

**C.S. Telecom, Inc. and International Brotherhood of
Electrical Workers, Local Union 98, AFL-CIO.**
Case 4-CA-28871

December 10, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND WALSH

On February 27, 2001, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

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

For the reasons given below, we find that the judge erred in dismissing the allegations that Company President John Yoast III on December 10, 1999,² and his brother, Vice President Michael Yoast, on December 13 unlawfully interrogated employee Bryan Galie. In addition, for the reasons given below, we agree with, or find it unnecessary to pass on, the judge's dismissal of other unfair labor practice allegations.

1. The judge found that interrogations of Galie by John and Michael Yoast were not unlawful because Galie had not engaged in concerted activity. We reverse.

On December 10, at a company Christmas party in a local hotel, John Yoast engaged Galie in a conversation.

¹ The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

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

The judge failed to include in the "Jurisdiction" section of his decision commerce facts establishing the Board's jurisdiction over the Respondent. Accordingly, we add the following commerce facts, which the Respondent admitted. The Respondent, a Pennsylvania corporation, with an office and principal place of business in Fort Washington, Pennsylvania, engages in the installation and service of telecommunications, data, and voice cabling equipment. During the past year, the Respondent purchased and received at its Fort Washington, Pennsylvania facility goods and services valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania.

² All dates hereafter refer to 1999 unless otherwise specified.

The credited testimony is that, during the conversation, John Yoast asked Galie whether he was giving information to the Union about the Respondent's jobsite locations. Galie denied it, and John Yoast said, "I know it's you." Galie again denied it. John Yoast then stated, "I know it's you. I'm not an idiot." Galie then put his head down, and John Yoast said, "Why? Explain it to me." Galie replied, "I can't. I'm caught in the middle."

On December 13, Michael Yoast similarly asked Galie if he was disclosing company information to the Union. This conversation took place in Michael Yoast's office. Michael Yoast also apologized for his brother's conduct at the Christmas party.

Employer interrogation of an employee violates Section 8(a)(1) if, under all the circumstances, it "reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177 (1984), *affd.* sub. nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Here, despite his obvious reluctance to answer, Galie was repeatedly pressured by high-ranking company officials to reveal whether he had assisted the Union by providing it with information on the locations where he was working. The Respondent's inquiries were not accompanied by any assurances against reprisal, even though they clearly probed into conduct protected by Section 7 of the Act. See *Ridgely Mfg. Co.*, 207 NLRB 193, 196-197 (1993) ("[E]mployees are entitled to use for self-organizational purposes information and knowledge which comes to their attention in the normal course of work activity and association, but are not entitled to their employer's private or confidential records"), *enfd.* 510 F.2d 185 (D.C. Cir. 1975). Indeed, the judge himself found that Galie's conduct in notifying the Union of the Respondent's jobsites was protected by Section 7 of the Act, and the Respondent has not excepted to that finding.

Nevertheless, the judge dismissed the complaint allegations of unlawful interrogations on the ground that Galie's conduct, although protected, was not concerted. In this regard, the judge erred in two respects. First, he failed to recognize that Section 7 "defines both joining and assisting labor organizations—actions in which a single employee can engage—as concerted activities." *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984). Accordingly, by definition, Galie's conduct was concerted without regard to the fact that he may have acted alone.³ Second, without any evidentiary support,

³ The judge's reliance on fn. 2 of the Board's decision in *A.S.I., Inc.*, 333 NLRB 70 (2001), is misplaced. In that footnote, the Board addressed an allegation that an employee's discharge was motivated by his protected concerted activity, not his union activity. For that reason, the Board emphasized that the employee had acted alone. By contrast,

the judge speculated that Galie's actions were "meant to force the Respondent to recognize the Union so that the Union would stop threatening its customers." Because there is nothing in the record indicating that Galie was a knowing participant in any threatening conduct in which the Union may have engaged, the judge's speculation must be rejected.

For all these reasons, we conclude, contrary to the judge, that the Respondent violated Section 8(a)(1) by coercively interrogating Galie about his union activities.

2. The Union excepts to the judge's failure to find that John Yoast also threatened Galie on December 10. Galie claimed that, in addition to interrogating him, Yoast told him that if he found out Galie was talking to the Union, Galie would be "done." Yoast testified only that he asked whether Galie was disclosing information to the Union and, when Galie denied it, said, "I know it's you." The judge credited Yoast and did not credit Galie where their testimony differed. Thus, the credited evidence is that Yoast made no threat. We therefore find no merit to the Union's exception.

3. The General Counsel excepts to the judge's failure to find that Installation Manager Sean Brennan and Installation Technician Dennis Murphy interrogated Galie and that Murphy also threatened Galie. The judge dismissed the allegations based on his finding that Brennan and Murphy were neither agents nor supervisors.

As discussed in section 1 above, we have found that John and Michael Yoast unlawfully interrogated Galie. We therefore find it unnecessary to pass on whether Brennan and Murphy also interrogated Galie in violation of the Act; the finding of such additional violations would be cumulative and would not affect the Order.

With respect to the alleged threat, Galie claimed that Murphy told employees that the Respondent was thinking of going out of the cable business because of the Union and that the Respondent would sell the business before becoming unionized. Murphy testified that he told employees there would be less work for them if the Union continued to have them removed from jobsites of the Respondent's customers. The judge credited Murphy and did not credit Galie where their testimony differed. Thus, the threat Galie attributed to Murphy did not occur. Further, we do not agree with the General Counsel that Murphy's own testimony establishes that he unlawfully threatened Galie. The natural import of Murphy's comment was not that the Respondent would take reprisals against employees for their union activities, but simply

the economic fact that to the extent the Union is successful in having the Respondent removed from its customers' jobsites, there is necessarily less work available for the Respondent's employees. Therefore, we affirm the judge's dismissal of this allegation.

Given our findings in the previous two paragraphs, we find it unnecessary to pass on the judge's discussion of the agency or supervisory status of Brennan and Murphy.

4. The Union excepts to the judge's dismissal of the allegation that Vice President David Nelson threatened Galie on December 23. Galie claimed that Nelson told him that he would be "pissed off" if he found out Galie was communicating with the Union. Nelson testified that he did not talk to Galie about any subject related to a union. The judge credited Nelson and did not credit Galie where their testimony differed. Thus, the credited evidence is that Nelson made no threat. We therefore find no merit to this exception.

5. The General Counsel excepts to the judge's dismissal of the allegation that the Respondent violated Section 8(a)(3) on December 23 by giving Galie a reduced Christmas bonus because of his support for the Union. We find no merit to the exception.

We agree with the judge that the bonus given to Galie was proportional to the bonuses given to other technicians, taking into account Galie's length of employment and skill. Thus, even assuming the General Counsel satisfied the threshold burden under *Wright Line*⁴ of showing that the bonus amount the Respondent gave to Galie was motivated by antiunion considerations, we adopt the judge's finding that the Respondent has demonstrated that it would have given him the same bonus even in the absence of his protected activity.

6. The General Counsel and the Union except to the judge's dismissal of the allegation that the Respondent violated Section 8(a)(3) on January 3, 2000, by laying off Galie because of his support for the Union. We find no merit to the exception.

We agree with the judge that the record shows that the number of hours the Respondent's employees spent performing the only work for which Galie was qualified declined precipitously in December 1999 and January 2000 and that the Respondent had good reason to believe such work would not increase in future months. Thus, even assuming the General Counsel satisfied the threshold burden under *Wright Line* of showing that Galie's layoff was motivated by antiunion considerations, we adopt the judge's finding that the Respondent has dem-

in other cases in which it is alleged that an employee was discharged for engaging in union activity, the Board has squarely held that it is irrelevant that the employee may have acted alone. E.g., *Mauka, Inc.*, 327 NLRB 803, 804 fn. 8 (1999).

⁴ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

onstrated that it would have laid him off even in the absence of his protected activity.⁵

ORDER

The National Labor Relations Board orders that the Respondent, C.S. Telecom, Inc., Fort Washington, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities.

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

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

(a) Within 14 days after service by the Region, post at its Fort Washington, Pennsylvania facility copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 4, 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

⁵ In their exceptions, the General Counsel and the Union also argue that the Respondent violated Sec. 8(a)(3) by failing to recall Galie from layoff. We find no merit to this argument.

The judge credited the testimony of Vice President Michael Yoast that in July 2000, due to an increase in cable work, he hired his brother-in-law, and in September 2000, Michael Yoast hired his wife's godson. Neither employee had any cabling experience or any certifications in the industry. The judge also credited Michael Yoast's testimony that the Respondent has a policy of giving preference in employment to family members recommended for hire by him, by his brother, or by David Nelson, another vice president.

There is no contention that the Respondent's employment policy is unlawful, and no showing that it was not applied in a neutral manner. Applying *Wright Line*, we will assume that the General Counsel met the initial burden of proving discriminatory motivation for the Respondent's failure to recall Galie in July and September 2000. However, we also find that the Respondent has shown that, based on its nondiscriminatory employment policy, it would have made the same hiring decisions even in the absence of Galie's union activity. Accordingly, we conclude that the Respondent's failure to recall Galie did not violate the Act.

Chairman Hurtgen agrees that there is no violation with respect to the failure to recall Galie in July–September 2000. The complaint did not allege such a violation; it alleged only the layoff of Galie on or about January 2000.

⁶ If this Order is enforced by a judgment of the 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."

Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 10, 1999.

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate you about your union activities.

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

C.S. TELECOM, INC.

Donna Brown, Esq., for the General Counsel.

Michael Avakian, Esq. (Smetana & Avakian), for the Respondent.

Richard McNeill, Esq. (Sagot, Jennings & Sigmond), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was tried before me in Philadelphia, Pennsylvania, on November 28 and 29, 2000. The complaint herein, which issued on May 12, 2000, and was based on an unfair labor practice charge that was filed on January 18, 2000 by International Brotherhood of Electrical Workers, Local Union 98, AFL–CIO (the Union), alleges that C.S. Telecom (the Respondent) interrogated an employee about his union activities and threatened to discharge him if he continued to engage in these activities,

threatened that it would go out of the cabling business and sell its business if its employees selected the Union as their bargaining representative, threatened an employee with unspecified reprisals if he engaged in union activities, and laid off employee Bryan Galie because of his support for the Union. At the conclusion of the hearing, counsel for the General Counsel amended the complaint to allege that the Respondent gave Galie a reduced Christmas bonus on December 23, 1999,¹ because of his support for the Union. All of these activities are alleged to violate Section 8(a)(1) and (3) of the Act.

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

A. Background

The Respondent is a nonunion employer engaged in the installation, service, and upgrading of telecommunications, data, and voice cabling equipment. Its unit employees range from highly skilled technicians to other technicians who principally carry telephone cable from one location to another. Alleged discriminatee Galie came within this latter category; his prior employment experience was solely as a cook. Although the Union was his impetus in applying to work for the Respondent, this is not the usual "salting" case. Galie never attempted to convince his fellow employees to join or meet with the Union. Rather, his union activities apparently consisted of notifying the Union of the jobs that the Respondent was performing, or was about to perform. On learning of these jobs, the Union then spoke to, or threatened these customers of the Respondent. It is the Respondent's position herein, that incidents that counsel for the General Counsel alleges as threats or interrogation, were actually situations where it was trying to determine if Galie was the "mole" at the company, and therefore was not a threat or interrogation in violation of the Act. The Respondent also defends that Galie was laid off on about January 3 because of lack of work.

Galie began working for the Respondent in August; although his job classification was technician, the work that he performed was pulling cable for telephones and computers through walls and dropped ceilings and putting a jack on the end of the cable. During his employment with the Respondent he possessed no electronic certifications and was the least experienced technician employed by the Respondent.

¹ Unless indicated otherwise, all dates referred to herein relate to the year 1999.

B. The 8(a)(1) Allegations

It is alleged that on December 10, 1999, the Respondent's president, John Yoast, interrogated Galie about his union activities and threatened him with discharge if he continued to engage in those activities. December 10, 1999, was the date of the Respondent's Christmas party at a local hotel; employees and customers were invited. J. Yoast and Galie agree that they had both been drinking at the party. Galie testified that J. Yoast approached him at the party and said that he wanted to talk to him outside. They walked outside and J. Yoast told him that he suspected that one of his workers was talking to the Union and he suspected that person was Galie. Galie said that he did not know what J. Yoast was talking about. Yoast said that he wanted to know the "fucking truth," and if he found out that it was Galie who was talking to the Union, "that I'm done." J. Yoast said that if he wanted to be "a little fucking snitch for the Union," he could do so, but: "No one in the Union makes money." That was the extent of the conversation. J. Yoast testified that he told Galie that he wanted to speak to him; they walked to the hotel entrance and J. Yoast asked Galie if he was disclosing information about where the Respondent was working to the Union; Galie denied it and Yoast said: "I know it's you," and Galie again denied it. J. Yoast then said: "I know it's you, I'm not an idiot." Galie then put his head down, and J. Yoast said, "Why? Explain it to me." Galie said, "I can't. I'm caught in the middle." That was the extent of the conversation.

James Daly, who operates James Daly Insurance Company, is a very good friend and a client of John Yoast and the Respondent. In late 1999, Daly needed some work performed to connect his computers and J. Yoast said that he would perform the work for Daly at cost. Daly agreed, without asking J. Yoast what the cost would be. On December 8, the Respondent's employees arrived at Daly's premises to perform the work; later that day, Daly was told that he had an important phone call from Union Representative Ray Della Vella, and for him to call him back. When Daly did so, Della Vella identified himself as the union business agent and asked if Daly was doing business with J. Yoast and the Respondent. Daly said that he was, and that the Respondent was installing his phone system that day. Della Vella then threatened to put a picket line around his building.² Daly said that he had no idea that the phone system had anything to do with Unions, and Della Vella said that it did, and that Daly should talk to Yoast about becoming Union; Daly said: "Well, that's your job." After this conversation, Daly called John Yoast and told him of this conversation with Della Vella. John Yoast testified that after receiving this call from

² In *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593, 602 (1999), the Board adopted the recommended Order of Administrative Law Judge Margaret Kern, who stated:

Respondent's unlawful actions toward 10 separate neutral employers in a 19-month period, involving picketing, threats to picket, and work stoppages at six locations in the Philadelphia area, demonstrates Respondent's proclivity for violating the Act and its general disregard for the fundamental rights of employees and neutral employers. A narrow order, confined to the instant case, would not sufficiently deter further misconduct. I therefore recommend that the Board issue a broad order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act.

Daly he was “ticked off” and discussed the matter with his brother Michael. They determined that the informant was either Galie, Marcy or Brennan, although he did not speak to either of them about the subject until the discussion with Galie at the Christmas party. He testified further that earlier in 1999 he had received similar reports of threats to his customers, but he had not discussed the issue with his employees because: “I wasn’t really concerned about it.” He had met with Della Vella in about February and was given a sample union contract. He told his employees about it, and told them that if they wanted to meet with the Union they should do so. The difference between those earlier incidents and the one in December was that Daly was a personal friend. “I was angry about Mr. Daly getting hassled by the union.”

It is further alleged that on about December 13, Respondent, by Michael Yoast, interrogated an employee about his union activities. Galie testified that on that day, Michael Yoast, vice president, owner, and brother of John Yoast, asked to speak to Galie in his office. He questioned him about what was said at the Christmas party, and apologized for John Yoast’s actions. He told Galie that he had told John that he suspected Galie of talking to the Union, but he didn’t want him speaking to him about it at the party. He also asked Galie if he was leaking information to the Union, and if he was satisfied working for the Respondent. Michael Yoast testified that he called Galie into his office on December 13 to find out whether he was disclosing company information to other people. He also apologized to Galie for John Yoast’s questioning him at the Christmas party: “I didn’t think that it was the time or place for Jack to talk to Brian.”

It is next alleged that on about December 13 Sean Brennan interrogated an employee about his union activities. The complaint alleges that Brennan was Respondent’s installation manager and that Dennis Murphy was its installation technician and that they have been agents of the Respondent within the meaning of Section 2(13) of the Act; there is no complaint allegation that they were supervisors under Section 2(11) of the Act. Galie testified that on December 13, Brennan asked him what occurred between he and John Yoast, Brennan’s cousin, at the party; Galie told him that Yoast accused him of being a “Union rat and a spy.” Brennan testified that in December he received a telephone call from Della Vella asking him if he wanted to join the Union. After receiving this call, Brennan asked the other employees, including Galie, if they had also received a telephone call from Della Vella. Sometime after receiving these calls, these employees got together and took a vote amongst themselves and decided that they did not want to join the Union. Murphy testified that he also received a number of telephone calls from Della Vella. In addition, Murphy was attempting to arrange a meeting for the employees with Della Vella, but it never worked out.

It is next alleged that on about December 15, Murphy interrogated employees about their union activities, and threatened the employees that the Respondent would go out of the cabling business and sell its business if the employees selected the Union as their bargaining representative. Galie testified that on about December 15, all of the technicians met on the Respondent’s premises after work; none of the bosses were present. He

testified that at this meeting Murphy said that John (Yoast) was thinking of going out of the cabling business “because the Union’s been coming down on him really hard.” He also said that John would rather sell the Company before going Union, and he asked the person who was passing the information to the Union to come forward and to admit it. Murphy testified that after receiving a call from Della Vella, he asked all the technicians to stay after work on November 25, for a meeting without the bosses. Prior to this, he asked Michael Yoast if he could use the conference room for a meeting with the technicians, without telling him the purpose of the meeting. At this meeting, he said that the Union was showing up on all their jobs and it was affecting their work: “just on a personal level . . . I just found it kind of rude.” He said that the Union seemed to know everything they were doing, and if it continued, they would not be able to do any work, and wouldn’t need as many employees. He recommended that the person speaking to the Union come forward and admit it but, apparently, nobody did.

Finally, it is alleged that David Nelson, Respondent’s vice president and admitted agent, on about December 23, threatened an employee with unspecified reprisals if he engaged in union activities. Nelson met separately with all of the technicians on December 23, to give them their Christmas bonuses. Galie testified that when he met with Nelson on that day, Nelson said that he hoped what John (Yoast) accused him of was not true, but if he found out that it was true, he would be pissed off. He also told Galie that he had a good future with the Respondent and looked forward to working with him and training him.

C. Agency Status of Brennan and Murphy

When Respondent’s technicians were performing installation or service work at a customer’s jobsite, it is with from one to three employees. Galie testified that when Brennan is present, he was in charge. If Murphy, rather than Brennan is present, Murphy was in charge. Galie has worked on jobs for the Respondent when neither Brennan nor Murphy was present. He testified that on jobs where either Brennan or Murphy was present: “They did the same type of work we did. They also did more sophisticated work.” Technician Scott Marcy testified:

Mr. Brennan or Mr. Murphy would go over the job with all of us who was present at the time. And we pretty much know what has to be done. I mean, each person that’s on the job site knows what they have to do. If they don’t, then they approach somebody that does know what’s going on so they could help you.

But if they stay at that particular job site, then you could confront them and they could give you more direction. But we pretty much know what’s going on.

He testified that he considers Brennan and Murphy to be technicians, rather than a part of management. Technician Pat Coonan testified that Brennan and Murphy were “coworkers” who performed “pretty much the same” work as he did. He testified that Mike Yoast gives the employees detailed instructions on what job to go to and, when necessary, what job to perform. Brennan does not assign them to specific jobs be-

cause, "Everybody knows their job limits." When he first began working for the Respondent, Brennan taught him cabling.

Brennan has been employed by the Respondent for 8 years; his job title is installation manager. He testified:

I first go out and meet the customer before a job starts, figure out what needs to be done and the best way to go about installing a new phone system. Ask questions on how to setup a phone system, do cabling issues, see it all the way through from beginning to end.

He spends about 50 percent of his time installing equipment, about 25 percent overseeing other employees installing equipment and, apparently, 25 percent preparing jobs as discussed above. He assigns work to technicians based on the work that needs to be done and the work that the employees are capable of performing. He testified: "[T]he newer hires usually start out doing cabling. It's a little more physical stuff before you get into the actual technical end of the wiring and the programming. You kind of work your way up to that." If he sees that an employee is performing a job incorrectly, he will discuss it with the employee. On one occasion he gave a written warning to Galie and Coonan for lateness. He could approve an employee's request to report to work late or leave early.

Murphy has been employed by the Respondent for 5 years; he testified that his title also is installation manager. If there is a lot of work, he spends most of his time on jobsites doing installations. If work is slow, he is in the office doing remotes, changing customers' services from the Respondent's office, whenever possible. If neither Brennan nor Mike Yoast is at his jobsite, he is responsible to "make sure that my jobs are done right." However, he receives daily voice mails from Michael Yoast that are "very detailed" on how to perform particular jobs; Michael Yoast's nickname is "Message Mike." When he has new employees working with him, it is sometimes necessary to give them detailed instructions on what to do. "But guys usually catch on pretty quick what they need to do." The Respondent gave him business cards with the title "Manager." He testified: "That's just a title that I have on my business card that I give out to customers, that they can get a hold of me." He was then asked what he does that is different from technicians that makes him a manager, but he could not think of anything.

The uncontradicted testimony is that neither Brennan nor Murphy can hire, fire, transfer, suspend, layoff, reward, promote or discipline employees, or effectively recommend such action.

D. The Alleged 8(a)(3) Violations

It is alleged that the Respondent gave Galie a reduced Christmas bonus on about December 23, and unlawfully laid him off on about January 3, 2000, because of his activity on behalf of the Union. The employees were given their Christmas bonus on December 23 and Galie received a gross bonus of \$500. When Nelson gave him the bonus he told him that he needed to take courses in his spare time to be certified to operate the advanced equipment, and that Respondent was planning to train him. Unlike the other technicians, Galie had no certifications for Respondent's advanced systems. Brennan, who has been employed by the Respondent for 8 years and has two or

three certifications, received a \$7000 Christmas bonus. Murphy, who was employed by the Respondent for 5-1/2 years and has eight or nine certifications, received a \$9000 bonus. Employee Scott Marcy, who has been employed by the Respondent for 2-1/2 years, and has a certification for one system, received a \$3000 Christmas bonus. Coonan, who has been employed for 5 years and has two certifications, received \$2500. Other employees, not further identified in the record, received bonuses ranging from \$2200 to \$5000. Michael Yoast testified that bonuses are determined by "how much work did they do. I mean, the guys that are technical and helped the business grow, they get more." Nelson testified that the bonuses are based upon work ethics, willingness to learn and job performance. At the time that he distributed the bonuses, he was aware that Galie was suspected of being the Union "mole." John Yoast testified that the principal factors in determining bonuses are work ethic and technical ability.

As previously stated, Galie had no technical experience prior to his employment with the Respondent, and learned of the job from the Union. He made no attempt to convince Respondent's other technicians to sign for the Union and, in fact, denied to the other employees that he supported the Union because he felt that they were against the Union. Coonan testified that he worked with Galie regularly and Galie never discussed the Union with him. Michael Yoast testified that after he and his brother John received calls from customers notifying them that they had been threatened by the Union, they concluded that either Galie or Marcy, both of whom worked on the jobs in question, was the one passing the information to the Union.

Galie, who began working for the Respondent in August, principally pulled cables. In December 1999, he spent 3 days stocking shelves in the Respondent's stock room because business was slow at the time. He was laid off on January 3. On the prior evening, Brennan left him a voice mail to meet him in the shop with his tools the following morning. Brennan told him that work was slow and that they were going to have to lay him off. He told Galie that as soon as work picked up they would call him. He never was recalled. Brennan testified that he had been told by Michael Yoast that work had slowed down because of Y2K and that they had to lay off Galie and he asked Brennan to tell Galie of the layoff. As to the economic defense, Brennan testified: "It was pretty busy before the year 2000, with a lot of installation of voice-mails and phone systems. But then it died down after the first of the year, and towards the end of the year it was getting slower. It was very slow at the beginning of the year." Murphy testified that he spent a little time in December counting stock in the stock room. Marcy testified that he performed less cabling work in December than he had earlier in the year.

Michael and John Yoast each testified that 1999 was a very busy year because of the Y2K issue resulting in a large number of voice-mail upgrades and phone installs that had to be performed prior to the end of the year. In about August, Michael Yoast determined that he needed additional cabling help because a lot of the employees were working a substantial amount of overtime. That is when they hired Galie. He testified that he told Galie to first learn cabling, to ask questions and take books home to read and train himself on the more advanced aspects of

the job, but he, apparently, never did so. Michael Yoast identified and explained numerous Respondent exhibits supporting the Respondent's economic defense herein. The technicians call in the number of hours performed for different tasks, together with the job number and their employee identification number. The Respondent's records state that the number of employee hours spent cabling was 456 in September. For the following 4 months the hourly figures were 391, 345, 125, and 103. For the following 8 months, the hours worked cabling were 152, 149, 200, 95, 331, 272, 117, and 411 in September 2000. Further, the percentage of the Respondent's business that cabling represented was 31 percent from January through August, 29 percent from September through December, 17 percent from January through March 2000, 25 percent from April through June 2000, and 36 percent from July through November 2000. In December he told Nelson that they did not have much work lined up and they had to do something, so they decided to lay off Galie; he waited until January 3, 2000, because he did not want to lay him off during the holiday season. They chose Galie because the only work that he performed was cabling, and there was a big decrease in that work.

After Galie was hired, the Respondent had nine technical employees, including Brennan and Murphy; Galie was the least senior of these employees. One of these employees transferred to the sales department in October, another left of his own accord in December; they expected him to return, but he never did, and Galie was laid off on January 3, 2000. Michael Yoast testified that in July 2000, because of an increase in cable work, he hired his brother-in-law, Michael Rue, and in September they hired William Littleton, his wife's godson. Neither Rue nor Littleton had any cabling experience or any certifications in the industry. When I asked why he did not recall Galie rather than hiring Rue and Littleton, he testified:

Because it's company procedure that in order to hire somebody, it would be either somebody that I recommend, Jack or Dave Nelson, the other partner. Friends of other people. I mean, that's how we got 90% of our employees, are family members or friends of the company who are ex-neighbors.

John Yoast is in charge of sales for the Respondent; he and his brother, Michael, had some disagreements, including Michael Yoast's sentiment that John Yoast should not have questioned Galie at the Christmas party. John Yoast testified:

There was a lot of family disputes regarding the business. Him and I did not see eye to eye on things and I was extremely disappointed that he didn't take action to find out why a good friend of mine was being hassled. You know, I am not concerned about the union going after my employees. I am not concerned about the union going after my clients. I am confident we have enough relationship with those. When they go after a friend, the witch hunt has to stop.

At a regular meeting with Nelson on December 15, John Yoast announced for the first time that he was taking a leave of absence, effective immediately. The reasons for the leave were:

Stress in the business, stress on the family, and my wife was in the last month of her pregnancy. She was due in mid-January. I had a three and a half year old at home. It was a little difficult on my wife during her pregnancy.

When he left on his leave of absence, he did not tell Nelson or Michael Yoast when he would return or even if he would return: "I told them I didn't know what I was doing." As to the sales and the sales pending at the time:

There was relatively none. It had been a blockbuster year. People had already spent their money on upgrades and it was very slow. I don't believe I was working on anything substantial, however, if some of our major clients needed to get in touch with me, I told them to let me know and that I would call them. I wasn't going to leave my clients in the dark.

He returned to the facility briefly on December 23, to decide on the Christmas bonuses with Nelson and Michael Yoast. After that, he was in and out briefly in January, and returned full time on about February 1, 2000. He did not discuss the decision to lay off Galie with Michael Yoast and did not learn about it until later that week.

Michael Yoast testified that when he hired Galie he assumed that he would be a permanent employee; in fact, the Respondent had never before laid off an employee. However, even more important than the post Y2K drop-off in business, was the fact that John Yoast took a leave of absence in the middle of December; this was important because John Yoast handles the Respondent's sales and he, Michael Yoast, and Nelson were not experienced in sales.

IV. ANALYSIS

It is alleged that Brennan and Murphy are agents of the Respondent within the meaning of Section 2(13) of the Act. This issue relates to the two allegations in the complaint wherein Brennan and Murphy are alleged to have interrogated and threatened Galie in violation of Section 8(a)(1) of the Act. The Board may find agency based on either actual or apparent authority to act for the employer. In *Southern Bag Corp.*, 315 NLRB 725 (1994), the Board stated:

The Board applies common law principals when examining whether an employee is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. The test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." As stated in Section 2(13) of the Act, when making the agency determination, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." [Citations omitted.]

An employer may have an employee's statements attributed to it if the employee is "held out as a conduit for transmitting information [from management] to the other employees." *Deb-*

ber Electric, 313 NLRB 1094, 1095 fn. 6 (1994). *Tim Foley Plumbing Service*, 332 NLRB 1432 (2000). Finally, as stated rather succinctly in *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988): “Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity.” The burden of proof is placed on the party alleging the agency status, the General Counsel herein.

I find the evidence herein insufficient to establish that either Brennan or Murphy were supervisors or agents of the Respondent. In a similar situation in *Knogo Corp.*, 265 NLRB 935 (1982), the Board stated: “Gonzales’ transmittal of working orders from Rizzi to the employees is of a purely routine nature. We find it indicates no more than that Gonzales is an experienced employee entrusted with nonsupervisory lead authority.” That is precisely the situation herein as well. Brennan and Murphy are experienced and capable technicians who, when necessary, trained and assisted the other technicians. There is also no reasonable basis for a belief that John or Michael Yoast authorized Brennan and Murphy to speak to Galie or the other employees about the Union. Rather, Brennan and Murphy spoke to the employees because they were solicited by Della Vella to join the Union, and they wanted to learn how the other employees felt about it; Murphy spoke to the employees because he was annoyed that the Union was disrupting their jobs. It is highly unlikely that if Della Vella viewed them as prospective union members and rank-and-file employees, their fellow employees saw them as acting for the Respondent.

The powers enumerated in Section 2(11) of the Act are to be read in the disjunctive. *NLRB v. McEver Engineering*, 784 F.2d 634, 642 (5th Cir. 1986). If an employee possesses any of these forms of authority, he is a supervisor for purposes of the Act. *Debber Electric*, supra. The only enumerated powers that are present herein are “assign” and “responsibly to direct.” However, Section 2(11) requires that the exercise of these powers involve the use of independent judgment, and not be merely routine. The direction of work herein is similar to that in *Loyalhanna Health Care Associates*, 332 NLRB 933 (2000), wherein the Board stated: “Such direction reflects nothing more than the exercise of the nurses’ greater training, skill and experience in helping less skilled employees perform their job correctly.” Further, Michael Yoast gives them daily detailed instructions on how the jobs are to be performed and they generally simply transmit these instructions to the other employees. I therefore find that Brennan and Murphy are neither agents or supervisors of the Respondent and recommend that the 8(a)(1) allegations involving them be dismissed.

It is next alleged that John Yoast’s interrogation of Galie at the Respondent’s Christmas party violated Section 8(a)(1) of the Act.³ Counsel for the General Counsel and counsel for the

³ I found John and Michael Yoast, as well as Nelson, Brennan, and Murphy to be credible witnesses. Their testimony was reasonable and they appeared open and direct in their cross-examination as well as the direct examination. Although I did not find Galie to be an incredible witness, whenever necessary, I would credit their testimony over his.

Charging Party view this situation differently than does counsel for the Respondent. Counsel for the General Counsel and counsel for the Charging Party allege that John Yoast was questioning Galie about protected concerted activities that he was engaging in, giving the Union the location of the Respondent’s jobsites, to assist the Union in organizing its employees. The Respondent alleges that the questions were not meant to coerce Galie in the exercise of his Section 7 rights. Rather, John Yoast was angry that Daly, his friend and customer, was getting threatened and hassled by the Union and he wanted to learn who was giving the information to the Union that resulted in these threats.

Normally, an employee who contacts a union is engaged in concerted activities if he is acting on behalf of at least one other employee. *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1507 (8th Cir. 1993). And unless there is a specific reason why the conduct loses its protected nature, it is protected as well. The first issue is whether Galie’s notification to the Union of the Respondent’s jobsites was concerted activity. Clearly, he was acting alone in passing the information to the Union and, apparently, had little or no union supporters among the other technicians. However, that does not mean that his activities were not concerted. In *NLRB v. Henry Colder Co.*, 907 F.2d 765, 768 (7th Cir. 1990), the Court, citing *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), stated: “Section 7 of the Act protects the concerted activity of an individual even when he acts alone, so long as he intends to induce group activity or acts as another employee’s representative.” Were Galie’s actions meant to induce group activity, i.e., get the other technicians interested in the Union, or was it meant to force the Respondent to recognize the Union so that the Union would stop threatening its customers? I find the latter to be the case. If Galie had really wanted to induce group action of the technicians, he would have attempted to convince them to sign cards for the Union; he never did so and, in fact, denied that he supported the Union. In *Asbestos Services*, 333 NLRB 70 fn. 2 (2001), the Board stated:

The judge found that the Respondent established that it would have discharged Nelson even in the absence of his protected concerted activity for several reasons, including his complaining to the legal department at Vandenburg Air Force Base about the Respondent’s alleged noncompliance with the Davis-Bacon Act. In adopting this finding, we note that the judge discredited Nelson’s claim that he spoke to other employees about the issue. Consequently, although Nelson’s activity at Vandenburg Air Force Base may have been protected, it was not concerted in this instance.” [Citations omitted.]

I therefore find that by notifying the Union of the Respondent’s jobsites, resulting in the Union threatening its customers, in violation of the broad Board order against it, Galie was not engaged in concerted activities. I therefore recommend that the allegation involving John Yoast’s interrogation of and threats to Galie at the Christmas party be dismissed. For the same reason, I would recommend that the allegations involving Michael Yoast’s interrogation of, and apology to, Galie, and Nelson’s statement to him on December 23, be dismissed.

Although I have found that Galie's actions were not of a concerted nature, I find that his activities in notifying the Union of the Respondent's jobsites do not justify the loss of the protection under the Act. It is only conduct that is egregious, opprobrious or flagrant that takes conduct outside the protection of the Act. *Consumers Power Co.*, 282 NLRB 130 (1986); *Health Care & Retirement Corp. of America*, 306 NLRB 63 (1992); and *Earle Industries*, 315 NLRB 310 (1994). The situations where the Board has most often found that an employee loses the protection of the Act are where employees pilfer or read private correspondence or records of his employer, even if the subject of the documents relates to bargaining subjects. *Uniform Rental Service*, 161 NLRB 187 (1966); *Canyon Ranch*, 321 NLRB 937 (1996). As the Court stated in *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990): "Quite simply, wrongfully obtaining information from a company's private file is not a protected activity." Galie's actions did not reach this level. They may have been inappropriate or "sneaky," but they were not egregious, opprobrious or flagrant. I therefore find that had his actions been concerted, they would have constituted protected concerted activities.

The final allegations involve the reduced Christmas bonus paid to Galie on December 23, and his layoff on January 3; it is alleged that each violates Section 8(a)(3) of the Act because they were done in retaliation for Galie's actions on behalf of the Union. I have previously found that Galie's activities of notifying the Union of the Respondent's jobsites did not constitute concerted activities. Therefore, even if the Respondent had reduced his Christmas bonus and laid him off for that reason, it would not constitute a violation of the Act. However, I need not get to that. Galie was the Respondent's least experienced technician, having been employed by the Respondent for about 4 or 5 months. He had no certifications, and only did cabling work. Marcy, who had been employed for 2-1/2 years and had one certification, received a \$3000 bonus. Coonan, employed for 5 years with two certifications, received \$2500. Brennan and Murphy, with 8 and 5-1/2 years of employment and two or three and eight or nine certifications, received \$7000 and

\$9000. I fail to see any discrimination in the awarding of the Christmas bonus. Considering his length of employment and skill, Galie's bonuses was, at least, proportional to the other technicians. I therefore recommend that this allegation be dismissed.

Finally, even if Galie had been engaged in protected concerted activities, I would recommend that the allegation that he was unlawfully laid off on January 3 be dismissed. The testimony, together with the exhibits, establishes an extreme drop in the Respondent's business beginning in about September. In December and January 2000, the number of hours the Respondent's employees spent performing cabling work (the only work that Galie was able to perform) was about 25 percent of what it had been in September. Further, in January, cabling represented about half of Respondent's business compared to what it had been during the first half of 1999. Brennan, Murphy and Marcy corroborate this evidence that work generally, and cabling work in particular, was slow in December and January 2000. The final factor supporting the Respondent's defense, but more nebulous than the others, is John Yoast's leave of absence. It was not previously scheduled and was open ended. Since he handled all of the Respondent's sales, the Respondent had reason to be concerned about its business and payroll over the next few months. I therefore recommend that the allegation that Galie's layoff violated Section 8(a)(1)(3) of the Act be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, C.S. Telecom has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent did not violate Section 8(a)(1) and (3) of the Act as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]