 far predates the  
19 union activity in the early summer of 2014 and the investigation into Teenier and his co-  
20 conspirators in the fall of 2014, overcoming any suggestion that Charter suddenly departed from  
21 a practice of loose enforcement corresponding with the investigation itself. The culture shift had  
22 been underway for more than a year and a half. Likewise, while the GC questions “why DeBeau  
23 should have been in trouble” for performing non-company business on company time (“special  
24 projects”) if his supervisor asked him to do it (GC Brief at 40), the answer is simple: Charter  
25 expects its employees to know right from wrong; it fired all of the employees engaged in the  
26 scheme, including Teenier—the supervisor who gave the improper permission.

1           *Third*, contrary to the GC’s contention that Charter’s reasons for the terminations shifted  
2 (GC Brief at 40), the evidence shows Charter’s reasons for terminating all five employees have  
3 been entirely consistent. Using proverbial smoke and mirrors, the GC argues that Sherry  
4 Farquhar (a high level HR executive at Charter) gave different reasons for terminating the five  
5 employees than Peters. This argument is wholly disingenuous. Farquhar, in her testimony,  
6 identified the specific conduct that each employee engaged in that led to their termination.  
7 1379:17-1383:1, 1383:20-24. Peters testified about the specific policies *that each employees’*  
8 *conduct* violated. 623:1-624:2, 624:17-25, 625:6-8, 630:11-631:16, 634:13-635:12, 636:8-  
9 638:3, 1556:1-1557:11. The testimony of Farquhar and Peters is entirely consistent. Moreover,  
10 Harth Goulette (another HR executive) and Culver—the *actual decisionmaker*—also testified as  
11 to the reasons for the terminations and their testimony is entirely consistent with that of Farquhar  
12 and Peters. 795:1-799:3, 1700:13-1703:2. Contrary to the GC’s argument—and wholly unlike  
13 the GC’s witnesses who were so dishonest that they ended up contradicting each other—all four  
14 of Charter’s witnesses consistently and reliably testified that the five employees were terminated  
15 because they provided false information during Charter’s investigation into their misconduct in a  
16 deliberate attempt to frustrate Charter’s investigation and to retaliate against Lothian, the  
17 supervisor who reported the misconduct, by discrediting him.

18           *Fourth*, the GC blatantly misrepresents the record evidence and the entirety of Peters’  
19 testimony when it alleges that Charter failed to conduct a meaningful investigation into Teenier  
20 and the co-conspirators (GC Brief at 42). The GC offers the following examples, which the  
21 record demonstrates are nothing but Swiss cheese disproved by the record:

- 22           • The GC accuses Peters of failing to confront DeBeau when he claimed he had  
23           never been to Teenier’s house yet also recalled going apple picking at Teenier’s  
24           house. GC Brief at 42. The record demonstrates this is not true: Peters did  
25           confront DeBeau on this inconsistency in his story during the investigation and,  
26           despite having a clear opportunity to explain this discrepancy, DeBeau offered  
27           nothing but silence in response. 1481:2-13.

- 1           • With respect to Schoof, the GC faults Peters for not tracking down the exact date  
2           of the sod project. GC Brief at 43. Schoof himself could not recall, either during  
3           the investigation or during the hearing, when the sod project occurred. R. Ex. 9 at  
4           8; 1180:10-12. The person in the best position to provide the date of the sod  
5           project was Schoof, and he did not even know the date. Moreover, the actual date  
6           of the sod laying was irrelevant—Charter was investigating whether employees  
7           were working on non-company business during company time. The employees at  
8           issue worked under limited supervision and because their misconduct was  
9           endorsed by Teenier, they could have manipulated their time records to reflect  
10          whatever they needed.
- 11          • The GC faults Peters for crediting Lothian and Watkins over the other witnesses  
12          (GC Brief at 43). Yet Peters and Culver both consistently testified about their  
13          reasons for doing so, and they are logical and reasonable. First, they found  
14          Lothian credible because he had nothing to gain from making the complaints that  
15          initiated the investigation, and that his demeanor and statements showed he was  
16          forthcoming. 1555:22-1557:11. As Culver testified, Lothian’s report that  
17          employees were *laying sod* on company time was so specific and unusual that he  
18          found it to be credible. 1698:14-1699:5. Lothian was also clearly worried about  
19          Teenier retaliating against him and, in fact, Teenier and his cronies tried to do just  
20          that. Peters was also justified in relying on Watkins. The GC argues—without  
21          any evidence—that Watkins was merely repeating what Lothian told him. The  
22          record evidence, however, shows that Watkins told Peters he obtained the  
23          information about the sod project from Jozeska, not Lothian. 1524:5-24; ALJD  
24          15 n. 29.
- 25          • Peters was also justified in crediting Lothian because, when compared to the  
26          stories told by the other employees (all of whom were either trying to save their  
27          jobs or punish Charter or both), the version of events relayed by Lothian is the

1 only one that actually makes any sense. For example, Lothian told Peters that  
2 Felker told him that he (Felker) discovered the employees were laying sod at  
3 Schoof's house during work hours after he drove by Schoof's house and found  
4 them working there. Felker, of course, denied this story both during the  
5 investigation and at the hearing. But Felker admitted that he *never* told Peters  
6 that he was at Schoof's house while Schoof, DeBeau, and Teenier were laying  
7 sod. In fact, *none* of the employees involved in the sod laying incident—Felker,  
8 Schoof, DeBeau, and Teenier—told Peters that Felker had visited Schoof's house.  
9 Felker told Peters that he drove by Schoof's house *after* the sod had been laid.<sup>2</sup>  
10 The other three employees conceded that they omitted Felker's allegedly brief  
11 appearance from the information they provided Peters. The reason for this is  
12 simple; *Felker did not actually make his presence known when he visited*  
13 *Schoof's house*. What likely happened is that Felker suspected Schoof and  
14 DeBeau were performing personal work on company time. Frustrated that  
15 DeBeau and Schoof were not returning his calls, and suspecting that Teenier had  
16 pulled the employees on yet another special project, Felker drove to Schoof's  
17 house. ALJD 20:12-28. When he saw Schoof and DeBeau (and perhaps Teenier  
18 as well) laying sod on company time, he took a series of pictures as "evidence" of  
19 the employee's misconduct (which he denied to Peters). This is consistent with  
20 the version of events he allegedly told Lothian that Lothian then conveyed to  
21 Peters. Only after Charter terminated the employees did the employees likely  
22 coordinate their stories and agree to retell the story with Felker appearing at  
23 Schoof's house. Charter chose to believe Lothian not because of union animus  
24

25 \_\_\_\_\_  
26 <sup>2</sup> Felker also testified that even though he told Peters that he did not have any pictures of the sod, he did take  
27 pictures with his personal sod after it had been installed. He did not tell Peters about these pictures, even though she  
specifically asked him about pictures. Felker, of course, offers no explanation as to why he drove to a co-worker's  
house to take pictures of his grass after it had been installed, especially given that he was there at the time the sod  
was being put in.

1 but rather because Lothian is the only one who provided complete information  
2 and made sense when doing so.

- 3 • It cannot be ignored that Peters made the correct decision: all of the GC's  
4 witnesses admitted to withholding information from Peters and providing false  
5 information. They also admitted that they did not provide full information to the  
6 Region during its investigation. For example, until the hearing, DeBeau never  
7 told Peters or the Region that he helped Schoof lay sod on two separate days, not  
8 just one day. 1124:11-13 , 1083:9-1084:1. Likewise, Teenier did not tell the  
9 Region about his post-termination discussions with French. 571:11-23. Teenier's  
10 omission is significant because, while he testified at the hearing that he told  
11 French that French was the subject of meetings about union activity around the  
12 time of the handbilling, French asserts that conversation did not occur until after  
13 they were terminated. 83:20-21, 510:9-11. Accordingly, Teenier's omission  
14 discredits his version of events. It is quite surprising that the GC asks the Board  
15 to credit (and reinstate) witnesses who admitted lying during the Region's  
16 investigation—when they were fired for lying during the investigation.
- 17 • The GC urges the Board to draw an inference adverse to Charter because Lothian  
18 did not testify at the hearing. GC Brief at 44. Yet at the time of the hearing,  
19 Lothian no longer worked for Charter. 1684:17-22. As a former employee, he  
20 was equally accessible to Charter and the GC, and the GC chose not to call  
21 Lothian to the stand. *See, e.g., Krispy Kreme Division, Beatrice Foods*, 261  
22 NLRB 773, 773 n.1(1982) (declining to draw adverse inference when witness is  
23 former employee and thus equally accessible to both employer and General  
24 Counsel), citing *Hitchiner Manufacturing Company*, 243 NLRB 927 (1979). In  
25 fact, it is known that the GC subpoenaed Lothian to appear at the hearing, yet  
26 declined to call him when he appeared at the hearing location. .

1           **C.     The ALJ Correctly Found That Peters’ Directive to Employees to Keep The**  
2           **Investigation Regarding Employee Misconduct Confidential Was**  
3           **Warranted.**

4           The ALJ properly concluded that the facts of this case warranted Peters’ request to  
5 witnesses to keep the details of the investigation confidential, and in doing so she did not unduly  
6 interfere with employees’ Section 7 rights. ALJD 24:25. Peters was concerned that she needed  
7 to interview a number of people to complete her investigation and she wanted “to preserve the  
8 integrity of it so that there wasn’t a lot of conversation, and I’d have to go back and follow up  
9 with everybody.” 1469:12-23. As the ALJ correctly found, the record evidence demonstrated  
10 “an obvious[] danger of the employees coordinating their stories or suggesting ‘helpful’  
11 interview answers to others” such that Peters’ instruction was lawful. ALJD 25:26-27.

12           Charter recognizes the Board’s decision in *Banner Health System* provides that an  
13 employer may restrict employees’ ability to discuss an investigation only where there is a  
14 legitimate and substantial business justification for doing so. *Banner Health System*, 362 NLRB  
15 137, slip op. at 10 (2015) (citing *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op.  
16 at 15 (2011)). Charter submits that *Banner Health System* was wrongly decided, and that  
17 employers always have a legitimate interest in protecting the integrity of their investigations into  
18 misconduct, and it does not impinge on employees’ Section 7 rights to require such  
19 confidentiality. Accordingly, Charter urges the Board to overrule *Banner Health System*.<sup>3</sup>

20           However, the Board need not go that far to affirm the ALJ’s conclusion. An employer  
21 may lawfully request that employees keep an investigation confidential if the employer  
22 determines that evidence is in danger of being destroyed, testimony is in danger of being  
23 fabricated, and there is a need to prevent a coverup. *Id.*; see also *Caesar’s Palace*, 336 NLRB  
24 271, 272 (N.L.R.B. 2001) (“Because the investigation involved allegations of a management  
25 coverup and possible management retaliation, as well as threats of violence, the Respondent’s  
26 investigating officials sought to impose a confidentiality rule to ensure that witnesses were not

27 <sup>3</sup> In addition, the Board’s decision in *Banner Health System* postdates Peters’ investigation and the filing of the  
underlying charge.

1 put in danger, that evidence was not destroyed, and that testimony was not fabricated. We find  
2 that the Respondent has established a substantial and legitimate business justification for its rule  
3 and that, in the circumstances of this case, this justification outweighs the rule’s infringement on  
4 employees’ rights.”)

5         Here, Peters believed there was an urgent need to keep the investigation confidential.  
6 The investigation involved allegations of a group of supervisors and employees acting together  
7 to defraud Charter and to protect each other. Peters had heard that Teenier was directing his  
8 employees to deny everything if questioned by human resources. R. Ex. 9 at 19. Lothian also  
9 told Peters that he was worried about Teenier retaliating against him. Lothian was so concerned  
10 about retaliation that Peters said he cried while telling her this information. At the same time  
11 that Lothian was confiding with Peters, Teenier was calling Culver to tell him that Lothian was  
12 “paranoid.” Then, on the first day of the investigation, Teenier showed up at Charter’s offices  
13 after another co-worker called him and told him that Culver was at the office. 426:8-427:7.  
14 Teenier was supposed to be on leave following the death of his father and yet came into the  
15 office to discuss the investigation with Culver. *Id.*, 425:14-21, 1471:5-19. In light of these early  
16 indicators, Peters correctly determined that the investigation should be kept confidential in order  
17 to preserve its integrity.

18         With respect to French, Counsel for the General Counsel erroneously argues that the  
19 confidentiality instruction was not warranted since “he revealed that he knew all about the  
20 investigation.” GC Brief at 26:10-12. The record evidence reveals, however, that French’s  
21 boasting was unsupported, as French proceeded to relate very few details of the investigation to  
22 Peters, and therefore he was either not actually familiar with the investigation or was lying to  
23 Peters and obstructing the investigation. French also provided supposedly “new evidence” to  
24 Peters about Lothian having a gun in a Charter vehicle. This information directly related to  
25 Charter’s concern that employees being investigated were engaging in an effort to discredit and  
26 retaliate against Lothian. Peters needed to confirm that French’s information was false—which  
27

1 she ultimately did—and in the interim it was appropriate for her to ask French to keep the  
2 allegations confidential.

3         Indeed, despite Peters’ instruction, a number of the employees did speak with one another  
4 about the investigation: French and Payne discussed the investigation; Schoof and DeBeau spoke  
5 with Teenier about the investigation; and Carlson and Schuetz spoke with Teenier about the  
6 investigation. Peters’ concerns about the investigation turned out to be well grounded. In this  
7 context, where the investigation is aimed directly at employees conspiring together to violate  
8 company policy, an investigation can only be effective if the employees are not permitted to  
9 coordinate their stories. The fact that the employees ignored that instruction and were able to act  
10 together to try to get Lothian in trouble and mislead the company does not render the instruction  
11 unlawful. The ALJ correctly concluded that Charter’s legitimate reasons for giving  
12 confidentiality instructions are “patently obvious” and outweighed any alleged infringement on  
13 the employees’ rights. ALJD 25:25-29.

14             **D.         The ALJ Correctly Found Schoof, DeBeau, and French Were Not**  
15             **Terminated for Breaching Peters’ Confidentiality Instruction.**

16         The ALJ properly rejected the GC’s baseless claim that Charter terminated Schoof,  
17 DeBeau, and French for violating Peters’ instruction to keep the investigation confidential. The  
18 record directly contradicts the GC’s theory, as Peters, Farquhar, and Culver each testified as to  
19 the specific reasons Charter terminated the three employees, none of which involved the  
20 confidentiality directive. The record is devoid of any evidence supporting this claim. In fact,  
21 such a claim is not properly before the Board. While the GC sought to amend the Complaint to  
22 include this allegation, the ALJ never granted the GC’s motion.<sup>4</sup>  
23  
24  
25

26 <sup>4</sup> The GC raised this baseless allegation for the first time at the close of the tenth and final day of the hearing.  
27 1788:13-1791:25. Charter objected to the GC’s motion to amend its complaint to add this new theory at the close of  
the hearing, after all of the witnesses had testified. *Id.* The ALJ asked the parties to brief the issue, and in the ALJD  
the ALJ did not grant the GC’s motion to amend.

1           **E.     The ALJ Properly Dismissed Certain Untimely Allegations Under Section**  
2           **10(b).**

3           The ALJ correctly ruled that Section 10(b) precludes certain untimely allegations raised  
4           for the first time in the second amended charge.<sup>5</sup>

5           Section 10(b) of the Act provides in relevant part:

6                     Whenever it is charged that any person has engaged in or is  
7                     engaging in any such unfair labor practice, the Board ... shall have  
8                     power to issue and cause to be served upon such person a  
9                     complaint stating the charges in that respect and containing a  
10                    notice of hearing before the Board or a member thereof ...  
11                    *provided, that no complaint shall issue based upon any unfair*  
12                    *labor practice occurring more than six months prior to the filing*  
13                    *of the charge with the Board ....*

14           29 U.S.C. § 160(b) (emphasis added).

15           The new allegations that were not added until French’s Second and Third Amended  
16           Charges are time-barred under a literal application of Section 10(b). French filed his Second  
17           Amended Charge on October 29, 2015 (and repeated the allegations in his Third Amended  
18           Charge on November 18, 2015). These untimely allegations concern alleged unfair labor  
19           practices that took place *more than a year earlier* between July and October **2014**.

20           The Board has consistently held that the General Counsel cannot prosecute an alleged  
21           violation that was not timely charged unless the violation is “closely related” to the allegations in  
22           a previously filed and timely charge. The Board uses a three-part test to determine whether  
23           timely and untimely allegations are “closely related:”

24                     First, the Board will look at whether the otherwise untimely  
25                     allegations involve the same legal theory as the allegations in the  
26                     pending timely charge. Second, the Board will look at whether the  
27                     otherwise untimely allegations arise from the same factual  
                      circumstances or sequences of events as the pending timely charge.  
                      Finally, the Board may look at whether a respondent would raise  
                      similar defenses to both allegations.

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28           <sup>5</sup> As noted in Charter’s Brief in Support of its Exceptions, Charter disagrees with the ALJ’s decision to allow other  
29           allegations to survive Section 10(b) and be considered on their merits.

1 *Nickels Bakery of Indiana, Inc.*, 296 NLRB 927, 928 (1989) citing *Redd-I, Inc.*, 290 NLRB 115,  
2 1118 (1988); see also *The Carney Hospital*, 350 NLRB 627, 630 (2007); *SKC Electric, Inc.*, 350  
3 NLRB 857, 858 (2007).

4         The untimely allegations raised in French’s Second Amended Complaint fail all three  
5 prongs of the Board’s test for determining whether timely and untimely allegations are closely  
6 related. French’s original allegations concerned his termination and an alleged single exchange  
7 with Lothian in September 2014. French—the Charging Party—was clear that his charge was  
8 limited to these sole allegations. 256:1:12; 259:5-24. The new and untimely allegations refer to  
9 various acts of alleged misconduct by other members of Charter’s management over the course  
10 of a four-month period of time from July to October 2014. The two sets of allegations do not  
11 involve similar conduct during the same time period with a similar object, nor is there a causal  
12 nexus between the allegations. Indeed, French had little to no personal knowledge of any of the  
13 factual underpinnings for these allegations. The untimely allegations in the second amended  
14 charge are nothing more than separate actions carried out independently by several different  
15 Charter supervisors, the overwhelming majority of whom are alleged to have played no part in  
16 the decision to terminate French. This is insufficient to support a finding of factual relatedness  
17 under Section 10(b). *SKC Electric, Inc.*, 350 NLRB at 859 (“Although the events occurred  
18 during the same organizational campaign and the same general time period, ‘a chronological  
19 relationship without more is insufficient to support a finding of factual relatedness.’”) (*quoting*  
20 *Carney Hospital*, 350 NLRB at 631). In addition, Charter’s defenses to the untimely allegations  
21 are different from the defenses it has raised to the allegations made in the first amended charge.  
22 Charter has asserted a *Wright Line* defense to the allegations surrounding French’s termination.  
23 251 NLRB 1083 (1980). Charter would have discharged French even in the absence of protected  
24 conduct because it did not believe he was honest during his investigatory interview with Charter.  
25 *Id.*; *APX International v. NLRB*, 144 F.3d 995 (6th Cir. 1998). Charter’s defense to the untimely  
26 allegations are either that the conduct did not occur or that the conduct did not reasonably tend to  
27 interfere with Section 7 rights.

1           **F.     The ALJ Correctly Found Charter Did Not Engage in Coercive Surveillance**  
2           **Of Employees Engaged in Union Activity At Its Saginaw Facility On or**  
3           **About July 15, 2014**

4           The ALJ correctly rejected the GC’s contention that Charter engaged in coercive  
5 surveillance of protected activities and correctly discredited the GC’s unreliable witness, T.J.  
6 Teenier. ALJD 23:6-18. As the ALJ observed, the three union organizers who distributed flyers  
7 in Saginaw on or about July 15, 2014, did so out in the open in a parking lot adjacent to Charter’s  
8 facility. ALJD 4:14-16. None of these union organizers were Charter employees, and the whole  
9 of the union activity took place on or near Charter’s property. 1619:1-1620:24. Three  
10 supervisors—Felker, Chad Erskin, and Dave Jurek—observed the union activity. 1615:8-  
11 1617:4; 1634:14-1636:10. Both Erskin and Jurek credibly testified that they went outside *solely*  
12 to make sure that the union organizers did not trespass on Charter’s property or block traffic. *Id.*  
13 When they satisfied themselves that these things were not occurring, they both went back inside  
14 Charter’s building. *Id.* None of the three supervisors wrote down the names of the employees  
15 who took handbills from the union organizers or made any other effort to identify employees  
16 who may have supported the union. *Id.*

17           As the ALJ correctly ruled, the conduct of Charter’s supervisors on or about July 15,  
18 2014, does not rise to the level of unlawful surveillance, especially given that the union activity  
19 occurred in public on Charter’s premises. The Board has often held that management officials  
20 may observe public union activity, particularly where such activity occurs on company premises,  
21 without violating Section 8(a)(1) of the Act, unless such officials do something out of the  
22 ordinary. *Metal Industries, Inc.*, 251 NLRB 1523 (1980) (citing *Chemtronics, Inc.*, 236 NLRB  
23 178 (1978)); *G. C. Murphy Company*, 216 NLRB 785, n.2 (1975); *Larand Leisurelies, Inc.*, 213  
24 NLRB 197, 205 (1974); *Tarrant Manufacturing Company*, 196 NLRB 794, 799 (1972).

25           Here, the Board has not presented any evidence that Charter supervisors did anything  
26 “out of the ordinary” when the supervisors observed the union handbilling that occurred just  
27 outside its parking lots. They walked outside, observed the conduct, and after determining that  
the activity was not creating a safety hazard, returned inside the building.

1 In rejecting this allegation, the ALJ correctly disregarded the GC’s incredible evidence –  
2 including conflicting testimony from Teenier and Felker. ALJD 23:5-18. Teenier claimed that  
3 he received a phone call from Felker that there were union organizers at the Saginaw office.  
4 372:12-378:13. Teenier was at Charter’s Bay City office when he received this call. *Id.* Teenier  
5 further testified that while en route to the Saginaw office, he spoke with Culver and that Culver  
6 instructed him to pay attention to who was taking the flyers and to take notes of who appeared  
7 interested. *Id.* Teenier testified that he conveyed this information to Felker and that when he  
8 arrived at Saginaw he was met by Felker and Erskin. *Id.* Teenier testified that Chad Erskin—a  
9 Charter supervisor—gave him a copy of a flier Erskin had collected and told Teenier the names  
10 of a couple of employees who were involved. *Id.* Teenier, of course, did not remember these  
11 alleged names. *Id.*

12 Teenier’s testimony is neither useful nor credible. ALJD 23:17-18. First, Teenier had not  
13 yet arrived at the site during the relevant time period. Second, all three of the supervisors who  
14 actually witnessed the handbilling—Felker (a GC witness), Erskin, and Jurek—contradict  
15 Teenier’s version of events. Both Erskin and Jurek testified that they did *not* write down the  
16 names of any employees who took handbills from the union organizers. Given that Teenier  
17 testified that he *cannot remember the names* of the employees that Erskin allegedly told him,  
18 Erskin and Jurek’s version of events—that they did not note names—is more likely and, thus,  
19 more credible.

20 Of course, the testimony of Felker does not align with Teenier’s version of events.  
21 Felker testified that he although he contacted Teenier about the handbilling, Teenier did *not*  
22 instruct him to note the names of employees who took handbills. According to Felker, Teenier  
23 instructed him to “go out and stand next to the individuals and make sure they did not come on  
24 Charter property.” 851:18-852:3. Rather, Felker testified that *Erskin*, not Teenier, told him to  
25 note the names of employees taking handbills and that Erskin got that instruction from his  
26 supervisor, Bob Morgan. 856:2-11. Erskin, of course, denies that he received or gave any such  
27 instruction. 1616:9-1617:1. Teenier and Felker were unable to keep their stories straight and, as

1 a result, are not credible. ALJD 23:17-18. The only reasonable conclusion—which the ALJ  
2 adopted—is that the three supervisors made sure that it was safe and driveways were not being  
3 blocked and then left. 1615:20-1616:5. In any event, it is undisputed that no notes were taken.  
4 The jumble of conflicting stories does not allow the GC to establish this violation by a  
5 preponderance of the evidence.

6 **G. The Motion to Strike Should Have Been Denied, Is Now Moot.**

7 While Charter agrees that the ALJ should have ruled on the GC’s Motion to Strike  
8 Charter’s submission of the Teenier Complaint, the ALJ should have denied the motion for the  
9 reasons stated in Charter’s Opposition. Moreover, the Teenier Complaint is now part of the  
10 record before the Board and the GC has not made any motion to strike to the Board; therefore,  
11 the underlying motion to the ALJ should be ruled moot. It is proper to take judicial notice of a  
12 filed complaint.

13 **H. The ALJ Properly Declined to Award Consequential Damages, Which Are  
14 Not Available Under Current Board Law.**

15 Although the ALJ erred in awarding any damages to French, the ALJ correctly applied  
16 existing Board law in declining the GC’s request for consequential damages. Under current  
17 Board law, consequential damages are not an available remedy, and the Board would exceed its  
18 authority were it to grant such relief. *See, e.g., Goodman Logistics, LLC*, 363 NLRB No. 177,  
19 slip op. at 2-3 n.2 (2016), *Guy Brewer 43, Inc.*, 363 NLRB No. 173, slip op. at 2 n.2 (2016)  
20 (rejecting request for consequential damages as contrary to longstanding Board precedent), citing  
21 *The H.O.P.E. Program*, 362 NLRB No. 128, slip op. at 2 n.1 (2015) (rejecting request for  
22 consequential damages on basis of longstanding Board precedent) and *Ishikawa Gasket America,*  
23 *Inc.*, 337 NLRB 175, 176 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004), and cases cited therein).<sup>6</sup>

24 **I. Charter’s Rule On “Professional Conduct” Is Not Overly Broad.**

25 An employer violates Section 8(a)(1) of the Act if it maintains workplace rules that  
26 would reasonably tend to chill employees in the exercise of their Section 7 rights. *See Lafayette*

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27 <sup>6</sup> Moreover, the underlying charge, filed on November 3, 2014, far predates the General Counsel’s Memorandum  
OM-16-24, issued on July 28, 2016.

1 *Park Hotel*, 326 NLRB 824, 825 (1998) enforced 203 F.3d 52 (D.C. Cir. 1999). The analytical  
2 framework for assessing whether maintenance of rules violates the Act is set forth in *Lutheran*  
3 *Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, a work rule is  
4 unlawful if “the rule explicitly restricts activities protected by Section 7.” *Id.* at 646 (emphasis in  
5 original). If the work rule does not explicitly restrict protected activities, it nonetheless will  
6 violate Section 8(a)(1) if “(1) employees would reasonably construe the language to prohibit  
7 Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has  
8 been applied to restrict the exercise of Section 7 rights.” *Id.* at 647. Rules cannot be construed  
9 in isolation and must be given a reasonable reading. *The Roomstores of Phoenix, LLC*, 357  
10 NLRB 1690 n.3 (2011); *Lutheran Heritage*, 343 NLRB at 646.

11 The “Workplace Expectations” section of Charter’s Employee Handbook contains the  
12 following discussion of “Professional Conduct:”

13 Charter is proud of its professional and congenial work  
14 environment and will take all necessary steps to ensure that the  
15 work environment remains pleasant for all employees. This is a  
16 commitment that Charter takes very seriously. Accordingly, you  
17 are expected to demonstrate professional courtesy and  
18 consideration toward fellow employees, customers, vendors, the  
19 public or anyone else encountered while conducting business on  
20 behalf of Charter. You are a reflection of Charter and are expected  
21 to represent Charter’s professional standards to others. If you  
22 engage in unprofessional conduct, you will be subject to corrective  
23 action, including termination of your employment.

24 Unprofessional conduct includes, but is not limited to,  
25 insubordination (including refusal to obey a direct and lawful order  
26 or instruction from a supervisor, not being truthful or exhibiting a  
27 derogatory attitude toward a supervisor or member of  
management), disrespectful conduct, using inappropriate or  
offensive language, viewing inappropriate internet sites (including  
but not limited to sites that contain sexual or offensive content),  
screaming, yelling, raising one’s voice, threatening or attempting  
to harm a co-worker, sabotaging another’s work, stalking others,  
making false statements about others with malice that cause harm,  
publicly disclosing another’s private information, behaving in a  
rude or uncivil manner, damaging Charter property and/or  
reputation, tape recording, video recording, or recording by any  
other means, without express permission of all individuals being  
recorded, viewing television or other images in the workplace that  
include excessive violence, explicit sexual content, swearing, or  
adult programming or content, or otherwise failing to meet

1 standards of common decency. In addition, unprofessional conduct  
2 includes sleeping or engaging in horseplay or recreational activities  
3 while on the job.

4 Amended Answer, Paragraph 6. After much prodding and an ALJ Order, the General Counsel  
5 finally clarified that he objects only to the underlined portions of the “Professional Conduct”  
6 policy.

7 Charter’s “Professional Conduct” policy does not explicitly restrict protected activities,  
8 and there is no evidence that the policy was promulgated in response to union activity, or that the  
9 policy has been applied to restrict the exercise of Section 7 rights. Further, the General Counsel  
10 has not proven that employees would reasonably construe the language to prohibit Section 7  
11 activity.

12 This policy, when read as a whole, prohibits conduct that amounts to insubordination and  
13 related conduct that employees would reasonably understand to be insubordinate. The policy  
14 requires employees to cooperate with each other and the employer in the performance of their  
15 work. The entire policy is premised by the statement: “Charter is proud of its professional and  
16 congenial work environment and will take all necessary steps to ensure that the work  
17 environment remains pleasant for all employees.” The policy, therefore, is lawful because  
18 employees would reasonably understand that it is stating the employer’s legitimate expectation  
19 that employees work together in an atmosphere of civility. *Copper River of Boiling Springs,*  
20 *LLC*, 360 NLRB No. 60, slip op. at 1 (Feb. 28, 2014).

21 Further, the context of the rule makes clear that only serious misconduct is banned. For  
22 example, the prohibited conduct includes serious misconduct such as “threatening or attempting  
23 to harm a co-worker, sabotaging another’s work, stalking others, making false statements about  
24 others with malice that cause harm.” Even when a rule includes phrases or words that, alone,  
25 reasonably would be interpreted to ban protected criticism of the employer, if the context makes  
26 plain that only serious misconduct is banned, the rule will be found lawful. *Tradesman*  
27 *International*, 338 NLRB 460, 460-62 (2002).



1 DATED this 13th day of January, 2017.

2 Davis Wright Tremaine LLP  
3 Attorneys for Charter Communications, LLC

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5 By: \_\_\_\_\_  
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