

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

RHINO NORTHWEST, LLC

and

**Case 19-CA-165356
 19-CA-168813
 19-CA-169067
 19-CA-181097**

**LOCAL NO. 15, INTERNATIONAL ALLIANCE
OF THEATRICAL STAGE EMPLOYEES AND
MOVING PICTURE TECHNICIANS, ARTISTS
AND ALLIED CRAFTS OF THE UNITED
STATES AND CANADA AFL-CIO, CLC**

**RESPONDENT’S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE’S DECISION**

Respondent Rhino Northwest, LLC (“Respondent”), by its undersigned counsel and pursuant to Rule 102.46 of the Board’s Rules and Regulations, files the following exceptions to the decision of Administrative Law Judge (“ALJ”) John T. Giannopoulos, dated November 3, 2017,¹ and filed in the above-captioned matter.

A. Complaint ¶¶ 9; 11 – Enforcement of 90-Day Deactivation Rule

1. Respondent excepts to the ALJ’s finding that enforcement of Respondent’s 90-day deactivation rule was not consistent with its past practice. ALJD p. 29 line 31 – p. 30 line 18.

2. Respondent excepts to the ALJ’s failure to find that the presence of new management is a valid justification for more consistent enforcement of a previously existing rule.

ALJD p. 29 line 18 – p. 30 line 18.

¹ Citations to the Administrative Law Judge’s decision will be referenced as “ALJD” and followed by the appropriate p. and line numbers. The Consolidated Complaint, Order Consolidating Cases and Notice of Hearing will be referenced as “Compl.” followed by the appropriate paragraph number. Charging Party Local No. 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, AFL-CIO, CLC will be referred to as the “Union.”

3. Respondent excepts to the ALJ's failure to make any finding whether Respondent's enforcement of its 90-day deactivation rule constituted a material and substantial change because it is contrary to applicable NLRB precedent. ALJD p. 29 line 18 – p. 30 line 18.

4. Respondent excepts to the ALJ's finding that a practice of deactivating employees because they have not worked in 90 days can constitute a unilateral change from a practice of deactivating employees because they "ha[ve]n't worked in a long time" or otherwise worked an insufficient amount of jobs. ALJD p. 29 line 18 – p. 30 line 18.

5. Respondent excepts to the ALJ's finding that Respondent's enforcement of its 90-day deactivation rule can constitute a unilateral change because the Union's underlying certification is based on the invalid unit appropriateness standard of *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934 (2011).

6. Respondent excepts to the ALJ's finding that Respondent's enforcement of its 90-day deactivation rule can constitute a unilateral change because such a finding impermissibly imposes a "discipline bar" on Respondent, as explained more fully in former Chairman Miscimarra's dissent to *Total Security Management, Inc.*, 364 NLRB No. 106 (2016), slip op. at **17-41. ALJD p. 29 line 18 – p. 30 line 18.

7. Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1) and (5) by enforcing its 90-day deactivation rule because the preponderance of the evidence, much of which is not considered or addressed in the ALJD, does not support this conclusion. ALJD p. 16 line 19 – p. 17 line 6; p. 29 line 18 – p. 30 line 18.

B. Complaint ¶¶ 10(e, f); 12; 13 – The Respondent's Motivation for Deactivating Travis Rzeplinski and Heidi Gonzalez

8. Respondent excepts to the ALJ's imputation of knowledge of Union and protected activities to Respondent while disregarding undisputed evidence that the decision-maker in

Rzeplinski and Gonzalez's deactivations had no knowledge of their protected activities. ALJD p. 25 lines 15-30.

9. Respondent excepts to the ALJ's reliance on lawful comments regarding third-party customers' views on unionization as evidence of anti-Union animus. ALJD p. 25 line 33 – p. 26 line 6.

10. Respondent excepts to the ALJ's reliance on lawful comments regarding the legal requirement to maintain the status quo during bargaining as evidence of anti-Union animus. ALJD p. 26 lines 8-18.

11. Respondent excepts to the ALJ's reliance on lawful comments regarding other companies that have lost jobs or ceased doing business as evidence of anti-Union animus. ALJD p. 26 lines 20-26.

12. Respondent excepts to the ALJ's reliance on lawful comments regarding pre-election hearing testimony about work processes as evidence of anti-Union animus. ALJD p. 26 line 28 – p. 27 line 2.

13. Respondent excepts to the ALJ's reliance on lawful social media comments regarding terms and conditions of employment as evidence of anti-Union animus. ALJD p. 27 lines 4-9.

14. Respondent excepts to the ALJ's failure to consider that the absence of unlawful motives is shown by CEO Jeff Giek's affirmative order during a management meeting that Rzeplinski should continue to be scheduled for work without regard for possibly pro-Union sympathies. ALJD p. 17 lines 23-39.

15. Respondent excepts to the ALJ's reliance on comments made by individuals who played no role in the decisions to deactivate Rzeplinski and Gonzalez as evidence of unlawful motivations for those decisions. ALJD p. 25 line 33 - p. 27 line 11.

16. Respondent excepts to the ALJ's reliance on comments regarding hearing testimony as evidence of anti-Union animus motivating the discharge of Rzeplinski, who did not testify at the pre-election hearing. ALJD p. 26 line 28 – p. 27 line 2.

17. Respondent excepts to the ALJ's reliance on comments regarding Rzeplinski as evidence of anti-Union animus motivating Gonzalez's discharge. ALJD p. 27 lines 4-11.

18. Respondent excepts to the ALJ's reliance on lawful comments and actions as evidence to support a finding of anti-Union animus in the decisions to deactivate Travis Rzeplinski and Heidi Gonzalez because such a finding is contrary to Section 8(c) of the Act. ALJD p. 25 line 33 – p. 27 line 11.

19. Respondent excepts to the ALJ's failure to consider that the absence of unlawful motives is shown by the lack of any adverse action against employee Kyle Daley, who testified at hearing on behalf the Union. ALJD p. 5 lines 2-3.

20. Respondent excepts to the ALJ's failure to consider that the deactivations of Rzeplinski and Gonzalez were consistent with the high rate at which both employees declined work opportunities. ALJD p. 27 line 13 – p. 28 line 22.

21. Respondent excepts to the ALJ's failure to consider that the absence of unlawful motives is shown by the fact that Rzeplinski and Gonzalez were amongst many other employees deactivated for failures to accept sufficient work during late 2015 and early 2016. ALJD p. 29 lines 35-38.

22. Respondent excepts to the ALJ's inconsistent reliance on reactivations of some deactivated employees as evidence of disparate treatment, while failing to consider that other deactivated employees have not been reactivated. ALJD p. 27 lines 34-39.

23. Respondent excepts to the ALJ's application of the *Wright Line*, 251 NLRB 1083 (1980) framework in this case, in that the ALJ improperly placed the burden on Respondent to prove that Rzeplinski and Gonzalez were properly deactivated, and ignoring the burden on the General Counsel to show disparate treatment and that Respondent's reasons for its actions were pretext for anti-Union animus. ALJD p. 23 line 35 - p. 28 line 22.

C. Complaint ¶¶ 10(c-e); 12 – Deactivation of Travis Rzeplinski

24. Respondent excepts to the ALJ's failure to consider that the absence of unlawful motives is shown by Respondent's many job offers to Rzeplinski over the course of several months after his last Union activities of which Respondent had knowledge. ALJD p. 28 lines 4-10.

25. Respondent excepts to the ALJ's failure to consider that Rzeplinski's cordial and casual conversations regarding the Union with CEO Jeff Giek were unlikely to engender anti-Union animus. ALJD p. 9 lines 6-38; p. 17 line 41 – p. 42 line 6.

26. Respondent excepts to the ALJ's finding that Rzeplinski sought reactivation with sufficient clarity to conclude Respondent discriminated against him by failing to reactivate him. ALJD p. 18 line 32 – p. 19 line 16; p. 28 lines 4-22.

27. Respondent excepts to the ALJ's finding that Rzeplinski's deactivation violated Section 8(a)(1) and (3) because the ALJ ignored the preponderance of the evidence showing that Rzeplinski was deactivated solely due to his failure to accept sufficient work, and was not reactivated solely because he did not properly seek reactivation. ALJD p. 24 line 18 – p. 28 line 22.

D. Complaint ¶ 10(b, e, f); 12; 13 – Deactivation of Heidi Gonzalez

28. Respondent excepts to the ALJ's failure to consider that the absence of unlawful motives is shown by Respondent's many job offers to Gonzalez over the course of several months after her testimony at the pre-election hearing. ALJD p. 19 lines 20-34.

29. Respondent excepts to the ALJ's finding that unlawful motives and pretext are shown by Respondent's consideration of Gonzalez's poor treatment of schedulers in its decision not to reactivate her. ALJD p. 27 lines 38-46.

30. Respondent excepts to the ALJ's finding that testimony regarding Gonzalez's "bad attitude" towards schedulers constituted a "veiled reference" to protected activities. ALJD p. 27 lines 38-46.

31. Respondent excepts to the ALJ's finding that Gonzalez's deactivation violated Section 8(a)(1), (3), and (4) because the ALJ ignored the preponderance of the evidence that shows that Gonzalez was deactivated solely due to her failure to accept sufficient work, and was not reactivated due to her poor treatment of Respondent's schedulers and record of declining job offers. ALJD p. 24 line 20 - p. 28 line 2.

E. Proposed Remedies

32. Respondent excepts to the ALJ's proposed remedy that Respondent compensate Rzeplinski, Gonzalez, and any other bargaining unit employee due backpay, for any adverse tax consequence of receiving a lump-sum backpay award as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), because this remedy exceeds the Board's remedial authority. ALJD p. 31 lines 27-29.

33. Respondent excepts to the ALJ's proposed remedy that Respondent compensate Rzeplinski, Gonzalez, and any other bargaining unit employee due backpay, for search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings, as prescribed in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), because this remedy exceeds the Board's remedial authority, as explained in former Chairman Miscimarra's dissent at slip op. **9-16. ALJD p. 31 lines 29-32.

34. Respondent excepts to the ALJ's proposed remedy that Respondent compensate Rzeplinski, Gonzalez, and any other bargaining unit employee due backpay with interest compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), because this remedy exceeds the Board's remedial authority. ALJD p. 31 lines 34-38.

35. Respondent excepts to the ALJ's proposed remedy that Respondent post Notices electronically as prescribed in *J. Picini Flooring*, 356 NLRB 11 (2010), because electronic posting is an extraordinary remedy, as explained in former Member Hayes' dissent at 356 NLRB 16-17. ALJD p. 32 lines 1-2.

36. Respondent excepts to the ALJ's proposed remedies because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support any such remedies. ALJD p. 31 line 8 – p. 32 line 2.

37. Respondent excepts to the ALJ's proposed Order because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support any such remedies. ALJD p. 32 line 7 – p. 34 line 2.

Respectfully submitted,

/s/ Timothy A. Garnett

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2017, the foregoing was filed with the NLRB's Division of Judges via the NLRB's electronic filing system and copies of the foregoing Respondent's Exceptions to the Administrative Law Judge's Decision were served via electronic mail to the following:

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