

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RHINO NORTHWEST, LLC

and

Cases 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, ITS TERRITORIES AND CANADA,  
AFL-CIO, CLC

GENERAL COUNSEL'S LIMITED CROSS EXCEPTIONS AND SUPPORTING  
BRIEF TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46(e) of the Board's Rules and Regulations, Counsel for the General Counsel ("General Counsel") hereby files limited cross-exceptions, together with a Brief in Support, to the findings and conclusions relating to employee Matthew Klemisch ("Klemisch") that are contained in the November 3, 2017, Decision of Administrative Law Judge John T. Giannopoulos (the "Judge"). Specifically, while the General Counsel agrees with the Judge regarding her having presented a *prima facie* case that Klemisch was discharged because of his protected activities, the General Counsel avers that the Judge erroneously concluded that Respondent had shown that it would have taken the same action against Klemisch, notwithstanding his protected activities. Accordingly, other than what is excepted to herein, the findings of the Judge are appropriate and proper.

## I. EXCEPTIONS

1. The Judge erred in finding that Respondent's CEO, Jeff Giek ("Giek"), learned that Klemisch operated Precision Rigging at the June 4, 2015, NLRB pre-election hearing. (p.23, ll.3-4).

2. The Judge erred in finding it to be of no substance that other of Respondent's employees or managers may have known about Klemisch's involvement with Precision Rigging before the Union organizing drive. (p.28, n.28).

3. The Judge erred in finding that there was no evidence that, before Klemisch's NLRB testimony, Giek knew anything about Klemisch's involvement with Precision Rigging. (p.28, n.28).

4. The Judge erred in finding that Respondent had shown it would have taken the same actions against Klemisch notwithstanding his protected activities. (p.28, ll.36-37).

5. The Judge erred in failing to find that Respondent violated §§ 8(a)(1), (3), and (4) of the Act by deactivating Klemisch in retaliation for his Union and other protected activities.

6. The Judge erred in failing to order that Respondent reactivate Klemisch and make him whole for any loss of earnings and other benefits suffered, including compensation for adverse tax

consequences of receiving a lump-sum backpay award, and search for work expenses, as a result of Respondent's discrimination against him.

## II. BRIEF IN SUPPORT OF LIMITED CROSS-EXCEPTIONS

### A. PERTINENT FACTS<sup>1</sup>

In 2012, Klemisch started a business, Precision Rigging, LLC ("Precision Rigging"), which rents out rigging equipment and provides production riggers as well as general rigging labor primarily to venues in the Pacific Northwest. (ALJD 21:20-32). At the pre-election hearing, Respondent's counsel asked Klemisch if he owned his own business, and then specifically asked about Precision Rigging by name.<sup>2</sup> Klemisch admitted at the pre-election hearing that Precision Rigging competes with Respondent for shows, but on a small scale, as he only provides riggers, and not stagehands, loaders, forklift drivers and others like Respondent does. (GCX 36, p.295). Among the arguments stressed by Respondent prior to the Union election was the fact that Respondent was not going to negotiate a contract with the Union that made it less competitive, as Respondent was successful because it provided "the highest quality service at reasonable costs." (ALJD 6:39-41; RX 23).

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<sup>1</sup> References to the Judge's decision will be referred to as "ALJD" followed by the appropriate page number(s) and, where applicable, followed by a colon and the particular line numbers. References to the official transcript in this proceeding will be designated as (Tr. \_\_:\_\_). The first number refers to the pages; the second to the lines. References to the Judge's Exhibits appear as (ALJX\_\_); references to General Counsel Exhibits appear as (GCX \_\_); references to Union Exhibits appear as (UX\_\_); and references to Respondent Exhibits appear as (RX \_\_).

<sup>2</sup> The specific exchange at went as follows (GCX 36, pp.293-294):

Respondent's Counsel: Q: Do you have your own company?

Klemisch: A: Yes

Respondent's Counsel: Q: Your own rigging company.

Klemisch: A: Yes

....

Respondent's Counsel: Q: What jobs do you perform? Is it called Precision Rigging?

Klemisch: A: Yes

Months prior to the June 2015 pre-election hearing, Karen Biggers, then-Director of Operations for Respondent, referred the production manager for event company Endless Entertainment to Klemisch to provide production rigging services. (ALJD 22, n.20, 4:40-41, 22:2-4, 13-17; GCX 25). In noting the amount he charged for his services in response to Biggers' inquiry prior to the referral, Klemisch testified that he found it odd, as what he charged was "such a large amount compared to what we got paid working for [Respondent]." (Tr. 152: 2-19; RX 4). Thus, not only did Respondent know about his business, but it knew what he charged and it referred him business.

In addition to knowledge from interaction with Biggers, Respondent also had bases of knowledge as to Klemisch's business from other means. Specifically, Klemisch had employed riggers who also perform rigging work for Respondent; had worked events where he was the production rigger or supervisor directing the work performed by Respondent's rigging crew; and Precision Rigging provided riggers at times on a show that had stagehands provided by Respondent. (ALJD 21:33-35, 37-42; Tr. 87:16-88:18). On the shows where Klemisch worked as a supervisor directing the work of Respondent's riggers, Respondent also had supervisors present. (ALJD 21:37-42; Tr. 89:1-90:7). Further, although he could not say exactly when he became aware of who owned Precision Rigging, then-rigging manager Tyler Alexander ("Alexander") specifically admitted that he was aware of Klemisch's company around the time it was established. (Tr. 343:18-344:16).

Despite prior side-by-side jobs with Respondent, referrals of work to Precision Rigging, demonstrated management knowledge, as well as the fact that Klemisch testified about his company in response to a leading question from Respondent's counsel, CEO Giek claimed he had no idea Klemisch owed his own company prior to the pre-election hearing on June 4, 2015. (Tr. 465:9-13, 480:21-25; GCX 36 pp.293-94). He claims it was this new knowledge that prompted him, at some point after the hearing date, to tell Manager Michelle Smith that Klemisch could no longer work for Respondent, citing the conflict

of interest policy in Respondent's handbook. (ALJD 23:4-11). According to Giek, this policy is designed to prohibit a competitor from potentially stealing Respondent's customers or business. (ALJD 23:15-16).

After being offered work for Respondent's events up through August 10, 2015, Klemisch was deactivated, according to Respondent's records, on November 3, 2015, for violating Respondent's conflict of interest policy. (ALJD 23:23-29). Respondent never informed Klemisch that he had been deactivated, or the reason for his deactivation (ALJD 21:6-7), and Klemisch was not aware of Respondent's "conflict of interest" policy until after the pre-election hearing; in fact, Respondent did not provide any witnesses with firsthand knowledge of Klemisch having read the policy or even Respondent's handbook prior to that point (Tr. 132:10-133:2, 400:24-401:5). Respondent also did not address the question of why Klemisch was not removed from the schedule and deactivated until after the Union was certified as the collective bargaining representative of Respondent's riggers. (ALJD 14:7-17).

Respondent failed to introduce any evidence showing that it ever enforced its conflict of interest policy prior to using it to justify deactivating Klemisch. In addition, Giek, who visits Respondent's Fife location one to two times per year, admitted that there may very well be other employees who own their own business, but he has never asked any of them and is unaware of other employees competing against Respondent. (Tr. 467:9-12, 486:6-17, 485:25-486:5).

## **B. ARGUMENT**

### **1. The Judge Erred by Concluding that Giek Did Not Have Knowledge of Klemisch's Involvement with Precision Rigging Prior to the Pre-Election Hearing (Exceptions 1, 2 and 3)**

The Judge correctly found that Biggers was aware that Klemisch owned his own company months prior to the Union's petition being filed in May 2015, and that other supervisors and employees were aware of this ownership as well. (ALJD 3:25-26, 21:20-21, 37-42, 22:2-5, n.20). However, the Judge also concluded that CEO Giek was unaware of Klemisch's ownership prior to the pre-election hearing, and

dismissed as being of no substance that other of Respondent's employees or managers may have known about Klemisch's involvement with Precision Rigging. Both of these conclusions are incorrect.

First, at the pre-election hearing held on June 4, 2015, it was Respondent's counsel who raised the matter during Klemisch's testimony, and not only asked Klemisch if he owned his own business, but asked about it by name. Respondent had obviously informed its attorney about Precision Rigging, and both Biggers and Alexander knew that Klemisch owned his own business. The fact that Giek, who lives in San Diego and only visits Respondent's Fife office once or twice a year, claimed to not be aware of Klemisch's business until he attended the pre-election hearing, even if true, is not dispositive. "A person has notice of a fact if his agent has knowledge of the fact, reason to know it or should know it, or has been given a notification of it, under circumstances coming within the rules applying to a liability of a principal because of notice of agent." Restatement 2d Agency § 9(3); *H&M Int'l Trans.*, 363 NLRB No. 139 (2016); *Food Park*, 277 NLRB 427, 430 (1985). Thus, as supervisors and agents of Respondent had clear knowledge of Klemisch's ownership of Precision Rigging, the evidence supports a finding that knowledge could be imputed to Giek prior to June 4, 2015.

**2. The Judge Erred by Concluding that Respondent Established it Would Have Taken the Same Actions Against Klemisch Notwithstanding His Protected Activities (Exceptions 4, 5 and 6)**

The Judge also erred when he concluded that Respondent established it would have deactivated Klemisch notwithstanding his protected activities. This is especially problematic in light of the fact that Respondent failed to introduce any evidence showing that it ever enforced its conflict of interest policy prior to using it to justify deactivating Klemisch and there had been no conflict of interest for all the years that Klemisch had been openly operating Precision Rigging with management's awareness. Indeed, his purported "conflict of interest" was not only condoned, but actually a benefit utilized by Respondent right up until the point that Klemisch's support for the Union became known and he testified in favor of the Union.

The fact that Respondent had never before enforced its conflict of interest policy, and that Respondent never communicated to Klemisch that his deactivation had anything nothing to do with his involvement with Precision Rigging is particularly telling. As Klemisch was one of the employees leading the Union organizing drive, and Respondent's anti-Union animus (ALJD 28:27-34), the evidence supports a finding that Klemisch was deactivated solely because of his Union activities, and that Respondent's asserted reasons for his deactivation were mere pretext. *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *KOFY TV-20*, 332 NLRB 771 (2000); *Fluor Daniel*, 311 NLRB 498 (1993).

Further, it cannot be stressed enough that this is not a case where Klemisch was surreptitiously working to steal jobs from Respondent. As the evidence makes clear, Klemisch's business activities were open and known to Respondent. Indeed, since it appears Klemisch charged more than Respondent for his limited services than did Respondent, Klemisch was not, in fact, stealing work from Respondent. Moreover, that Giek never asked other employees if they owned their own businesses demonstrates that such was not the pressing concern Respondent here claims it is.

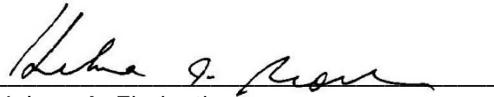
Since the Board has long found that an employer cannot lawfully punish an employee for conduct it has previously tolerated only after he or she begins to engage in protected activities, Klemisch's deactivation for his purported conflict of interest cannot stand. *See Valley Health System, LLC*, 352 NLRB 312, 314 (2008) (discipline of an employee violates § 8(a)(3) of the Act when there is evidence that the employer has seized upon union activity to justify changing its previous tolerant policy toward the employee); *Aero Ambulance Service, Inc.*, 327 NLRB 639, 646 (1999) (discharge of employee for allegedly unacceptable behavior only after union's advent); *Gravure Packaging, Inc.*, 321 NLRB 1296 (1996). *See also Edward G. Budd Mfg. Co. v. NLRB*, 138 F. 2d 86, 90-91 (3d Cir. 1943); *Einhorn Enter.*, 279 NLRB 576, 582 (1986).

C. CONCLUSION

For all of the above reasons, the General Counsel respectfully requests that the Board grant the General Counsel's Limited Cross-Exceptions to the Decision of the Administrative Law Judge.

**DATED** at Seattle, Washington, this 12th day of January, 2018.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of General Counsel's Limited Cross Exceptions and Supporting Brief to the Decision of the Administrative Law Judge was served on the 12<sup>th</sup> day of January, 2018, on the following parties:

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