JD–75–13
Corona &
Long Beach, CA

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

PURPLE COMMUNICATIONS, INC.

and

Case Nos. 21-CA-095151
21-RC-091531
21-RC-091584

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO

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DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard these consolidated unfair labor practices and representation cases in Long Beach, California, on June 10 and 11, 2013. Communications Workers of America, AFL-CIO (the Union, the Charging Party, or the Petitioner) filed the charge on December 18, 2012, alleging that Purple Communications, Inc. (the Employer, the Respondent, Purple, or the Company) had committed unfair labor practices by maintaining rules that unlawfully interfered with employees' rights to engage in protected concerted activity. Representation elections were held at a number of the Employer's locations on November 28, 2012, including at the locations in Corona, California, and Long Beach, California. At the Corona facility, 10 ballots were cast for the Union and 16 ballots against the Union, with one challenged ballot. At the Long Beach facility, 15 ballots were cast for the Union

and 16 ballots against the Union, with two challenged ballots.[1] The Union filed timely objections to pre-election conduct at those locations.

On April 22, 2013, the Director of Region 21 of the National Labor Relations Board (the Board) issued a complaint alleging that the Employer had committed unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining two rules that interfered with employees' rights under Section 7 of the Act. The Employer filed a timely answer in which it denied that the rules violated the Act. On April 30, 2013, the Director of Region 21 issued a report on challenged ballots and objections and an order consolidating the cases regarding those matters with the unfair labor practices case for purposes of hearing.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Employer, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation, provides interpreting services to deaf and hard of hearing individuals, from its facilities in Corona, California, and Long Beach, California, where it annually performs services valued in excess of $50,000 for customers in states other than the State of California. The Employer admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND FACTS

The Employer is a provider of communication services for deaf and hard of hearing individuals. The primary service it provides is sign language interpretation during video calls. An employee known as a "video relay interpreter" or "VI" facilitates communication between a hearing party and deaf party by interpreting spoken language into sign language and sign language into spoken language. The Employer offers its video call interpretation services 24 hours a day, 7 days a week, from 15 call center facilities across the United States. In 2012, interpreters at seven of those facilities engaged in campaigns for union representation. The allegations in this case concern two facilities at which union representation elections were held on November 28, 2013. At one of those facilities, located in Corona, California, the Employer employs approximately 30 interpreters. At the other, located in Long Beach, California, the Employer employs approximately 47 interpreters.

[1] At the start of trial, the Respondent and the Union stipulated that the challenged ballots at the Long Beach facility were cast by ineligible voters and should not be counted.

III. Unfair Labor Practices

A. Facts

The Employer's video relay interpreters "process" calls using company-provided computers located at their workstations. The interpreters can use these workstation computers to access the Employer's intranet system and various work programs, but the computers have limited, if any, access to the internet and non-work programs. The Employer assigns an email account to each video interpreter, and the interpreters can access these accounts from the workstation computers as well as from their home computers and smart phones. Employees routinely use the work email system to communicate with each other, and managers use it to communicate with employees and other managers. At the Corona and Long Beach facilities, the Employer also maintains a small number of shared computers that are located in common areas and from which employees are able to access to the internet and non-work programs.

The Employer has an employee handbook that sets forth its policies and procedures. The unfair labor practices alleged in this case concern two handbook policies that the Employer has maintained since about June 19, 2012, and which the parties stipulate were in effect at all times relevant to this litigation. The first policy provides as follows:

> The following acts are specifically prohibited and will not be tolerated by Purple. Violations will result in disciplinary action, up to and including terminations of employment.
>
> * * *
>
> - Causing, creating, or participating in a disruption of any kind during working hours on Company property;

The second handbook policy at issue concerns internet, intranet, voicemail and electronic communications. The portions that are alleged to violate the Act provide as follows:

> Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by Purple to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.
>
> * * *
>
> Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities:
>
> * * *

> 2. Engaging in activities on behalf of organization or persons with no professional or business affiliation with the Company.
>
> * * *
>
> 5. Sending uninvited email of a personal nature.

The Employer is authorized to punish an employee's violation of this policy with discipline up to and including termination. Ferron testified that the reason interpreters are prohibited from using their workstation computers for personal use is to prevent computer viruses from contaminating the call center

B. ANALYSIS

1. The General Counsel argues that the Employer's maintenance of the handbook policy prohibiting employees from "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property" violates Section 8(a)(1) of the Act because it sets forth an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity. In determining whether the maintenance of a rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would "reasonably tend[ ] to chill employees in the exercise of their Section 7 rights." *Knauz BMW*, 358 NLRB No. 164, slip op. at 1 (2012), citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Under this standard, a rule that explicitly restricts Section 7 rights is unlawful. Id., citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). If a rule does not explicitly restrict Section 7 rights, the General Counsel may establish a violation by showing any one of the following: (1) that employees would reasonably construe the language to prohibit Section 7 activity; (2) that the rule was promulgated in response to union activity: or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id., citing *Lutheran Heritage*, 343 NLRB at 647.

The Employer's prohibition on "causing, creating, or participating in a disruption of any kind during working hours on Company property" does not explicitly restrict Section 7 activity, however, the General Counsel argues that the policy violates the Act because it would reasonably be interpreted to do so. This argument is supported by Board precedent. In *Heartland Catfish Co.*, the Board found that an employer rule that prohibited employees from "engaging or participating in any interruption of work" violated Section 8(a)(1) of the Act because it would reasonably be interpreted by employees "to prohibit participation in a protected strike." 358 NLRB No. 125, slip op. at 1-2 (2012). Similarly, in *Labor Ready, Inc.,* the Board held that an employer's rule that "Employees who walk off the job will be discharged" was overbroad and unlawful. 331 NLRB 1656 (2000). In *North Distribution, Inc.*, the Administrative Law Judge ruled on exactly the same disruption language that is at-issue here. 2002 WL 991684 (2002). In that case the judge held that the rule violated Section 8(a)(1) because its language was "overbroad and could be interpreted as barring Section 7 activity, including the right to engage in a work stoppage." Id. Although I am not bound by the Judge's decision,[2] I find his reasoning persuasive. Because the Employer's prohibition does not define or limit the meaning of "disruption" or state that it is not intended to refer to Section 7 activity, I find that employees would reasonably interpret it to outlaw some such activity.

[2] There is no Board decision reviewing the Administrative Law Judge's decision in *North Distribution, Inc.*, supra.

To support its contention that the rule prohibiting employee disruptions is permissible, the Employer relies on the fact that the rule only prohibits disruptions during working hours. The Employer cites *Daimler-Chrysler Corp.*, 344 NLRB 1324 (2005), and argues that the "disruption" language would not interfere with lawful strike activity because strikes are not protected unless they occur on non-work time. This contention is not persuasive for several reasons. First, I note that the prohibition on "disruptions" is so broad that it can reasonably be understood to apply not only to strike activity, but also to other forms of protected Section 7 activity, including, for example, solicitation. In addition, while the Employer argues in its brief that the Company is entitled to prohibit union activities during working "time," the rule at-issue is not, in fact, limited to working time. Rather the prohibition explicitly extends to the entire "working *hours"* period. The Board has long held that the phrase "working hours," unlike the phrase "working time," encompasses periods that are the employees' own time such as meal times and break periods, as well as times when employees have completed their shifts but are still on the company premises pursuant to the work relationship. *Grimmway Farms*, 314 NLRB 73, 90 (1994), enfd. in part 85 F.3d 637 (9th Cir. 1996) (Table); *Wellstream Corp.* 313 NLRB 698, 703 (1994); *Keco Industries*, 306 NLRB 15, 19 (1992). For this reason, the Board has held that a rule prohibiting union solicitation during "working hours" is presumptively invalid, even though a presumption on solicitation during "working time" is generally lawful. Id.; see also *Our Way*, *Inc.*, 268 NLRB 394-395 (1983), citing *Essex International, Inc.,* 211 NLRB 749 (1974). This distinction is particularly significant here since the Employer operates 24 hours a day, 7 days a week – meaning that the prohibition on disruptions during "working hours" arguably applies to *all* hours of the day and night. Moreover, the rule does not only prohibit employees from directly participating in a disruption, but also from "causing" or "creating" a disruption that takes place during working hours on company property. Employees could reasonably fear that this would allow the Employer to discipline them for participating in meetings or other Section 7 activities that take place during non-work time and away from the workplace if those activities are causally linked to a disruption at the facility. Lastly, I note that the Employer incorrectly assumes that any strike that ran afoul of its rule prohibiting disruptions during working hours on company property would be a sit-down strike or slow down and, therefore, unprotected by the Act. See Brief of Respondent at Page 14, citing *Daimler-Chrysler Corp.*, supra. This overlooks the scenario in which a strike begins when employees walk off the job and exit the facility. Such strikes are generally protected by the Act, see, e.g., *Labor Ready, Inc.*, supra, but would nevertheless be prohibited by the Employer's rules since the disruption would begin during working hours on company property.

For the reasons discussed above, I conclude that the Employer's maintenance of the rule prohibiting employees from "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property" violates Section 8(a)(1) of the Act because it sets forth an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity.

2. The General Counsel also alleges that the Employer interfered with employees' exercise of Section 7 rights in violation of Section 8(a)(1) by maintaining overly-broad rules that prohibit the use of its equipment, including computers, internet, and email systems for anything other than business purposes, and which specifically prohibit the use of that equipment for "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company." While the General Counsel makes this allegation, it concedes that finding a violation would require overruling the Board's decision in *Register-Guard*, 351 NLRB 1110 (2007), enfd. in part sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). In that decision the Board held that "employees have no statutory right to use the Employer's e-mail system for Section 7 purposes" and therefore that an employer does not violate Section

8(a)(1) by maintaining a prohibition on employee use of its email system for "non-job-related solicitations." The General Counsel argues that *Register-Guard* should be overruled, inter alia, because of the increased importance of email as a means of employee communication. If the General Counsel's arguments in favor of overruling *Register-Guard* have merits, those merits are for the Board to consider, not me. I am bound to follow Board precedent that has not been reversed by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984).

Therefore the allegation that the Employer violated Section 8(a)(1) by maintaining rules that prohibit the use of company equipment for anything but business purposes should be dismissed.

IV. Challenged Ballots

The Employer challenged the ballots of two individuals – Martin Garcia and LeeElle Tullis – who cast ballots in the representation election at the Long Beach facility. Those ballots are sufficient in number to affect the outcome of the Long Beach election. The Employer challenged these ballots on the grounds that the individuals had not worked the requisite number of hours to qualify to vote. At trial, the Union and the Employer stipulated that the two challenges should be sustained, and that the ballots of Garcia and Tullis should not be counted. No testimony or documentary evidence was presented on the subject. Given that the parties have stipulated to the validity of the ballot challenges, I conclude that the ballots of Garcia and Tullis should not be opened or counted.

V. Objections to the Election

In October 2012, the Union filed petitions for representation elections at the Corona and Long Beach facilities. On October 25, the Union and the Employer entered into stipulated election agreements for elections at both of those facilities to be held on November 28 for bargaining units comprised of all full-time and part-time video interpreters. The elections were held as scheduled and the Union filed post-election objections. The Regional Director for Region 21 directed that a hearing be held on the six objections filed by the Union regarding the election at the Corona facility (21-RC-91531) and the election at the Long Beach facility (21-RC-091584). The Union's objections, which are identical for both facilities, are as follows:

> 1. The employer encouraged a decertification petition to be prepared and circulated in the bargaining unit. It furthermore allowed employees to circulate this petition during work time and in work areas.
>
> 2. The employer maintained and enforced unlawful rules in the workplace which interfered with the exercise of rights guaranteed by section 7 and interfered with the election.
>
> 3. The employer made threats of bankruptcy and threatened employees with closure of the facility or loss of work if the workers voted or supported the Union.
>
> 4. The employer made offers of benefits and bribes to employees if they would not support the Union.

5. The employer otherwise threatened employees with loss of benefits if the employees supported the Union.

6. The Excelsior List was inadequate. It did not contain email address[es], work shifts, rates of pay and phone numbers.

These objections are discussed below.

OBJECTION NO. 1: The employer encouraged a decertification petition to be prepared and circulated in the bargaining unit. It furthermore allowed employees to circulate this petition during work time and in work areas.

The Board has stated that an employer has no legitimate role in instigating or facilitating a decertification petition and may not solicit employees to circulate or sign it. *Armored Transp., Inc.*, 339 NLRB 374, 377(2003); cf. *Bridgestone/Firestone, Inc.*, 335 NLRB 941, 941-42 (2001) (Employer did not violate the act when employee decided of his own volition to file a decertification petition, and employer did not provide more than ministerial assistance.); *Ernst Home Centers*, 308 NLRB 358 (1992) (same). Objection No. 1 refers to the petitions that employees submitted in an effort to cancel the November 28, 2012, representation elections as "decertification petitions." This is a misnomer inasmuch as the Union was not the certified collective bargaining representative of interpreters at either facility and therefore could not be "decertified." Nevertheless, I believe it is appropriate to apply the standard quoted above to the question of whether the Employer unlawfully involved itself in the petition to cancel the election. I find that under that standard, the Union has failed to show that the Employer instigated, facilitated, circulated, improperly permitted or otherwise unlawfully involved itself in the petitions at the Corona and Long Beach facilities.

The record evidence shows that shortly before the representation elections were held at the Corona and Long Beach facilities, interpreters at those facilities circulated identically worded petitions, which stated that the signing employees "wish to withdraw our request to unionize at this time, thereby canceling the vote that is scheduled to occur on November 28, 2012." The petitions also stated that "[b]y agreeing to withdraw, the undersigned are neither stating support for or against unionization, rather, we see wisdom in allowing Purple, our employer, to realize that they have been lax in addressing their employees' concerns and taking supportive action." After obtaining a number of signatures in support of the petitions, the proponents of the petitions transmitted copies to the Board, the Union, and the Employer. The letter transmitting the Corona petition is dated November 19, 2012, and the letter transmitting the Long Beach petition is dated November 26, 2012.

Prior to when the proponents of the petition transmitted it, video interpreters Judith Kroeger and Ruth Usher observed co-workers circulating the petition from work station to work station at the Corona location during working hours. Kroeger also saw the petition displayed in the Corona breakroom. On November 14, Kroeger sent an email message to facility manager, Sam Farley, stating:

> I just wanted to touch bas[e] with you as several VIs are approaching me stating that they are being accosted in their stations while working by other VIs not in support of the union. They are telling me they are being

> bribed with promises and coerced into agreements by these individuals while on company time.

Kroeger testified that the persons circulating the petition were rank-in-file interpreters who lacked authority to promise changes in working conditions. Later that day, Farley responded to Kroeger by email as follows:

> Thank you for bringing this to my attention. You are correct that I will not stand for any harassment in the workplace especially to the level that people are being accosted in their stations. If you would like to give me more specific information I can look into this further. I understand that you do not want to disclose any specific details in which case I will do my best to keep my eyes and ears open. Also . . . if people are coming to you, please encourage them to come and speak with me as well so I can make sure this is . . . dealt with appropriately.

The next day, November 15, Kroeger responded:

> Thank you Sam, and I have been directing individuals, but not everyone feels comfortable nor wants to contribute to what is going on. I know that the only way for you to effectively handle it would be for them to come to you. Thank you for making the extra effort to be more aware. I and many others are truly appreciative.

Kroeger testified that she did not see the petition being circulated again after the above email exchange with Farley.

Farley testified that he was not aware that any employees were circulating a petition to cancel the election until he received the November 14 email from Kroeger and that afterwards he was on the lookout for such conduct. He testified that no one besides Kroeger mentioned the petition to him prior to its submission, and that not a single employee complained to him that they had personally been accosted or offered bribes to sign the petition. Farley further testified that he did not help employees transmit the petition to the Union or other call centers. Although Farley may have been able to see employees walking in the hallways between the interpreters' work stations, Usher, a witness for the Union, conceded that someone seeing this activity would not necessarily know that the employees were moving between workstations because they "could be coming from anywhere."

I found Farley a generally credible witness based on his demeanor, testimony and the record as a whole. Moreover, his testimony was essentially unrebutted. For these reasons, I fully credit Farley's testimony that he was not involved in any way with the petition. There was no evidence that any other supervisor, manager, or agent of the company was involved in the creation, circulation, or submission of the petition at the Corona facility. Nor was there evidence that any other such individual was aware that the petition was being circulated at the Corona facility during working time. Under the circumstances, I find that the evidence does not show that the Employer encouraged, prepared, instigated, facilitated, or improperly permitted the Corona petition in any way.

Evidence to support the Union's objection is similarly lacking with respect to the petition at the Long Beach facility. The Union presented the testimony of Robert LoParo, an interpreter at the Long Beach facility and one of the three pro-union individuals who presented the petition

for representation to management. On November 18, LoParo received the petition to cancel the vote in an email from a co-worker. The following day, a different co-worker showed LoParo the petition in the break room. That day, LoParo also saw interpreters passing around a piece of a paper, and heard them saying "sign this, please," but he could not tell whether the paper was the petition, and, at trial, he did not remember who he saw passing it. LoParo stated that the individuals were not on formal, clocked-out, breaks when they were passing the paper. However, the record indicates that this would not necessarily mean that the employees were passing the paper during times when they should have been working since interpreters are allowed 10-minutes of break time per hour and do not clock out for those breaks. Angela Emerson, another Long Beach interpreter, stated that she saw the petition passed at that facility on three occasions during a single morning in October or November. Eventually the petition was passed to her at a time when she was not handling a call, but was not taking an official break.

On Friday, November 23, 2012 (the day after the Thanksgiving holiday), LoParo sent an email about the petition to Ty Blake-Holden, the manager of the Long Beach facility. LoParo stated that an interpreter had told him that she was feeling accosted at her work station by people attempting to pass the petition. Blake-Holden responded by email the following Monday, November 26. He stated: "You're correct. Nobody should feel accosted in their station. This is not appropriate. Please make sure that this person contacts me directly." There was no competent evidence that any employees contacted Blake-Holden to advise him that they personally had been accosted by a proponent of the anti-vote petition. Blake-Holden's office afforded a view into one or two interpreter work stations, but not into the hallway between the interpreters' work stations.

Even assuming that LoParo's above-discussed testimony is fully credited, I find that the evidence does not show that the Employer encouraged, prepared, instigated, facilitated, or improperly permitted the Long Beach petition in any way.

The evidence does not substantiate Objection No.1 with respect to either the Corona or Long Beach facility and that objection is overruled.

OBJECTION NO. 2: The employer maintained and enforced unlawful rules in the workplace that interfered with the exercise of rights guaranteed by Section 7 and interfered with the election.

In its brief, the Union bases this objection on the same two employer rules that the General Counsel alleged were violations of Section 8(a)(1) in the unfair labor practices case discussed above. As found above, the Employer's maintenance of the rule prohibiting employees from "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property" sets forth an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity. The second rule – the Employer's prohibition on the use of company equipment for anything other than business purposes – is not, under current Board law, considered an improper infringement on Section 7 rights. I see no basis upon which to conclude that that rule is objectionable.

Objection No. 2 is sustained with respect to both the Corona facility and the Long Beach facility to the extent that the Employer's workplace rule regarding disruptions is overly broad and interferes with the Section 7 rights of employees. The Objection is overruled to the extent that it alleges other objectionable conduct.

OBJECTION NO. 3: The employer made threats of bankruptcy and threatened employees with closure of the facility or loss of work if the workers voted or supported the Union.

OBJECTION NO. 4: The employer made offers of benefits and bribes to employees if they would not support the union.

OBJECTION NO. 5. The employer otherwise threatened employees with loss of benefits if the employees supported the Union.

1. Facts

The Union's argument in favor of sustaining Objections 3, 4, and 5, are based on statements allegedly made by Ferron (the Employer's president and CEO) during his November 16, 2012, presentations to day shift interpreters at the Corona and Long Beach facilities.[3] These meeting were held 12 days before the union election and for the purpose of trying to persuade employees to vote against representation. A bit of background is necessary to provide context for Ferron's statements during those presentations. For some time prior to the presentations, the Employer had not been profitable. In 2010, the rate at which the FCC reimbursed the Employer for its video interpreting services was reduced by approximately 7 percent and the Employer reacted to the loss of revenue by, inter alia, reducing pay for interpreters and managers, and instituting layoffs. That year, the Employer closed approximately four of its facilities, including the Long Beach facility. Ferron's understanding in 2012 was that the FCC would soon reset the compensation rates for video interpretation services and that the rates would be lowered again at that time. Nevertheless, management was not contemplating closing any facilities. Rather Ferron was planning to expand the company's operations, in part to take advantage of the lower cost of doing business in other geographic areas and also to add interpreters who were not on the certified interpreters' registry and therefore could be employed more cheaply. At some point in late 2011 or early 2012, the Employer reopened the Long Beach facility and rehired some of the interpreters who it had laid off there in 2010.

The Employer also sought to address its financial situation by increasing interpreter productivity. In early October 2012, shortly before the Union petitioned to represent interpreters at the Corona and Long Beach facilities, the Employer raised the productivity benchmarks that it relied on to, inter alia, determine bonuses. The Employer increased the amount of time interpreters were expected to be logged onto the Employer's system and the amount of billable time interpreters were expected to generate.[4] The record indicates that these changes resulted in interpreters being denied bonuses that they would have obtained under the prior productivity standards. Not surprisingly, interpreters disapproved of the new benchmarks and made their disapproval known to the Employer. In a letter to Ferron dated November 20, 2012, the Union noted that the new log-in standards were causing many interpreters "physical pain," and stated that the Union would not take any legal action if the Employer lowered those rates, regardless of whether the facilities were scheduled for a union election. At some point in November 2012 –

[3] At trial there was also testimony about other meetings conducted by Fran Cummings, vice-president of operations, and Tanya Monette, vice-president of human resources. The Union's brief does not identify any conduct by the Respondent at those meetings that it contends was objectionable.

[4] The Employer refers to its production standards as "key performance indicators" or "KPI."

prior to the representation election – the Employer lowered some of the productivity benchmarks, although the benchmarks remained higher than they had been before the increases a month earlier. These changes were made at all facilities, regardless of union activity. It is not clear from the record exactly when in November the productivity standards were eased, but one interpreter at the Long Beach facility first found out about the changes in a November 21 email from the Employer.

Ferron made his antiunion presentations at the Corona and Long Beach facilities on November 16, and also made such presentations at five or six other facilities. Ferron prepared a set of notes for these presentations and used the same notes in each instance. Before preparing those notes, Ferron consulted with legal counsel and an outside labor relations consultant. He did not read from the notes, but did refer to them during the presentations in order to remind himself to cover certain topics. At each presentation, Ferron talked for 45 minutes to an hour, and then responded to questions for 30 to 45 minutes.

Corona Presentation

In support of the objections based on Ferron's presentation at the Corona facility, the Union relies on the account given by Ruth Usher, a former video interpreter at that location. The Employer counters Usher's testimony with that of Ferron, who disputes Usher's account in a number of key respects. I do not consider the account of either of these two witnesses to be unbiased or generally more reliable than that of the other regarding disputed matters. Usher served as a union observer during the election and at the time of trial her separation from the Employer was the subject of a pending unfair labor practices charge. On the witness stand, she sometimes gave the impression of straining to support the Union's position. Based on my consideration of Usher's demeanor, testimony, and the record as a whole, I think that her account was tainted by bias. I note, moreover, that no other interpreter who attended Ferron's presentation at the Corona facility testified to corroborate Usher's account.

Ferron's testimony was less than fully reliable since he conceded that he was generally unable to distinguish what he said during his Corona and Long Beach presentations from what he said at any other of the facilities where he spoke against unionization. In general, his testimony regarding what he said at the Corona and Long Beach facilities was rather vague except when he was asked about certain alleged coercive statements, at which points he became quite certain in his denials and seemed more intent on showing that he had not engaged in objectionable conduct than in searching his recollection for an accurate account of his statements. No other attendee was questioned by the Employer to corroborate Ferron's account of the disputed aspects of either the Corona meeting or the Long Beach meeting, although Ferron said that several management and supervisory employees attended the Long Beach meeting.

Some things about Ferron's presentation at Corona are clear. Ferron discussed: the recent decision of Hostess Brands, a company with union-represented employees, to file for bankruptcy; the Employer's own financial challenges and uncertain financial future; a plea that employees delay bringing in a union and allow management time to address employee concerns; the company's priorities in the event that the Union won the right to represent interpreters; and the costs the Employer had incurred to resist the union campaign;

Regarding Hostess Brands, the record indicates that Hostess' situation relative to bankruptcy had been prominent in the news shortly before Ferron gave his presentations at the Corona and Long Beach facilities. Usher testified that, during his Corona presentation, Ferron referenced the Hostess situation and stated that "because of the union, Hostess was filing for

bankruptcy," but that Ferron did not elaborate further. At another point in her testimony, Rusher stated that Ferron had said something a bit different – "lot of good the union did in order to keep their jobs . . . at Hostess." Ferron testified that his discussion of Hostess during the presentations was confined to one or two sentences. According to him, he stated that he knew that employees were scared, but that "unionization isn't a panacea," as evidenced by the recent events at Hostess. He also testified that he told employees that having a union "was an added cost and it . . . may or may not produce a favorable or desired result from the standpoint of the interpreter." He testified that he said "Hostess, you know – you know, their situation ended in bankruptcy which was disastrous for the company and its employees and nobody was served." Ferron stated that he was fully aware that "bankruptcy" was a "fearful term" to employees and claimed that he "would never use it" in reference Purple itself. However, he stated that he considered it acceptable to mention the Hostess bankruptcy because "it was a popular topic in the news." He denied that he said that "what happened to Hostess would happen at Purple if employees voted in the Union." Based on the demeanor of the witnesses, the testimony, and the record as a whole, I find that Ferron made the statements regarding Hostess that he admitted to, but do not find a basis for crediting Usher over Ferron regarding additional statements about Hostess.

Regarding the Employer's overall financial situation and future, Usher testified that Ferron told employees that the Employer had "not made a big profit from last year to this year" and that the "overall tone" of Ferron's discussion was that "if we go union, I don't know what's going to happen." She testified that Ferron said, in relation to all employees, that he "couldn't promise that there would be benefits or anything like that in the future," and that he "could not make any promises about the future." For his part, Ferron testified that he told employees that the only promise he could make was that he "was doing his best to grow our company; to . . . increase profitability through productivity standards, through diversification of the company . . . but that it was an uncertain outcome because [he] had an uncertain reimbursement rate" for video interpretation services. He stated that the Employer was evaluating alternatives for expanding capacity at existing call centers and by opening new call centers. He discussed the possibility that benefits would be eliminated as a way of coping with further video interpretation rate reductions. According to Ferron, he also told employees that where the Employer "may have failed" was "in communicating" to employees that the state of their industry had rendered interpreters' expectations about wages and benefits unreasonable. He testified that he told employees: "We are in an uncertain time . . . with declining rates and what I'm trying to do is preserve what all of you have. . . . I can't sit here and give you an expectation of pay increases, increased benefits, things like that. We're all lucky to have a job and I'm trying to preserve what we have." In Ferron's account, he also stated that he wanted the Company to remain the "employer of choice" for video interpreters, but that the interpreters would have to measure what the Company was offering against the FCC reimbursement rate and what competitors were offering. "Employer of choice" was a term that the Employer had used in the past to mean that the Company respected and valued the interpreters' work and provided competitive wages and benefits. The testimonies of Usher and Ferron about Ferron's statements regarding the Employer's overall financial situation are not contradictory, and I accept that Ferron made the statements recounted by both witnesses on that subject and which are recounted above in this paragraph.

Usher also testified that Ferron told employees that he "would give more or less preferential treatment to the non-union employees because they were willing to work with him." I do not credit Usher's testimony in this regard. On the face of it, her use of the phrase "more or less" renders this testimony uncertain and/or unclear. Moreover, as stated above, I believe that Usher's testimony was tainted by bias. Usher also testified that Ferron said that if some of the facilities became unionized he would "play hardball with the Union" but that he would "treat" the

non-union facilities "differently." Ferron denied that he said anything about giving less preferential treatment to facilities that voted to unionize. He did, however, testify that one of his basic talking points was that if employees "did not trust" him "it would become a different ballgame." In that case, he told the interpreters, he would have to negotiate in good faith and also "have to get the best deal for the company with the respect to the Union." He testified that he told employees that his focus during such negotiations would be "on the shareholders, the deaf and hard of hearing community, and looking after all of our employees – union, non-union and corporate." Based on the demeanor of the witnesses, the testimony and the record as a whole I do not find a basis for crediting Usher over Ferron regarding the question of whether Ferron made statements threatening to treat employees who unionized worse than employees at non-union facilities. I do, however, credit Ferron's uncontradicted testimony that he made the statements discussed above with respect to "a different ballgame" and how he would negotiate if the employee's elected union representation.

Ferron also testified that he asked employees to "give" him "another 12 months" to address their concerns without a union. He discussed improving communications by having additional meetings and forums and placing a priority on the issuance of monthly newsletters. He testified that he said:

> [T]here were things that we could hopefully collectively solve . . . . if given an opportunity over the next 12 months [to] evaluate whether, you know, conditions in their mind relative to what is controllable versus that which is not controllable has improved or has not improved and you could always address a Union situation 12 months later. But give us an opportunity to bridge that divide.

Ferron discussed employees' concern about the heightened productivity benchmarks. According to him, he stated that the productivity standards were "always fluid" and that the increases were in the interpreters' "best interest despite how they felt about them" because improved productivity allowed management to avoid layoffs and pay cuts. He testified he told employees that, nevertheless, "interpreter health and safety . . . had to come first and foremost" and that the company might have gone too far and "needed to recalibrate" production standards and "were looking at that matter." The portion of Ferron's testimony that is set forth in this paragraph is not directly contradicted as regards the Corona facility and I credit that testimony.

Regarding costs associated with the Union campaign, Ferron testified that he said the following:

> And to the degree that we would have communicated better and wouldn't have incurred the cost to fly around the country and encourage a no-vote to these union call centers, think of how much more money the company would have had from a discretionary standpoint. And then we could have done a lot of things with it. We could have invested in further product development. We could have given spot bonuses to the interpreters. A lot of things we could have done that – you know – that money has kind [of] leaked out of the company.

I credit this testimony by Ferron, which was not contradicted by any other witness to his presentation at the Corona facility.

Long Beach Presentation

In support of its objections based on Ferron's presentation to the Long Beach facility interpreters, the Employer relies on the testimonies of LoParo and another Long Beach

interpreter, Angela Emerson. The Employer again relies on the testimony of Ferron – which generally did not distinguish what he said at the Long Beach presentation from what he said any of the other "vote no" presentations he made around the same time. A number of management and supervisory officials of the Employer were present at the Long Beach talk (including Blake-Holden according to Emerson's account, and Tanya Monette according to Ferron's account) – but Ferron was the only representative of the company who testified about the meeting.

It is undisputed that Ferron mentioned the Hostess bankruptcy at his presentation. He testified that he said that he knew that employees were scared, but that unionization was not a panacea, as evidenced by the bankruptcy at Hostess. He stated further that having a union adds costs and that it might lead to results that employees would not consider favorable. He cited the experience of Hostess, which "ended in bankruptcy which was disastrous for the company and its employees and nobody was served." I credit Ferron's testimony that he made these statements. His testimony was consistent with that of Emerson, who testified that Ferron "brought up . . . the correlation between what our fears were, and Hostess, and what they went through." LoParo testified that Ferron went further and directly stated that the union at Hostess had caused that company to go bankrupt. I do not credit LoParo's testimony that Ferron made that explicit connection over Ferron's contrary testimony. I do not consider LoParo an unbiased witness. He was one of the proponents of unionization who delivered the representation petition to the Employer. Moreover, LoParo's accounts of what Ferron said regarding Hostess varied over the course of his testimony – becoming increasingly damning as the questioning went on.[5] I was left with the impression that LoParo was not so much trying to recount what Ferron had actually said about Hostess, as trying to convey what he believed was Ferron's implicit message on the subject. In addition, his memory appeared faulty. For example, he testified that Ferron made certain statements about councils and committees, but when confronted with his own notes, he conceded that those statements were made by someone other than Ferron at a different meeting, or possibly only in a company newsletter, and possibly not until after the November 28 elections. Emerson testified at one point that the "feel" of what Ferron was saying was "almost like" "if you vote union, this is going to happen to you," "Union equals, you know, what happened to Hostess." However, after reviewing Emerson's testimony as a whole, I find that at these points in her testimony she was conveying her subjective impressions of Ferron's presentation, not attempting to report his actual statements.[6]

At his Long Beach presentation, as at Corona, Ferron discussed the Company's difficult financial situation, and the challenges posed by rate reductions. LoParo testified that Ferron told the employees that "with some of the requests the Union might [make], it could possibly lead to closing of certain centers or the non-viability of certain centers that decided to go union." After his recollection was refreshed with notes that he prepared several days after the presentation –- LoParo quoted Ferron as stating that "depending on the vote, he could either expand [the Long Beach operation], or not." LoParo also testified that Ferron discussed the possibility of eliminating benefits for interpreters in order to address the Company's financial situation. For his part, Ferron testified that he had not talked about closing any facilities or linked the viability of facilities or a reprioritization of facilities to whether those facilities unionized. According to Ferron, he told employees that there was the possibility of expanding

[5] For example, at one point LoParo recounted that Ferron said: "Did you see the news recently about Hostess? They went union. See what happens there." Later LoParo recounted that what Ferron said about Hostess was: "It was the union that caused Hostess to have to close down and declare bankruptcy."

[6] The test of whether an employer's conduct is objectionable "is not a subjective one, but an objective" one, and "the subjective reactions of employees are irrelevant to the question of whether there was in fact objectionable conduct." *Lake Mary Health &* Rehabilitation, 345 NLRB 544, 545 (2005).

the Long Beach operation, "but that a lot of variables went into that," including the "cost of labor" and "the outcome of collective bargaining relative to the pay rate of those interpreters." Ferron stated that he told employees that as a result of declines in the industry, it might be necessary to reduce pay or eliminate certain benefits at all call centers. I find that Ferron made the statements discussed above regarding the Employer's difficult financial situation, the variables that would affect a possible Long Beach expansion, and the possibility of reduced pay and benefits, but do not find a basis for crediting LoParo's testimony over Ferron's denials regarding statements Ferron allegedly made warning that decisions about whether to close, expand, or give preferential treatment to particular facilities would be based on whether employees voted to unionize.

At Long Beach, Ferron also made a plea that employees refrain from bringing in a union and give the Employer a chance to improve matters. As with the Corona talk, I credit Ferron's testimony that at Long Beach he told the interpreters: "There were things we could hopefully collectively solve . . . . If given the opportunity over the next 12 months evaluate whether, you know, conditions in their mind relative to what is controllable versus that which is not controllable has improved or has not improved and you could always address a Union situation 12 months later. But give us an opportunity to bridge that divide." I also find that he told employees "From the standpoint that you've turned towards a union vote, obviously there's things that we as a company could have done better; first and foremost being communication" and that he discussed various steps to improve communication. I also credit his admission that he referenced the heightened productivity standards, stating the changes might have gone "too far," that he would not have made the same changes knowing what he knows now, and that to the extent that the changes were not consistent with the health and well being of interpreters, the company would have to "adjust" as part of "a constant process of recalibration." That testimony was essentially uncontradicted and, to a significant extent, corroborated by LoParo and Emerson.

LoParo also testified that Ferron said: "I've heard you about your needs, but I'm in purgatory. I can't give you anything . . . . Those centers that haven't filed – I can change things for them, [productivity standards] and expectations. For those that filed for unionization, I can't do anything. My hands are tied." LoParo's testimony regarding the language used by Ferron on this subject was confident and detailed. Emerson testified less confidently and in less detail on this subject, but indicated that Ferron had said that he would not be able to take action to adjust productivity standards if the Union was voted in; however, Emerson did not appear to be claiming that Ferron said he could not take such action because the vote was pending. Ferron testified that he did not "talk about changes to the [productivity standards] based on the Union vote." I consider Ferron's testimony on this subject unclear. Although I think Ferron's testimony is fairly understood as denying that he told employees he would decide whether or not to make favorable changes based on the outcome of the Union vote, it is not clear at all that he was also denying that he told employees that the scheduled Union election prevented him from making changes. Additional questions were not posed to elicit a clear response from Ferron on the question of whether he told employees that he could not make changes at facilities where a union election was scheduled, but could do so at other facilities. I considered LoParo's testimony on this subject quite credible. He testified confidently and recounted colorful language – e.g., "I'm in purgatory" – that stood out from LoParo's own manner of speech during his testimony and had the ring of truth. Based on the above, I find that Ferron made the statements recounted by LoParo regarding the company's ability to make changes at facilities where no election was scheduled, but not where an election was scheduled.

On the subject of addressing employee complaints discussed immediately above, LoParo claims that Ferron went further and stated that the employees who did not want the

union "would become his priority" and "pretty much that those who were for the union would be have-nots and those who were against the union would be haves." However, in other testimony he stepped back from this claim, stating that Ferron did not explicitly say who were the "haves" and the "have-nots." Elsewhere in his testimony, LoParo claimed that Ferron clearly warned that he would prefer the non-union employees, stating that "he considered [the Employer] a family and a business and that, if certain centers decided to go union, he would have to reprioritize and focus on his family." Ferron unequivocally denied telling employees that the non-union employees would be treated as "haves" or otherwise become his priority, or that he would reprioritize based on whether a facility was unionized. In addition, Emerson, the Union's other witness regarding the Long Beach presentation, did not recount the additional statements alleged by LoParo regarding giving priority to some facilities, or treating them as "haves" because they did not support the Union. I do not find a basis for crediting LoParo's testimony over Ferron's on this subject.

Ferron testified about a number of statements he says he made regarding his plans in the event that the facility rejected his plea for more time and voted for the Union. He testified that he told employees that his "first and foremost attention" would be to "our shareholder base . . . the people who own the company" and that he had to be concerned about the "deaf and hard of hearing consumers [that] rely upon [the Employer] for communication." He testified that he said that if employees voted in favor of union representation he would have to bargain in good faith and "would negotiate to get the best possible outcome that [he] could on behalf of all those constituents" and would want "to have the non-Union and Union centers be aligned with regards to, you know, economic incentives, the productivity standards, and the general, you know, care and maintenance of being an employer to all of them." I credit this testimony by Ferron, which was not directly contradicted by other witnesses to the Long Beach presentation.

The witnesses for both sides are in agreement that Ferron made some remarks about the money that the company had expended campaigning for a "no vote" on unionization. In Ferron's account, he told employees that if he had communicated with employees more effectively in the past, and thereby avoided the costs of campaigning for a no-vote, the company would have had more discretionary money to use for things such as product development and employee bonuses. In LoParo's account, Ferron said "We've spent so much money on the unionization issue, traveling around, et cetera, that we should have just paid out the bonus" or that if they had not expended that money they could have "possibly paid out bonuses to [the interpreters]."[7] Emerson gave a slightly different account. She stated that when people asked about their bonuses, Ferron stated that they had not reached the new benchmarks for receiving them. Then, Emerson recounts, Ferron went on to state that "he didn't want to have to spend all this money on a union buster, that . . . he should have just used all that money to just pay us our bonuses." The various accounts about what Ferron said regarding the costs of the Employer's antiunion campaign are not clearly contradictory and I find that he made all the statements discussed in this paragraph.

[7] LoParo further testified: "In effect [Ferron] was saying, 'Fighting the union now is taking out the resources that I would have normally given to you, but now that you're going pro-union that makes you have nots again. It means that you can't earn that money, that bonus. It's not available for you anymore.'" I do not understand LoParo to be testifying that Ferron actually made these statements. Rather given LoParo's statement that this was "in effect" what Ferron was saying, I understand LoParo to be paraphrasing what he took to be Ferron's message, not reporting his exact words.

2. Analysis

The Union argues that Objection No. 3 is substantiated by the statements that Ferron made regarding the Hostess bankruptcy, the Employer's financial issues and lack of profitability, and the possibility that the Union's demands might lead to the closing or non-viability of facilities that elected union representation. I find that this objection is not substantiated for either the Corona facility or the Long Beach facility.

As discussed above, I find that Ferron discussed the recent bankruptcy of Hostess, and the presence of a union at that company, as evidence that "unionization is not a panacea," and that it would not necessarily be a solution to the interpreter's problems, but could, instead, have an outcome unfavorable to the interpreters and the Employer. Contrary to the Union's contention, this statement is not an unlawful threat of bankruptcy. In *Parts Depot, Inc.*, the Board found that a similar statement by a manager was not impermissibly coercive. 332 NLRB 670, fn.1 (2000), enfd. 24 Fed. Appx. 1 (D.C. Cir. 2001). The manager in that case stated: "Remember what happened to Eastern Airlines. Because they let the union in they went bankrupt." The Board held that the statement was at most "a misrepresentation as to what caused Eastern to go bankrupt, not an implicit statement that the [employer] would take action on its own to declare bankruptcy if the Union won the election." Id.; cf. *Eldorado Tool*, 325 NLRB 222, 223 (1997) (employer unlawfully threatened plant closure when it displayed a series of tombstones with the names of closed union factories, culminating, on the day prior to the representation election, with a tombstone bearing name of the employer itself and a question mark). If anything, Ferron's statement was marginally less threatening than the one in *Parts Depot* since in that case the manager explicitly stated that unionization had caused the bankruptcy of Eastern Airlines, whereas I find that Ferron noted a correlation, but did not explicitly claim causation. Moreover, Ferron did not suggest that Hostess purposely chose to declare bankruptcy rather than deal with a union, but rather suggested that Hostess was forced into bankruptcy for economic reasons that unionization was either unable to ameliorate or negatively influenced. Thus Ferron's reference to Hostess cannot in my view be reasonably viewed as a threat that the Employer would choose to declare bankruptcy, or close union facilities, in order to avoid dealing with a union. I do not doubt that Ferron was hoping that the interpreters would see Hostess' experience not only as evidence that unionization was not a "panacea," but also as cause to fear that bringing in the Union at Purple would negatively affect the economic future of the facility. Indeed, Ferron conceded he was aware that the use of the word "bankruptcy" was frightening to employees. However, based on *Parts Depot*, I find that his statement did not impermissibly cross the line between a statement about the experience at one unionized employer and a threat that the Employer would choose to file for bankruptcy or close down facilities rather than deal with a union.[8]

I conclude that the evidence does not substantiate Objection No. 3 at either the Corona or the Long Beach facility, and that Objection is overruled.

[8] In its brief, the Union notes that Emerson believed that the message that Ferron was conveying about Hostess was "If you vote for the Union, this is going to happen to you . . . the company would cease to exist or we wouldn't have jobs anymore." However, the subjective impression of Emerson is not determinative since "[t]he test is not a subjective one but an objective" one, and the "subjective reactions of employees are irrelevant to the question of whether there was in fact objectionable conduct." *Lake Mary Health & Rehabilitation*, 345 NLRB at 545. In this case, Ferron's statements regarding Hostess cannot objectively be seen as a threat that he would choose to close the facility or declare bankruptcy rather than deal with the Union.

The Union argues that Objection No. 4 is substantiated by Ferron's statements that, if the employees gave him year he would try to fix things without a Union, and that he would be able to change productivity standards for facilities that had not unionized or filed for unionization, but could not make such changes for those facilities that had done so. The Union argues further that this Objection is substantiated by Ferron's statements that he wished to return to being the "employer of choice" for video interpreters.

An employer unlawfully coerces employees when it promises improvements in wages, benefits, and other terms and conditions of employment if employees vote against a union. *DTR Industries*, 311 NLRB 833, 834 (1993), enf. denied on other grounds, 39 F.3d 106 (6th Cir. 1994); see also *Curwood Inc.*, 339 NLRB 1137, 1147-1148 (2003) enfd. in pertinent part 397 F.3d 548 (7th Cir. 2005) (promise to improve pension benefits violated Section 8(a)(1) where the respondent was reacting to knowledge of union activity among its employees). I find that in this case the Employer did not make an improperly coercive promise. Ferron asked the employees to give the company another year to see whether by improving communication, and working together, they could address employee's concerns. The evidence showed not only that Ferron did not promise increases in wages or benefits, but that he specifically stated that he could not promise improved wages and benefits or even guarantee that there would not be decreases.

Although it is a closer question, I also conclude that the Ferron did not make an unlawful promise regarding productivity standards. During both his Corona and Long Beach presentations to employees, Ferron asked the employees to give the Company 12 months to improve communications and work with employees to address their concerns. He allowed that the Employer might have gone too far in raising productivity standards, that setting productivity standards involved an ongoing process of recalibration, and that he was looking into the matter. I conclude that these statements at Corona and Long Beach did not constitute a coercive promise. At the outset I note that the evidence does not show that he made any promise at all. He did not describe specific new productivity standards or promise that any changes he made in the future would necessarily be ones that the employees would approve of. He simply asked for another chance, conceded that the company might have gone too far with productivity standards and stated that the Company was looking into the matter as part of an ongoing process of recalibration. In *Noah's New York Bagels*, 324 NLRB 266 (1997), the Board considered circumstances very similar to these and found that the employer's president did not violate the Act during a captive audience speech the day before a union election by: asking employees to give "us a second chance to show what we can do," admitting that the company had made mistakes, stating that the best way to overcome the mistakes was to work together without the involvement of a third party, and stating that the presence of a third party creates costs for both the company and employees and does not guarantee "job security, fair treatment good wages and benefits, and a warm friendly work environment." The Board noted that an employer's"[g]eneralized expressions . . . asking for 'another chance' or 'more time,' have been held to be within the limits of permissible campaign propaganda" when the employer does not "make any specific promise that any particular matter would be improved." *Noah's Bagels*, 324 NLRB at 266-267,citing *National Micronetics*, 277 NLRB 993 (1985). Nor did Ferron violate the Act by stating that Purple wanted to be the "employer of choice" for interpreters. This, too, was not a promise of any specific changes, but no more than propaganda about what the Company claimed would be its generally respectful and favorable treatment of interpreters.

I find, however, that Ferron did engage in objectionable conduct by stating to the Long Beach interpreters that he could not make changes to address employees' discontents given that a union election was scheduled, although he could make such changes at those facilities where a union vote was not scheduled. That characterization of the situation is clearly at odds with federal law. In *Lampi, LLC,* 322 NLRB 502 (1996), the Board stated: "As a general rule, an

employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene." As was observed in *First Student, Inc.*, 359 NLRB No. 120, slip op. at 5 (2013), employers misstate the law when they tell employees that because they are awaiting a scheduled union election "they are caught between a proverbial 'rock and a hard place.'" Neither granting nor withholding improvements is illegal unless "the employer is found to be manipulating benefits in order to influence his employees' decision during the union organizing campaign." Id. In this case, I find that Ferron unlawfully coerced employees by blaming the upcoming union election for his purported inability to make changes to address employees' discontent.

Objection No. 4 is sustained with respect to Ferron's speech at the Long Beach facility and overruled with respect to Ferron's speech at the Corona facility.

The Union argues that Objection 5, which states that the Employer threatened interpreters with loss of benefits if the employees supported the Union, is substantiated at the Corona facility by Ferron's statement that he could not make any promises that the Company would continue to provide benefits for full-time and part-time interpreters. The statement that the Union relies on does not attach the possible discontinuation of benefits to the Union vote or its outcome. In fact, Ferron mentioned discontinuing benefits in the context of a discussion of the financial challenges facing the Employer and the various actions being contemplated to address those challenges. The actions he mentioned included expanding some facilities, creating new facilities, diversifying the company and increasing productivity – not just eliminating employee benefits. I find that the record does not show that these statements by Ferron at the Corona facility were improperly coercive as alleged in Objection No. 5.

The Union argues that Objection No. 5 is supported with respect to the Long Beach facility by evidence that Ferron said he was considering eliminating benefits as a means of saving money and that he would be unable to help those interpreters at unionized facilities. As discussed above, I found that the evidence did not show that Ferron told employees that he would be unable to make positive changes for employees if they elected to be represented by the Union. He did make reference to the possibility of cutting benefits, but as at Corona, this was in the context of a discussion of a variety of ideas that the company was contemplating to address its financial challenges and was not linked to the results of the union vote.

Objection No. 5 is overruled with respect to both the Corona facility and the Long Beach facility.

OBJECTION NO. 6: The Excelsior List was inadequate. It did not contain email address[es], work shifts, rates of pay and phone numbers.

By letters dated October 25, 2012, the Acting Regional Director for Region 21 of the Board notified the managers of the Corona and Long Beach facilities of the Employer's obligation, pursuant to the terms of the election agreement, to provide "an election eligibility list containing the full names and complete addresses (including postal zip codes) of all the eligible voters who were on the Employer's payroll for the period ending Sunday, October 14, 2012." Similarly, the election agreement that the parties executed for each facility stated that the Employer had agreed to provide "an election eligibility list containing the full names and addresses of all eligible voters" and cited *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966) and *North Macon Health Care Facility*, 315 NLRB 359 (1994). Neither document imposes on the Employer an obligation to include email addresses, work shifts, rates of pay, or phone numbers,

as part of the election eligibility lists. There is no dispute that the Employer provided election eligibility lists containing all of the information required by the October 25 letters from the Board and by the election agreements between the parties. The Union did not even present evidence establishing that, prior to the election, it notified the Employer that the Union considered the election eligibility list to be deficient.

In its brief the Union presses its claim that the Employer engaged in objectionable conduct by failing to include employees' email addresses on the election eligibility list, but makes no argument that it was objectionable not to include information about work shifts, rates of pay, or phone numbers. Even regarding the subject of email addresses, the Union concedes that "the Board has not yet required an employer to provide employees' email addresses in order to fulfill its *Excelsior* duty." The fact is that the Board has specifically held that an employer's obligation under *Excelsior*, supra, *does not* extend to providing email addresses for the eligible employees, even when the employer made a specific pre-election request for such information. *Trustees of Columbia University*, 350 NLRB 574 (2007). The Union makes a conclusory assertion that "in the particular circumstances of this case" additional information should have been provided, but it does not identify any special circumstances that would justify departing from the established standards. I conclude that the evidence does not show that the election eligibility lists provided by the Employer were inadequate under either Board law or the election agreement between the parties.

Objection No. 6 is not substantiated and is overruled.

VI. ANALYSIS OF THE SUSTAINED OBJECTIONS

At both the Corona and Long Beach facilities, the Employer maintained an overly broad rule that violated Section 8(a)(1) and constituted objectionable conduct. In addition, the Employer engaged in objectionable conduct when, at the Long Beach facility, Ferron told employees that because a union election was scheduled there he could not make changes to address employees' discontents, but that he could make changes at others facilities where a union election was not scheduled. The question is whether these objections are sufficient to warrant setting aside the election at either facility. The Board has stated that "[r]epresentation elections are not lightly set aside." *Safeway, Inc.*, 338 NLRB 525 (2002). "[T]he Board sets aside an election and directs a new one when unfair labor practice violations have occurred during the critical period,[9] unless the violations are de minimis." *PPG Aerospace Industries*, 355 NLRB No. 18, slip op. at 4 (2010). "In determining whether misconduct is de minimis, the Board considers such factors as the number of violations, their severity, the extent of their dissemination, the number of employees affected, the size of the bargaining unit, the closeness of the election, and the violations' proximity to the election." Id., citing *Bon Appetit Mgt. Co.*, 334 NLRB 1042 (2001); see also *First Student, Inc.*, 359 NLRB No. 120 , slip op. at 4 (2013) (when election results are close, objections must be carefully scrutinized); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (same).

Turning first to the Corona facility, I find that the circumstances there do not warrant setting aside the election. Only a single objection was sustained with respect to that facility – the maintenance of an overly broad rule regarding employee involvement in "disruptions." The Board has found that the mere maintenance of an invalid rule may be an insufficient basis on which to overturn election results. See, e.g., *Delta Brands, Inc.*, 344 NLRB 252, 253 (2006); *Safeway, Inc.*, 338 NLRB 525, 525-526 (2002). I note, moreover, that the evidence in the

[9] The "critical period" is the interval from the date of the filing of the petition to the time of the election. *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962)

instant case did not show that the Employer enforced this rule at all during the critical period, much less that it enforced the rule against employees for engaging in union or protected concerted activity. Nor did the evidence suggest that any employee refrained from protected activity because of the rule. In any event, the Corona vote was not particularly close – 16 ballots were cast against Union representation, and only 10 in favor it, with one challenged ballot. I conclude that the employer engaged in only de minimis misconduct which, under the circumstances here, did not affect the outcome of the election at the Corona facility.

With respect to the Long Beach facility, the situation is different. At that facility the Employer acted unlawfully both by maintaining the overly broad rule and also when Ferron told the interpreters that he could not make changes to address their discontents given that a union election was scheduled, but that he could make such changes at those facilities where a union vote was not scheduled. This statement was made less than 2 weeks before the election and was broadly disseminated at a meeting held for all the interpreters present at the facility. In *First Student, Inc.*, the Board required that an election be set aside where, during the critical period, the employer told employees that it was not granting wage increases because Federal Law prohibited them from making unilateral changes to the current pay scale when there is a union election pending. 359 NLRB No. 120, slip op. at 5. Like the speaker in that case, Ferron was essentially blaming the union campaign for the Employer's refusal to make changes favorable to employees. In the instant case the misconduct is similar, but in certain respects both more severe and less severe than in *First Student*. It is more severe in that Ferron not only stated that he could not address the Long Beach employees' concerns because the union election was upcoming, but also contrasted that with the situation that would pertain if a vote was not scheduled and he could make changes. Those statements would certainly provide fuel for the efforts at Long Beach to persuade interpreters to petition for cancellation of the upcoming election. Although the election was not, in fact, cancelled, it is reasonable to infer that at least some of the antiunion sentiment generated or harnessed during the effort to cancel the election would carry over when the Union vote was held. On the other hand, the misconduct here was less severe than in *First Student*, because it was not shown that the Employer, in fact, withheld any benefit because a union vote was upcoming or in order to influence that vote.

On balance, I conclude that Ferron's statement that he could make changes to address employee discontent at facilities where a union vote was not scheduled, but could not do so at those where a union vote was scheduled, interfered with employees' free choice in the election and warrants setting aside the November 28, 2012, election at the Long Beach facility. In reaching this conclusion, I rely not only on the nature of the misconduct, the fact that Ferron's statement was disseminated to a large group of employees, and the temporal proximity of that statement to the election, but also on the extremely close margin by which the election at Long Beach was decided. Fifteen valid ballots were cast in favor of union representation, and 16 against it. Thus, if Ferron's misconduct caused even a single eligible voter to cast a ballot against, rather than for, union representation, then the outcome of the election was altered by that misconduct. For the reasons discussed above, I recommend that the November 28, 2012, election at the Long Beach facility be set aside, and that a new election be held.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Employer has violated Section 8(a)(1) of the Act since June 19, 2012, by maintaining a rule prohibiting employees from "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property" because that rule creates an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity.

4. Objection 2 is sustained with respect to the Corona facility and the Long Beach facility

5. Objection 4 is sustained with respect to the Long Beach facility.

6. Objections 1, 3, 4, 5, and 6 are overruled with respect to the Corona facility.

7. Objections 1, 3, 5 and 6 are overruled with respect to the Long Beach facility.

8. The objectionable conduct engaged in by the Employer at the Corona facility during the critical election period did not have a more than de minimis impact on the election.

9. The objectionable conduct engaged in by the Employer at the Long Beach facility during the critical election period had an impact on the election, and that impact was more than de minimis.

REMEDY

Having found that the Employer has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order and Direction.[10]

ORDER

The Employer, Purple Communications, Inc., its officers, agents, and representatives, shall

1. Cease and desist from

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

(a) Maintaining any rule that prohibits employees from "causing, creating, or participating in a disruption of any kind" or that otherwise creates an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity.

(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) Delete the unlawful workplace rule that prohibits employees from "causing, creating, or participating in a disruption of any kind" from the current version of its employee handbook and notify employees that this has been done.

(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 Employer has taken to comply.

IT IS FURTHER ORDERED that the election held on November 28, 2012, in Case 21-RC-091584 is set aside and that this case is severed and remanded to the Regional Director for Region 21 for the purpose of conducting a new election.

DIRECTION OF A SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Communications Workers of America, AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 21 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994).

The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. October 24, 2013.

_____
PAUL BOGAS
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT maintain any rule that prohibits you from "causing, creating, or participating in a disruption of any kind" or that otherwise creates an overly broad restriction that interferes with your Section 7 rights to engage in union and/or protected concerted activity.

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

WE WILL delete the unlawful workplace rule that prohibits you from "causing, creating, or participating in a disruption of any kind" from the current version of our employee handbook and notify you that this has been done.

Purple Communications, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

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

888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5184.