

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

**DAVID SAXE PRODUCTIONS, LLC and
V THEATER GROUP, LLC, Joint Employers**

and

**INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES AND MOVING PICTURE
TECHNICIANS, ARTISTS, AND ALLIED
CRAFTS OF THE UNITED STATES AND
CANADA, LOCAL 720, AFL-CIO**

**Cases 28-CA-219225
28-CA-223339
28-CA-223362
28-CA-223376
28-CA-224119**

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Case 28-RC-219130

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Respectfully submitted,

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I. INTRODUCTION

Pursuant to Section 102.46(e) of the Rules and Regulations of the National Labor Relations Board (the Board), Counsel for the General Counsel (CGC) files this Brief in Support of Cross-Exceptions to the Decision issued by Administrative Law Judge Maralouise Anzalone (the ALJ) on August 27, 2019 (JD(SF)-25-19) in this matter (the ALJD).¹ Under separate cover, the General Counsel also files with the Board on this date an Answering Brief to Respondents' Exceptions.

II. QUESTIONS PRESENTED

- A. Did the ALJ err in failing to find that Respondents' Email and Communications policy in its Employee Handbook violates Section 8(a)(1) of the Act as alleged in paragraph 5(b)(1) of the Complaint?² [Cr. Exc. #1]
- B. Did the ALJ err in failing to find that Respondent, by admitted supervisor Thomas Estrada, Sr. promulgated and maintained an overly-broad directive not to talk to employees who supported the Union? [Cr. Exc. #2]
- C. Did the ALJ err by failing to issue a broad cease and desist order? [Cr. Exc. #3]
- D. Did the ALJ err in using an incorrect abbreviation of the Union's name in the Notice to Employees and Explanation of Rights? [Cr. Exc. #4]

¹ As used in this brief, "ALJD" refers to the ALJ's decision; "Tr." to the transcript of the hearing before the ALJ; "GCX" to General Counsel Exhibits; "Cr. Exc." to the General Counsels' Cross-Exceptions; "JX" to Joint Exhibits; "Complaint" to the Order Further Consolidating Cases, Consolidated Complaint, and Notice of Hearing issued on August 20, 2018, as amended; and "R. Br." to Respondents' Brief in Support of Exceptions to the Administrative Law Judge's Decision and Recommended Order, dated October 15, 2019.

² "Complaint" means the Order Further Consolidating Cases, Consolidated Complaint, and Notice of Hearing issued on August 20, 2018, as amended.

III. ARGUMENT

A. The ALJ Erred by Failing to Find That Respondents' Email and Communications Activity Policy Violates Section 8(a)(1) of the Act [Cr. Exc. #1]

1. Facts

David Saxe Productions, LLC (Respondent DSP) and V Theatre Group, LLC (Respondent V) (collectively, Respondents) maintain the following policy in their employee handbooks:

Email and Communications Activities

* * *

The following non-inclusive list contains examples of inappropriate materials that should NOT be sent or received via e-mail or Internet Access:

* * *

- Customized signature lines containing personalized quotes, personal agendas, solicitations, etc., (only information pertaining to name, job title, and contact information should be included).

(ALJD 9:1-11; 11:22-33). Respondents' handbooks allow any manner of personal use of the Respondents' email system, so long as it is not excessive, does not interfere with productivity, and complies with the Respondents' policies. (GCX 99 at 25, 27, 72, 75).

2. Argument

The ALJ found that Respondents' maintenance of the above rule does not violate the National Labor Relations Act (the Act). The ALJ acknowledged that, under extant Board law (*Purple Communications, Inc.*, 361 NLRB 1050, 1063 (2014)), employees have a presumptive right to use their employer's email system to engage in Section 7 activities.

(ALJD 11:43-12:10) The ALJ further acknowledged that customizing an email signature line

to include commentary on or criticism of an employer can constitute conduct protected by Section 7 of the Act. (ALJD 12:13-15, citing *California Institute of Technology Jet Propulsion Laboratory*, 360 NLRB 504, 516 (2014)). However, the ALJ found that Respondents' rule is not unlawful because, for the presumption of a right to use an employer's email system to engage in Section 7 activities to apply, as a threshold requirement, there must be evidence that the employer has authorized employees' personal use of its email system, and Respondents have not authorized personal use, and, moreover, the restriction on customized email signatures is not discriminatory because Respondents prohibit all personal use of their email system. (ALJD at 12:12-23)

The ALJ erred in these findings. First, with respect to the ALJ's finding that the presumption of a right to use an employer's email system to engage in Section 7 activities does not apply, the presumption applies whenever an employer has granted employees any access to its email system, as it has in this case. *Purple Communications, Inc.*, 361 NLRB at 1054. Thus, under extant Board law, Respondents' employees had a presumptive right to use Respondents' email system for Section 7 activities regardless of whether Respondents permitted personal use, and, since Respondents have not established any special circumstances warranting a restriction on customization of email signatures, the restriction is unlawful.

However, the General Counsel has requested that the Board overrule *Purple Communications, Inc.*, and return to the standard of *Register Guard*, 351 NLRB 1110 (2007), enfd. in part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), except where employees are unable to communicate through any means other than their employer's email system, for the reasons stated in the Brief of the General Counsel in

response to the Board's invitation to file briefs in *Rio All-Suites Hotel and Casino*, Case 28-CA-060841. Thus, CGC respectfully requests that the Board return to the standard of *Register Guard*, find that Respondents' employees do not have a presumptive right to use their email system for Section 7 activities, and not find Respondents' restriction on customized email signatures to be unlawful based on the application of such a presumption.

Second, with respect to the ALJ's finding that the restriction on customized email signatures is not discriminatory because Respondents prohibit all personal use of their email system, the ALJ erred in her factual finding that Respondents prohibit all personal use of their email system. As noted above, Respondents' handbooks explicitly allow any manner of personal use of the Respondents' email system, so long as it is not excessive, does not interfere with productivity, and complies with the Respondents' policies. (GCX 99 at 25, 27, 72, 75). Thus, while allowing for any manner of personal use, while restricting use of customized email signatures, Respondents' rule discriminatorily prohibits employees from conveying Section-7-protected messages through their email signature lines. *See California Institute of Technology Jet Propulsion Laboratory*, 360 NLRB at 516.

A finding that Respondents' restriction on customized email signatures is discriminatory is consistent with rationale of *Republic Aviation v. NLRB*, 324 U.S. 793 (1945). In that case, in recognizing the balancing the Board must make "between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments," the Supreme Court sanctioned the Board's adoption of presumptions that rules against solicitation on an employer's property during non-working time and against wearing union insignia at work are unlawful. *Id.* at 797-804.

Extending this principle to the contemporary workplace, where employees' presence in the workplace is often electronic, an email signature line functions as the modern-day equivalent of a union button, signaling the employee's sympathies at all times when the employee, via email, is present, but not requiring any activity by the employee during working time. Thus, applying the rationale of *Republic Aviation*, the display of insignia or a protected message in a the signature line functions more like a the wearing of a button at work (presumptively protected at any time since it does not interfere with business operations) than a solicitation (presumptively protected only during non-working time since it could otherwise interfere with work).

Respondents have not established special circumstances warranting their restriction on signals of union support or other protected messages in email signature lines. Although Respondents may assert that the display of protected insignia or messages in a signature line could interfere with business interests by creating the appearance that Respondents are sanctioning the insignia or message, email signature lines containing personal insignia, messages, and quotations intended to express something about the identity or views of the sender are so common that email recipients would certainly understand that the message is from the sender and not from Respondents. Moreover, this asserted business interest could be addressed by a rule more narrowly tailored to prohibit unauthorized statements on Respondents' behalf. In addition, although Respondents may assert a business interest in encouraging thoughtful and concise communications, this clerical concern does not outweigh of the interest of employees to display insignia or messages that, like union buttons, in a momentary glance, can be viewed or ignored.

Thus, although the General Counsel requests that the Board overturn extant Board law establishing a presumptive right to use an employer's email system to engage in Section 7 activities, even absent such a presumption, the evidence supports a finding that Respondents' Email and Communications Policy is a discriminatory interfering with display of protected insignia and messages and violates of Section 8(a)(1) of the Act, as alleged in paragraph 5(b)(1) of the Complaint.

B. The ALJ Erred by Failing to Find that Estrada Unlawfully Told an Employee not to Talk to Employees Who Support the Union [Cr. Exc. #2]

1. Facts

In February 2018, Respondents learned that their employee Zachary Graham (Graham) had been soliciting employees to sign union authorization cards. (ALJD 15:27-16:6) Stage Manager Thomas Estrada, Sr., an admitted supervisor, personally observed Graham handing out union cards in the parking garage at Respondents' Saxe Theater, after a day-crew employee reported this activity to Estrada. (ALJD 15:28-32) Estrada immediately reported this activity to Respondents' Production Coordinator Tiffany DeStefano (DeStefano), who reported it to David Saxe, the Owner and President of Respondent DSP and the President and CEO of Respondent V. (ALJD 15:32-35)

Around that time, Estrada observed Graham talking to employee Alansi Langstaff (Langstaff) about signing a union card while Graham and Langstaff were walking toward the parking garage area where Estrada had earlier observed Graham handing out union cards. (ALJD 16:4-10) When Graham walked away at the end of his exchange with Langstaff, Estrada held the door open for Langstaff to reenter the theater and said to Langstaff, "I'd be careful being seen talking to [Graham] if I were you." (ALJD 16:10-13)

2. Argument

The ALJ found that Estrada's statement to Langstaff created the impression of surveillance of his and Graham's union activities and constituted a threat of unspecified reprisals. (ALJD 16:13-28) However, the ALJ found that the statement did not constitute promulgation and maintenance of an overly-broad directive, as alleged in paragraph 5(c)(iii) of the Complaint because the Board has found that a supervisor's remark to a single employee "does not constitute the promulgation of a rule of general applicability sufficient to violate the Act." (ALJD 16:30-35, citing *Food Services of America, Inc.*, 360 NLRB 1012, 1016 fn. 11 (2014)) The ALJ's finding that Estrada's statement did not constitute promulgation and maintenance of an overly-broad directive is in error.

The Board has held that a supervisor's directing an employee not to talk to a union supporter is unlawful because it would reasonably tend to coerce the employee in the exercise of the right to talk to the union supporter. *Smith Auto Service, Inc.*, 252 NLRB 610 (1980) (Board adopted ALJ's finding employer unlawfully told individual employee to "stay away" from other employees because of their union support); *Flite Chief, Inc.*, 229 NLRB 968, 976 (1977) (Board found unlawful employer telling employees "anybody that wants to keep their job better stay away from" a union adherent). Estrada's statement to Langstaff that he would be careful being seen talking to Graham if he were Langstaff would have conveyed to Langstaff a directive that he not be seen talking to Graham. It was therefore clearly unlawful under Board precedent concerning directives to employees not to talk to union supporters.

Although, as the ALJ notes, the Board has found that a supervisor's remark to a single employee "does not constitute the promulgation of a rule of general applicability sufficient to violate the Act," the Complaint does not allege that Respondent maintained a rule of general

applicability against talking to Graham or to union supporters. Rather, it alleges that Estrada promulgated a directive against talking to union supporters, and, for the reasons set forth above, the Board has found such directives to be unlawful even when uttered by just one supervisor to a single employee.

Based on the foregoing, credible record evidence supports a finding that Respondents promulgated and maintained an overly-broad directive not to talk to employees who supported the Union, in violation of Section 8(a)(1) of the Act, as alleged in paragraph 5(c)(iii) of the Complaint.

C. The ALJ's Erred in Failing to Include a Board Cease and Desist Order in Her Recommended Order [Cr. Exc.#3]

1. Facts

The ALJ found “that the egregiousness of Respondents’ unfair labor practices and Respondents’ status as a recidivist violator of the Act warrants a broad order requiring Respondents to cease and desist ‘*in any other manner*’ from interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.” (ALJD 94:13-17 (emphasis added)). Moreover, the ALJ’s recommended Notice to Employees reads in relevant part: “WE WILL NOT *in any manner* interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.” (emphasis added). However, the ALJ’s recommended Order does not include a Board cease and desist order, but requires Respondents to “[c]ease and desist from . . . (k) *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.” (ALJD 95:23-24 (emphasis added)).

2. Argument

The Board will issue a broad cease and desist order “when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees’ fundamental statutory rights.” *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). *See also, Somerset Valley Rehab. & Nursing Ctr.*, 364 NLRB No. 43 (July 13, 2016) (issuing broad cease and desist order and upholding the judge’s findings that respondent violated Section 8(a)(1), (3), and (5) by eliminating the LPN position from the bargaining unit and transferring LPN work to non-unit RNs in retaliation for the LPNs' union activity and to evade its responsibility to reinstate its unlawfully discharged LPNs); *Excel Case Ready*, 334 NLRB 4, 4 fn. 5 (2001) (broad cease-and-desist order warranted where employer committed numerous violations of Sec. 8(a)(3) and (1) to quash an organizing campaign).

Respondents’ unlawful conduct in this case meets that standard. The record evidence establishes that, upon learning of their employees’ union activities Respondents embarked upon a crusade to quash the organizing effort, including by interrogating employees, threatening employees, creating the impression of surveillance of employees’ union activities, soliciting grievances and promising employees benefits, granting a wage increase, granting an employee a more prestigious work assignment, and discriminating against employees, most notably by discharging ten union supporters. The Board considers the unlawful discharges of union supporters to be highly coercive “hallmark violations” of the Act. *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), *enfd.* 47 F.3d 1161 (3d Cir. 1995) (stating that such conduct is “likely to have a long-term coercive impact [because it is] among the most flagrant forms of interference with employees’ Section 7 rights”). Moreover, as high ranking officials were involved in the egregious unfair labor practices committed by Respondents, such involvement

“exacerbates the natural fear of employees that they [will] lose employment if they persist[] in their union activities[,]” and “are likely to have a lasting impact not easily eradicated by the mere passage of time or the Board's usual remedies.” *Id.*

In light of Respondents’ egregious and widespread unfair labor practices, a broad remedial order is warranted.

D. The ALJ Used an Incorrect Abbreviation of the Union’s Name in the Notice to Employees and Explanation of Rights

The ALJ abbreviated name of International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, Local 720, AFL-CIO as “IATSI Local 720,” when the correct and commonly used abbreviation is “IATSE Local 720.” CCG respectfully requests that the Board correct this error in its Order, to increase the effectiveness of the portion of the remedy requiring Respondent to post the Notice to Employees and Explanation of Rights.

IV. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board grant the General Counsel’s limited cross-exceptions, reverse the portions of the ALJ’s decision to which the General Counsel has excepted, and provide a full and appropriate remedy for all of Respondents’ unfair labor practices.

Dated at Albuquerque, New Mexico, this 29th day of October, 2019.

Respectfully submitted,

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