

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 ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE
LAW JUDGE'S DECISION

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I. INTRODUCTION

This case involves Respondent's anti-Union animus and its willingness to take whatever actions it deems necessary to avoid its obligations under the law to recognize and bargain with 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 (the "Union").

Following the issuance of a Consolidated Complaint, this case was heard by the Honorable John T. Giannopoulos (the "Judge") from February 7 through 9, 2017, in Seattle, Washington. On November 3, 2017, the Judge correctly found that Respondent violated: §§ 8(a)(1) and (3) of the Act by discriminating against employee Travis Rzeplinski ("Rzeplinski"); §§ 8(a)(1) (3) and (4) of the Act by discriminating against employee Heidi Gonzalez ("Gonzalez"); and §§ 8(a)(1) and (5) of the Act by, without having given the Union an opportunity to bargain, unilaterally instituting and applying a more stringent enforcement of its 90-day deactivation rule. (ALJD 30:20-31:6).¹

On December 29, 2017, Respondent filed exceptions and supporting brief with the Board seeking reversal of virtually all of the Judge's well-reasoned findings by mischaracterizing record evidence, and citing to inapplicable Board precedent, while asserting no facts or law that would warrant reversal.² For the reasons set forth below, the Board should sustain those findings of fact, conclusions of law, proposed remedy and recommended order challenged by Respondent.

II. PROCEDURAL BACKGROUND

On August 3, 2015, the Union was certified as the collective bargaining representative of Respondent's riggers. (ALJD 14:7-16; GCX 3). The Union requested that Respondent meet and bargain,

¹ 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 ALJ 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 __).

² The allegation that Respondent discriminated against employee Matthew Klemisch in violation of §§ 8(a)(1), (3), and (4) will be the subject of Cross-Exceptions filed by the General Counsel.

but Respondent refused to do so. (ALJD 14:18-19; GCX 1(z) ¶ 6 (d), GCX 1(bb) ¶ 6(b)). Instead, Respondent informed the Union that it was requesting review of the Region's Decision and Direction of Election (the "D&DE"). (GCX 1(z) ¶ 6 (d), GCX 1(bb) ¶ 6(b)). The Board issued an Order on November 30, 2015, denying Respondent's request for review of the Region's D&DE. (GCX 1(z) ¶ 7(d), GCX 1(bb) ¶ 7(d)).

Thereafter, on December 17, 2015, after issuance of a test of certification complaint by the Region due to Respondent's refusal to recognize and bargain with the Union, the Board issued its decision in *Rhino Northwest, Inc.*, 363 NLRB No. 72 (2015) (the "Board's Order"), finding that, by refusing to recognize and bargain with the Union, Respondent had violated § 8(a)(5) of the Act. (ALJD 14:18-21). Respondent continued its refusal to bargain with the Union and petitioned for review of the Board's Order with the D.C. Circuit Court of Appeals, specifically contesting the Board's decision in *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934, 945 (2011), and the Regional Director's application of *Specialty Healthcare* to the riggers at issue. *Rhino Northwest, LLC v. NLRB*, 867 F.3d 95, 99 (D.C. Cir. 2017). On August 11, 2017, the Court rejected Respondent's arguments and enforced the Board's Order. *Id.* at 103.

This case does not implicate *Specialty Healthcare*, as the Circuit Court has already decisively addressed that issue. Rather, this case at this juncture focuses solely on the allegations involving Respondent having violated: §§ 8(a)(1), (3), (4) and (5) due to its discrimination against its employees Rzeplinski and Gonzalez, and its unilateral institution and application of a more stringent enforcement of its 90-day deactivation rule.³

³ Respondent seeks to shift the focus of this case to application of *PCC Structural, Inc.*, 365 NLRB No. 160 (2017), a case by which the Board recently overruled *Specialty Healthcare*. As discussed, such refocusing is improper, as the Circuit Court has already addressed the underlying certification. Respondent also seeks to challenge the validity of the ALJ's decision here by raising the other recent Board decisions reversing precedent as to certain issues as well as the General Counsel's Memorandum 18-02, wherein he announced his decision that Agency personnel are no longer to follow certain guidance issued by his predecessors. Simply because Respondent cites these reversals by the Board and so many of the cases raised in the GC Memorandum does not make them either factually or legally applicable.

III. RESPONSES TO RESPONDENT'S EXCEPTIONS

A. The Judge Correctly Found that Respondent Violated §§ 8(a)(1) and (5) By Unilaterally, and Without Giving the Union an Opportunity to Bargain Over its Decision, Instituting and Applying Stringent Enforcement of its 90-Day Deactivation Rule (Exceptions 1-7)

Respondent argues (Resp. Br. at pp. 15-23) in the collective of its 7 exceptions that, because the Judge misapplied Board law, he concluded erroneously that Respondent's enforcement of its 90-day deactivation rule (the "90-day rule") was not consistent with its past practice; that the preponderance of the evidence does not support the Judge's conclusion; and that Respondent had no obligation to bargain with the Union over its 90-day rule as a result of the Board's recent decision in *PCC Structural, Inc.*, 365 NLRB No. 160 (December 15, 2017). Respondent's arguments are meritless and should be rejected.

1. The Judge's Finding that Respondent Violated § 8(a)(5) By Unilaterally Enforcing Its 90-day Rule is Well-Supported and Consistent with Board Precedent, both Past and Present

Section 8(a)(5) prohibits an employer from making changes to its employees' terms or conditions of employment without giving the union prior notice and an opportunity to bargain regarding the change. *NLRB v. Katz*, 369 U.S. 736 (1962). This principle also applies in the case of previously unenforced rules. *See Pacific Bell Telephone Co.*, 362 NLRB No. 105 (2015) (enforcement of dormant policy without bargaining, a violation even where policy is written, as enforcement of the policy constitutes the change).

A deactivated rigger is unable to access Respondent's upcoming events, and is no longer offered work. (ALJD 15:8-12). The credited evidence established that Respondent added a section to its employee handbook in December 2013 stating that employees would "automatically be removed from [Respondent's] current employee in good standing list," for not having worked a shift in any 90 day period (the "90-day rule"). (ALJD 15:6-8). Respondent was barely aware it even had this policy on the books, as it had represented to the Region for more than a year prior to hearing that it had no written deactivation rule and that it had no designated threshold for when an employee becomes deactivated; it was not until four

days prior to hearing that it provided a letter to the Region opened “correcting” that position. (Tr. 391:11-22; GCX 3, GCX 35).

As correctly found by the Judge, prior to November 2015, this 90-day rule was enforced sporadically, at best, prior to Amber Peterson (“Peterson”) becoming employed as Respondent’s Human Resources Coordinator. (ALJD 15:18-25, 16:19-23; GCX 1(bb) ¶ 4; GCX 29; RX 17). Specifically, Respondent’s records containing the names of riggers and its other employees who were deactivated since June 2014 established that multiple weeks could pass without anyone being deactivated for not having worked for more than three months, and when a deactivation did occur, it was because the employee in question had not worked for multiple months or even years – not merely 90 days. (ALJD 15:18-20, 25-28; RX 17). In fact, Respondent’s own evidence established that, from June 12, 2014, until October 13, 2015, it did not deactivate a single rigger for not for not having worked in 90 days. (GCX 29).

Based on this evidence, the Judge properly found that Respondent violated §§ 8(a)(1) and (5) of the Act by instituting and pursuing a policy of stricter enforcement of its 90-day rule. *Hyatt Regency Memphis*, 296 NLRB 259, 264 (1989), *enfd.* 939 F. 2d 361, 371-73 (6th Cir. 1991); *Celotex Corp.*, 259 NLRB 1186, 1193-94 (1982); *San Luis Trucking, Inc.*, 352 NLRB 211, 229 (2008). (ALJD 30:14-18). As he noted, Respondent’s reliance on *Wabash Transformer Corp.*, 215 NLRB 546 (1974), and its progeny, was unavailing.⁴ (ALJD 30:4-12).

Respondent’s argument (Resp. Brf. at 19) that the Judge’s failure to make a finding on whether Respondent’s decision to enforce its 90-day rule constituted a material and substantial change warranting reversal borders on the ridiculous and should be rejected. As the Judge found, Respondent’s newly

⁴ In *Wabash Transformer Corp.*, 215 NLRB 546 (1974), the Board found that an employee discharge for violating productivity standards was not a unilateral change where the standards, and their enforcement, pre-dated the union. Similarly, Respondent erroneously relied on *Trading Port, Inc.*, 224 NLRB 980 (1976), involved an employer utilizing different methods for conducting evaluations of employee productivity after previously monitoring productivity for years. Lastly, *Service Spring Co.*, 263 NLRB 812, 812-13 (1982), a case in which a new manager was hired after an election, but the evidence failed to establish the union was not notified of the employer’s plan to strictly enforce its work rules, was similarly unpersuasive and was properly rejected by the Judge.

enforced 90-day rule on its riggers imposed new conditions of employment akin to discharge, as it resulted in employees losing the opportunity to work for Respondent at all. (ALJD 15:6-16) Thus, the change implemented by Respondent is clearly "material and substantial." *See, e.g., Cotter & Co.*, 331 NLRB 787, 796 (2000) (work rules, especially those involving the imposition of discipline, constitute a mandatory subject of bargaining); *Great Western Produce*, 299 NLRB 1004, 1005 (1990), overruled on other grounds by 351 NLRB 644 (2007) (discipline or discharge of an employee violates § 8(a)(5) if the employer has unlawfully implemented work rules or policies that were a factor in the discipline or discharge).

2. The Recent Decisions In *Raytheon Network Centric Systems* and *Total Security Management* Do Nothing to Alter the Judge's Findings on Respondent's Unlawful Unilateral Change

In one of its many last ditch efforts to avoid its obligations by latching on to recent Board law or the change in General Counsel positions, Respondent argues (Resp. Brf. at 16) that the Board's recent decision in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (December 15, 2017), somehow applies to the instant matter and requires a reversal of the Judge's decision. Respondent's argument misconstrues the law and ignores the record evidence.

Raytheon dealt with an employer making a change to health insurance benefits *post expiration of the parties' collective bargaining agreement*. There, the Board held that the employer was not obligated to bargain with the union as the changes made to the health insurance benefits were consistent with what the employer had done in the past. Here, there is *no* prior collective bargaining agreement between the parties, and the record evidence falls woefully short of establishing that Respondent had previously deactivated riggers pursuant to the 90-day rule.

In another attempt to piggy back on an anticipated change in law, Respondent also argues (Resp. Brf. at 22). that the Judge's finding in this matter equates to a "discipline bar" as described in former Chairman Miscimarra's dissent in *Total Security Management, Inc.*, 364 NLRB No. 106 (2016). Again, Respondent's argument is neither consistent with the law nor comports with the facts of this case. In *Total*

Security Management, the Board held that where an employer's disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed, the employer must maintain the fixed aspect of the discipline system and bargain with the union over the discretionary aspects. In his dissent, Chairman Miscimarra criticized the Board for, *inter alia*, finding it unlawful for an employer to issue discipline without bargaining with the union, even in cases where the employer's actions are similar in kind and degree to the its past actions. Again, the facts of this case make clear that the Judge correctly found Respondent's enforcement of its 90-day rule was not consistent with its actions prior to the Union's certification. (ALJD 30:10-12).

3. The Board's Decision in PCC Structural, Inc. Does Not Relieve Respondent of Its Bargaining Obligation

Respondent next argues (Resp. Brf. at 20) that the Board's decision to overrule *Specialty Healthcare* in *PCC Structural* necessitates that all § 8(a)(5) allegations in this case be dismissed. As stated previously and argued below, this argument has no merit in light of the Circuit Court's decision regarding the test of certification.

Here, as correctly found by the Judge, the allegation that Respondent has violated § 8(a)(5) by refusing to bargain with the Union was already ruled on by the Board in *Rhino Northwest, LLC*, 363 NLRB No. 72 (2015), and the Board's Order was enforced by the D.C. Circuit Court of Appeals. (ALJD 14:18-26, 29:44-46). Thus, the issue of whether or not Respondent has an obligation to bargain with the Union is no longer pending, and any such attempts by Respondent to somehow revive its dismissed arguments via the instant matter should be rejected under the doctrine of *res judicata*.⁵

⁵ See *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1987) (A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and *res judicata*, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ..."); *Cromwell v. County of Sac.*, 94 U.S. 351, 352 (1877); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955) (under *res judicata*, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action).

While the Board's usual practice is to apply new policies and standards retroactively, such practice applies to cases that are still pending. *SNE Enterprises, Inc.*, 344 NLRB 673 (2005), citing *Aramark School Services*, 337 NLRB 1063, n.1 (2002). However, since the test of certification case is no longer pending, this is not a live issue. Thus, along with its other attempts, Respondent has merely raised another recent case overturning prior precedent as if that action alone, despite the legal and factual underpinnings, warrants overlooking its unfair labor practice conduct. Respondent's argument is unconvincing and should be rejected.

B. The Judge's Determination That Riggers Travis Rzeplinski and Heidi Gonzalez Were Deactivated in Retaliation For Their Union and Other Protected Activities is Supported by Both Fact and Law (Exceptions 8-31)

Respondent argues (Resp. Brf. at 23-41) that the Judge's application of the framework set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), as to both Rzeplinski and Gonzalez contained multiple errors warranting reversal. In support of its numerous claims, Respondent primarily attacks the Judge's findings of anti-Union animus, claiming either that its actions and conduct do not evidence animus and/or are protected by § 8(c) of the Act, and that the Judge improperly shifted the *Wright Line* burden and failed to consider reasons that were not unlawful for Respondent's actions. Contrary to Respondent's contentions, the Judge's application of the law was proper and the evidence firmly establishes that both Rzeplinski and Gonzalez were deactivated because of their protected activities.

1. Legal Standard

Under the applicable framework set forth in *Wright Line*, the General Counsel must first establish a *prima facie* case showing that Respondent discriminated and deactivated employees because of their Union support and other protected activities. A *prima facie* case is established here by satisfying the following elements: (1) Respondent's riggers Rzeplinski and Gonzalez engaged in Union and other protected activities; (2) Respondent knew about these activities; (3) Respondent took adverse employment

actions against Rzeplinski and Gonzalez; and (4) there was a motivational nexus between the two riggers' protected activities and the adverse employment actions. *See Hays Corp*, 333 NLRB 1250 (2001).

The Board may infer discriminatory motivation from direct or circumstantial evidence and the record as a whole *Tubular Corp. of Am.*, 337 NLRB 99 (2001); *Metro Networks, Inc.*, 336 NLRB 63, 65 (2001). It is also appropriate to consider relevant evidence beyond charged conduct. *Meritor Automotive, Inc.*, 328 NLRB 813 (1999). Evidence of discriminatory motivation may include: (1) expressed hostility toward the protected activity, *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001); (2) timing, *Sears, Roebuck & Co.*, 337 NLRB 443 (2002); (3) departures from policy or practice, *Sunbelt Enterprises*, 285 NLRB 1153 (1987); (4) stricter enforcement of a policy, *Treanor Moving & Storage Co.*, 311 NLRB 371, 375 (1993); and (5) disparate treatment, *NACCO Materials Handling Group*, 331 NLRB 1245 (2000). Once the General Counsel establishes a prima facie case, the burden of persuasion shifts to the Respondent to establish that it would have taken the same actions regardless of any discriminatory motive. *Manno Electric*, 321 NLRB 278, 283 n.12 (1996); *Wright Line*, 251 NLRB 1083 (1980).

a. The Judge Properly Found Anti-Union Animus (Exceptions 9-18)

While Respondent does not except to the Judge's findings that both Rzeplinski and Gonzalez engaged in Union and protected, concerted activities (ALJD 24:20-25:13), or that Respondent was generally aware of these activities (ALJD 25:17-29),⁶ Respondent does except to the Judge's finding of animus. In examining the motivation underlying Respondent's actions toward Rzeplinski and Gonzalez, the Judge relied on materials distributed and comments made by Respondent prior to the election, as well as

⁶ Citing no law in support, Respondent argues (Resp. Brf. at 23) that the Judge erred in generally imputing knowledge of the Union and protected concerted activities of Gonzalez and Rzeplinski, instead of examining the lack of knowledge by the putative decision-maker, Amber Peterson. First, while Peterson was hired and trained to enforce the 90-day rule (Tr. 413:6-9), the evidence did not establish that Peterson was responsible for refusing to offer Rzeplinski work, or for the decision not to reactivate Gonzalez. (ALJD 20:6-7, 28:5-15). Even assuming Peterson was established as the decision-maker, the knowledge of other agents of Respondent about the activities of Rzeplinski and Gonzalez (*see, e.g.*, ALJD 25:17-27:11) are imputed to her. *State Plaza, Inc.*, 347 NLRB 755, 757 (2006). That Respondent decided to hire a new manager who testified that she had never spoken with Gonzalez prior to deactivating her does not refute a finding of imputed knowledge or animus with respect to Gonzalez or Rzeplinski. *Id.* (knowledge of protected activity properly imputed absent rebuttal testimony to the contrary).

Respondent's statements and actions directed toward employees Rzeplinski and Gonzalez on an individual basis. (ALJD 25:33-27:11). In so doing, the Judge properly found that the record is replete with animus, both generally and specific to the alleged discriminatees. (ALJD 25:33).

b. Respondent's Arguments Do Not Refute the Judge's Findings of Animus

Respondent attempts to refute the Judge's findings of animus by approaching each line of the Judge's decision in a vacuum and out of context. First, Respondent objects (Resp. Brf. at 24-25) to the Judge's finding of animus based on CEO Jeff Giek ("Giek") having told or asked employees before the election: that Respondent had been successful in getting contracts in venues and with production companies like Live Nation; that it was no secret that some of Respondent's clients want nothing to do with unions (especially the Union in the instant matter); that Respondent's clients did not want Respondent to bring a union into their venues or shows; why employees would take a risk of alienating Respondent's best clients in the Northwest by unionizing, improperly conveyed to employees?; that if they unionized Respondent would possibly lose their best customers, and workers would be without work. (ALJD 25:33-26:6).

Respondent relies on *TNT Logistics North Am., Inc.*, 345 NLRB 290 (2005), to support its claim. However, in *TNT Logistics*, the employer provided employees with a factual basis for its belief about job loss, and was considered in the context of the employer also not foreclosing the possibility of employees transferring to work on other employer accounts in the event it lost its contract with Home Depot.⁷ Thus, Respondent's exception on this basis is ill-founded because, as correctly found by the Judge, such

⁷ *Manhattan Crowne Plaza Town Park Hotel Corp.*, 341 NLRB 619, 620 (2004) (objections case where the employer provided employees with a recent concrete example of what happened to other employees represented by same union, and added that each set of negotiations was different); *Stanadyne Automotive Corp.*, 345 NLRB 85, 89 (2005) (statements referring to picket line violence at other employers did not violate § 8(a)(1) where concrete examples were provided, and speakers repeatedly made clear they were not making threats or predictions about the future).

statements, where there is no objective factual basis for making them, constitute an implied threat of job loss. *Blaser Tool & Mold, Inc.*, 196 NLRB 374 (1972).

Similarly, Respondent's exception to the Judge's reliance on its written statements suggesting job loss in support of his finding of animus because they were not violative of the Act (Resp. Brf. at 27) should be rejected, as Respondent's statements evince animus even if they are not independently alleged to violate § 8(a)(1) of the Act.⁸ Moreover, even if Respondent's statements could arguably be considered § 8(c) protected statements, "the Board repeatedly has permitted dependence upon statements of an employer that demonstrates its opposition to unionization of its employees or in general to unions, even where the statements are protected under Section 8(c)."⁹

Respondent also attempts to segregate Giek's statements from their context on the basis that, because the riggers in the Northwest all worked together and/or alongside one another, somehow Respondent's client's preferences were common knowledge. Not surprisingly, Respondent cites no facts or authority for such a claim, much less for parsing out statements from the context in which they were made.

Respondent further excepts (Resp. Brf. at 10) to the proper finding by the Judge that statements made by Giek and Supervisor Eric Drda ("Drda") placing the onus on the Union for Respondent not providing employees with wage increases, and asking employees how long they would be willing to wait given that negotiations could take years, also supports a finding of animus. (ALJD 26:9-18). In support of this exception, Respondent attempts to paint its comments in terms of accurately stating to employees what the law requires, and argues that statements of law and facts cannot amount to implied threats. *Oxford Pickles*, 190 NLRB 109 (1971). In the circumstances of this case, however, Respondent did not merely

⁸ See, e.g., *NLRB v. Colonial Lincoln Mercury Sales, Inc.*, 485 F. 2d 455, 456 (5th Cir. 1973); *J.P. Stevens v. NLRB*, 461 F. 2d 490, 493-494 (4th Cir. 1972); *Overnite Transportation Co.*, 335 NLRB 372, 375 n. 15 (2001); *Stoody Co.*, 312 NLRB 1175, 1182 (1993); *Gencorp*, 294 NLRB 717, 717 n.1 (1989).

⁹ *Novato Healthcare Center*, 365 NLRB No. 137 (September 29, 2017), citing *Norton Audubon Hospital*, 338 NLRB 320, n.1 (2002). See also *Tim Foley Plumbing Service, Inc.*, 337 NLRB 328, 329 (2001); *Stoody Co.*, 312 at 1182 (1993); *Ross Stores, Inc.*, 329 NLRB 573, 576 (1999), *enfd. in rel. part*, 235 F.3d 669, 675 (D.C. Cir. 2001).

make an innocuous statement of law to its employees, but rather in the context of an anti-union appeal, implied that, without the Union, there would be a wage increase; the indefinite time delay was due to the union. This is unlawful. *Atlantic Forest Products*, 282 NLRB 855, 858 (1987). Thus, the Judge's findings of animus were proper.

2. The Judge's Finding that Respondent Failed to Rebut The General Counsel's Case With Respect to Rzeplinski and Gonzalez Was Proper (Exceptions 19-31)

Respondent's remaining exceptions concern the Judge's application of *Wright Line* and go to his determinations as to the weight of the evidence. Respondent argues that, with respect to both Rzeplinski and Gonzalez, the Judge improperly: failed to acknowledge that Respondent's conduct in deactivating Rzeplinski and Gonzalez was consistent with how it treated other employees (Resp. Brf. at 33); and relied on the fact that some riggers were reactivated to support a finding of disparate treatment, but ignored the many more employees who were not reactivated (Resp. Brf. at 34). Contrary to Respondent's arguments, however, the Judge did consider the record as a whole, including attempts by both Rzeplinski and Gonzalez securing work from Respondent, and the absence of evidence reflecting that other riggers sought and were denied work from Respondent. (ALJD 16:9-17, 28-32, 18:32-19:16, 20:1-34, 27:23-25, 42-43; RX 17). Further, while Respondent argues that the Judge ignored the "many more" employees who were not reactivated, the record reflects clearly that Respondent failed to introduce any evidence establishing that other employees had attempted to be reactivated like Rzeplinski and Gonzalez did and were denied. Thus, as discussed in detail below, the Judge's findings with respect to both Rzeplinski and Gonzalez were proper and fully supported by the record evidence and his determinations supported by law.

a. The Judge Properly Found that Respondent Discriminated Against Rzeplinski

After working for a job for Respondent in April 2016, Rzeplinski's letter calling for employee action against Respondent in retaliation for various job related complaints was posted on Facebook. (ALJD 18:8-

30). Despite numerous attempts at securing additional work, both by phone and in person, Rzeplinski was offered no further work. (ALJD 18:37-40, 18:43-19:3, 19:6-11). Thereafter, on July 15, 2016, despite Rzeplinski's repeated efforts to secure work, Respondent deactivated Rzeplinski for not having worked in 90 days. (ALJD 19:6-14, 28:4-10). Respondent offered no explanation or defense for its conduct toward Rzeplinski.

As correctly found by the Judge, the evidence supports a finding that Respondent used the 90-day rule to target Rzeplinski; indeed, there was no other explanation as to why Michelle Smith ("Smith") would have questioned why Tyler Alexander ("Alexander") scheduled Rzeplinski in mid-to late 2015, at a time when he was only a few days away from being deactivated. (ALJD 28:14-17, 17:23-30). While Respondent argues (Resp. Brf. at 29) that Giek cutting off Smith's comments and telling Alexander that scheduling Rzeplinski was proper suggests that Respondent's actions were not motivated by anti-Union animus. However, given Giek's statements prior to the election, his cutting off Smith merely suggests that Giek did not want Respondent's animosity toward Rzeplinski expressed in front of his friend, Alexander. (ALJD 18:10-16).

Respondent argues (Resp. Brf. at 35-36) that the Judge erred by failing, essentially, to find that Respondent's offering of work to Rzeplinski in 2015 and the beginning of 2016, along with the cordial conversation between Giek and Rzeplinski in January 2016, somehow ameliorates the conduct directed against Rzeplinski in 2016. Respondent is incorrect. As found by the Judge, after Rzeplinski and Giek exchanged e-mails following Giek's June 9, 2015, meeting with riggers, Rzeplinski stopped receiving as many offers for longer engagements from Respondent, and when he was contacted by Respondent, it was for more short-term work with less advance notice. (ALJD 17:15-20). This resulted in Rzeplinski having to turn down work from Respondent because he was already booked by other employers. (ALJD 17:20-21). After meeting with Giek in January 2016, where he voiced his concern over work slowing for him and

Klemisch, Rzeplinski worked two more shows for Respondent and was never offered work again. (ALJD 18:2-6; RX 20).

Further, Respondent argues (Resp. Brf. at 26-27) that Rzeplinski failed to properly seek reactivation with sufficient clarity. This, too, strains credulity given that, as properly found by the Judge, Rzeplinski repeatedly asked Respondent for work. (ALJD 18:32-19:16). To the extent Respondent seems to suggest Rzeplinski was required to use some kind of magic words to request reactivation, these words are not discernible from the record or Respondent's brief. Rather, as the Judge found, the record evidence speaks to Respondent having failed to offer any explanation as to why it refused to reactivate Rzeplinski. (ALJD 27:23-25).

b. The Judge Properly Found that Respondent Discriminated Against Gonzalez

Upon learning that she had been deactivated, Gonzalez called in December 2016, and was told by Peterson that she had been deactivated because she had not worked for Respondent in 90 days. (ALJD 20:1-3). Gonzalez informed Peterson that she wanted to work, and that she had sent an e-mail to Alexander about wanting to work, but instead of reactivating her, Peterson told Gonzalez she had to speak to someone to see if she could be reactivated. (ALJD 20:5-7).

Peterson admitted speaking with Gonzalez about her reactivation, claiming that Gonzalez wanted to work an upcoming show that was assigned to Gonzalez's brother, but that Peterson denied Gonzalez's request to cover for her brother. (ALJD 20:11-15). Peterson further admitted that the schedulers were aware that Gonzalez wanted to return to work, but testified that "[t]here were other factors taken into consideration," including "poor performance feedback" regarding Gonzalez, and that she had a "bad attitude" toward the schedulers and accepting work." (ALJD 20: 17-20). None of these "factors" were supported by the record evidence.

Rather, Gonzalez's unrefuted and properly credited testimony was that, in her five years working for Respondent, she had never been told that her job performance was poor, that she had a bad attitude, or that she would not be work because of performance issues. (ALJD 20:24-26). Noting that reference to employees having a "bad attitude" has been found as a veiled reference to employee's protected activities,¹⁰ and the absence of an explanation for why Respondent would reactivate other employees, but refused to reactivate Gonzalez, the Judge properly found that the defenses offered by Respondent were pretextual. (ALJD 27:42-46).

Although Respondent disagrees (Resp. Brf. at 38) with the Judge as to unlawful motive and pretext, its contentions are not supported in the record. As found by the Judge, there was no evidence establishing that Gonzalez had ever been told she had a bad attitude by Respondent, and far from being an undisputed fact as Respondent alleges (Resp. Brf. at 38), Respondent offered only bald hearsay claims from Peterson. As such, the exception must fail.¹¹

Respondent also claims that the fact that it offered Gonzalez work after she testified at the Representation case hearing in June 2015 somehow establishes a lack of animus. As with other claims made by Respondent relying on isolated slivers of evidence without context, this argument misses the mark and ignores facts that are inconvenient for Respondent's case. In isolation, Gonzalez allegedly being offered work after she provided testimony is unsubstantiated to begin with, but when viewed in the context of Respondent's refusal to offer her any work months later and refusing to reactivate her, clearly does not stand for what Respondent would hope for – it does not establish a lack of animus. Similarly unavailing is

¹⁰ See *Roger's Electric, Inc.*, 346 NLRB 508, 520 (2006) citing *Children's Studio School Public Charter School*, 343 NLRB 801, 805 (2004) ("Bad attitude" has long been considered a veiled reference to employees' protected concerted activities). See also *American Licorice Co.*, 299 NLRB 145, n.6 (1990)(frequently used as a code word for a person's protected concerted activities is to have a "bad attitude").

¹¹ Respondent's attempt to rely on yet another new case, *The Boeing Company*, 365 NLRB No. 154, slip op. at *4 n.15 (December 14, 2017), to support its argument (Resp. Brf. 39) also fails. Here, the issue is not whether Respondent maintained a rule requiring a good or positive attitude, or the legality of any such policy, but rather whether, in the context of this case, Respondent presented evidence establishing a lawful reason for not reactivating Gonzalez. As properly found by the Judge, it failed to do so. (ALJD 27:42-26).

Respondent's argument (Resp. Brf. at 32) that Respondent's decision not to deactivate all three employees who testified at the pre-election case hearing somehow establishes a lack of unlawful motivation on behalf of Respondent with respect to Gonzalez. Even if true, such argument does not comport with Board law. See *Clinton Electronics Corp.*, 332 NLRB 479, 484 (2000), citing *Handicabs, Inc.*, 318 NLRB 890, 897-898 (1995), *enfd.*, 95 F.3d 681 (8th Cir. 1996).

C. The Remedies Ordered By the Judge Were Appropriate Under Board Law (Exceptions 32-37)

Under well-established Board law, when evaluating a backpay award, the "primary focus clearly must be on making employees whole. *Jackson Hosp. Corp.*, 356 NLRB No. 8 (2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *Pressroom Cleaners & Serv. Employees Intl. Union, Local 32BJ*, 361 NLRB No. 57 (Sept. 30, 2014). The remedies ordered by the Judge under current Board law seek to accomplish this goal.

Respondent argues (Resp. Brf. at 40) that the Judge's ordering Respondent to compensate Rzeplinski, Gonzalez and any other bargaining unit employee due back pay for any adverse tax consequences as a result of receiving a lump-sum backpay award, pursuant to *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), encroaches on punitive grounds because the Board's authority to grant relief is limited to remedial relief. Similarly, Respondent argues (Resp. Brf. at 41) that the Judge's ordering that Respondent to compensate employees for search-for-work and interim employment expenses, as prescribed in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), and (Resp. Brf. at 42) that backpay awards include interest compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), because this also exceeds the Board's remedial authority.

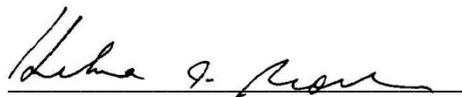
Despite its argument, Respondent acknowledges (Resp. Brf. at 41), that the rigging employees at issue work for many employers during the year, and are always seeking work. Further, even if the rigging

employees at issue were not deactivated, and continued to be offered by Respondent, the rate at which such employees would have accepted work is dependent on many factors, including when the work was offered, and what other work the rigger might be performing at the time. Thus, any prediction concerning the amounts of wages lost as a result of Respondent's conduct, the unlikely result of a windfall resulting, or the amount being punitive, is premature. This is something to be determined in the compliance stage, assuming the Board finds the remedy appropriate.

Finally, Respondent argues (Resp. Brf. at 42) it should not have to post the Notice of Employees ordered by the Judge electronically because electronic posting is an extraordinary remedy, and extraordinary remedies should only be imposed where unusual circumstances dictate their necessity. In *J. Picini Flooring*, 356 NLRB 11 (2010), however, the Board announced that it would order electronic distribution of the notice "if the Respondent customarily communicates with its employees by such means." As the evidence establishes that Respondent communicates with its employees via e-mail, such an order by the Judge is appropriate.

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 Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision was served on the 12th day of January, 2018, on the following parties:

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