

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9**

**FRONTIER COMMUNICATIONS
CORPORATION**

and

Case 09-CA-247015

**COMMUNICATIONS WORKERS OF
AMERICA, DISTRICT 2-13**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel files this Answering Brief to Respondent Frontier Communications Corporation's Exceptions to the Decision of Administrative Law Judge Geoffrey Carter which issued on October 14, 2020. Judge Carter correctly concluded that Respondent violated Section 8(a)(5) of the Act by failing and refusing to (1) notify and provide the Union with the opportunity to bargain over the effects of Respondent's decision to require bargaining unit employees to provide new Form I-9's and supporting documentation, and (2) to provide the Union with requested information related to its decision.

Respondent could have easily avoided the charge and ultimately the ALJ's Order had it chosen to work with the Union as it did in 2013. In order to comply with federal law requiring employers to verify their employees' work authorization, employees fill out U.S. Citizenship and Immigration Services Form I-9 usually only once at the commencement of their employment with a new employer. However, in 2013, Respondent required its existing employees in West Virginia to fill out I-9 forms again. The Union requested bargaining and the parties met to discuss the Union's concerns about why new I-9 forms were needed. (Tr. 38-39).¹ Respondent explained that I-9 forms had been lost and with the Union's assistance, Respondent obtained correct and complete I-9 forms for the bargaining unit employees in West Virginia. (Tr. 41, 209). At hearing, Frontier Senior Vice-President of Labor Relations Bob Costagliola testified that what happened in 2013 was the "best example of an employer [and] union working together." (Tr. 188).

¹ References to the Administrative Law Judge's Decision will be designated as (JD); references to Respondent's answering brief will be designated as (R's Brief); references to the trial transcript will be designated as (Tr. __); and references to the Joint exhibits will be designated as (Jt. Ex. ____).

In 2019, Respondent sought to require 95 percent of the employees in the bargaining unit to fill out I-9 forms again even though they had filled them out either in 2013 (for a second time) or for those hired afterwards, upon commencing of employment. The Union requested to bargain as it did in 2013, but this time, Respondent categorically refused to bargain either over the decision to require new forms or the effects of its decision even though its own admitted “massive” non-compliance was the reason new forms were needed. Respondent also refused to provide the Union any information about the specific deficiencies of the forms on file and the location and storage method of the employees’ previously completed Form I-9’s and any accompanying documents.

A hearing on the charge was held via videoconference on August 25, 2020 before Administrative Law Judge Geoffrey Carter. After post-hearing briefs were submitted, ALJ Carter found that Respondent violated the National Labor Relations Act by “failing and refusing to notify the Union and provide an opportunity for effects bargaining and by failing and refusing to provide information to the Union in response to one of the information requests at issue.” JD at 1. Respondent has filed exceptions to the ALJ’s decision. As explained below, because the ALJ’s decision is based on the undisputed evidence presented at hearing and grounded in governing Board law, the Board should affirm the ALJ’s rulings, findings, and conclusions and adopt the recommend Order.

II. ARGUMENT

A. The ALJ Correctly Found that Respondent Violated Section 8(a)(5) by Failing to Bargain over the Effects of the I-9 Advantage Program

- 1. The ALJ correctly concluded “as a preliminary matter” that requiring employees to fill out new Form I-9’s was a mandatory subject of bargaining because Respondent threatened to terminate employees for non-compliance. [Exception 1]**

The ALJ correctly found as a “preliminary matter” that Respondent’s requirement that employees submit new I-9 forms is a mandatory subject of bargaining because it impacted terms and conditions of employment. JD at 18:5-18. General Counsel acknowledges that the Complaint does not allege a duty to bargain over the decision. While the ALJ’s finding is not necessary as prerequisite to finding that Respondent was required to bargain over the effects of the decision and to provide relevant information, the ALJ was correct in his determination.

The ALJ found that the purpose of Form I-9 is to verify the identity and employment authorization of each new employee and “given that purpose,” completing the new forms affected terms and conditions of employment as “employees who (for whatever reason) have difficulty completing the I-9 form risk losing their jobs, among other consequences.” JD at 18:15-18 (citing *Ruprecht Co.*, 366 NLRB No. 179 (2018) and *Washington Beef*, 328 NLRB 612, 612 fn. 2, 620 (1999)). The establishment of a new condition of continued employment and new grounds for discipline are mandatory bargaining subjects. *Aramark Educational Services, Inc.*, 355 NLRB 60, 62-63 (2010). In *Aramark*, the employer, without prior notice to the union, changed its policy regarding verification of social security numbers for employees with discrepancies in these numbers, as a result of no-match lists sent by the Social Security Administration, by disciplining employees who failed to correct the discrepancies. As this change affected the employees' terms and conditions of employment, it was found to be a mandatory subject of bargaining and that the unilateral change violated Section 8(a)(1) and (5) of the Act. *Id.*

Here, Respondent’s alleged unlawful conduct affected the employees’ terms and conditions of employment in that employees who failed to complete a new Form I-9 and provide supportive documentation were threatened with discipline. Accordingly, the decision to require

the new forms gave rise to an obligation to bargain when the Union made such a request. See Section II.A.2, *infra*.

2. The Union made four demands to bargain and was not required to make a specific demand to bargain over the effects because Respondent's decision was a *fait accompli*. [Exceptions 5, 7, 10-12, 18]

In several exceptions, Respondent challenges the ALJ's conclusion that the Union failed to request bargaining over the effects of its decision to require new I-9 forms. These exceptions are without merit. The evidence presented at hearing shows that on at least four occasions, the Union sought to establish an agreed-upon timeline for employees to complete their forms and bargain over the impact on employees who failed to complete the process. The requests included:

- August 1, 2019² – Union representative Lea Perry sent an email to Respondent's Director of Labor Relations Peter Homes demanding to bargain over the completion of the Form I-9's. (Jt. Ex. 17).
- August 8 – Perry made a second request to Homes to bargain over the Respondent's requiring employees to fill out Form I-9's above and beyond what is requested by federal law. (Jt. Ex. 19).
- October 2 – In an email to Homes, Perry reaffirmed that the Union had no objection to Frontier complying with federal law but that Frontier had refused to engage in productive discussions or to provide information supporting its claim that federal law dictates its action and that deficiencies exist in previously-completed Form I-9's. Perry also informed Homes that Frontier has scanned and photographed information or asked employees to do so. Perry demanded that Frontier suspend further implementation of the I-9 Advantage program until reasonable bargaining can occur. (Jt. Ex. 22).

December 10 – After Homes informed Perry that employees may be terminated if they fail to complete the Form I-9 verification process (Jt. Ex. 28), Perry made another demand to bargain and requested that Respondent suspend implementation pending bargaining. (Jt. Ex. 26).

² All dates are 2019 unless otherwise indicated.

In its Brief, Respondent quibbles that Perry never used the word “effects” when demanding bargaining. R’s Brief at 11. The Board does not require the use of this “magic” word where the decision made was a “*fait accompli*” as was the case here. See, *Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999) (union not required to demand bargaining over effects when decision is announced as a *fait accompli*); *Dodge of Naperville, Inc.*, 357 NLRB 2252, 2272 (2012) (no waiver of effects bargaining by failing to request bargaining when change announced as *fait accompli*). Here, Respondent informed its employees that they would be required to complete the I-9 Advantage process before it ever notified the Union. Accordingly, the Union did not have an obligation to demand effects bargaining.

The cases cited by Respondent (see R’s Brief, pp. 12-13) are inapposite as those management decisions were not announced as a *fait accompli*. In *Jim Waters Resources*, 289 NLRB 1441 (1988), the Board overturned the ALJ’s finding that the decision changing insurance premiums was a *fait accompli* and found that the Union failed to meet its obligation to request bargaining because the decision was announced before its effective date. *Id.* at 1442. In *Bell Atlantic*, 336 NLRB 1076 (2001), the employer informed the union of its decision to transfer work to another location, delayed implementation of that decision for 6 months, which was “more than ample time to bargain about it had the Union shown any interest in doing so,” and then “waited more than two months to begin planning for the physical changes required to implement its decision.” *Id.* at 1088. Under these circumstances, the Board found that “clearly,” the employer’s decision was “not a *fait accompli*.” *Id.*; see *Clarkwood Corp.*, 233 NLRB 1172, 1172 (1977) (reversing ALJ’s finding that notices were tantamount to a *fait accompli* and that Union had not waived its right to bargain).

Finally, Respondent faults the ALJ for failing to consider the motivation for the Union's "obstruction" of its compliance initiative. R's Brief, p. 11. First, at hearing, there was absolutely no reliable evidence supporting Respondent's assertion that the Union's conduct constituted "outright obstruction and interference." *Id.* at 12. Respondent's groundless claim relies completely on its sole witness Vice-President of Labor Relations Robert Costagliola testifying that he saw "documents somewhere along the way that were posted" that he "believe[d]" told "people not to cooperate." (Tr. 216). However, Costagliola never identified the document, where they were posted, whether the Union authorized them, and in fact, and could not even recall what media was used. (Tr. 216). Moreover, Respondent failed to offer the document in question or any other witness to support any claim of union interference.

In contrast, the hearing evidence established that Union repeatedly informed Respondent that it had no objection to it complying with federal immigration law (see, e.g., Jt. Ex. 22) but unlike 6 years earlier, Respondent categorically refused to explain why it needed the new I-9 forms. At hearing, Respondent's Costagliola acknowledged that it was reasonable for the Union to be skeptical why the company was now seeking new I-9's from 95 percent of the bargaining unit employees and admitted that Frontier had botched the process in 2013 by accepting non-compliant documents like gun and hunting licenses. (Tr. 212, 218). Despite what, by its own admission, was "massive" non-compliance with federal law, Respondent refused to provide the Union any details about the deficiencies, even in conjunction with individual grievances. (Tr. 214, 215, 217).

3. Respondent had a duty to bargain over the effects of its decision to require employees to complete new Form I-9's regardless of any requirement under federal law. [Exception 7-9, 14, 16, 19]

Respondent next argues, contrary to the ALJ's findings, that it did not have an obligation to bargain with the Union over the effects of its decision to require employees to complete new Form I-9's "because its actions were mandated" by the federal Immigration Reform and Control Act (IRCA). R's Brief at 13

"It is well established that an employer is generally obligated to bargain over the effects of a decision even when it has no statutory duty to bargain over the decision itself." *Tramont Manufacturing, LLC*, 369 NLRB No. 136, slip op. at 5 (July 27, 2020) (citations omitted); *Rochester Gas & Electric Corp.*, 355 NLRB 507, 516 (2010) (employer's actions that have an *effect* as it relates to wages, hours, and conditions of employment constitute a mandatory subject of bargaining). In *Washington Beef*, the employer refused to bargain with the union over the amount of time given to a bargaining unit employee to establish that he possessed authentic work documents to fill out a new Form I-9. The Board found that "there can be no question that the length of time given to aliens in which to establish they possess genuine work documents constitutes a term and condition of employment over which Respondent must bargain upon request." 328 NLRB at 620 (citing *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 220 at n.5 (9th Cir. 1995)); see *Nortech Waste*, 336 NLRB 554, 554 n.1, 569-570 (2001) (affirming Administrative Law Judge's conclusion that employer met duty to meet and consult with union concerning treatment of suspected undocumented workers).

Here, the ALJ correctly found that the Union had a valid interest in effects bargaining to explore "options to obtain a valid I-9 form for each employee." JD at 18:27-30. The effects of the implementation of the I-9 Advantage program related to employees' continued employment.

Frontier set a 39-day deadline for employees to provide genuine work documents establishing their employment authorization. A number of employees failed to meet this initial deadline. On October 24, Frontier informed employees that if they did not complete the I-9 verification process by October 29, they would be removed from their work schedules without pay. In addition, Frontier threatened to terminate their employment if they continued to not comply.

As the ALJ found,

given the history of lost or misplaced forms and repeated requests for new I-9 forms, along with the possibility that some employees might need time to locate/obtain and provide appropriate documentation of their identity and employment authorization, there were several topics that Respondent and the Union could address and possibly resolve through effects bargaining.

Id. at 18:29-33 (citing *Washington Beef*, 329 NLRB at 619-620); see *Ruprecht Co.*, *supra*, at 1, fn. 1 (finding that the employer's enrollment in E-Verify was a mandatory subject of bargaining).

Respondent argues it did not have an obligation to bargain with the Union over the effects of its decision because its actions were mandated by IRCA. Respondent cites six Board decisions for the proposition that an employer's compliance with federal law obviates its bargaining obligations. R's Brief, p. 13. However, these cases are readily distinguishable because in none of the cases was there any allegation that the employer refused to engage in effects bargaining.

Four of the cases which found that there was no duty to bargain are further distinguishable because the employer did not require the employees to do anything that if they refused, could have caused them to be disciplined. See *Exxon Shipping Co.*, 312 NLRB 566, 567-68 (1993) (deducting union dues to comply with Federal maritime law); *Long Island Day Care Services*, 303 NLRB 112, 117 (1991) (unilaterally increase employee salaries per government directive); *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964) (raising employees'

pay to comply with new federal minimum wage rates); *Southern Transport, Inc.*, 145 NLRB 615, 618 (1963) (changing wage rates and method of payment pursuant to a determination from U.S. Department of Labor that employer's operation was subject to FLSA). Respondent argues that its actions are akin to the employer's FLSA-mandated payment of the federal minimum wage to its employees. R's Brief, p. 16. However, the comparison is misplaced as there is an important distinction because in *Standard Candy* and *Southern Transport*, increasing the employees' wages did not impact the employer's disciplinary system.

In contrast in the instant case, Respondent has, in effect, promulgated a new workplace rule requiring the employees to take affirmative actions or be subject to potential discipline, including termination. The Board has repeatedly found that the bargaining obligation attaches where there is a potential for discipline. See, e.g., *Edgar P. Benjamin Healthcare Center*, 222 NLRB 750, 751 (1996) ("The element that is critical to finding an employer's policy to be a condition of employment is not whether the subject of the policy is related to job performance, but whether the policy has *the potential to affect continued employment of the employees who become subject to it.*") (emphasis added); *Chemical Solvents, Inc.*, 362 NLRB 1469, 1473 (2015) ("the potential for discipline for failing to adhere to the new pre-trip inspection rule convinces us that the Respondent's failure to give the Union prior notice and an opportunity to bargain about the changes violated Section 8(a)(5) and (1)").

The two other cases cited by Respondent involved unilateral changes to rules that potentially could have led to discipline. In *Murphy Oil USA, Inc.*, 286 NLRB 1039, 1042 (1987), the Board found that there was no duty to bargain over a rule adopted to comply with OSHA regulations prohibiting employees from consuming food or beverages in an area exposed to a toxic material. In *Tri-Produce Co.*, 300 NLRB 974 (1990), the Board found that newly-enacted

IRCA imposed a “non-negotiable duty” upon the company to verify work status of its employees and that the company did not violate the Act by unilaterally requiring that proof or by the temporary withholding of paychecks until compliance. *Id.* at 984. However, neither of these Board’s decisions discuss any duty of the company to bargain over the effects of the decision, presumably because the unions never sought it. As such, *Murphy Oil* and *Tri-Produce* have no applicability to the allegation that Respondent failed to engage in effects bargaining even if it there was no obligation to bargain about the decision itself. See, e.g., *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995) (citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-682 (1981)).

Respondent next argues that it exercised “no discretion in responding to the audit results to promptly achieve compliance with the IRCA Record Requirement.” R’s Brief, p. 14. That is simply not true. While Respondent may have not exercised discretion in deciding to obtain new I-9’s from existing employees, it certainly exercised discretion in how it went about to achieve compliance. See, *Washington Beef*, *supra*; *Nortech Waste*, *supra*. Here, the effects of the implementation of the I-9 Advantage program potentially impacted employees’ continued employment. Frontier set a 39-day deadline for employees to provide genuine work documents establishing their employment authorization. A number of employees failed to meet this initial deadline. On October 24, Frontier informed employees that if they did not complete the I-9 verification process by October 29, they would be removed from their work schedules without pay. In addition, Frontier threatened to terminate their employment if they continued to not comply.

The Union requested bargaining to establish an agreed-upon timeline for employees to complete the process and the impact on employees who failed to complete the process. As

established in *Washington Beef*, the timeline for employees to complete the electronic Form I-9 and provide their requisite documents, and the potential adverse action on employees who fail to do so, constituted mandatory subjects of bargaining.

4. Respondent was required to engage in effects bargaining because the failure to complete the Form I-9's impacted the disciplinary system. [Exceptions 6, 12-15]

Next, Respondent argues that it was not required to engage in effects bargaining because the completion of the Form I-9's did not affect terms and conditions of the employees' employment in a "material, substantial, and significant way." R's Brief, p. 17. In support of its claim, Respondent argues that completion of the form was a "simple task" and that there was "no evidence at hearing that any bargaining unit employee suffered any form of adverse consequences." *Id.* at 18.

Respondent conveniently glosses over the fact that on September 26, Labor Relations Director Homes informed the Union that if the 284 West Virginia bargaining unit members who had not started the I-9 Advantage process did not do so by October 4, Respondent would begin removing them from the schedule, causing them to lose pay. (Jt. Ex. 21). Further, Homes informed the Union that if any employee continues to not complete the form, Respondent may terminate the employee. (Jt. Ex. 21). The fact, as Respondent argues (R's Brief, pp. 18, 22-23) that no bargaining unit member suffered any form of adverse consequence is of no import as the bargaining obligation attaches where there is a *potential* for discipline. See, e.g., *Edgar P. Benjamin Healthcare Center*, *supra*; *Chemical Solvents*, *supra*. Similarly, the cases cited by Respondent are distinguishable because the changes did not implicate the potential for discipline. R's Brief, p. 17 (citing *Southern California Edison Co.*, 284 NLRB 1205 (1987) and *Rust Craft Broadcasting*, 225 NLRB 327 (1976)).

Respondent relies heavily on its claim that bargaining unit employees never saw or learned of these emails because it argues, if the employees did not see them, they “could not have been impacted by them.” R’s Brief, p. 18. Contrary to the Respondent’s assertion, the employees did learn of the “potential adverse consequences” for not completing the Form I-9’s. In his September 26 email to the Union, Labor Relations Director Peter Homes attached a template email that the company planned on sending to the employees informing them that beginning on October 4, the company will begin to remove non-compliant employees from the work schedule and that if an employee continues to not comply with the Form I-9 verification process, the company may terminate the employee. (J. Ex. 21). Moreover, on October 24, Homes sent an email to the Union stating that *later that day*, the company would be sending the template email to five employees who had not yet completed Section 1 of the Form I-9 and provided the Union with the names of those five employees.³ (J. Ex. 29). In addition, given that the Union filed grievances for individuals who were threatened with discipline and Respondent initially agreed to provide documents in connection with these grievances, confirms that the employees knew about the potential discipline. (Tr. 88-89, 165; Jt. Ex. 23).

Respondent concedes that:

if Frontier had informed employees that they would be removed from the work schedule because the Company did not possess a correct and complete Form I-9 for

^{3/} At hearing, Respondent curiously did not produce Peter Homes to testify even though he was the only management official communicating with the Union about the Form I-9’s. Instead, Respondent called Home’s supervisor Robert Costagliola, whose testimony it relies upon for its claim that the email notifications were not sent to the bargaining unit employees. However, Costagliola never testified that the emails were not sent. Instead, he said the he did not “believe” the correspondence was sent but also conceded that they could have been sent out without his knowledge. (Tr. 201:17-19).

Further, given that the September 26 and October 29 correspondence were admitted as joint exhibits, it is highly unlikely that Respondent would have stipulated to their admissibility if the letters to the bargaining unit members were never sent to them.

them, then Frontier arguably would have first been required to provide notice to the Union and an opportunity to bargain about any such removal.

R's Brief, p. 22 (emphasis in original). As just shown, the evidence supports that Respondent did inform employees individually that they would be disciplined. Even if Respondent only informed the Union of the potential discipline of its members, the bargaining duty would still attach as Section 8(a)(5) requires the employer to provide the "bargaining representative" with notice and opportunity to bargain before making material, substantial, and significant changes to an employer's disciplinary system as there is a legal distinction between "employees and their selected representatives." *Bridon Cordage*, 329 NLRB at 259 ("Notification to unit employees, however, is not equivalent to providing notice to their collective-bargaining representative."); *NLRB v. Katz*, 369 U.S. 736 (1962) (employer is required to provide notice and opportunity to bargain to the employees' representative).

Finally, Respondent argues that because it never actually prevented any employee from working, it never "took any action that would have changed employment terms." R's Brief, p. 19. Just as Section 8(a)(5) is violated when an employer announces a unilateral change to a penalty for infractions of a new safety rule, see *Electric-Flex Co.*, 238 NLRB 713, 731 (1978), whether Respondent here actually disciplined any employee is immaterial and does not excuse its failure to provide notice and failure to bargain over the effects. See *Storer Communications, Inc.*, 297 NLRB 296, 297 fn. 5 (1989) ("the fact that the new drug/alcohol policy was not 'enforced' immediately does not preclude our finding a [Section 8(a)(5)] violation.").

B. The ALJ Correctly Found that the Employer Failed in its Duty to Provide Requested Information Requested on August 8, 2019. [Exceptions 2, 17, 20-25]

On August 1, the Union requested a list of employees that Frontier had identified as not completing a Form I-9 and a list of those employees identified as having incomplete or incorrectly completed I-9's. The ALJ found that in providing the Union with a single list of all bargaining unit employees in West Virginia for whom Respondent did not have a correctly completed I-9 form a week later, Respondent did not violate Section 8(a)(5). JD at 22:7-9.

On August 8, the Union made a second request for information, seeking the specific deficiency for each incorrectly completed Form I-9 and the location and storage method of the employees' previously completed Form I-9's and any accompanying documents. Frontier did not provide the Union with any response to the August 8 information request. JD at 22:11-13.

An employer's duty to bargain under Section 8(a)(5) of the Act includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. See, *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956). Information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See, *Hanson Aggregates BMC, Inc.*, 353 NLRB 294 (2008).

The ALJ found that the Union's August 8 request was reasonable and relevant and that by failing to provide the information, Respondent violated Section 8(a)(5). The ALJ reasoned that "[e]ssentially, the Union asked Respondent to specify what was wrong with the previously completed I-9 forms and describe how and where the previously completed I-9 forms and supporting documents were stored." JD at 22:11-16. The ALJ found that these questions were appropriate, particularly given the fact that Respondent previously (in 2013) required employees

to submit new I-9 forms and now were asking “95 percent of the bargaining unit to submit another I-9 form in 2019, thereby raising questions about what happened to the I-9 forms that employees completed in (and after).” Id. at 22:16-18.

The Union sought information about the location of the Form I-9’s and accompanying documents because they contained sensitive information such as social security numbers, and was concerned the information could be compromised, resulting in identity theft. (Tr. 76). Under these particular circumstances, the Union’s effort to protect its members from the devastating impact of identity theft was reasonable and the very limited information sought was certainly relevant to its representational duties.⁴ *Detroit Newspaper Agency*, 317 NLRB 1071, 1071 (1995) (“Few matters can be of greater legitimate concern to individuals in the workplace...then exposure to conditions threatening their health, well-being, or their very lives.”). Now almost 18 months after it first sought the new Form I-9’s, Respondent has yet to explain what happened to the 2013 forms so that the Union’s and employee’s concerns may be assuaged.

Respondent also challenges the ALJ’s finding regarding the August 8 request by arguing that there cannot be a violation for failing to provide information where there is no duty to bargain. R’s Brief, p. 23. As explained earlier, the ALJ correctly determined that Respondent had a duty to bargain over the effects. Accordingly, it had a corresponding duty to provide

⁴ Federal law requires the employer to retain either a paper, electronic, microfilm or microfiche copy of the originally signed Form I-9. 8 CFR § 274a.2(b)(2). Given Frontier’s failure to explain why it needed new Form I-9’s for approximately 95 percent of the bargaining unit, the Union was rightfully concerned that the Form I-9’s in the company’s possession may have been lost or compromised. According to the Federal Trade Commission, there were over 650,000 reports of identity theft in the United States in 2019, the most of any category of fraud. Federal Trade Commission, Consumer Sentinel Network Data Book 2019 (January 2020) (https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2019/consumer_sentinel_network_data_book_2019.pdf). Social security numbers and similar sensitive information in the wrong hands can wreak havoc on an individual’s finances and cause severe emotional repercussions for years as documented in studies. See “The Aftermath: The Non-Economic Impacts of Identity Theft,” Identity Resource Center (2018) (https://www.idtheftcenter.org/wp-content/uploads/2018/09/ITRC_Aftermath-2018_Web_FINAL.pdf).

information. See, e.g., *Las Vegas Sands, Inc.*, 324 NLRB 1101, 1109 (1997) (“duty to provide information encompasses not only material necessary and relevant for the purpose of contract negotiations but also information necessary ... for effects bargaining.”); *Art Iron Inc.*, 367 NLRB No. 108 (March 21, 2019) (ordering production of requested information related to effects bargaining).

Respondent next argues that the ALJ improperly ordered that it should compile a list of each employee’s I-9 discrepancies because “the list of data does not currently exist and there is no obligation for Frontier to create a document to respond to an information request, particularly when it would be extremely burdensome to do so.” R’s Brief, p. 24; Exception 25. The ALJ’s Order *does not* require Respondent to provide a list of anything. Rather, the Order requires Respondent to provide the Union with “information” in response to the Union’s request for the specific deficiencies in each bargaining unit member’s previously completed I-9 form. JD at 24:14-17. Such “information” can be the actual Form I-9’s that the employees had previously filled out that Respondent now finds to be deficient. Respondent possesses these forms as they reviewed each one as part of its audit, and thus, it is not required to create any new document or list to comply with the ALJ’s Proposed Order.

Further, even if Respondent can somehow show that the Union’s requests for information were unduly burdensome, Respondent never raised, at the time of the request, any issue concerning the possible burden of complying with the Union’s request, undermining “its claim of burdensomeness as a defense.” *Mission Foods*, 345 NLRB 788, 789 (2005) (citations omitted). In fact, the Board has found that if a party “does wish to assert that a request for information is too burdensome, this must be done at the time information is requested, and not for the first time

during the unfair labor practice proceeding.’’ *Honda of Hayward*, 314 NLRB 443, 450 (quoting *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348, 353 fn. 6 (D.C. Cir. 1983)).

Respondent then argues that the ALJ erroneously concluded that it was required to produce information related to the location and storage method for the employees’ previously completed I-9 forms because how it stores documents is not a term and condition of employment.⁵ R’s Brief, p. 25. The ALJ stated that the current storage location and storage method of the I-9 forms “arguably does not relate to a term or condition of employment, and thus is not presumptively relevant.” JD at 21:15-17. However, the ALJ found that “based on the facts of this case,” this information was relevant based on the “objective evidence” that Respondent “(a) required employees to submit new I-9 forms in 2013 after it could not locate the I-9 forms completed for Respondent’s predecessor; and (b) asked 95 percent of the bargaining unit to submit another I-9 form in 2019, thereby raising questions about what happened to the I-9 forms that employees completed in (and after) 2013.”⁶ JD at 24:18-23.

Finally, although not discussed in its Brief, Respondent excepts to the ALJ’s proposed remedy concerning internet/intranet posting. See Exception 25. Contrary to Respondent’s claim, the ALJ did not impose “an overly broad internet or posting obligation.” *Id.* Rather, the proposed order states that in addition to the posting of physical notices, “the notices shall be distributed electronically *such as* by email, posting on an internet or intranet site, and/or by other electronic means.” JD at 23:23-26 (emphasis added). Thus, Respondent can comply with the

⁵ The recent Advice Memorandum cited by the Respondent is distinguishable because the request for the company’s document retention policy was not made, unlike here, to an employer had a history of failing to retain documents that contained sensitive information such as social security numbers. *ABM I Bus. & Indus.*, 13-CA-259139, 2020 WL 4924273, at *2 (Advice Response Memo July 9, 2020).

⁶ Respondent acknowledges that there are circumstances where the document retention request could be relevant, including if the Form I-9’s were hacked or misappropriated. R’s Brief at 25.

proposed order by emailing notices to each employee or by some other electronic means and is not required to post the notice on the internet or intranet.

III. CONCLUSION

For the reasons discussed above, Counsel for the General Counsel respectfully requests that Board overrule the Respondent's Exceptions to the Administrative Law Judge's Decision and adopt the ALJ's Order.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the attached Counsel for the General Counsel's Brief to the Administrative Law Judge on the following parties by electronic mail:

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